

# Who Cares?

Can the Ethics of Care help judges to determine 'best interests' in mid-childhood healthcare decisions?

## What is the role of parents in decision-making for children?

- Limited 'parental responsibility' to make decisions about their children's health.
- In difficult, novel, or contentious situations the only option may be to resort to the courts to seek resolution.

Judicial approaches:



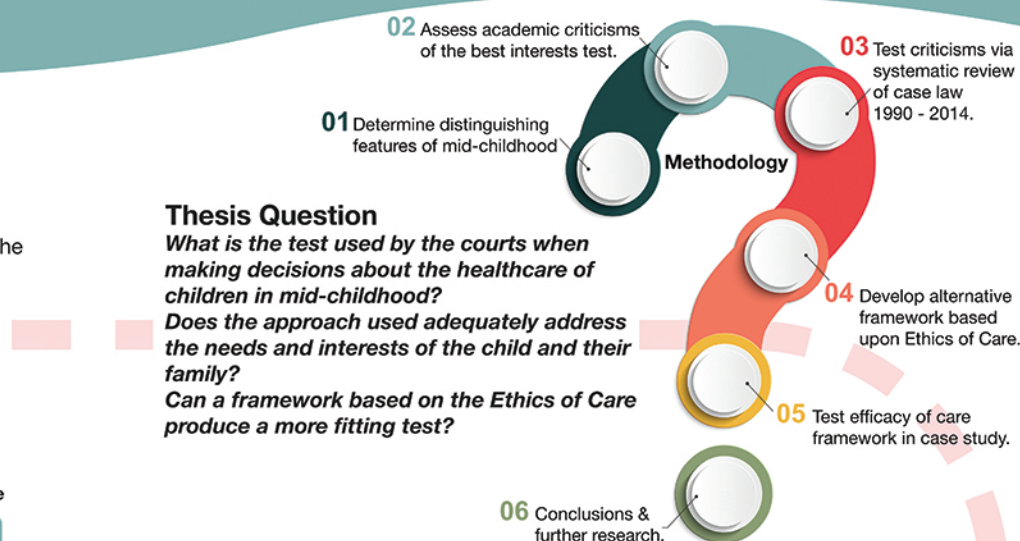
Best Interests



Gillick Competence

### What is the position of children in mid-childhood (age 8-14)?

It has been under theorised in the academic literature and largely ignored by the courts. Most often treated in the same way as infants.



## Thesis Question

*What is the test used by the courts when making decisions about the healthcare of children in mid-childhood?*

*Does the approach used adequately address the needs and interests of the child and their family?*

*Can a framework based on the Ethics of Care produce a more fitting test?*

## 1. Characteristics of Mid-Childhood

'Interesting questions and issues arise with children whose abilities are inbetween' - that 'messy but morally important reality of children who are neither completely dependant nor fully autonomous' (Brennan)



1. Change - Fluctuating nature of vulnerability (Van Praagh, Dwyer).

2. Emotional growth; impact of body on self-identity.

3. Familial relationships joined by friendships, religious & social networks.

4. Participation in decision-making, access to information, greater capabilities (Alderson & Montgomery).

## 2. Criticisms of Best Interests

1. The concept is vague - by whose standards?
2. Deference to medical opinion - lends 'scientific legitimacy' to judgments (Elliston) but downplays other relevant factors e.g. religion, emotions, family.
3. Judges are overly paternalistic - finding of competence/participation less likely.
4. Individualistic interpretation and weighting of best interests - disregards child's relationships (Herring).
5. 'Short sightedness' - disregard past/future care. Are these borne out in the case law?

## 3. Systematic Case Review

All reported cases on mid-childhood healthcare 1990-2014 (included age 15 & 16 to enlarge sample)

- Results: 12 cases. In 11 the child deemed incompetent and best interests applied. Criticisms largely borne out - court failed to recognize capabilities of mid-childhood, paternalistic.
- BUT - Best Interests is the pragmatic choice (McGuinness) - powerful history, wide acceptance, enough flexibility for contextual/comparative decision-making, reinterpret it via Ethics of Care?

Immunisation case, 2 girls aged 11(M) & 15(L). Father wanted MMR, mother and girls objected. **Outcome** - Theis J held medical evidence 'pointed all one way' & girls' views naive, misinformed and unduly influenced by mother - MMR in best interests. **Using Care Framework** - age, medical position and basis of objection different for L than for M. Consider embodied experience and practical implications of coerced treatment. Scrutinise father's motives and view maternal influence as result of living in relation. Result - MMR probably not in best interests of L.

## 5. Case Study - F v F [2013] EWHC 2683.

Expand Jo Bridgeman's 3 normative guidelines of 'Relational Responsibility' to include mid-childhood:

1. **Attentiveness to the child as an individual:** Vulnerable (Fineman), Embodied, Interconnected.
2. **Consideration of the history of caring practices:** Experience of care as source of expertise, child as 'one caring', responsibility for own health, separate needs of family members, collaborative decisions.
3. **Consideration of the social context of care:** Medical opinion weighted on own terms, implications in religious/social/cultural context, scrutinising function to uncover 'dark side' of relationships.

## 4. Ethics of Care Framework

## 6. Concluding Thoughts and Further Research.

Whilst the best interests test remains the pragmatic choice in healthcare decision-making, its current construction does not adequately address the needs and interests of children in mid-childhood. However, the test is capable of interpretation using a framework based upon the Ethics of Care, which in turn may encourage judges to take a more holistic view of best interests and articulate more clearly the nature and weight of factors they deem relevant to the decision.

### Further Research:

- Testing the care framework in other healthcare scenarios - palliative care, organ donation, treatment for transgendered children.
- Examining care in informal decision-making and professional practice - parents, children, nurses.
- Questioning the limits of care - how effective is the Ethics of Care when there are no caring relationships?

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