THE RIGHTS OF CHILDREN TO MEDICAL CONFIDENTIALITY: GILLICK REVISITED—PART I

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The recent English High Court case of R. (Axon) v Secretary of State for Health 1 centred on the alleged conflict between the rights of parents and the rights of children to confidentiality. Susan Axon brought judicial review proceedings against the UK Department of Health claiming that parents should be notified if their children under 16 years access sexual health advice or treatment. Delivering judgment in London High Court on January 23, 2006, Lord Justice Silber rejected Mrs Axon's contentions and wished to emphasise that “Nothing in the judgment was intended to encourage young people to seek or to obtain advice or treatment on any sexual matters without first informing their parents and discussing matters with them. Indeed, everybody must hope that all young people will discuss these sexual matters with their parents at the earliest opportunity”. The first part of this two-part article will examine the judgment of Lord Silber in Axon in detail and the court's affirmation of the Fraser guidelines as set out in the seminal decision of Gillick v West Norfolk and Wisbech Health Authority. 2 Secondly, it will examine how the court balanced competing rights under the Children Act 1989 and public policy implications. Finally, the kernel of the debate surrounding the tension between a child's autonomy (which can be articulated in terms of Article 8 of the European Convention on Human Rights), the parent's (and the family's) right to family life, (which can also be articulated in terms of Article 8), and the parent's duty to make decisions in the child's best interests will be addressed. The case law on parental rights from the European Court of Human Rights applied in Axon will also be analysed. Furthermore, the influence of the ratification by the UK of the United Nations Convention on the Rights of the Child (“UNC”) in November 1989 which post-dated Gillick will be addressed.

UK LEGISLATION ON CONSENT TO SURGICAL OR MEDICAL TREATMENT AND MINORS

Mrs Axon sought declarations that:

1. a doctor is under no obligation to keep confidential advice and treatment which he or she proposes to provide in respect of contraception, sexually transmitted infections and abortion and must therefore not provide such advice and treatment without the parents' knowledge unless to do so would or might prejudice the child's physical or mental health so that it is in the child's best interest not to do so. The claimant's primary case was that this represents the nature and scope of the doctor's duty of confidence in respect of all the above treatments. However, her alternative case was that, at the very least, this is his or her duty in respect of the provision of advice and treatment in respect of abortion; and
2. a document published by the Department of Health entitled “Best Practice Guidance for Doctors and other Health Professionals on the provision of Advice and Treatment to Young People under 16 on Contraception, Sexual and Reproductive Health” (“the 2004 Guidance”) is unlawful.

This application was primarily concerned with the position in which a young person under the age of 16 wishes to obtain advice and treatment on contraception, sexually transmitted illnesses and abortions but who cannot be persuaded to notify his or her parents or to let the medical professional inform his or her parents that their child is seeking advice or treatment on sexual matters.

Under s.8(3) of the UK Family Law Reform Act 1969, any person over the age of 16 years can give a valid consent to surgical or medical treatment. Normally if it is proposed to provide surgical or medical treatment to a young person under the age of 16 years, the consent of that person's parent or guardian would be needed before the treatment could be given. The main issue raised on this application was whether and in what circumstances a health professional can provide advice and treatment on sexual matters to young people without their parents first being notified after the young person concerned has refused either to inform his or her parents themselves or to allow the medical professional to do so. The Secretary of State for Health maintained that a medical professional can provide such advice and treatment on sexual matters for young people under the age of 16 years without the knowledge or consent of their parents provided that certain important and stringent conditions laid down by the House of Lords had been complied with. That was also the stance of the intervener on the application, the Family Planning Association.

**GILLICK V WEST NORFOLK AND WISBECH HEALTH AUTHORITY AND THE FRASER GUIDELINES**

A central issue for determination for the House of Lords in *Gillick* was whether a doctor could ever, in any circumstance, lawfully give contraceptive advice or treatment to a girl under the age of 16 years of age without the consent of the girl's parents. The majority of the Appellate Committee, comprising of Lord Fraser of Tullybelton, Lord Scarman and Lord Bridge of Harwich, held that a doctor could give such advice and treatment to a girl under the age of 16 if she had sufficient maturity and intelligence to understand the nature and implications of the proposed treatment and provided that certain conditions were satisfied. The claimant in that case had contended that the relevant previous Guidance issued by the Secretary of State (“the Pre- *Gillick* Guidance”) was unlawful but the majority of the Appellate Committee reversed a previous decision of the Court of Appeal, which had upheld the claimant's complaint.

All members of Counsel in *Axon* relied on the Fraser Guidelines set out in the *Gillick* case by Lord Fraser. Lord Fraser explained in a speech with which Lord Scarman and Lord Bridge expressly agreed that:

There may well be other cases where the doctor feels that because the girl is under the influence of her sexual partner or for some other reason there is no realistic prospect of her abstaining from intercourse. If that is right it points strongly to the desirability of her doctor being entitled in some cases, in the girl's best interest, to give her contraceptive advice and treatment if necessary without the consent or even the knowledge of her parents. The only practicable course is to entrust the doctor with a discretion to act in accordance with his view of what is best in the interests of the girl who is his patient. He should, of course, always seek to persuade her to tell her parents that she is seeking contraceptive advice, and the nature of the advice that she receives. At least he should seek to persuade her to agree to the doctor's informing the parents.

Lord Fraser acknowledged that “there may well be cases, and I think there will be some cases, where the girl refuses either to tell her parents herself or to permit the doctor to do so and in such cases, the doctor will, in my opinion, be justified in proceeding without the parent's consent or even knowledge”. However, the doctor must be satisfied on the following matters:

1. the girl (although under 16 years of age) will understand his or her advice;
2. that he or she cannot persuade her to inform her parents or allow him or her to inform those parents that she is seeking contraceptive advice;

3. that she is very likely to begin or to continue having sexual intercourse with or without contraceptive treatment;

4. that unless she receives contraceptive advice or treatment her physical or mental health or both are likely to suffer;

5. that her best interests require him or her to give her contraceptive advice, treatment or both without the parental consent.

Lord Fraser was mindful that the above result “ought not to be regarded as a licence for doctors to disregard the wishes of parents on this matter whenever they find it convenient to do so”. Any doctor who behaves in such a way would be failing to discharge his or her professional responsibilities, and be expected to be disciplined by his or her own professional body accordingly. Lord Scarman agreed with Lord Fraser’s Guidelines but he also stated that practically: “It will be a question of fact whether a child seeking advice has sufficient understanding of what is involved to give a consent valid in law …. It is not enough that she should understand the nature of the advice which is being given: she must also have a sufficient maturity to understand what is involved”.2

THE RÔLE OF PARENTAL RIGHTS

What is most significant in Gillick is that the majority approached the issue by considering parental rights in general terms before then turning to the specific matter raised on the appeal. Below are the important points relied on by Lord Silber in Axon from the speeches of the majority in Gillick condensed:

• “Nor has our law ever treated the child as other than a person with capacities and rights recognised by law”8;

• “… parental rights to control a child do not exist for the benefit of the parent. They exist for the benefit of the child and they are justified only in so far as they enable the parent to perform his duties towards the child and towards other children in the family”9;

• “… even up till a young person’s 18th birthday [the parental right] is a dwindling right which the courts will hesitate to enforce against the wishes of the child and the more so the older he is” per Lord Denning MR in Hewer v Bryant10;

• “I would hold that as a matter of law the parental right to determine whether or not their minor child below the age of 16 will have medical treatment terminates if and when the child achieves a sufficient understanding and intelligence to enable him or her to understand fully what is proposed. It will be a question of fact whether a child seeking advice has sufficient understanding of what is involved to give a consent valid in law” per Lord Scarman11;

• Lord Scarman explained what he meant by “sufficient understanding of what is involved to give a consent valid in law”.12 He was mindful of the moral and family questions, especially her relationship with her parents; long term problems associated with the emotional impact of pregnancy and its termination; and there are risks to health of sexual intercourse at her age, risks which contraception may diminish but cannot eliminate. It follows that a doctor will have to satisfy himself that she is able to appraise these factors before he can safely proceed upon the
basis that she has at law capacity to consent to contraceptive treatment;

• Lord Scarman added that “it further follows that ordinarily the proper course will be for [the doctor, as the pre- Gillick] guidance lays down, first to seek to persuade the girl to bring her parents into consultation, and if she refuses, not to prescribe contraceptive treatment unless he is satisfied that her circumstances are such that he ought to proceed without parental knowledge and consent”\(^{13}\);

• Lord Fraser stated “… I think there will be some cases, where the girl refuses either to tell the parents herself or to permit the doctor to do so and in such cases, the doctor will, in my opinion, be justified in proceeding without the parent's consent or even knowledge provided he is satisfied on the following matters”.

It is noteworthy that both Lord Fraser and Lord Scarman sanctioned the provision of advice and treatment to young persons on sexual matters not only without parental consent but also without parental knowledge.

THE CHILDREN ACT 1989 AND THE PUBLIC INTEREST ARGUMENT

Section 1(1) of the Children Act 1989\(^{14}\) ("the 1989 Act") provides that in respect of the welfare of a child when a court determines any question with respect to (a) the upbringing of a child, or (b) the administration of a child’s property or the application of any income arising from it, the child's welfare shall be the court's paramount consideration. Parental responsibility is defined in s.3 of the 1989 Act as "all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property".

The claimants submitted that a doctor is under no obligation to keep confidential advice and treatment which he or she proposes to provide in respect of contraception, sexually transmitted infections and abortion and must therefore not provide such advice and treatment without the parents’ knowledge unless to do so would or might prejudice the child's physical or mental health so that it is in the child's best interest not to do so. The claimant's primary case was that this represents the nature and scope of the doctor's duty of confidence in respect of all the above treatments. However, the claimant's alternative case was that, at the very least, this is his or her duty in respect of the provision of advice and treatment in respect of abortion.

Lord Silber found the alternative claim of Mr Havers, Counsel for the claimant, in respect of limiting the duty of medical professionals for proposed abortion advice and treatment stronger than the alternative claim for limiting the duty for proposed treatment and advice on contraception and sexually transmitted illnesses because, as he submits, unlike treatment for contraception and sexually transmitted illnesses, abortion first involves an invasive and irreversible procedure; secondly, has potentially serious risks and side-effects; and thirdly, raises difficult moral issues. Lord Silber went on to consider both matters separately. Mr Havers pointed out there are important features of the relationship between parents and their children, which supported his submission that there has to be a limited duty of confidence owed by the medical professional to the young person in relation to that young person's parents. He stressed that a parent, rather than any third party, is responsible for the welfare of the young person under the age of 16 and so he contended that it follows that a parent is the best person for guiding and advising a young person of that age. Mr Havers also stated that it is significant that parents have a duty to protect their children and to guide them on issues of education, social matters and health as well as having an interest in providing welfare for their children. He attached weight to the significant public interest in promoting family life and that means that the courts should not sanction secrecy on any aspect of their children's lives, which is as important as sexual matters. On the other hand, it was submitted that the medical professional (unlike a parent) does not owe the same duties to a young person and if the medical professional is not relieved of the obligation to keep confidential from the young person's parents the proposed advice and treatment in respect of contraception and sexually transmitted diseases, this would undermine or destroy the important rôle that parents can and should play in advising and in helping their child. Mr Havers stressed that secrecy is destructive of family life and also that it is important for parents to be able to advise their children as to how to deal with the important issues of contraception, sexually...
transmitted infections and abortion. His case was that in order to fulfil their parental obligations to their children, parents must be sufficiently informed because if there was a full and unlimited duty of confidentiality owed by a doctor to a young person, it would not then be possible for the young person's parents to fulfil this important obligation to advise and to help the child on matters as important as sexual matters. Lord Silber referred to the above factors as “the family factors”. Lord Silber noted that, nevertheless, these family factors have to be considered and appraised against the background of:

1. Gillick and other legal authority;
2. the evidence in this case;
3. the crucial fact that a young person does not want his or her parents to be informed;
4. the risk that the young person will not seek or obtain advice on sexual matters altogether; and
5. the consequences of that risk.

Lord Silber stressed that this issue is only relevant where a young person in the particular case does not want his or her parents to be informed.

EUROPEAN CONVENTION ON HUMAN RIGHTS AND THE UN CONVENTION ON THE RIGHTS OF THE CHILD

It is appropriate to bear in mind that the European Convention on Human Rights (ECHR) attaches great value to the rights of children. The ratification by the UK of the United Nations Convention on the Rights of the Child in November 1989 was significant as showing a desire to give children greater rights. The ECHR and the UNC show why the duty of confidence owed by a medical professional to a competent young person is a high one and which, therefore, should not be overridden except for a very powerful reason. Although family factors are significant and cogent, they should not override the duty of confidentiality owed to the child. This duty was described in Z. v Finland as “a vital principle in the legal system of all Contracting Parties to the Convention”. Counsel for the claimant, Mr Havers, during the course of Axon pointed out that the claimant in that case was not a child but that is not a distinction of decisive or any great importance especially where the child is sufficiently mature to be able to understand the consequences of his or her decision. In Yousef v Netherlands, the European Court of Human Rights explained with emphasis added that in “judicial decisions where the rights under article 8 of parents and of a child are at stake, the child’s rights must be the paramount consideration”. By parity of reasoning, Lord Silber found that the child’s claim to confidentiality should not be overridden in the manner advocated by the claimant.

THE UN CONVENTION ON THE RIGHTS OF THE CHILD

It is appropriate at this stage to set out some of the relevant provisions of the UNC which was adopted in November 1989 and so post-dated Gillick. It has now been ratified by the United Kingdom. Article 5 of the UNC provides that:

States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.

Article 12 of the UNC states that: “States Parties shall assure to the child who is capable of forming his or her own views 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.”

Article 16 (1) states that: “No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation”

Article 18 (1) provides that: “States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern”.

Lord Silber relied on the recent decision of Mabon v Mabon to illustrate that the right of young people to make decisions about their own lives by themselves at the expense of the views of their parents has now become an increasingly important and accepted feature of family life. This approach of attaching substantial weight to the young person's article 12 rights is supported by the comment of Baroness Hale of Richmond in R. (on the application of Williamson and others) v Secretary of State for Education where she explained that: “above all, the State is entitled to give children the protection they are given by an international instrument to which the United Kingdom is a party, the United Nations Convention on the Rights of a Child”

Lord Silber felt that in the light of this change in the landscape of family matters, in which rights of children are becoming increasingly important, it would be ironic and indeed not acceptable now to retreat from the approach adopted in Gillick and to impose additional new duties on medical professionals to disclose information to parents of their younger patients. Lord Silber bore in mind that in the light of the well-established duty of confidence owed by a doctor to a competent young person, the burden of proving any justification for an exception of that rule would be firmly on the party asserting it, in this case, the claimant. Lord Silber found that the claimant in Axon could and did not discharge that duty.

CONCLUDING COMMENTS

The application in Axon as illustrated above raised tension between two important principles of which the first is that a competent young person under 16 years of age (who is able to understand all aspects of any advice, including its consequences) is an autonomous person, who first should be allowed to make decisions about his or her own health and second is entitled to confidentiality about such decisions even vis-à-vis his or her parents. The second principle is that a parent of a young person has a responsibility for that young person's health and moral welfare with the consequence that he or she should be informed if a medical professional is considering providing advice and treatment on sexual matters to that young person so that the parent could then advise and assist the young person. There was also a significant public policy dimension to the proceedings because evidence was submitted that without the guarantee of confidentiality, some of these young people might not seek advice or treatment from medical professionals on sexual matters with potentially disturbing consequences.

The second and concluding part of this piece—to be published in the next issue—will address further the separate issue to be resolved by Lord Silber as to whether the issues concerning abortion advice and treatment was important and so difficult that a medical professional is under no obligation to keep confidential advice and treatment which she proposed to give in respect of abortion unless to do so would or might prejudice the young person's physical or mental health. The claimant's alternative case that the 2004 Guidance was unlawful will be addressed and finally the claimant's case on the existence of a parent's Article 8(1) right to be notified and social policy implications surrounding such.

Part II of this article will appear in the next issue of the Irish Law Times.

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6. P.174B–D.

7. P.189A–E.

8. Lord Scarman at P.184B.

9. Lord Fraser at P.170D–E.


11. P.188H–189A.

12. P.189.

13. P.189E.


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