LORD DENNING AS A CHAMPION OF CHILDREN'S RIGHTS: THE LEGACY OF *HEWER* v. *BRYANT*

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> "... the legal right of a parent to the custody of a child ends at the 18th birthday: and even up till then, it 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. It starts with a right of control and ends with little more than advice."[1]

INTRODUCTION

Ask any family law teacher or student of family law which decision of the English courts has made the greatest contribution to the acceptance of the idea of children's rights and the answer would almost certainly be the *Gillick* case.[2] True enough, the majority of the House of Lords established in that case that the legal capacity of a child to be involved in important decisions affecting him or her did not depend at common law exclusively on arbitrary age-limits but rather on the level of maturity and understanding of the individual child. Thus, the notion of the gathering independence of adolescents took root and is now expressed in many places in the Children Act 1989[3] and, internationally, in the United Nations Convention on the Rights of the Child.[4] But it is possible, perhaps, to overlook that there was a second, equally important, aspect to the *Gillick* litigation. The decision also reasserted that there were limits to the legal authority of parents, despite the fact that parental 'rights' or 'custody,' now reconceptualised as 'parental responsibility,' continue to exist right up to the child's attainment of majority. It can plausibly be

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[1] Lord Denning M.R. in *Hewer* v. *Bryant* [1970] 1 Q.B.357 at 369.

[2] *Gillick* v. *West Norfolk and Wisbech Area Health Authority* [1986] 1 F.L.R. 224.

[3] See particularly s.1(3)(a), s.22(4), s.38(6) and s.43(8).

[4] Article 12 requires States Parties to "assure to the child who is capable of forming his 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."

argued that Lord Denning's famous dictum in *Hewer* v. *Bryant*, set out above, was the real foundation for this part of the majority decision in *Gillick* and, in that sense, has contributed as much, if not more, to the development of English law's approach to the legal relationship of parent and child.

In this short tribute to Lord Denning I would go further. It will be my contention that if greater attention had been paid in the post-*Gillick* period to the spirit of what Lord Denning had to say in 1969 the law would not now be in the unsatisfactory and somewhat confused state in which it undoubtedly is. This is a charge which I would lay primarily, but not exclusively, at the doorstep of the Court of Appeal. Neither the former Conservative government nor the present Labour administration seem to have done at all well in comprehending what Lord Denning took to be self-evident thirty years ago - that as the independence of children gradually takes hold, so parental control 'dwindles.'

HEWER v. *BRYANT*: THE DECISION

Hewer v. *Bryant* was not a case falling within the traditional parameters of family law. Indeed, if those same family law teachers and students were asked to recall what the principal issue was in the case most would be very hard pressed to do so. It is indeed a tribute in itself to Lord Denning that a case which really had nothing to do with family law has continued to exert such an influence on thinking in the subject.

The facts, characteristically with Lord Denning, are easier to glean from his judgment than they are from any other part of the report including the headnote:

> "Fergus Hewer was born on December 28, 1946. So he is now 22. On August 15, 1962, when he was 15 years and eight months, he was seriously injured in a motor accident. He could not *himself* bring an action for damages at that time because he was under 21 [the then age of majority].[5] His father might have brought an action on his behalf, *as his next friend*, but he did not do so. So Fergus, as soon as he was 21, issued a writ himself. It was issued on January 16, 1968, a week or two after his 21st. birthday. The defendant says the action is barred by the Statutes of Limitation. He says that Fergus was at the time of the

[5] The age of majority was reduced from 21 to 18 very shortly after the decision in *Hewer* v. *Bryant* by the Family Law Reform Act 1969.

> accident 'in the custody of a parent,' and that an action is barred after three years from the date of the accident."[6]

It is important to understand the argument of counsel for the defendant since it is essentially the argument which was to resurface again fifteen years later in the *Gillick* saga - and not just resurface but be unanimously upheld by the Court of Appeal. The gist of the argument was that "custody" when used in a statute was a technical legal term which should be given a technical legal interpretation.[7] It was possible to determine definitively who in law was vested with "custody" in relation to a child and, once determined, that was the end of the matter. The child was either in the "custody" of a person in this technical sense or not and the *factual* situation of the child's position *vis-à-vis* that person was irrelevant. Therefore the fact that Fergus Hewer was living independently from his parents and was employed as an agricultural worker when the accident occurred was, according to this argument, of no significance to the question whether he was in the "custody" of his parents. If he was, any civil action would need to be brought on his behalf by his parents even though they were under no legal duty to bring it.

Lord Denning would have none of this and enquired of counsel whether "the pop-singer who, though under twenty-one, earns thousands a year" was also "in the custody of a parent" so that if he should be injured the parent would be required to sue on his behalf within the three-year limitation period. For Lord Denning the concept of "custody" as used in the context of the Limitation Acts, denoted "a state of fact and not a state of law." An infant was only to be regarded as "in the custody of a parent" for these purposes where he was "in the effective care and control of a parent at the time of the accident."[8] On this test Fergus Hewer was clearly not in his father's custody having, at the relevant time, left home and taken up employment miles away as a farm-worker at the agricultural wage. Accordingly his claim was not statute-barred.

Lord Denning rejected the notion of absolute authority over children, exemplified by the Victorian parent, taking the view that the common law

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[6] By virtue of an amendment introduced in 1954 an infant who had suffered personal injuries was to be barred from bringing an action after three years from the date of the accident unless he could prove that he "was not, at the time when the right of action accrued to him, in the custody of a parent." (S.2(2) of the Law Reform (Limitation of Actions, etc) Act 1954 amending s.22 of the Limitation Act 1939).

[7] As Raymond Kidwell Q.C. and Hilary Barker for the defendant put it:

> "When Parliament in 1939, after centuries of history, used the words 'in the custody of a parent' they should be taken to have intended that bundle of rights and duties comprised in the common law concept of 'custody' familiar in every branch of family jurisdiction." [at p.363].

[8] *Supra* n.1 at p.370.

"can, and should, keep pace with the times."[9] But the spectre of the Victorian parent was to re-emerge in the Thatcherite 80s in the shape and form of Victoria Gillick.[10]

GILLICK AND THE INFLUENCE OF *HEWER* v. *BRYANT*

Mrs. Gillick, as is well-known, asserted, *inter alia*, that in the matter of contraceptive advice or treatment given to girls under the age of sixteen the parent had an unqualified right to be consulted and a veto on such dealings between children and the medical profession. She lost at first instance before Woolf J. (as he then was) who, in the course of his judgment, relied on "the vivid language of Lord Denning" and took the view that he was not required "to ignore the change in attitudes since the Victorian era."[11]

The Court of Appeal, on the other hand, had no difficulty relying on the late Victorian decision in *Re Agar-Ellis* in which the court had upheld the absolute authority of a father over his seventeen-year-old daughter which was said to continue unabated until the acquisition of majority at twenty-one.[12] Parker L.J. noted Lord Denning's "trenchant criticism" of this decision but also observed that:

> "Lord Denning was clearly of the view that the legal right to custody continues, and should continue, up to but not beyond, the child's 18th. birthday (which it does) albeit that the right was a dwindling one."

For Parker L.J. this legal right of control of the parent was unassailable, subject only to the court's power to intervene where the parent was not thought to be acting in the child's best interests. Fox L.J. took the same position but expressed it somewhat differently. According to him,

> "Lord Denning ... despite his criticism of Re Agar-Ellis did not doubt that legal custody should continue to 18 though as the child gets older it may, in practice, be a waning right unless the court is prepared to support it for the child's welfare."[13]

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[9] *Ibid* at p.369.

[10] Mrs Margaret Thatcher (now Baroness Thatcher of Kesteven), the then Prime Minister, famously favoured a return to "Victorian values" not least in relation to the family.

[11] [1984] F.L.R. 249 at 261.

[12] (1883) 24 Ch.D. 317.

[13] [1985] F.L.R. 736 at 750-751.

The essence, therefore, of the Court of Appeal's decision was that unless and until someone challenged the exercise of parental authority before the courts, that authority or control remained absolute. "Custody," by this time more accurately known as "parental rights and duties"[14] was either vested in someone or not, in a technical legal sense and, subject to possible intervention by the court, that was the end of the matter. In other words, the very argument of counsel for the defendant in *Hewer* v. *Bryant*, so comprehensively dispatched by Lord Denning, was uncritically accepted by the Court of Appeal in *Gillick*.

The House of Lords allowed the appeal of the D.H.S.S. by a thin majority of three-two.[15] It is perhaps revealing that the two dissenting members, Lords Brandon and Templeman, made no reference whatever in their respective speeches to *Hewer* v. *Bryant* and, as we shall see, apart from one passing reference this is very largely true of the judgments in two subsequent decisions of the Court of Appeal which have come to represent "the retreat from Gillick."[16] The principal majority speeches of Lords Fraser and Scarman, on the contrary, rely heavily on what Lord Denning had to say - in particular his scathing criticism of the *Re Agar-Ellis* case which Lord Scarman described as "horrendous" and "rightly remaindered to the history books by the Court of Appeal in *Hewer* v. *Bryant*."[17] Lord Fraser agreed with "every word" of Lord Denning's dictum and "especially with the description of the father's authority as a dwindling right."[18] So it was that the House of Lords, albeit by majority, was able to hold robustly that there were indeed legal limits on parental control which was not absolute despite its continuation right up to the child's majority. As Lord Scarman put it "parental rights are derived from parental duty and exist only so long as they are needed for the protection of the person or property of the child"[19] and Lord Fraser was at pains to underline that such rights existed for the benefit of the *child* and not for the benefit of the parent.[20] But the majority decision went further than this. It also appeared to establish definitively that in the event of a clash between the views of a child factually competent to take his own decision

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[14] The concept was contained in s.85 Children Act 1975 and was defined to mean "all the rights and duties which by law the mother and father have in relation to a legitimate child and his property."

[15] *Supra* n.2.

[16] *Re R (A Minor) (Wardship: Medical Treatment)* [1992] 1 F.L.R.190 and *Re W (A Minor) (Consent to Medical Treatment)* [1993] 1 F.L.R. 1. The phrase was first used by Gillian Douglas in "The Retreat from Gillick" (1992) 55 *M.L.R.* 569.

[17] *Supra* n. 2 at p.248.

[18] *Ibid* at p.238.

[19] *Ibid* at p.249.

[20] *Ibid* at p.235.

and that of his parent the child's views should be given *priority*. Lord Scarman seemed particularly clear about this when he said:

> "the parental right yields to the child's right to make his own decisions when he reaches a sufficient understanding and intelligence to be capable of making up his own mind on the matter requiring decision."[21]

THE POST-*GILLICK* ERA: THE NEGLECT OF *HEWER* v. *BRYANT*

As we approach the twenty-first century we cannot say with confidence that we have put behind us the influence of the nineteenth. Quite a number of legal developments over the decade or so since *Gillick* suggest that there will continue to be an uneasy co-existence of the gathering independence of young people and the responsibility of their parents. The terminology has changed. We now confront much more openly the idea that children are persons capable of possessing "rights" and, far from asserting the "custody" or "rights" of parents, we now talk of "parental responsibility."[22] Yet the central issue with which Lord Denning got to grips thirty years ago is much the same today. How precisely can we acknowledge and respect the growing independence of children without denying what is indisputable - that parental responsibility remains intact until those children reach majority? Lord Denning's opinion was that the *level* of parental control decreased inversely to the extent of the individual child's factual capacity. It *dwindled*. But an examination of leading decisions of the Court of Appeal and legislation introduced by governments of both complexion shows that there is considerable reluctance to accept what many thought to be a fundamental principle entrenched by *Gillick*.

Let us begin with the Court of Appeal. In two major decisions, *Re R*[23] and *Re W*[24] the Court has contrived to hold that while a "*Gillick*-competent" child can provide a valid *consent* to certain medical procedures, that same child has no equivalent right or capacity to *refuse* them. The intricacies of the arguments in these cases are beyond the

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[21] *Ibid* at p.251.

[22] The definition of "parental responsibility" is now contained in s.3(1) Children Act 1989 and is remarkably similar to the former definition of "parental rights and duties" (see *supra* n.14). It is defined to include "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."

[23] See *supra* n.16.

[24] *Ibid*

scope of the present discussion[25] but, in the final analysis, the central argument which prevailed is not very far removed from the one which has already reared its ugly head several times in the course of this article. This is that while children may go on merrily accumulating independent capacities this does not terminate or detract from the ongoing responsibilities of parents - specifically in this context to provide a consent which would protect the medical profession against a possible tortious action arising from unauthorised contact with a child. Lord Donaldson neatly skipped around what Lord Scarman had to say in *Gillick* by holding that he had only really meant to say that parental powers were not *determinative* in the sense that the parent could not be said to have a *veto* over medical procedures. But this did not mean that the parent's *concurrent* right to provide a consent was obliterated by the acquisition of the child's capacity. *Either* the competent child, *or* the parent, held a key which could unlock the door to the procedure concerned[26] and either could provide the medical profession with a "flakjacket" against a possible tortious action.[27]

Lord Donaldson did not refer in either decision to the opinion of Lord Denning in *Hewer* v. *Bryant*.[28] It is a pity that he did not do so since, as demonstrated above, it was the foundation of the majority view in *Gillick* about the nature of parents' authority or responsibility. Would Lord Denning really have allowed into English law the illogicality of conferring on children the right to consent but not the right to refuse? Would he have been inspired by the prospect of a teenager being told: "It doesn't matter what you want. Your parents want it and, in the end, that's all that counts"? I rather doubt it.

Some of the policies of the former Conservative government and the present Labour government are also difficult to reconcile with Lord Denning's notion of "dwindling" parental authority. Take, for example, the education policy of the Conservatives throughout their long period of office which was dominated by the notion of "parental choice." There was early legislation to entrench parental preferences regarding choice of school.[29] Subsequent legislation increased parents' representation on governing bodies while abolishing the office of pupil governor.[30] Then

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[25] For a fuller discussion see Andrew Bainham, *Children: The Modern Law* (2nd.ed., Jordans, 1998) at pp.273-281.

[26] The metaphor used in *Re R. supra* n.16.

[27] The metaphor used in *Re W*, *supra* n.16, the key/lock metaphor being discarded by this time.

[28] The only reference to *Hewer* v. *Bryant* in any of the judgments in either *Re R* or *Re W* was a passing reference to it by Farquharson L.J. at [1992] 1 F.L.R. 190 at 206.

[29] The Education Act 1980.

[30] The Education (No.2) Act 1986.

we had the "parents' charter" and publication of school "performance tables."[31] Perhaps most strikingly of all, at least in the context of this article, was the creation in 1993 of an *absolute* right for parents to withdraw their children from sex education classes except in so far as what is taught falls within the requirements of the National Curriculum.[32] This right of withdrawal is unqualified and exists alongside a similarly unrestricted right of withdrawal from religious education and acts of collective worship which originates from the nineteenth century.[33]

The arguments about the provision of sex education or religious education and worship in schools are complex and controversial and this is not the place to rehearse them.[34] But what must be clear to everyone is that the former Conservative government's view of the role of parents in education was very far removed from the idea of diminishing control. There is little in any of the Education Acts to support the notion that children have any independent rights despite the fact that they spend almost as much of their lives in school as they do in the family home. On the contrary, what we do find support for is the concept of absolute parental discretion, rejected in *Hewer* v. *Bryant*, which continues up to the age of majority - at least as far as sex and religion are concerned.[35] There is not so much as a hint that parental control "dwindles" or that children have independent views or interests.

The policy of the Labour government towards juvenile crime illustrates another approach to the interrelationship of children's capabilities and parents' responsibilities.[36] In its own way it is equally at odds with the philosophy of *Hewer* v. *Bryant*. On the one hand, it does appear to be grounded in the notion of personal responsibility for crime on the part of juveniles themselves and this might be thought consistent with the idea of growing independence and autonomy. As the child gets older and achieves more capacity for decision-making so that child or young person should accept the greater measure of responsibility which goes with it.[37]

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[31] First issued by the then Department of Education and Science in 1991.

[32] The National Curriculum in relation to sex education expressly does *not* include education about AIDS, HIV and sexually transmitted diseases. (See now s.405 of the Education Act 1996, originally s.241 Education Act 1993).

[33] The Elementary Education Act 1870.

[34] For more detailed treatment see N. Harris, *Law and Education: Regulation, Consumerism and the Education System* (Sweet & Maxwell, 1993), chapter 7 and Bainham, *supra* n.25 chapter 16.

[35] It is interesting to note, for example, that although the age of consent for sexual intercourse is sixteen, young people above that age may be denied sex education by parental withdrawal.

[36] Set out in its White Paper, *No More Excuses: A New Approach to Tackling Youth Crime in England and Wales* (Cm.3809) (The Stationery Office, 1997).

[37] Indeed the attitude of the last two governments towards juvenile crime has taken on an increasingly punitive, authoritarian aspect perhaps epitomised most by the introduction of

Having said that, the abolition of the *doli incapax* presumption in relation to children aged at least ten but under fourteen by the Crime and Disorder Act 1998[38] is hardly consistent with the *gradual* acquisition of legal capacity supported by both *Hewer* v. *Bryant* and *Gillick*. Children will now, in principle, be wholly criminally responsible on the sudden attainment of the age of ten. As Tony Smith has put it (commenting on the decision of the Divisional Court in *C* v. *D.P.P.*)

> "we now have a law which holds that a person is completely irresponsible on the day before his tenth birthday, and fully responsible as soon as the jelly and ice-cream have been cleared away the following day."[39]

The government in its White Paper which preceded the 1998 legislation appeared to accept, in relation to juvenile crime, something very like what Lord Denning was talking about in 1969:[40]

> "As they develop, children must bear an increasing responsibility for their actions, just as the responsibility of parents gradually declines - but does not disappear - as their children approach adulthood."[41]

It is when we turn to what has actually been done in the Crime and Disorder Act that we can see the real thinking is one of *dual* responsibility for crime. Children and parents are in essence conceptualised as jointly and severally responsible for the increase in juvenile crime which is seen as a matter of personal and family responsibility. Thus, far from repealing Conservative legislation which had made parents directly accountable for the crimes of their children through fines, the payment of compensation, costs and controversial bind-over powers[42] the Labour government has carried this policy further by the introduction of the new "parenting order."[43] The order will be available in relation to parents of convicted young offenders or of children who are the subject of the new "anti-social

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custodial sentences for persistent young offenders with the creation of "secure training centres" by the Criminal Justice and Public Order Act 1994.

[38] S.34.

[39] [1994] 3 W.L.R. 888 and A.T.H. Smith "Doli Incapax Under Threat" (1994) *C.L.J.* 426 at 427. The decision of the Divisional Court was subsequently reversed by the House of Lords ([1995] 2 W.L.R. 383) which held that any change in the law was for Parliament and not for the courts.

[40] *Supra* n.38.

[41] *Ibid* at para 4.1.

[42] S.58 of the Criminal Justice Act 1991.

[43] Ss.8-10 of the Crime and Disorder Act 1998.

behaviour order, sex offender order or child safety order" as well as those parents convicted of offences relating to school attendance.[44] It will require them to attend counselling or guidance sessions and the order may include other requirements relating to such matters as ensuring the child's attendance at school or that he is home by a certain time each night.

There are strong civil libertarian objections to these powers involving as they do substantial state intrusion into the way in which families conduct themselves. There is doubt also about whether they are in compliance with the United Kingdom's international obligations. But in the context of the present discussion the key point is that they rest on the dubious assumption that parents remain fully in control of their minor children and can be brought to book for their transgressions - not much evidence here of "dwindling" parental control. The new law makes little or no allowance for the potential conflict of interest between parents and children and does not acknowledge the reality that many teenagers are *in fact* beyond the control of their parents. It should moreover be pointed out that the extent to which a parent might lawfully resort to measures of physical restraint to control a wayward child is now open to considerable doubt - and the older the child, the more legally suspect such disciplinary measures are likely to be.[45]

CONCLUSION

There remain very many uncertainties and difficulties for the law in striking an appropriate balance between children's gradual progression towards adulthood and the contemporaneous, ongoing responsibility which attaches to parents. *Hewer* v. *Bryant* was without question an important landmark in the attempt to achieve this accommodation. Lord Denning's simple, yet memorable, solution to this problem - that as the

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[44] It should be noted that it is the *parent* and not the child who is legally liable in relation to the child's non-attendance at school - see s.7 Education Act 1996.

[45] A parent may in principle be liable for the false imprisonment of the child where the restraint of the child is "for such a period or in such circumstances as to take it out of the realm of reasonable parental discipline" (see *R* v. *Rahman* (1985) 81 Cr.App.R. 349). And, increasingly, the parental right to administer corporal punishment is being called into question and challenged under the European Convention on Human Rights – see *A.* v. *United Kingdom* (*Human Rights: Punishment of child*) [1998] 2 F.L.R. 959. In this case the stepfather of A had beaten him severely on several occasions with a garden cane. He was acquitted of assault having successfully raised the defence of "reasonable chastisement." The European Court of Human Rights subsequently found the United Kingdom to be in breach of Article 3 of the Convention in allowing the defence to be raised in circumstances such as this, which amounted to "inhuman or degrading treatment or punishment." At the time of writing the government is engaged in a consultation exercise about the appropriate limits of parental discipline.

one grows the other dwindles - revealed, characteristically for him, an insight which was perhaps ahead of the times. It was certainly a good deal more enlightened than much of the clumsiness which has followed in the intervening thirty years. The Court of Appeal has found itself acknowledging rights for adolescents in some areas but refusing them in others for arguably no better reason than a preoccupation with protecting the medical profession against law suits. The Conservative administrations of Margaret Thatcher and John Major wholly failed to give effect, in their education policy, to the growing acceptance in society of the notion of children's rights and instead supported an absolutist view of parental control. And Labour too, to the surprise of many, appears to favour an approach to tackling youth crime which fails, at one and the same time, to accept that the personal responsibility of juveniles for crime should be a gradual process dependent on age and maturity and that parental responsibility should correspondingly decline.

Perhaps what all this suggests is that whatever else we allow to "dwindle" in the coming years it ought not to be the influence of Lord Denning's common sense in *Hewer* v. *Bryant.*