THE RIGHTS OF CHILDREN TO MEDICAL CONFIDENTIALITY: GILlick REVISITED—PART II

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The recent English High Court case of R. (Axon) v Secretary of State for Health 1 centered 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 access sexual health advice or treatment. Delivering judgment in London High Court, 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 article, which appeared in the last issue, examined 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 Competing rights under the Children Act 1989 jurisprudence on parental rights from the European Court of Human Rights as applied in Axon were reviewed. Rights under the United Nations Convention on the Rights of the Child 3 (“UNC”) in November 1989 which post-dated Gillick were identified and analysed.

This second and concluding part addresses the separate issue to be resolved by Lord Silber as to whether the issues concerning abortion advice and treatment were important and so difficult that a medical professional is under no obligation to keep confidential advice and treatment which he or 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 “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” 4 (“the 2004 Guidance”) was unlawful will be addressed and advice to medical practitioners acknowledged.

Finally the claimant's case on the existence of a parent's Article 8(1) right to be notified under the European Convention on Human Rights will be analysed.

ABORTION ADVICE AND INFORMATION

The speeches of Lord Fraser, Lord Scarman and Lord Bridge in Gillick were a useful starting point in the context of proposed abortion advice and treatment as the approach of the majority was to consider in general terms the reasons why parental knowledge or consent might be required for medical advice and treatment and then again in general terms when that parental knowledge or consent would no longer be required. The issue to be resolved by Lord Silber was 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 he or she proposed to give in respect of abortion unless to do so would or might prejudice the young
person’s physical or mental health. Lord Silber found the answer in Lord Fraser's guidelines, which specify with emphasis added that the medical professional is only justified in proceeding without the parent's consent or even knowledge provided he or she is satisfied that the girl (although under 16 years of age) will understand his or her advice. This requirement means that she will have to appreciate all aspects of the advice because Lord Scarman explained what he meant by “sufficient understanding of what is involved to give a consent valid in law”(addressed in Part I of this piece). Lord Silber felt that there is no reason why this approach cannot be adapted so that a girl could only be considered to have understood advice if she understands properly “what is involved”. This would constitute a high threshold and many young girls would be unable to satisfy the medical professional that they fully understood all the implications of the options open to them. These requirements would be underpinned by two matters of which the first is that the sanction for medical professionals was as explained by Lord Fraser that a doctor who did not adhere to his or her guidelines could expect to be disciplined by his or her own professional body. The second matter was that the medical professional is required to take into account all aspects of the young person's health in deciding if what he or she is proposing satisfies the test of showing that, unless the girl receives the proposed abortion advice, her physical or mental health or both are likely to suffer”. Lord Silber did not find that there should be any different rule on waiving confidentiality when abortion advice or treatment is discussed from when contraceptive advice or other treatment is under consideration. Lord Silber felt fortified in coming to this conclusion by the fact, that young people would be deterred from taking advice on sexual matters such as abortion without the assurance of confidentiality bearing in mind Lord Fraser's guidelines were not “a licence for doctors to disregard the wishes of parents on this matter whenever they find it convenient to do so.”

THE UNLAWFULNESS OF THE MEDICAL GUIDANCE

Lord Justice Silber chose the construction adopted by Lord Scarman in Gillick to the pre-Gillick guidance or any guidance issued:

The House must be careful not to construe the guidance as though it were a statute or even to analysis it in the way appropriate to a judgment. The question to be asked is: what would a doctor understand to be a guidance offered to him, if he should be faced with a girl under 16 seeking contraceptive treatment without the knowledge or consent of her parents?

Lord Silber conceded to the claimants argument that it is not expressly stated anywhere in the 2004 Guidance that it should be the “exceptional” practice to offer contraceptive advice or abortion advice or treatment to young people without first involving the parent. Nevertheless, the court found that this did not mean that the 2004 Guidance was unlawful for a number of reasons. These reasons included the fact that there was nothing in the speeches of the majority in Gillick, which lay down as a matter of law the assertion that a medical professional should regard it as an “exceptional” practice or unusual to offer contraceptive advice or abortion advice to young people without involving their parents. Also, was made very clear in the 2004 Guidance that all medical professionals should initially try first to ensure that the parent of the young person is notified either by the young person or by the medical professional with the young person's consent before any advice or any treatment can be given to the young person and second that the medical professional should try to persuade the young person to ensure that his or her parents are notified. Further, by saying that “it is good practice” for Lord Fraser's guidelines to be considered, Lord Silber found that the 2004 Guidance was setting out the established procedure and the judicially accepted conditions and safeguards which have to be complied with before a young person could be given contraceptive advice. Ultimately, Lord Silber found that there is nothing in the 2004 Guidance, which states or shows that Lord Fraser's guidelines are to have any reduced importance or value as suggested by the claimants. Lord Silber found the converse to be true; the 2004 Guidance reasserts their continuing importance and relevance.

THE CLAIMANT’S CASE ON THE EXISTENCE OF A PARENT’S ARTICLE 8(1) RIGHT TO BE NOTIFIED

Article 8 of the European Convention on Human Rights provides that:

(1) Everyone has the right to respect for his private and family life, his home and his
(2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedom of others.

Although the cases of Z v Finland and MS v Sweden deal with the position of an adult, Lord Silber found that there was no good reason why they could not apply to protect the confidentiality of health information concerning a young person as, that duty of confidentiality is owed to a young person by medical professionals. Lord Silber approved the approach adopted in MS v Sweden that “respecting the confidentiality of health data is a vital principle in the legal systems of all contracting parties to the Convention”. Lord Silber also approved Lord Lester QC and David Pannick QC’s statements that “as a child matures, the burden of showing ongoing family life by reference to substantive links or factors grows”. This conclusion presupposes correctly that any right to family life on the part of a parent dwindles as his or her child gets older and is able to understand the consequence of different choices and then to make decisions relating to them found that, as a matter of principle, it is difficult to see why a parent should still retain an Article 8 right to parental authority relating to a medical decision where the young person concerned understands the advice provided by the medical professional and its implications. Further, any right under Article 8 of a parent to be notified of advice or treatment of a sexual matter must depend on a number of factors, such as the age and understanding of their offspring. Lord Silber found that there was nothing in the Strasbourg jurisprudence, which persuaded him that any parental right or power of control under Article 8 was wider than in domestic law, which is that the right of parents in the words of Lord Scarman “exists primarily to enable the parent to discharge his duty of maintenance, protection and education until he reaches such an age as to be able to look after himself and make his own decisions”. Lord Silber concluded that there was nothing in the 2004 Guidelines, which interferes with any of a parent’s Article 8 rights given the safeguards contained in the Guideline. One of the reasons why Lord Silber did not consider that the 2004 Guidance interferes with any Article 8 rights of a parent is that it is established that a child’s Article 8 rights overrides similar rights of a parent. In Hendricks v Netherlands, the Commission explained at paragraph 23 that: “[t]he Commission has consistently held that, in assessing the question of whether or not the refusal of the right of access to the noncustodial parent was in accordance with article 8 of the convention the interests of the child pre-dominate”.

Similarly in Yousef v Netherlands that “the court reiterates that in judicial decisions where the rights under Article 8 of the parents and those of the child are at stake, the child’s rights must be the paramount consideration”. Commentators Clayton and Tomlinson explain that under ECHR Jurisprudence: “the right of the child to respect for his private life or to exercise freedom or thought conscience and religion in a manner which is at variance with the new directives of his parent, has been receiving increased attention so that the weight given to parental authority may be reduced”.

A final reason is that in this particular area relating as it does to social policy, the judiciary should show a substantial deference to the executive on these issues. Lord Bridge in Gillick stated that the judgment in Gillick was concerned with how medical professionals should deal with young people, who want advice on sexual matters but who cannot be persuaded to inform their parents or to permit the medical professionals to inform their parents. Lord Bridge was eager to point out that there was nothing in the judgment which is intended to encourage young people to seek or to obtain advice or treatment on any sexual matters without first informing their parents and without discussing matters with them. On the contrary, it is to be hoped that all young people will do so because in Lord Fraser’s words in Gillick that “in the overwhelming majority of cases, the best judges of a child’s welfare are his or her parents”.

Lord Silber found following Gillick that he was led to the conclusion that the medical professional is entitled to provide medical advice and treatment on sexual matters without the parent’s knowledge or consent provided he or she is satisfied of the following matters:
1. that the young person although under 16 years of age understands all aspects of the advice that understanding includes all relevant matters and it is not limited to family and moral aspects as well as all possible adverse consequences which might follow from the advice;

2. that the medical professional cannot persuade the young person to inform his or her parents or to allow the medical professional to inform the parents that their child is seeking advice and/or treatment on sexual matters;

3. that (in any case in which the issue is whether the medical professional should advise on or treat in respect of contraception and sexually transmissible illnesses) the young person is very likely to begin or to continue having sexual intercourse with or without contraceptive treatment or treatment for a sexually transmissible illness;

4. that unless the young person receives advice and treatment on the relevant sexual matters, his or her physical or mental health or both are likely to suffer (in considering this requirement, the medical professional must take into account all aspects of the young person's health); and

5. that the best interests of the young person require him or her to receive advice and treatment on sexual matters without parental consent or notification.

Lord Silber again reiterated the precursor set down by Lord Fraser in Gillick that these guidelines were “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 professional responsibilities, and I would accordingly expect him to be disciplined by his own professional body accordingly”.

CONCLUSION

The application in Axon as illustrated in both parts of this article 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. The Gillick decision was relied on heavily by Lord Silber against the backdrop of a social change in the landscape of family matters, in which rights of children are becoming increasingly important. Lord Silber declined the opportunity 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. In short, Gillick has had new life breathed into it. Gillick extends beyond the provision of contraceptive services to the arena of abortion, where one might have thought it might have been less definitively authoritative. It continues to be the bridgehead for a new influx of children's rights jurisprudence into English law.

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Irish Law Times 2006, 24, 199-201


4. www.bma.org.uk/apnfs/Content/Confidentialityunder16

5. P. 189A–E.

6. P. 174 D.


8. www.hri.org/docs/ECHR50.html


11. P. 337 in para. 41.


13. P. 185E.


16. Para. 73.


18. P. 193G–194B.

19. P. 173E.

20. P. 174E.