# Child Patient and Consent to Medical Treatment in Malaysia: A Legal Perspective

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## Abstract

*This article aims to determine whether in Malaysia a child patient can give a valid consent in law to his/her medical treatment. Is there any legal provision in Malaysia that allows patients who are still children to give their own consent? The issue of whether a patient who is still a child has the right to give consent to medical treatment needs to be researched and discussed in order to give clarity and certainty to the law so that it can in turn be used as the basis for medical and legal practice. Giving children the right to make their own decision pertaining to their medical treatment could be regarded as giving them justice in determining their own well-being. In this article the writers will refer to Malaysian laws that are relevant to the issue and henceforth determine whether there is a need for a specific law to be introduced dealing with consent to medical treatment by children.*

**Keywords:** valid consent, medical treatment

## *Introduction*

This paper aims to determine whether a child patient in Malaysia can give a legally valid consent to his medical treatment. This issue needs to be addressed in order to give clarity and certainty to the law that can be used as a basis in medical and legal practice. In this paper the writers will refer to the existing Malaysian laws that are relevant to this issue to identify whether there is in fact a legal provision that gives a child patient the right to give his own consent to medical treatment and henceforth determine whether there is a need to reform the laws pertaining to consent by a child patient.

### *Definition of Child*

Most countries in this world have differing systems pertaining to adult and child patients. This is evident from the law applicable in each country. The International Convention on the Right of a Child defines "child" as: Every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier."

In Malaysia, section 2 of the Child Act 2001 defines "child" as:

(a) A person who is under the age of 18 years and

(b) In relation to a criminal proceedings means, a person who has attained the age of criminal responsibility, as prescribed in section 82 of the Penal Code (Act 574)

Section 2(1) The Guardianship of Infant Act 1961 defines "child" or "infant" as a person who has not attained his majority. Subsection 2(a)(i) further explains that for the purpose of this act, every person professing the religion of Islam shall be deemed to have attained his majority when he shall have completed his age of eighteen years and not before; and (ii)every other person shall be deemed to have attained his majority when he shall have completed his age of twenty one years and not before. However, the categorization of age in the above Act is meant specifically for the implementation of the Act. Therefore for our present purpose, the term "child" in this paper refers to those who are under the age of 18 as defined in the Child Act 2001.

The term "child" is also synonym with the term "minor ." Black's Law Dictionary defines "minor" as "someone who has not reached full legal age" (Gardner, 199) Full legal age ashave been mentioned before depends on the law of each particular country. There are countries such as Malaysia itself which provides that 18 is the full legal age.On the other hand, countries such as Singapore retaines 21 years of age as the full legal age. Full legal age is crucial in determining whether a person has the legal capacity to manage his own affairs, for instance, in owning his own property, enter into business transactions or to get married without parental consent(Dickens & Cook, 2007).

This paper however, focuses on the legal capacity of a child patient to give his own consent to his medical treatment just like an adult patient who has full legal capacity and therefore entitled to make and give his own consent.

The term child patient refers to a patient who has yet to attain full legal age in Malaysia, that is 18 years old. Most issues relating to consent to medical treatment seldom arise in cases involving children who are too young as for this category of patients, their parents will play an important role in deciding whether to give consent or not to medical treatment(McHale, 2001).Therefore this paper will confine itself to cases involving patients on the verge of maturity.

## *Children and Consent to Medical Treatment*

The essential issue pertaining to consent to treatment by children is whether they have the right to exercise their autonomy. Article 12(1) *United Nations Convention on the Rights of the Child (UNCRC)*provides that a child who is capable of forming his or her own views must be given the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child. Nevertheless this article does not provide specifically the arbitrary age to determine the capacity of the child.

The abovementioned rights was reinforced by the *The United Nations Committee on the Rights of the Child*recommendation for the signatories countries to take the necessary measures to protect the rights of the teenagers as stated in the *Convention on the Rights of the Child*(UNCRC General Comment No. 4, 2003).Even though the Committee recognises the continuous role of parents in making decisions relating to the healthcare of their children, but at the same time, the Committee urges the countries concerned to consider the likelihood of their domestic laws to give recognition that adolescents who are attaining maturity are capable to give their own consent to their medical treatment.(UNCRC General Comment No. 4, 2003).

Para 32 of the *United Nations Committee on the Right of the Child* clearly states that by giving rights to the children in making their own decisions does not mean that it is denying the role of the parents.The abovementioned Convention merely requires that children be given the opportunity to express their views before any decisions to treatment are made. And the views must be taken into consideration by the parties making the decision. This Convention also recognises the rights of the parents to give directions and guidance to their children but it is subjected to their capacity which is still evolving.

It is to be noted that even though UNCRC does not directly provide the competent children the right to give their own consent, at the same time it does not provide absolute rights to the parents to make decisions on behalf of their children. The UNCRC merely recognises the rights of the parents to give direction and guidance to their children (Wilson, et.al.,1995).

Generally, the law recognises the parental role in their young children affairs. This includes their power to give consent to medical treatment.In cases where the patients are too young and clearly incapable to make decision relating to medical treatment, it is the parents who will act as proxy in making decision(McHale,et.al., 2001). Thus in such situation, parental consent will allow the doctor to perform treatment for the best interest of the child and it will not expose the doctor to the risk of being sued for battery.

Consent to treatment cases show that the courts have taken a paternalistic stand in deciding on issues pertaining to consent to medical treatment involving young patients. The legal presumption is that children do not have the necessary capacity thus decision-making power is transferred to the parents or guardian of the children and in certain circumstances, to the court itself (Hartman, 2001).

In this aspect, legal development in other jurisdictions shows that the law is becoming reluctant to accept the above understanding but has recognised that children also have certain rights that need to be considered including the rights to make their own choices even to the extend where the choice made was against the choice of their parents.

Those countries have begun to apply the doctrine called the doctrine of mature minor. Under this doctrine the legal presumption pertaining to the capacity of children is that incapacity is not something that is absolute( Potter, 2006). The question that has to be addressed is whether children who have the capacity can be also said to be legally competent to give their own consent to medical treatment. If it was decided that they have the capacity, therefore they should be said to be legally competent to give consent. Hence in such situation, the doctor will no be liable for battery.

### *The Existing Malaysian Laws*

In discussing the issue of the age of consent to medical treatment in Malaysia, reference will be made to several existing statutes namely, the Age of Majority Act 1971,the Child Act 2001, the Law Reform(Marriage and Divorce)Act 1976, the Penal Code and the Child Witness Act 2007. In Malaysia, aperson is said to be a child if he has not attained the age of majority as provided in Section 1 of the Age of Majority Act 1971. Section 2 of the same act provides:

> "*Subject to section 4, the minority of all males and females shall cease and determine within Malaysia at the age of eighteen years and every such male and female attaining that age shall be of the age majority.*"

Section 4 of the 1971 Act further provides:

> "*nothing in the Act shall effect:*
>
> *(a)The capacity of any person to act in the following matters, namely marriage, divorce, dower and adoption;*
> *(b)The religion and religious rites and usage of any class of persons within Malaysia;*
> *(c)Any provision in any other written law contained fixing the age of majority for the purposes of that written law."*

The exceptions in section 4 clearly do not refer to the capacity of children who have not yet attained the age of majority to give their own consent to medical treatment. Section 4(a) only refers to matters pertaining to marriage, divorce, dower and adoption. As there is no specific law giving rights to children to give consent to treatment, exception 3 is also irrelevant. Section 4(b) is obviously immaterial to this issue. Based on this Age of Majority Act 1971 children below the age of 18 years are deemed to be incapable to give consent to medical treatment. The power to give consent lies on their parents as their legal guardian.

**A. The Child Act 2001**

As has been mentioned earlier, section 2 defines "child" as a person who is under the age of 18 years. This is in parallel with the Age of Majority Act 1971. Section 17 of the Child Act 2001 provides that a child is considered to be in need of care and protection if he falls under the provisions of the section.Section 17 of the Child Act 2001 provides:
A child is in need of care and protection if—

*(a)* The child has been or there is substantial risk that thechild will be physically injured or emotionally injured or sexually abused by his parent or guardian or a memberof his extended family;

*(b)* The child has been or there is substantial risk that thechild will be physically injured or emotionally injured or sexually abused and his parent or guardian, knowingof such injury or abuse or risk, has not protected or is unlikely to protect the child from such injury or abuse;

*(c)* the parent or guardian of the child is unfit, or has neglected,or is unable, to exercise proper supervision andcontrolover the child and the child is falling into bad association;

*(d)* the parent or guardian of the child has neglected or isunwilling to provide for him adequate care, food, clothingand shelter

*e)* the child—
(i) has no parent or guardian; or

(ii) has been abandoned by his parent or guardian andafter reasonable inquiries the parent or guardiancannot be found,and no other suitable person is willing and able to carefor the child;

*(f)* the child needs to be examined, investigated or treated—

(i) for the purpose of restoring or preserving his health;and

(ii) his parent or guardian neglects or refuses to havehim so examined, investigated or treated;

Section 21 of this act further provides "a medical officer before whom a child is presented under:

(a) Shall conduct or cause to be conducted an examination of the child;
(b) May, in examining the child and if so authorized by a Protecter or police officer, administer or cause to be administered such procedures and tests as ,may be necessary to diagnose the child's condition; and
(c) May provide or cause to be provided such treatment as he considers necessary as a result of the diagnosis.

If, in the opinion of a medical officer, the child referred to in section 21 requires treatment for a minor illness, injury or condition, a Protector or police officer may authorize such treatment(Section 24 Child Act 2001). Subsection 2 of the the said section further states that if the child is suffering from a serious illness, injury or condition or requires surgery or psychiatric treatment, a Protector or police officer shall then notify or take reasonable steps to notify and consult the parent or guardian of the said child or any person having authority to consent to such treatment.

In this circumstances, the Protector or police officer may also, with the written consent of the parent or guardian or such person, authorize such medical or surgical or psychiatric treatment as may be considered necessary by the medical officer.(Section 24 Child Act 2001). Section 24 is a provision relating to authorization of medical treatment for a minor as defined in section 21. By virtue of section 24, in any treatment for illness, injury or condition the authorization must first be obtained from a Protector or police officer.

It is important to note that this section gives a wide discretionary power to the Protector in making decision and henceforth authorising treatment to the child protected under this Act. This can be seen from subsection 3 of section 24 of the same Act where it provides that if a medical officer has certified in writing that there is immediate risk to the health of a child, a Protector may authorize, without obtaining consent referred to in subsection (2) above, such medical or surgical or psychiatric treatment as may be considered necessary by the medical officer. However, this power can only be used under any of the following circumstances:

(a)that the parent or guardian of the child or any person having authority to consent to such treatment has unreasonably refused to give, or abstained from giving, consent to such treatment;

(b)that the parent or guardian or the person referred to in paragraph (a) is not available or cannot be found within a reasonable time; or

(c)the Protector believes on reasonable grounds that the parent or guardian or the person referred to in paragraph (a) has ill-treated, neglected, abandoned or exposed, or sexually abused, the child.(Section 24(3)(a)-(c) Child Act 2001).

The Act unfortunately, neglected to define what is meant by "immediate risk to the health of a child". It also failed to define the phrase "unreasonably refused to give consent"(Section 24(3)(a) Child Act 2001) and "within reasonable time"as found in section 24(3) of the Act. Who will decide that the refusal of the parents or guardian to give consent is unreasonable? Also, what time frame is used to measure "reasonable time"? What is evident in this section is that the Protector has a wide discretionary powers in the identified circumstances to give consent to any medical treatment, surgery or psychiatric treatment proposed by the medical officer to be given to the child who has been put under protection.

It can be also concluded that those powers can override the rights of the parents to give or to refuse to give consent. Sections 21 and 24 clearly do not arm the children put under the ambit of the Child Act 2001 with the rights to have a say in matters pertaining to their medical treatment. Any decision to be made is put under the jurisdiction of the Protector or the police officer involved. There is no indication in the stated provisions that the views and opinions of the children will be taken into consideration or given priority. The Child Act 2001 can be said to be a paternalistic act in matters concerning medical treatment of the children put under its wings.

This can be said to have stemmed from the fact that the main aim of the Child Act 2001 is to protect and promote the welfare and interest of the children.

Nevertheless, this situation can be regarded as standing in stark contrast to Article 12 12 (1)of the UNCRC which encourages State parties which have ratified the convention to ensure that children with capacity should be allowed to voice out their opinions and views. Those views must then be given weight, taking into consideration the age and maturity of the children.

**B. Section 10 Law Reform (Marriage and Divorce) Act 1976**

Section 10 of the Law Reform (Marriage and Divorce) Act 1976 provides:

> Any marriage purported to be solemnized in Malaysia shall be void if at the date of the marriage either party is under the age of eighteen years, unless, for a female who has completed her sixteenth year, the solemnization of such marriage was authorized by a licence granted by the Chief Minister under subsection 21(2).

Section 21(2) states:

> The Chief Minister may in his discretion grant a licence under this section authorizing the solemnization of a marriage although the female party to the marriage is under the age of eighteen years, but not in any case before her completion of sixteen years.

Therefore it is clear that the law permits a female person who is only 16 years of age and have not attained the age of majority to enter into a marriage contract which will bring with it a huge impact on her life. Even though licence given under section 21(2) is a condition, but that section does not state that a person has to prove that she is old and mature enough to take the final step.

Historically, section 10 was enacted as a result of a report made by the Royal Commission in virtue of the term of reference given to it by the Government of Malaysia.

The Royal Commission was asked to determine whether there is a need for a law reform, by taking into consideration the resolution made by the United Nations relating to the minimum age for marriage.Article 2 Convention and Recommendation on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, 1962memperuntukkan:

"State parties to the present Convention shall take legislative action to specify a minimum age for marriage. No marriage shall be legally entered into by any person under this age, except where a competent authority has granted a dispensation as to age, for serious reasons, in the interest of the intending spouses."

The three factors that had been taken into consideration in accordance to the Convention were:

1) Agreement to marry
2) Minimum age for marriage
3) Marriage registration

As a result of the term of reference, the Commission in its report recommended that the minimum age for marriage in Malaysia is to be 16 years old. The recommendation was eventually enacted as law in the Law Reform(Marriage and Divorce) Act 1976 as mentioned above. Thus it can be concluded that in this instance, the law regards a female person of 16 years as competent to enter into a marriage contract.

**C. Section 375 of the Penal Code**

Section 375 of the Penal Code states:

> "A man is said to commit rape who, except in the case hereinafter excepted, has sexual intercourse with a woman under the circumstances falling under any of the following descriptions:
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> Seventh exception - With or without her consent, when she is under sixteen years of age.

This is a provision on statutory rape in Malaysia. A man who rapes a girl who is still under 16 years old commits rape even if the girl had consented to the act. This provision indicates that in Malaysia, a girl who has attained the age of 16 years is capable of giving her own consent to sexual intercourse. Does this mean that the law recognises a 16 year old girl as a person who has the required intelligence, maturity and understanding that she is allowed to engage in sexual activities which can, undoubtedly expose her to negative implications such as unwanted pregnancy and sexually transmitted disease?

If the answer to the question is in the positive, then the next question must be , is it not illogical and unreasonable to refuse to give the same person who is deemed competent to give consent to sexual intercourse, the right to give her own consent to medical treatment without waiting for her to reach the age of majority?

**D. Evidence of Child Witness Act 2007**

Section 13 of the Evidence of Child Witness Act 2007 provides:

When a child witness is giving evidence before the Court and in the course of giving evidence he attains the age of sixteen years, the Court shall continue to hear the evidence of that child witness and exercise all the powers under the Act.

The above provision can be deemed to mean that as a basis, a witness who is of sixteen years and above, can give evidence as an adult. This basis is further explained by section 2 of the same Act which interpreted a child witness as someone is is below sixteen years old.Section 2 of the Child Witness Act 2007 states "child witness means a person under the age of sixteen years who is called or proposed to be called to give evidence in any proceedings but does not include an accused or a child charged with any offence".

It can therefore be argued that the implication from both sections is that,for the purpose of giving admissible evidence in court, there are lawsin Malaysia that have already acknowledged that a child who has attained 16 years of age has the necessary intellectual capacity as if he is already 18 years old and above.

## *Conclusion*

In can therefore be concluded from the various legal provisions cited above that there are the laws in Malaysia that recognise children who are 16 years old and above (but below 18) as competent to perform or get involve in certain activities, including marriage. Section 375 of the Penal Code as an example, even permits young persons who have reached 16 years of age to enter into a consensual sexual relationship. If they consented to the sexual activity, then it will not be rape.

Inbasegaran in his article "stated that as a practice, government hospitals in Malaysia have already started to take consent from patients who are 16 years old.

Even though this is applaudable, one must bear in mind that as yet there is no clear provision of law that allows this practice to take place."(Inbasegaran, 2003). What is the basis for such a practice then?

This issue must be addressed and solved so that the doctors will be protected from any legal repercussions should anything undesirable happened to the patients who are still legally considered as children, but yet had given their own consent to the medical treatment performed on them.

Therefore it is the writers' contention that the recognition given to children under the abovementioned legal provisions must be extended to the rights of children who have reached the age of 16 years, to give their own consent to their medical treatment. Children who are 16 years old and above must be presumed to be legally competent to give their consent to medical treatment unless proven to be otherwise. If there is a doubt regarding the competency of a child patient, then a psychiatrist must be called to evaluate the patient to determine competency.

In determining this, the child in question must be able to understand the nature and implication from his decision.

In this aspect, the attending doctor must first disclose all necessary information in a way that can be understood by a person of that age and maturity. This will enable the patient to evaluate his options and thereafter make an informed consent. The seriousness of such a decision and the implications from it must of course be taken into consideration (Leong WaiKum, 2007). The child patient should be encouraged to consult with his parents or guardian before making his decision.

The time has come for Malaysia as a signatory to the UNCRC to take a significant step forward and reform this area of law. This will surely give the clarity and certainty needed to those involve in the giving of medical treatment to children who have reached maturity and have the required capacity to make their own decision. Example of countrieswhich have acknowledged this right are the United States of America through its doctrine of mature minor and in some states, through legislations and also the United Kingdom with its Family Law Reform Act 1969.

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