

# **International Family Law, Policy and Practice**

**Some Current Issues in the  
Modernisation of Family Justice  
in England and Wales**



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## **SOME CURRENT ISSUES IN THE MODERNISATION OF FAMILY JUSTICE IN ENGLAND AND WALES**

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# Editor's Message

This issue, the first of 2016, continues the recent theme of updates in Family Justice with a reassessment of the position of the mature minor in the context of medical matters in which, under the law of England and Wales, older teenagers may or may not be capable of taking such decisions themselves, even if close to the age of majority. Taking the reader through the extensive history since Gillick (1985) and Axon (2005), Professor Peter de Cruz addresses whether there really has been a 'retreat from Gillick', and, with the aid of some comparative material from other common law jurisdictions, reflects on whether there is, or is not, a more widespread doctrinal influence of the so called Gillick doctrine beyond English law.

Dr Lars Mosesson next considers the constitutional implications of the recent steeply rising rates in fees for applications to start proceedings in the new Family Court, since these have now reached a level beyond actual cost to HMCTS, raising new questions on access to justice; since it is clear that, in the absence of legal aid for most Family litigants, it is obvious that substantial numbers of potential applicants with a valid reason for bringing proceedings may simply be unable to afford the new levels of court fees, regardless of whether they can afford legal representation or will have to act for themselves as litigants in person.

Indian Advocate Anil Malhotra, from Chandigarh in the Punjab, then shares with us his concerns about what he considers to be pressing legislative reform in India, not least in both International Child Abduction and Surrogacy - since India has not yet signed up to the Hague Convention, although legislation now seems to be moving forward towards effecting this, and steps have also already been taken towards controlling the 'surrogacy tourism' which the sub-continent has attracted. In this respect when our own Law Commission's recommendations have often not been adopted by government in England and Wales, speedily or at all, it is of some comfort, (and of assistance in avoiding a hasty conclusion that English law is uniquely disadvantaged) to read of similar patterns in other common law jurisdictions such as India.

Finally, we include a Note on the Scottish approach to reform of Family Law, which, in noticing and catering for the needs of 'all of Scotland's families', often seems to be ahead of our Westminster government - this goal of 'protecting and safeguarding children and adults in today's family structures', first mentioned in the Scottish Executives' 2005 Memorandum to their Parliament ahead of their reforms to cohabitation law could usefully be adopted at Westminster', since it is an approach which has produced commendable results of which the Centre's Patron, Baroness Hale, has said in her judgment in the Supreme Court Scottish Appeal *Gow v Grant* in 2012, that 'English and Welsh cohabitants deserve nothing less'. This comment might well be applied to other topics which have been highlighted this year by the Solicitors' Family Law Association, Resolution, as urgent for reform.

The themes in our next three issues will now move on to those of the Centre's third triennial international conference of July 2016, the programme of which promises some excellent inspiration from the international Family Law community which always gathers so productively in London at these conferences to share perspectives and insights from around the world.

*Frances Burton*

Frances Burton, Editor

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# The Mature Minor Doctrine in English Law and Beyond: Should competent children be allowed to make autonomous medical decisions?

Peter de Cruz\*

## Abstract

This Article undertakes a critical assessment of the development of the 'mature minor' rule or Gillick principle over the last thirty-one years in the UK and the current status of the principle in relation to parental responsibilities, children's competence to consent to treatment and children's rights under English law. It also explores the question of whether there is been an adoption, operation and development of a similar principle in other common law jurisdictions such as the USA, Canada, Australia and New Zealand.

## Background

Thirty-one years ago, when the Gillick case<sup>1</sup> was decided, there was no real inkling of its long-term impact on Child Law. In essence, as a result of Mrs Victoria Gillick's challenge to a 1980 DHSS Memorandum which appeared to allow under-aged children to receive contraceptive advice and treatment in 'exceptional' circumstances, without parental knowledge or consent, the courts dealt with the issues of whether a child under 16 possessed the capacity to consent to treatment (in this case, contraceptive advice and treatment); the scope and limitations of parental authority; and in which circumstances such a child had the right to receive such advice and treatment without first having to inform its parents.

The House of Lords held in 1985 by 3:2 that although in general, parents should be made aware of contraceptive advice and treatment given to their under 16-year-old children, in clearly specified circumstances, those parents should not be informed. Hence, a child under 16 had a right to receive contraceptive advice and treatment provided she satisfied certain criteria as laid down by Lord Fraser.<sup>2</sup> The principle gleaned from the judgment was that if that child possessed sufficient comprehension and intelligence to understand the nature of the treatment that was being proposed, she could give her consent to that treatment. If she could not satisfy this competency requirement, her parents would need to give their consent. However, the issue of refusal of treatment by the minor was not

considered in the case itself.

In the years that followed, cases involving the Gillick/Fraser guidelines were only reported sporadically and it was nearly five years before the next notable case reached the reports, and this time raised the question of a minor's right to refuse treatment. This was in the Court of Appeal case of *Re R*<sup>3</sup> in 1991 which pre-dates the Children Act coming into force, and caused a minor furore as it was reported that a 15-year-old girl in care who suffered from cyclical psychotic behaviour had been refused the right to stop her medication when she complained that it made her nauseous. The problem was she fluctuated between periods of lucidity and florid psychotic behaviour. Lord Donaldson talked about consent being a key which unlocked a door and that a child usually had two key holders, namely her parents. He followed up this metaphor by calling consent a flak jacket. The upshot of this case and subsequent decisions<sup>4</sup> is that a child's refusal may be overridden by a court, its parents and anyone with parental responsibility. A child's refusal, although important, would not necessarily be conclusive. The Court of Appeal subsequently confirmed<sup>5</sup> that the courts could override parents, children and doctors when it performed its protective functions, although limiting the exercise of such a power only if 'the child's welfare is threatened by a serious and imminent risk that the child will suffer grave and irreversible mental or physical harm'.

## *Level of maturity and understanding*

One of the contentious issues which has never actually been resolved by the government, courts or health authorities, except in the broadest of terms, is the level of maturity and understanding that is required for a child to qualify as a Gillick-competent child. At a pragmatic level, this is not surprising since every child is different in emotional and intellectual development. On the other hand, a set of clarifying criteria on the lines of a Code of Practice might have been useful guidance for individual assessments, although the degree of understanding required would have to depend on the particular situation and be a matter of judgment for the assessor, whether court or health

\* Professor of Law, Liverpool John Moores University.

<sup>1</sup> *Gillick v West Norfolk and Wisbech AHA* [1985] 3 All ER 402 (hereinafter *Gillick*).

<sup>2</sup> Which have usually been referred to as the 'Fraser guidelines'.

<sup>3</sup> *Re R (A Minor) (Wardship: Medical Treatment)* [1991] 4 All ER 17.

<sup>4</sup> Such as *Re R (A Minor) (Wardship: Consent to Medical Treatment)* [1992] Fam 11 and *Re W (A Minor) (Medical Treatment: Court's Jurisdiction)* [1993] Fam 64.

<sup>5</sup> In *Re W (A Minor) (Medical Treatment)* [1992] 4 All ER 627.

professional. Despite the general principle espousing adolescent autonomy, the courts have been clear that a child refusing life-saving treatment will invariably be deemed incapable of making legally binding decisions which could threaten that child's survival. Hence a number of cases have affirmed that a child has no absolute right to refuse treatment such as a blood transfusion<sup>6</sup>, with courts declaring the children not to be 'Gillick competent' and that they were authorising treatment in the child's 'best interests.'

The Courts also overruled an anorexic child who was refusing food, because her life was at risk,<sup>7</sup> and ruled that an anorexic child whose life was at risk could be lawfully detained and force-fed if necessary.<sup>8</sup> A 15-year-old who refused a heart transplant essential for her survival<sup>9</sup> was also overruled as was a 14-year-old girl who refused a blood transfusion which was essential to prevent her from suffering a horrible death from severe burns<sup>10</sup>: she was also declared to be not 'Gillick competent'. Indeed, in the severe burns case, the Court said that it would still have authorised treatment even if the child *had* been Gillick competent.<sup>11</sup> These cases have been described as representing a 'retreat from Gillick' and perhaps a judicial trend not to apply the principle which would accord a child the right to decide its own treatment in certain types of circumstances.<sup>12</sup>

But it was only in 1993, in *Re C*,<sup>13</sup> a case involving an *adult* schizophrenic, a 68-year-old Broadmoor patient, that an English court had the opportunity to provide guidance for what legal competency meant, which has become the leading case on competency, approved by the Court of Appeal<sup>14</sup> and subsequently applied to cases involving an adolescent.<sup>15</sup>

### Criteria for Legal Competency<sup>16</sup>

According to *Re C*,<sup>17</sup> therefore, legal competency comprises three stages:

- (i) Comprehending and retaining the information relevant to the decision;
- (ii) believing it; and
- (iii) weighing up the information and making a

balanced, rational decision.

These criteria were applied in *Re C*<sup>18</sup> (*Detention: Medical Treatment*) in 1997 and illustrates that *Gillick* did not actually determine what level of maturity and understanding a child would need to have attained before it could qualify as a 'Gillick competent' child. It is important to note that Gillick competence is not the same as the *Gillick*/Fraser guidelines. Case law indicates that 'Gillick competence' thus appears to refer to all issues in which a child is involved (which would include illnesses, the right to choose legal representation and the right to apply to revoke Parental Responsibility or refuse medical assessment<sup>19</sup>) and the *Gillick*/Fraser guidelines refers to criteria for assessing a child's competence to make a decision in relation to specifically sexual issues (relating to contraception and abortion).

When we reflect on the post-*Gillick*, cases, therefore, *Gillick* has become almost a case cited more for what it did not say, rather than for what it did say. The original judgment did not say that all medical matters which involved advice and treatment to under-age persons would be covered by the DOH Guidance, only contraceptive advice and treatment. It certainly did not say that abortion would be covered by its ruling, which is presumably why the original Guidance was revised in 2004. Neither did it say that its notion of a Gillick competent minor covered 'mature' minors who could make decisions *outside* the contraceptive advice/treatment context, nor that life-threatening situations would be exempt. It did not say that Gillick competence (which it did not actually define except in the broadest of terms) would decide whether a child could appoint or 'sack' its solicitor<sup>20</sup> but this has also happened.

### THE ETHICAL ISSUES IN GILLICK

The *Gillick* Case appeared to pit the notion of children's rights against that of parental rights to decide a child's future; and the confidentiality owed by a doctor to his patient, even if she was an under-age child, against that

<sup>6</sup> See e.g. *Re E (A Minor) (Wardship: Medical Treatment)* [1993] 1 FLR 386 where a Jehovah's Witness child aged 15 refused a blood transfusion, but was overruled; *Re S (A Minor) (Wardship: Medical Treatment)* [1994] 4 All ER 627, another Jehovah's Witness teenager's refusal of blood was overruled, the Court declaring her not to be 'Gillick competent'.

<sup>7</sup> *Re W (A Minor) (Medical Treatment)* [1992] 4 All ER 627.

<sup>8</sup> See *Re C (Detention: Medical Treatment)* [1997] 2 FLR 180, discussed by de Cruz, P, in 'Adolescent Autonomy, Detention for Medical Treatment and *Re C* (1999) 62 Modern Law Review 595 and Fortin, J, in *Children's Rights and the Developing Law* (2003) 2nd ed. LexisNexis, Butterworths at pp. 150-151.

<sup>9</sup> *Re M* [1997] 2 FLR 1097.

<sup>10</sup> *Re L (Medical Treatment: Gillick Competency)* [1998] 2 FLR 810.

<sup>11</sup> see *Re L* (above) at 813 per Sir Stephen Brown P.

<sup>12</sup> The phrase probably originates from Gillian Douglas' commentary on *Re R* entitled 'The Retreat from Gillick' (1992) 55 Modern Law Review 569; see also Bridgeman, J 'Old enough to know best?' (1993) 13 Legal Studies 69, and further: Lyon, C and de Cruz, P, *Child Abuse* (1993) 2nd edition, p.379 ('the already very marked retreat from the principles of the Gillick decision').

<sup>13</sup> *Re C (Adult: Refusal of Medical Treatment)* [1994] 1 All ER 819.

<sup>14</sup> in *Re MB (Medical Treatment)* [1997] 2 FLR 426.

<sup>15</sup> in *Re C (Detention: Medical Treatment)* above, fn7.

<sup>16</sup> Discussed in Fortin *Children's Rights and the Developing Law*, (2003), above, pp 72ff

<sup>17</sup> [1994] 1 All ER 819

<sup>18</sup> see *Re C (Detention: Medical Treatment)*, in fn 7

<sup>19</sup> Under the Children Act 1989, see e.g. s.4(3); s6(7) and s.43(8) thereof.

<sup>20</sup> As in *Re S(A Minor) (Independent Representation)* [1993] 3 All ER 36.

of the right of the parent to know what its child was intending to do, in terms of sexual relationships, and the provision of contraceptive advice and treatment.

## Maintaining Confidentiality for Adolescents

Despite the importance of maintaining a healthy parent-child relationship, several reasons may be found for maintaining confidentiality in the delivery of health-care services to adolescents. These have been listed by Neinstein<sup>21</sup> as: (i) the needs of clinical practice, where confidentiality is required to facilitate adolescents seeking necessary care and in providing accurate, candid and complete health information; (ii) developmental needs where confidential discussions and disclosure help to support adolescents' growing sense of privacy and autonomy; and (iii) safety issues where confidentiality/consent is important to protect teens from humiliation which could result from disclosure of confidential information.

Of course, there are legal limits to confidentiality for the adolescent just as there are for adults. Hence, the moral need to protect the rights of the teenager must be weighed against the legal and ethical obligations to breach this confidentiality in selected cases. For example, there may be situations where the adolescent poses a severe risk of harm to himself or herself or to others, and cases of suspected physical or sexual abuse.<sup>22</sup>

In the UK, the past thirty years has seen a movement in the direction of replacing parental rights with parental responsibility<sup>23</sup> and a welcome trend towards a greater acknowledgment of children's rights but which has not quite fulfilled its initial promise globally, despite the many signatories to the United Nations Convention on the Rights of the Child 1989. Critical questions have to be answered on a case by case basis for each child whose competency and maturity comes under scrutiny: what is the age at which a child may become capable of informed consent, and are there certain medical procedures in which informed consent is more important than others? The Courts in the UK have not made any attempt to prescribe any sort of age range within which a child may be deemed 'Gillick competent' since 'maturity' is an individual concept which varies from child to child; they have proceeded on a case by case basis, only venturing to justify their decisions on the 'best interests' principle and to say, in totally different circumstances from a sexual health situation, that an older Gillick competent child would probably have the maturity and therefore the competence to dismiss a solicitor who had been assigned to her.<sup>24</sup>

### *The Gillick principle enshrined in The Children Act 1989*

The next stage in the Gillick saga was the enshrinement of its principal premise in statute. The Gillick principle was embedded into English law when it was given statutory recognition in the UK by the Children Act 1989, which came into force on October 14, 1991, giving children who possessed 'sufficient age and understanding' the right to refuse various forms of medical assessment, or to apply for revocation of a care order or emergency protection order or to apply for a section 8 order.<sup>25</sup>

## THE 2004 DEPARTMENT OF HEALTH GUIDANCE

The area of access to contraception by minors has remained largely uneventful, apart from a widening of such access in 2004 by the Department of Health's revised Guidance which broadened the mature minor's rights to include a right to abortion without the need to inform her parents, provided the usual *Gillick*/Fraser criteria were satisfied. In 2004, the Department of Health published a further guidance, *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*, which stated that doctors and other health professionals may provide contraception, sexual and reproductive health advice and treatment to those under 16 without parental knowledge or consent, provided the young person understood the advice and its implications and his or her physical or mental health would otherwise be likely to suffer.

The Guidance equated the duty of confidentiality owed to a person under 16, 'in any setting' with that owed to any person, which would include adults. It stated that 'This is enshrined in professional codes' and exhorted all services providing advice and treatment on contraception, sexual and reproductive health 'to produce an explicit confidentiality policy which reflected the Guidance and made clear that young people under 16 have the same right to confidentiality as adults.'

The right to confidentiality, as elucidated under the 2004 Guidance, therefore included the right to an abortion for a mature minor and in 2005, formed the subject of another challenge by another mother, Sue Axon, who, as in the *Gillick* case, did not claim that the amended Guidance had been improperly applied to the claimant's own daughter but that parental rights included a 'right to know' about her under-age daughter's intention to abort a child.

<sup>21</sup> See Neinstein, L S 'Confidentiality Issues' in Adolescent Health Curriculum at <http://www.usc.edu>

<sup>22</sup> *Ibid.*

<sup>23</sup> Not least by statute, through the enactment of the Children Act 1989 on October 14, 1991 which introduced the concept of Parental Responsibility, described in s.3 of the 1989 Act.

<sup>24</sup> See *Re S (Independent Representation)* [1993] 3 All ER 36.

<sup>25</sup> See ss43(8), 44(7), 39, 45(8) and 10(8), Children Act 1989, UK.

## The Sue Axon Case<sup>26</sup>

In 2005, Sue Axon, a mother of five children including two teenage daughters (aged 16 and 13), challenged the 2004 DOH guidance<sup>27</sup> through a judicial review application. Silber J confirmed that in the normal situation, parents are usually the best judges of a young person's welfare and that when seeking to apply the *Gillick* mature minor test, the medical practitioner in some circumstances need not notify parents as loss of confidence might deter some young people and would be against public policy and undermine the autonomy which was the basis of the *Gillick* principle. As far as whether giving advice and treatment to a girl under 16 without her parent's consent infringed Mrs Axon's parental rights, the Court held that *Gillick* was determinative of that issue; under certain circumstances (i.e. if it satisfied the Fraser guidelines) it did not.

Silber J also held that a parent would not retain an Art 8 Convention right<sup>28</sup> to parental authority relating to a medical decision where the young person concerned had understood the advice provided by the medical professional and its implications. Therefore, in the circumstances, there was nothing in the 2004 Guidance which had interfered with the parent's Art.8 Convention right.

The learned judge further ruled that in any contest between parental rights and a child's rights, the latter must prevail provided the child possesses sufficient maturity to understand the medical advice being given.<sup>29</sup> Mrs Axon's application was dismissed.

## Protecting Potential Human Life

Silber J observed that the American authorities which had been cited to him were concerned with the particular state's 'interest in the potentiality of human life' but 'there is no equivalent interest in the United Kingdom.'<sup>30</sup> Further, he declared that under the European Convention on Human Rights the unborn were not covered by the right to life under Art.2,<sup>31</sup> thus there was no potentially

overriding state interest in preserving unborn life. The second part of this statement is certainly technically correct under English law because an unborn child has no legal personality until born<sup>32</sup> but the case of *Re MB* [1998] 2 FLR 528 highlights the fact that English law does in fact recognise the unborn child in several ways<sup>33</sup> although it does not overtly offer protection in law to the unborn child until it is born alive.<sup>34</sup> On the other hand, the ongoing American campaigns to restrict or abolish the right to an abortion in the USA which stretch back to the 1970s illustrate a strong and arguably more visible interest in the potentiality of human life at least for some of the population in America.

## Provision of health advice and treatment

On the question of proposed advice and treatment for contraception and sexually transmitted diseases (STDs), Silber J declared that *Gillick* impliedly rejected the submission that a medical professional was obliged to inform the young person's parents about proposed advice on contraception. He emphasised that: "The type of advice being given deserved the highest degree of confidentiality and that undermined the existence of a duty of disclosure on the part of the medical professional."<sup>35</sup> In addition, considerable weight was now placed on the rights of a child under the UN Convention on the Rights of a Child 1989 and the incorporation of Art 8 of the Human Rights Convention in the Human Rights Act 1998.<sup>36</sup>

Thus, the claimant's contention that proposed advice and treatment should not be confidential except where the child's physical or mental health was prejudiced could not be justified.

With regard to proposed advice and treatment for abortion, the learned judge ruled that the guidelines in *Gillick* were appropriate to apply to this even though the treatment involved invasive and irreversible surgical procedure with potentially serious risks, consequences and side effects and involved non-medical issues, such as moral, ethical, religious and cultural issues, and one could draw

<sup>26</sup> (2006) Times, January 26; [2006] 2 FLR 206.

<sup>27</sup> 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*, published in July 2004.

<sup>28</sup> That is, the right to respect for one's private and family life, which the Court accepted meant the right to parental authority over their children, having due regard to their parental responsibilities, as argued by Mrs Axon's counsel: see [2006] 2 FLR at 247, at para [123] which would then mean a right to be notified as a parent.

<sup>29</sup> 'A child's Art. 8 rights overrides similar rights of a parent' in [2006] 2 FLR at 253, at para [144] and 'It is difficult to see why a parent still retains an Art 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': [2006] 2 FLR at 256, para [130].

<sup>30</sup> See [2006] 2 FLR at 222, at para [34]

<sup>31</sup> *Ibid.*

<sup>32</sup> See *R v Tait* [1989] 3 All ER 682

<sup>33</sup> For example, a Court approved the removal of a baby at birth whose mother had been a drug addict, to protect it from any further harm, because the baby was suffering from withdrawal symptoms, which suggests that protection for the child was being ordered owing to the harm it had suffered while in the womb: see *Re D* [1987] 1 All ER 20. Abortion is not permitted *carte blanche* in Britain and is still subject to time-limits and the requirements of the Abortion Act: see the Abortion Act 1967; the 'rights' of the unborn child have been recognised under the Variation of Trusts Act 1958, s.1(1) under which account may be taken of persons who are unborn and not even conceived at the time of application. In the law of succession, a child *en ventre sa mere* has, for many years, been recognised as a 'life in being', who is entitled to acquire property provided it is in fact subsequently born alive.

<sup>34</sup> See also *AG's Reference (No.3 of 1994)* [1997] 3 All ER 936.

<sup>35</sup> See [2006] 2 FLR at p. 230, at para [62].

<sup>36</sup> One can only speculate what will happen to Art 8 if the UK leaves the European Union by 2018, and the Human Rights Act 1998 is repealed and replaced by a new UK Bill of Rights with (possibly) a similar provision to Art 8 of the Human Rights Act 1998.



distinctions between advice and treatment for contraception and sexually transmitted infections (STIs) on one hand and abortion on the other. Hence the guidelines set out in *Gillick* were appropriate as guidance in respect of all sexual matters once they were adapted to cover such matters.

Thus, according to *Axon*, the *Gillick* principle should be applied to the mature minor's right to abort provided she satisfied the Fraser criteria. As with most childcare law decisions, the ultimate decision would depend on the perception of what was in the 'best interests' of the child.

### The Human Rights Dimension

In *Axon*, there was a considerable amount of argument relating to Art 12 of the UN Convention on the Rights of the Child which provides 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.' Silber J believed that Thorpe LJ was correct in *Mabon v Mabon* [2005] 3 WLR 460 when, commenting on Art. 12, said 'Unless we in this jurisdiction are to fall out of step with similar societies as they safeguard Art 12, we must, in the case of articulate teenagers, accept that the right to freedom of expression and participation outweighs the paternalistic judgment of welfare.'

There was also an argument over Art 8 of the ECHR. Mrs Axon had argued that, based on *X v Netherlands*<sup>37</sup> (1974) 2 DR 118 and *Nielsen v Denmark* (1988) 11 ECHR 175, there was a right of parental authority (having regard to the corresponding parental responsibilities) amongst the Art 8 rights, that ensuring respect for family life would include enforcing those rights and ensuring respect for family life will take precedence over avoiding any interference with the child's family life.

Indeed, the Secretary of State for Health argued in *Axon* that the Art 8 arguments tended to support the right of children to have their medical confidences respected, relying on *Z v Finland*<sup>38</sup> and *MS v Sweden*.<sup>39</sup> The Strasbourg jurisprudence suggested that parental authority dwindles as the child gets older. This echoes Lord Denning's comments in *Hewer v Bryant*.<sup>40</sup>

Silber J opined that there was no justification either in European Convention Human Rights authority or common sense, for holding that a parent retained an Art 8 right to parental authority in the context of medical advice about sexual matters where the child concerned understood and

was able to deal adequately with the advice and its implications.

Using Art 8(2), Silber J ruled that even if the 2004 Guidance did interfere with a parent's Art 8(1) rights, that interference was justified since it was 'in accordance with the law' and 'necessary in a democratic society ... for the protection of health... or for the protection of the rights... of others' as well as proportionate. The learned judge emphasised that it was proportionate because 'there was evidence that failure to provide confidentiality discouraged young people from seeking medical advice with all the consequential detrimental effects to the protection of health in society.'<sup>41</sup>

Hence, *Axon* decided that the *Gillick* guidelines did not infringe parental rights under the European Convention of Human Rights. Not only did a young person have his or her own right to respect for family life, and a significant and compelling right to confidentiality of health information under the European Convention, which would compete with, and potentially override, any parental authority, but also the right to parental authority dwindled as a child matured.<sup>42</sup>

### The Importance of Confidentiality

#### *Research on importance of Confidentiality for Teenagers*

In *Axon*, Silber J refers to a report entitled *Teenage Pregnancy- Report of the Social Exclusion Unit* (1999)<sup>43</sup> (the Report), a survey of teenagers, which found that in half of the teenage conceptions that occurred, those under 16 and a third of those who were between 16 and 19 in the UK, used no contraceptives on the first occasion on which they had sexual intercourse. According to the Report, one of the main reasons for this non-use of contraception was the fear by the teenagers that their parents would find out they had consulted their doctor for contraceptive advice or treatment. Thus, a pivotal finding of the Report is that assurance of confidentiality was regarded as a critical factor for the improvement of sexual health and the reduction of the incidence of sexually transmissible illnesses, which were serious problems especially for those under 16 years old. Silber J stressed that this point corresponded with the statistical evidence to which he referred.

#### *Surveys in the UK*

The *Axon* Court took considerable care in establishing that the need to preserve confidentiality was at the heart of this sort of situation, by approving the evidence provided in the witness statements which included findings from

<sup>37</sup> (1974) 2 DR 118.

<sup>38</sup> (1997) 25 EHRR 371.

<sup>39</sup> (1999) 28 EHRR 213.

<sup>40</sup> See *Hewer v Bryant* [1970] 1 QB 357.

<sup>41</sup> See [2006] 2 FLR at p.251, at para [128].

<sup>42</sup> This simply echoes Lord Denning's words in *Hewer v Bryant* [1970] 1 QB 357 at 369 which two Law Lords also approved in *Gillick*; see comments of Lord Fraser of Tullybelton and Lord Scarman in *Gillick*, cited by Silber J in *Axon* at [2006] 2 FLR at 215, at para [13].

<sup>43</sup> Cm 4342, TSO.

several research surveys, BMA publications and even Scandinavian Family Planning programmes.<sup>44</sup>

In 2004, a survey by the British Market Research Bureau entitled *Evaluation of Teenage Pregnancy Strategy* found that young people aged between 13 and 21 highlighted confidentiality and privacy as the single most important factor for them when seeking advice on matters relating to sex and relationships. In *Get Real: Providing Dedicated Sexual Health Services for Young People* (2002)<sup>45</sup> a report which surveyed young people about what they were looking for in sexual health services, identified confidentiality as one the most important characteristics of such services. A third research study, *Exploring the Attitudes and Behaviours of Bangladeshi, Indian and Jamaican young people in relation to Reproductive and Sexual Health*, commissioned by the Teenage Pregnancy Unit, interviewed young people aged 13 to 21 from these groups and a small number of parents, concerns were expressed, especially among those of Indian origin, that the GP might disclose personal information to other family members registered with the practice.

The BMA publication, *Consent, Rights and Choices in Healthcare for Children and Young People* made it evident a widely held belief among the medical profession is that a guarantee of confidentiality is crucial to encourage teenagers to obtain contraceptive advice and treatment. Finally, the Family Planning Associations of Denmark, Iceland, Finland, Norway and Sweden, who have achieved particular success in reducing teenage pregnancy, have made it a key feature, since 1998, to ensure that young people have a right to confidentiality. In *Axon*, the Court emphasised that there was clear evidence that an assurance of medical confidentiality encourages the use of contraceptive and abortion services by the under-16s<sup>46</sup> and this was in accordance with the Art 8(2) requirements.

## ACADEMIC CRITIQUES OF THE GILLICK PRINCIPLE (2011-2014)

In the past five years, several articles containing academic commentary on the scope, impact and interpretation of the Gillick principle have been published, mostly in response to two articles by Gilmore and Herring, both published in 2011.

The Gilmore and Herring articles<sup>47</sup> focus on the child's ability (or lack of such ability) to refuse medical treatment in certain circumstances as determined in *Re W*<sup>48</sup> and

sought to draw a distinction between the minor's refusal to consent to any (or all) treatment and refusal to consent to a particular treatment.<sup>49</sup> This would depend on whether *all* treatment has been refused or only *specific* treatment. They argue that a child's capacity to consent merely requires an understanding of the proposed treatment, whereas a valid refusal of all treatment requires an understanding of the full significance of a total failure to treat.<sup>50</sup> They therefore submit that a child who has capacity to consent does not necessarily have the capacity to refuse all treatment. Consequently, they offer a partial defence for Lord Donaldson's controversial opinion in *Re R* and *Re W* that there can be concurrent consents which exist for both parent and child, can be justified.

This view has been criticised by Emma Cave and Julie Wallbank,<sup>51</sup> who disagree with Gilmore and Herring's interpretation of the type of understanding required of a competent minor in *Gillick*. Cave and Wallbank argue that refusal was not a relevant consideration in the context of *Gillick* (which was considering the legitimacy of provision of contraceptive treatment to under-age children without their parents' consent) so that the Law Lords could not have contemplated refusal as part of the test for understanding.<sup>52</sup> They reject Gilmore and Herring's 'treatment-centred' (or treatment-specific) conception of competence. Gilmore and Herring responded in a rebuttal article, disagreeing with Cave and Bank's interpretation, arguing that many more children would lack capacity under Cave and Wallbank's approach and it would give more scope to argue that children are not competent to consent.<sup>53</sup>

In 2014, Emma Cave published an article<sup>54</sup> which notes that several commentators favour the application of parts of the Mental Capacity Act 2005 (MCA 2005) to minors. For example, the MCA 2005 provides a definition of capacity that is significantly more developed and comprehensive than *Gillick* competence. She proposes a new test for child incapacity so that any minor with 'an impairment of, or disturbance in the functioning of the mind or brain' that leads to an inability to understand, would be subject to the best interests test. Hence, any minors whose consent is rendered involuntary due to undue influence could be subject to the High Court's inherent jurisdiction. Any gaps that would appear would be less extensive because of the presumption of capacity under the MCA and the relevance of the MCA. Hence, she proposes

<sup>44</sup> See [2005] 2 FLR at 233-234.

<sup>45</sup> Published by *Save the Children*

<sup>46</sup> See [2006] 2 FLR at p.251-252, at paras [138] and [142].

<sup>47</sup> See Gilmore, S & Herring, J 'Children's Refusal of Medical Treatment: Could *Re W* be distinguished?' [2011] Fam Law 715; 'No' is the hardest word: consent and children's autonomy' (2011) 23 CFLQ 3.

<sup>48</sup> *Re W (A Minor) (Consent to Medical Treatment)* [1993] 1 FLR 1, which sought to respond to criticism of his judgment in *Re R (A Minor) (Wardship: Medical Treatment)* [1992] 1 FLR 190.

<sup>49</sup> See Gilmore and Herring, 'No' is the hardest word... fn 47 (above) at p.25.

<sup>50</sup> *Ibid.*

<sup>51</sup> See Cave, E & Wallbank, J 'Minors' capacity to refuse treatment: A Reply to Gilmore and Herring' [2012] 20 Med. LR 423.

<sup>52</sup> *Ibid.*

<sup>53</sup> See Gilmore, S & Herring, J 'Children's refusal of treatment: the debate continues' [2012] Fam Law \ 973.

<sup>54</sup> See 'Goodbye *Gillick*? Identifying and resolving problems with the concept of child competence' (2014) 34 Legal Studies 103.

enactment of legislation to incorporate minors within the MCA.<sup>55</sup>

### **A recent 'reinstatement' of the *Gillick* principle: An NHS Trust v ABC & a Local Authority (2014)**<sup>56</sup>

This case concerns the competence of a 13-year-old girl to consent to the termination of her pregnancy. At the time of the hearing, the girl (A) was living with her parents. Four days prior to the hearing, A's grandmother noticed that she had a 'bump at her waist' and a pregnancy test confirmed that she was pregnant. A day later a consultant paediatrician examined her and referred her for a scan, which dated her pregnancy at over 21 weeks. This made the case urgent as A was less than three weeks away from the 24-week cut-off point for termination of pregnancy under s.1(1)(a) of the Abortion Act 1967. Having been examined by several medical specialists, A was found to be uncommunicative and the healthcare professionals raised doubts over her competence to decide on whether to terminate her pregnancy.

These professionals applied to the High Court for declaratory relief, to determine whether she possessed the appropriate competence and if the court decided she did not, that it would be in her best interests to terminate her pregnancy. Relying heavily on the medical evidence from an interview with the consultant psychiatrist wherein A had expressed a clear and persistent wish that her pregnancy be terminated, as she could not cope with its continuance and it would stress her to a considerable degree, Mostyn J held A did meet the threshold and it would now be for A to decide what to do. The learned judge came to his decision by relying on Lord Fraser's construction of the test that the child would be competent to consent if she has 'sufficient understanding and intelligence to know what the proposed treatments involve.'

This appears to be a return to the test for competence as originally formulated in *Gillick*. However, Mostyn J also commented that the child could lawfully make a decision 'even if the result of that would lead her to take steps which are wholly contrary to her best interests.'<sup>57</sup> He went on to say that 'the question of best interests does not really inform the primary decision I have to make, which is whether she has the necessary capacity.'<sup>58</sup>

As Moreton observes, it might not be sensible to read

too much into either the scope or impact of this decision as being a High Court decision, will not have much impact on previous House of Lords and Court of Appeal decisions.<sup>59</sup> Moreover, the outcome which the Court reached was simplified by the fact that the case involved the question of consent rather than refusal, which meant the more contentious issues underpinning adolescent refusal did not need to be explored.<sup>60</sup> Moreton also appears to commend the decision because it states that best interests concerns should not override a competent child's wishes, the Court accorded the child (A) a measure of discretion. On the other hand, she argues that it may well be the fact that A's wishes were in agreement with the doctors and the Court, which made it easier to find her competent.<sup>61</sup> The present writer believes that this must have been an important factor and that the Court will continue to be paternalistic and not allow a child to make a decision which it would consider to be not in that child's best interests, for example in a life-threatening situation as previous case-law amply demonstrates.<sup>62</sup>

## **A COMPARATIVE EXCURSUS**

### **THE USA**

#### **A. Historical, Social and Ethical Context**

Historically, minors<sup>63</sup> in America were deemed incapable of making many medical decisions for themselves. According to one view, 'American society has held steadfast to, and legislatures and courts have maintained and perpetuated, a presumption that minors lack the requisite maturity and wisdom to determine their medical needs correctly.'<sup>64</sup> However, the last 35 years have seen an expansion of the rights of minors to consent to a range of sensitive health care services-including sexual and reproductive health care, mental health services and alcohol and drug abuse treatment.<sup>65</sup>

Hence, in the United States, 'the public policy debate over whether teenagers should be allowed to obtain reproductive health services confidentially, or be required to involve their parents, dates back to the 1970s'<sup>66</sup>. This was the time when 'teen sexual activity became increasingly visible and teen pregnancy was first deemed a national social problem.'<sup>67</sup> The debate over minors' rights is seen as 'a tension between the parental responsibilities towards the child, the immaturity of and vulnerability of children, and

<sup>55</sup> Cave, *ibid*, at p.122.

<sup>56</sup> [2014] EWHC 1445 (Fam).

<sup>57</sup> [2014] EWHC 1445 at [10].

<sup>58</sup> *Ibid*.

<sup>59</sup> See Moreton, K L 'Gillick Reinstated: Judging mid-childhood competence in Healthcare Law: An NHS Trust v ABC & A Local Authority [2014] 23 *Med LR* at p.313.

<sup>60</sup> *Ibid*.

<sup>61</sup> *Ibid*.

<sup>62</sup> See the discussion of such cases under *Level of maturity and understanding in this Article* (above)

<sup>63</sup> That is, currently those aged below 18 except in four States, see further fn 78.

<sup>64</sup> See Sher, E J Note 'Choosing for Children: Adjudicating Medical Care Disputes Between Parents and the State' (1983) 58 *NYULRev* 157, 169.

<sup>65</sup> Guttmacher Institute 'An Overview of Minors' Consent Law', State Policies in Brief at <http://www.guttmacher.org> last visited on 01/11/06.

<sup>66</sup> Dailard, C and Turner Richardson, C 'Teenagers' Access to Confidential Reproductive Health Services' at <http://www.agi-ny.org> last visited on 17/10/06.

<sup>67</sup> *Ibid*.

the child's right to be emancipated from the decision of the parent.<sup>68</sup> The debate over treatment of minors has also revolved around the notion of informed consent. In the light of their youth and immaturity, the question has been whether a child can give informed consent or whether their chronological age would make it necessary for their parents to give consent.

### **The level of maturity and understanding required to make autonomous decisions**

No American jurisdiction has ever authorised minors younger than 12 to make any sort of medical decision for themselves. Courts have not displayed any consistency in their judgments relating to children's competence, with some courts applying a 'rule of sevens'<sup>69</sup> approach to argue that children over 14 are competent to make their own decisions and others proceeding on a case by case basis. In 1982, Welthorn and Campbell<sup>70</sup> carried out empirical studies to test the law's presumption about the competence of American children to make decisions about their own healthcare. Performances of persons aged 9,14,18 and 21 were compared on a measure developed to operationalise legal standards of competency. The benchmark was the ability to posit general logical rules through internal reflection as propounded by Piaget.<sup>71</sup> Minors aged 14 demonstrated a level of competency equivalent to that of adults and children aged 9 were found to be less competent than adults.<sup>72</sup> No similar studies appear to have been carried out in the UK.

## **B. The Legal Position**

### **a. Key Questions**

In considering the American legal position in the context of this Article, it would be instructive to see (i) whether American law<sup>73</sup> has experienced a landmark case

like the *Gillick* case,<sup>74</sup> which has been so instrumental in initially heralding the recognition of children's rights in the UK, even to the extent of having the case's basic principle enshrined in statute. It would also be enlightening from a comparative point of view, to see if some sort of 'mature minor' principle exists in American jurisdictions; (ii) whether it allows minors unrestricted access to healthcare in terms of obtaining contraceptive advice and/or treatment; and (iii) whether American law allows minors the right to an abortion without parental consent or notification.

### **i. The Mature Minor Rule in the USA – Does a 'Gillick principle' exist in the USA?**

In the USA, there has been no judgment equivalent to the *Gillick* decision recognising in competent minors a right to consent to medical treatment, nor is there a statute equivalent to the Family Law Reform Act 1969, conferring a general right to consent upon young people aged 16 or over.<sup>75</sup>

Further, the American Constitution does not explicitly address either the status of children<sup>76</sup> or the right to privacy and autonomy in health care.<sup>77</sup> Consequently, American common law is the explicit source of law for the rights of children in health care and, under this common law, a minor<sup>78</sup> could consent to medical treatment if she could understand the nature and consequences of that treatment. However, many exceptions were judicially created to provide emergency medical treatment for minors where there was no time to contact an adult or parent<sup>79</sup> or in response to the need to treat and prevent specific diseases or conditions, or to allow for certain treatments.<sup>80</sup> For example, in the 1960s, in response to a rising incidence of sexually transmitted diseases among minors, many States

<sup>68</sup> Ibid.

<sup>69</sup> The 'Rule of Sevens' provides that under the age of 7, a child has no capacity; between the ages of 7 and 14, there is a rebuttable presumption that the minor has no capacity; and between 14 and 21, there is a rebuttable presumption that the individual has capacity: see *Cardwell v Bechtol* (1987) 734 SW 2d 739 at 745 (Tenn.).

<sup>70</sup> See Welthorn, L A & Campbell, S B 'The Competency of children and adults to make informed treatment decisions' (1982) *Child Development*, vol. 53, p.1589.

<sup>71</sup> See Piaget, J *The construction of reality in the child*, 1954, New York: Free Press.

<sup>72</sup> See Welthorn & Campbell, cited above fn 70.

<sup>73</sup> It is important to recognise that it is sometimes misleading to use the term 'American law' as an all-encompassing term since the law often varies from State to State and the legal position of any issue could depend on whether there is a conflict between State, Federal and Constitutional law. There is thus the added dimension of the written American Constitution, which guarantees certain fundamental rights and liberties, but where Articles would be open to interpretation from case to case. However, if the vast majority of States adopt a consistent line of authority, principle or policy, it would be accurate, as in the case of the mature minor rule, to use the general term 'American Law.' For further clarification, see de Cruz, P., *Comparative law in a Changing World* (1999), Cavendish at p.107.

<sup>74</sup> Described by Bainham as 'arguably...the most significant twentieth century decision on the legal relationship between parents and children' see Bainham, A *Children. The Modern Law* (2005) 3rd ed. Jordans at p.346 and by Fortin as 'the high-water mark for recognising adolescent making rights' see Fortin, J *Children's Rights and the Developing Law* (2003) 2nd ed. LexisNexis Butterworths at p.136.

<sup>75</sup> This is also mentioned by Silber J in the *Axon* Case at [2006] 2 FLR at 222, to distinguish the *Axon* and *Gillick* situations from the American situation.

<sup>76</sup> See Ramsey, S H and Abrams, D E *Children and the Law* (2003), Thomson West, MN.

<sup>77</sup> *Roe v Wade* (1973) 410 US 113.

<sup>78</sup> That is anyone aged 18 except in four States: Alabama and Nebraska (19); Pennsylvania and Mississippi (21) although in Mississippi the age for consent to health care is 18 years.

<sup>79</sup> See Hawkins, T E, Note, 'Living Will Statutes: A Minor Oversight' (1992) 78 *Va. L Rev* 1581 at 1586.

<sup>80</sup> See Wright, T E, 'A Minor's Right to Consent to Medical Care' (1982) *How. LJ* 525 at 53.

passed statutes which allowed minors access to treatment for communicable diseases among minors.<sup>81</sup>

Under the common law in the USA, a minor may be required to notify parents (or a legal guardian) about, or seek their consent to, abortion. This deference to parents has evolved in recognition of two fundamental tenets: (i) the immaturity and vulnerabilities of minor children and their consequent need for protection and representation in matters of informed consent to care; and (ii) the right of parents to control their children and the risks to which they are exposed.<sup>82</sup> As already pointed out, these opposing tensions have made it a difficult balancing exercise for policy makers who seek to establish rules for minors' consent to medical care.

In American jurisdictions, the general principle for medical treatment of a minor is that a health care provider must obtain informed consent from an adult who is legally authorised to make health care decisions on the child's behalf.<sup>83</sup> States have traditionally recognized the right of parents to make health care decisions on their children's behalf, on the presumption that before reaching the age of majority (which is 18 in all but four states<sup>84</sup>), young people lack the experience and judgment to make fully informed decisions. As Rosenbaum and Abramson explain, the exceptions to this basic principle recognise to a lesser or greater extent, the independence of children from their parents in certain circumstances.<sup>85</sup> Both the common law and state statutes recognise three distinct types of legal approaches to the issue of consent to care by minor children.<sup>86</sup> The first comprises two related concepts, known as the 'mature minor' and 'emancipated minor' doctrines which have been utilised by the courts and legislatures. The second is the *parens patriae* doctrine<sup>87</sup> and the third uses a doctrine that permits exceptions to the parental consent requirement for specific types of treatment sought by minors, particularly treatments related to reproductive and behavioural health, especially drug abuse.<sup>88</sup>

There are also the judicial bypass and physician bypass procedures which again allow parental notification to be waived in certain circumstances.

#### a. *The Emancipated Minor*

One set of exceptions to the mature minor rule, includes cases where a minor is 'emancipated' by marriage<sup>89</sup> or other circumstances, such as being pregnant, on active military duty, self-supporting and/or not living at home<sup>90</sup> and is thus declared legally able to make decisions on his or her own behalf. Thus, at common law, an 'emancipated' or 'mature' minor could consent to medical treatment and a doctor would not be liable for treatment without parental consent.<sup>91</sup> Some states, such as Mississippi, simply codified the common law, while others have modified it, for example Minnesota, which requires that the minor live 'separate and apart from his parents' and manage 'his own financial affairs,' but unlike the common law approach, will not require the parents' consent to living away from home. Other states, like Mississippi, allow treatment of a minor without parental consent if the minor is of 'sufficient intelligence to understand and appreciate the 'consequences' of the treatment.'<sup>92</sup>

For the minor to be considered sufficiently mature, there must be clear and convincing evidence that the minor fully understands the consequences of his actions<sup>93</sup> or has the ability to understand and weigh the benefits and a proposed course of action.<sup>94</sup> Courts will determine the minor's maturity by weighing several factors such as the age, ability, experience, education, training, and degree of maturity or judgement of the minor, as well as the conduct and demeanour of the minor at the time of the incident.<sup>95</sup> The Courts have also warned that the 'mature minor' exception is not a 'general licence to treat minors without parental consent' and that its application will depend upon the particular facts and circumstances of each case.<sup>96</sup> Some States have lowered the age of consent to deal with the need to grant minors the right to consent to medical treatment in certain exigencies, lowering it to 14 in states like Alabama.

#### b. *Parens patriae powers*

The most common example of the exercise of parens

<sup>81</sup> See Holder, A R, *Legal Issues in Paediatrics and Adolescent Medicine*, 1985, 2nd ed. at 130.

<sup>82</sup> See Rosenbaum, S, and Abramson, S, 'Assessing the Legal Environment of Health Information Technology, Health Information Control and Minor Children' at <http://healthinfo.org> last visited on 06/09/06

<sup>83</sup> Rosenbaum and Abramson, loc. cit, above at fn 82.

<sup>84</sup> See fn 78.

<sup>85</sup> Ibid.

<sup>86</sup> See Vukadinovich, D, 'Minors' Rights to Consent to Treatment: Navigating the Complexity of State Laws' *Jo Health Law*, vol. 37, 2004, Fall.

<sup>87</sup> That is, where the State, through the courts, exercises a protective jurisdiction over the vulnerable and the needy and this includes protecting the interests of minor children to promote the public health and welfare.

<sup>88</sup> Ibid.

<sup>89</sup> Marriage was considered an act of emancipation: see *Bach v Long Island Jewish Hosp.* (1966) 49 Misc. 2d 207, 267 N.Y.S. 2d 289.

<sup>90</sup> Rosenbaum, S, and Abramson, S, op cit see fn 82, above.

<sup>91</sup> See *Smith v Seibly* (1967) 72 Wash. 2d 16, 431 P.2d 719.

<sup>92</sup> see Miss. Code. Ann. s.41-41-3(h).

<sup>93</sup> see *In re EG* (1990) 549 NE 2d 322 (Illinois)

<sup>94</sup> see 'Expanded Health Care Consent Statutes for Minors: 'Mature Minor Rule' Justice Resource Institute at [http://www.bostoncoop.net/lcd/wiki?Mature\\_Minor\\_Rule](http://www.bostoncoop.net/lcd/wiki?Mature_Minor_Rule) last visited on 18/10/06.

<sup>95</sup> See *Cardwell v Bechtol* (1987) 724 SW 2d at 739, at 748.

<sup>96</sup> Ibid.

patriae powers 'takes place in the context of children who are ... victims of neglect or abuse and removed from their parents' control' and it extends beyond the actual physical removal of a child from a family and includes state action to establish minimum ages for conduct such as drinking, driving and voting.<sup>97</sup>

### c. *The Judicial Bypass Procedure*

Another device which is used by states to circumvent the general rule of parental notification, in the context of a minor's access to an abortion, is the 'judicial bypass' option. This procedure allows a teenager<sup>98</sup> to appear before a judge to request a waiver of the parental involvement requirement. In order for a teenager to receive a waiver, the judge must decide that the teenager is mature enough to make the decision herself or that the abortion is in her best interest. The teenager has to fill out a form obtainable at the County courthouse that asks whether she feels she is mature enough to obtain an abortion. The case will then be assigned a date for an interview with a judge and an attorney will be assigned at no extra charge. At a designated date and time, usually on the same day, the judge will interview the minor and if the application is approved, the judge will sign a 'waiver of parental notification' which the minor should produce to her medical provider in order to have the abortion performed without giving any notice to the minor's parents.

### d. *The Physician Bypass Alternative*

In the State of Maryland, a 'physician bypass' allows a doctor to waive parental notice if he believes that the minor is capable of giving informed consent or if notice would lead to abuse of the minor.

Hence, despite not having made a *Gillick*-type of ruling, over the years, the courts in some States have applied the so-called *mature minor rule*, as discussed above, which has been used by the courts whenever there has been an absence of a statutory scheme for the provision of healthcare services to minors. It has been given statutory force in states like Arkansas and Nevada and State High Courts have accepted the doctrine as law in Pennsylvania, Tennessee, Illinois, Maine and Massachusetts. It has also been 'consistently applied in cases where the minor is sixteen years or older, understands the medical procedure in question, and the procedure is not serious'<sup>99</sup> but 'application of the doctrine in other circumstances is more questionable.'<sup>100</sup>

## ii. Minors' access to contraceptive advice and treatment

The last 30 years has seen a fairly dramatic expansion of the range of health care services made available to minors although states have allowed minors rights to contraceptive advice and treatment through invoking exceptions. As of 1 November 2006, 35 states have passed laws *explicitly* authorising minors to consent to health care related to sexual activity, substance abuse and mental health care. Although some states give doctors the option of informing parents that their minor son or daughter has received or is seeking these services, these laws leave the decision of whether to inform the parents entirely to the discretion of the physician as to the best interests of the minor.<sup>101</sup>

The recognition of minors' rights to decide health care decisions for themselves was given a fillip by U.S. Supreme Court rulings which extended the constitutional right to privacy to a minor's decision to obtain contraceptives<sup>102</sup> and to terminate an unwanted pregnancy.<sup>103</sup> Boonstra and Nash maintain that it also reflects a recognition on the part of lawmakers that while parental involvement is desirable, many minors will not seek the services they need if they have to inform their parents.<sup>104</sup> In *Carey*<sup>105</sup> the Supreme Court invalidated a New York law that prohibited the sale of condoms to adolescents under 16 by asserting a minor's privacy rights. The Court concluded that the 'right to privacy in connection with decisions affecting procreation extends to minors as well as adults.' Other courts have delivered similar judgments and lower courts have invalidated parental involvement requirements for contraception.

According to the surveys carried out by the Guttmacher Institute, 25 states and the District of Columbia explicitly allow all minors<sup>106</sup> to consent to contraceptive services and 21 states explicitly permit minors to consent to contraceptive services in one or more circumstances. The largest number of states (21) allow a minor to consent to contraceptive services if married; 10 allow it if the minor meets other requirements such as being 16 years old or being a high school graduate demonstrating maturity or receiving a referral from a specified professional, such as a physician or member of the clergy; six states allow a minor who is a parent to consent to medical treatment without parental involvement and six

<sup>97</sup> Rosenbaum & Abramson, loc cit see fn 82.

<sup>98</sup> Defined as aged 17 or younger, as in Arizona.

<sup>99</sup> 'Treatment of Minors' Encyclopaedia of Everyday Law at <http://law.enotes.com/everyday-law-encyclopedia/treatment-minors/print> last visited on 17/10/06.

<sup>100</sup> *Ibid.* See e.g. the discussion in the next section with regard to minors' rights to abortion.

<sup>101</sup> For a survey of the extent of parental involvement in the various states of American, see below.

<sup>102</sup> See *Carey v Population Services International* (1977) 431 US 678.

<sup>103</sup> See *Planned Parenthood of Central Missouri v Danforth* (1976) 428 US 52.

<sup>104</sup> See Boonstra and Nash 'Minors and the Right to Consent to Health Care' in <http://www.guttmacher.org/pubs/tgr/03/4gr030404.html> last visited on 02/09/06.

<sup>105</sup> fn 102 (above).

<sup>106</sup> Aged 12 and older.

other states allow a minor who is or has been pregnant to consent to contraceptive services.<sup>107</sup>

Clearly, there are wide variations between States as far as access to healthcare for minors is concerned. In most cases, State consent laws apply to all minors aged 12 or older but in some cases, States only allow certain groups of minors (namely those who are married or pregnant or already parents) to consent on their own behalf. In some States, there is no relevant policy or case law and here, physicians usually provide medical care to minors whom they deem sufficiently mature, especially if the State allows minors to consent to related services.<sup>108</sup>

### iii. The Minor's right to an abortion without parental consent or notification

Abortion constitutes the one notable exception to the expansion of minors' decision-making authority on health care matters. Only two states—Connecticut and Maine—and the jurisdiction of the District of Columbia have laws that affirm a minor's ability to obtain an abortion without parental consent or notification.

As of 1 November 2006, thirty-five<sup>109</sup> American states have operational laws which require parental involvement in a minor's decision to have an abortion.<sup>110</sup> Two landmark US Supreme Court rulings, *Planned Parenthood of Central Missouri v Danforth*<sup>111</sup> in 1976 and *Bellotti II*<sup>112</sup> in 1979 have led the way in prohibiting parents from having an absolute veto over their daughters' decision to have an abortion which has led to many states requiring the consent or notification of only one parent, usually 24 or 48 hours before the abortion takes place.

In *Danforth*, two Missouri-licensed physicians challenged the constitutionality of the Missouri abortion statute. Section 3(4) thereof requires, in the first 12 weeks of pregnancy, where the woman is unmarried and under the age of 18 years, the written consent of a parent or person in loco parentis unless, 'the abortion is certified by a licensed physician as necessary in order to preserve the life of the mother.' Only one parent's consent is required. On the merits, the Court upheld various provisions that had also been challenged but held that the State may not constitutionally impose a blanket parental consent requirement, such as s3(4), as a condition for an unmarried minor's abortion during the first 12 weeks of her pregnancy for substantially the same reasons as in the case of the spousal consent provision, there being no significant state interests, whether to safeguard the family unit and parental authority or otherwise, in making the abortion conditional

on the consent of a parent with respect to the under-18-year-old pregnant minor. However, the Court made it plain that merely holding s3(4) to be invalid does not suggest that every minor, regardless of age or maturity, may give effective consent for termination of her pregnancy. It referred to *Bellotti v Baird*, which had been decided just before *Danforth*.

The case of *Bellotti v Baird*<sup>113</sup> has two stages worth noting for present purposes. In *Bellotti I*, decided in 1976, there was a challenge to a 1974 Massachusetts law that required consent of both parents to an abortion by an unmarried woman under 18 years old, but allowed the requirement to be waived by a judge for 'good cause shown'. The US Supreme Court held that the statute may be constitutional depending on the meaning given to 'good cause' and the exact procedure that would be utilised. The case was remanded for a definitive interpretation by the Massachusetts state courts of the meaning of the statute. In *Bellotti II*<sup>114</sup>, reported in 1979, the facts were that the Massachusetts law challenged in *Bellotti I* finally reached the Massachusetts Supreme Judicial Court. This Court ruled that (a) a minor should first attempt to obtain her parents' consent and only if refused, to approach a court for permission for her abortion and that her parents should be notified when a minor files for judicial waiver; and (b) the judge hearing the petition may deny the petition if it is found that an abortion would be against the minor's best interests. The Supreme Court held the law to be unconstitutional. All minors must have an opportunity to approach a judge without first consulting their parents, and the proceedings must be confidential and expeditious. If States are going to restrict the right of minors to have an abortion, they have to provide a 'confidential alternative' which is an alternative to the requirement of parental consent, to allow the minor who is mature enough to make the decision of whether to have an abortion by herself. A confidential alternative is required to protect a minor's right to privacy.

The Court affirmed that a mature minor must be given permission for an abortion, regardless of the judge's view as to her best interests. However, even an immature minor must be permitted to have a confidential abortion, if the abortion is in her best interests. From a comparative perspective, this last point therefore goes beyond Gillick and Axon and shows how far the mature minor concept can and has been extended.

In *H.L. v Matheson*<sup>115</sup>, there was a challenge to a Utah law which makes it a crime for a physician not to notify a

<sup>107</sup> The source of all the survey information in this paragraph is : Guttmacher Institute 'An Overview of Minors' Consent Law: State Policies in Brief' on <http://alanguttmacher.org> last visited on 01/11/06.

<sup>108</sup> Guttmacher Institute, as in fn.107, above.

<sup>109</sup> There are actually 44 States with parental involvement laws (see Guttmacher Institute, 'An Overview of Minors' Consent Law' as in fn 107, above) but in 9 of them, enforcement is temporarily or permanently blocked by a court order and are therefore not in effect.

<sup>110</sup> See: Guttmacher Institute 'Parental Involvement in Minors' Abortions: State Policies in Brief' at [www.guttmacher.org](http://www.guttmacher.org) last visited on 01/10/06.

<sup>111</sup> (1976) 428 US 52.

<sup>112</sup> (1979) 443 US 622.

<sup>113</sup> (1976) 428 US 132.

<sup>114</sup> *Bellotti v Baird* (1979) 443 US 622.

<sup>115</sup> (1981) 450 US 398.

parent before performing an abortion on an un- emancipated minor, who was dependent on her parents. The appellant was a 15-year-old girl who was living with and dependent on her parents for her financial support. She discovered she was pregnant and consulted with a social worker and a physician. The physician advised her that an abortion would be in her best medical interests. However, because of the Utah law<sup>116</sup> he refused to perform the abortion without first notifying the girl's parents. The statute makes it a crime for doctors to perform the abortion on an 'un-emancipated' dependent minor without first notifying her parents. The issue in this case was whether a state statute which requires a physician to 'notify, if possible' the parents of a dependent unmarried minor girl prior to performing an abortion on the girl violates federal constitutional guarantees. The US Supreme Court upheld (by 6:3) the Utah State law, and held that despite the *Bellotti* and *Danforth* rulings, a statute setting out a mere requirement of parental notice when possible does not violate the constitutional rights of an immature, dependent minor. The statute does not give parents a veto power over the minor's abortion decision.

In *Ohio v Akron Centre for Reproductive Research*,<sup>117</sup> there was a challenge to a 1985 statute requiring a physician performing an abortion on a minor to give notice to her parent or guardian 24 hours prior to the procedure. Although the law provided a judicial bypass mechanism, the Sixth Circuit Court of Appeals found several aspects of it unduly burdensome to minors and constitutionally deficient. The Court held that without deciding whether a law that requires notice to only one parent requires a judicial bypass, the court held that the bypass provided by the Ohio statute did meet constitutional standards. The court rejected the argument that the judicial bypass was flawed because it required the minor to sign her name on court papers, prove her entitlement by clear and convincing evidence, and wait as long as three weeks to obtain a court ruling. It also upheld a requirement that the physician personally notify the parent.

In *Planned Parenthood of Southern Pennsylvania v Casey*,<sup>118</sup> there was a challenge to Pennsylvania's 1989 Abortion Control Act. This statute required that, except in medical emergencies: (a) a woman must wait 24 hours between consenting to and receiving an abortion; (b) the woman be given state-mandated information about abortion and offered state-authored materials on foetal development; (c) a married woman must inform her husband of her intent to have an abortion; and (d) minors' abortions be conditional on the consent of one parent or guardian, provided in person at the clinic, or upon a judicial waiver.

In addition, physicians and clinics that perform abortions were required to provide to the state annual statistical reports on abortions performed during the year, including the names of referring physicians.

The Court reaffirmed the validity of a woman's right to choose abortion under *Roe v Wade* (1973), but announced a new standard of review that allows restrictions on abortion prior to foetal viability so long as they do not constitute an 'undue burden' to the woman. A restriction is an 'undue burden' when it has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion. Under this standard, only the husband notification provision was considered an undue burden and therefore unconstitutional. All the other provisions were upheld as being not unduly burdensome.

In early 2006, the US Supreme Court justices ordered a lower court to amend a New Hampshire parental disclosure law to include an emergency health exception. In *Ayotte v Planned Parenthood of Northern New England*,<sup>119</sup> there was a challenge to a New Hampshire Law<sup>120</sup> that requires that a parent be notified 48 hours before an abortion can be provided to a minor. The lower federal courts had held that the law was unconstitutional because it does not permit an immediate abortion without notifying a parent in medical emergencies that threaten the minor's health.

Responding to a challenge to the New Hampshire Law, the US Supreme Court held that completely invalidating a parental notification statute was unnecessary if narrower declaratory and injunctive relief could be found. Three propositions were established in Justice O'Connor's ruling: first, States have the right to require parental involvement when a minor considers terminating her pregnancy; secondly, a State may not restrict access to abortions that are 'necessary, in appropriate medical judgment for preservation of the life or health of the mother', relying on *Planned Parenthood of Southeastern Pennsylvania v Casey*<sup>121</sup>; thirdly, the Court did not wish to disturb the lower courts' ruling that the statute was unconstitutional because it lacked a medical emergency exception. This proposition was not disputed by New Hampshire and was supported by prior precedents of the court that had held that the State may not restrict access to abortions that are necessary to preserve the woman's health and life. It would be unconstitutional to apply the Act in a manner that subjects minors to significant health risks.

*Post-Ayotte: Abortion Remedies and New Directions*<sup>122</sup>

Ayotte's case can be seen as a move towards narrower judicial remedies in the context of abortion rights.<sup>123</sup> Two

<sup>116</sup> Utah Code Ann. 76-7-304 (1978).

<sup>117</sup> (1990) 497 US 502.

<sup>118</sup> (1992) 505 US 833.

<sup>119</sup> See (2006) 126 S.Ct 961; for a full discussion of this case, and the post-Ayotte cases, see Note (2006) 119 Harv LR 2552.

<sup>120</sup> The New Hampshire Parental Notification Prior to Abortion Act 2003. N.H.Rev. Stat. Ann sections 132: 24- 132:28 (Supp. 2004).

<sup>121</sup> (1992) 505 US 833.

<sup>122</sup> This section is based upon the Note in (2006) 119 *Harvard LR* 2552.



cases decided post-Ayotte did not provide any unequivocal indication of the effect Ayotte might have on the abortion jurisprudence relating to this area. These cases simply suggest that if there is no explicit health exception in a statute, this would not be constitutionally valid.

In the first case, *Planned Parenthood Federation of America v Gonzales*, heard in 2006, Judge Reinhardt, on behalf of a unanimous Ninth Circuit panel, found the federal partial abortion ban constitutionally deficient for its failure to include a health exception. Great weight was placed on the legislative history of the statute in question which indicated that although Congress was aware that the absence of a health exception was inconsistent with the *Sternberg*<sup>124</sup> case, it nevertheless chose to proceed without including the exception. It was prepared to distinguish *Ayotte* because the statute there was only short of a health exception. The Court unanimously invalidated the statute in its entirety. In the second case, *National Abortion Federation v Gonzales*, the Ninth Circuit Court held that the absence of a health exception created a constitutional infirmity. A divided Court was prepared to follow *Ayotte* but requested further briefing before deciding on a remedy.

### C. The Importance of confidentiality for Minors seeking Access to Health Care

In a 2002 American survey<sup>125</sup> asking sexually active teenage girls seeking services at family planning clinics in Wisconsin what they would do if they could not get prescription contraceptives unless the clinic notified their parents, the results indicated the following:

- 47% said they would stop accessing all reproductive health care services if they could not get contraceptives without first telling their parents
- 12% said they would stop using some health some reproductive health care services or would delay testing or treatment for HIV or other STDs.
- Therefore, 59% of sexually active teenage girls would stop or delay getting critical health care services;

However, 99% of these teenagers - including the ones who would stop or delay getting contraceptive services or STD testing and treatment - said they would continue having sex. In the same vein, some American commentators<sup>126</sup> point out that most American youth-serving agencies and medical professionals believe that access to confidential services is essential, because in their experience, many sexually active adolescents will not seek

care if they have to inform a parent or have their parent's consent.

The debate continues between these agencies and advocates of parental involvement laws who criticise government laws for undermining the family unit, and 'conservative activists' who maintain that granting minors access to confidential services practically condones sexual activity and that despite their access to contraceptives, pregnancy rates among teens is rising. Parental involvement and imparting parental values would be 'the best deterrent to preventing early sexual activity.'<sup>127</sup>

American health service providers who work with young people agree that parental involvement is desirable but maintain that in some instances, it is not to a minor's benefit.<sup>128</sup> In the light of the ever-present threat of HIV infection among adolescents, they argue that confidentiality has to be a 'cornerstone' of their services.<sup>129</sup>

Another review of state and federal laws and policies pertaining to minor adolescents' rights to access services for contraception and sexually transmitted diseases has concluded that 'mandated parental involvement for teenagers seeking contraceptive care would likely contribute to increases in rates of teenage pregnancy.'<sup>130</sup>

These conclusions certainly reflect the findings of the surveys carried out in the UK, referred to in the Sue Axon Case.<sup>131</sup>

### D. Parental Involvement in Minor's Abortions: Survey Findings

The Alan Guttmacher Institute has periodically reviewed American state laws pertaining to minors' authority to consent to medical care and to make other important decisions without their parents' knowledge or permission.

In 36 states, the laws restrict minors' rights to obtain abortions by either (i) requiring them to obtain the permission of one or both parents, or (ii) to notify one or both of them of the procedure. The rest of the states either have no laws regarding parental consent and notification and abortion or have laws that are currently blocked from going into effect by the state courts.

Of the 36 states requiring some parental involvement in a minor's decision to have an abortion, 23 states require parental consent with two (Mississippi and North Dakota) requiring both parents' consent; 13 states require parental notification of either parent with Mississippi and Minnesota requiring that both parents be notified; and currently two

<sup>123</sup> This is the view elucidated and expanded in the Note referred to in fn 122.

<sup>124</sup> *Sternberg v Carhart* (2000) 330 US 914 where the US Supreme Court invalidated a Nebraska statute which banned so-called 'partial birth' abortions. The Court held that the law was unconstitutional, because *inter alia* it did not have a health exception.

<sup>125</sup> See Reddy, D, et al 'Effect of Mandatory Parental Notification on Adolescent Girls' use of Sexual Health care services' (2002) 288 *JAMA* 780.

<sup>126</sup> See Boonstra, H, and Nash, E, 'Minors and the Right to Consent to Health Care' see fn 104.

<sup>127</sup> A statement made by an American group called Focus on the Family, cited by Boonstra and Nash, *ibid*.

<sup>128</sup> see Boonstra and Nash, fn 126 (above).

<sup>129</sup> see Boonstra and Nash, *ibid*.

<sup>130</sup> see Jones, R, and Boonstra, H, 'Confidential Reproductive Health Services for Minors: The Potential Impact of Mandated Parental Involvement for Contraception' (2004) 36 *Perspectives on Sexual and Reproductive Health*, 182-191.

<sup>131</sup> See discussion in the early part of this Article, above.

States (Oklahoma and Utah) require both parental consent and notification<sup>132</sup>. All 35 states that require parental involvement contain an alternative process for minors seeking an abortion and include a judicial bypass procedure, which allows a minor to obtain approval from a court; 6 also permit a minor to obtain an abortion if a grandparent or other adult relative is involved in the decision. Twenty-eight states have parental involvement statutes which also include a medical emergency exception and 34 states have a judicial bypass procedure.<sup>133</sup> Of the states that require parental involvement, 28 permit a minor to obtain an abortion in a medical emergency and 12 permit a minor to obtain an abortion in cases of assault, abuse, incest or neglect.<sup>134</sup> Nine additional States have parental involvement laws that are temporarily or permanently enjoined and 5 States have no relevant policy or case law.<sup>135</sup>

#### *States that require consent before a minor may have an abortion*

Alabama, Arizona, Arkansas, Indiana, Kentucky, Louisiana, Massachusetts, Michigan, Mississippi,<sup>136</sup> Missouri, North Carolina, North Dakota,<sup>137</sup> Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Virginia, Wisconsin, and Wyoming.

#### *States that require notification to a parent before a minor's abortion*

Colorado, Delaware, Florida, Georgia, Iowa, Kansas, Maryland, Minnesota (both parents), Nebraska, Oklahoma, South Dakota, Utah and West Virginia.

But Alabama, Arizona and Arkansas make an exception in the case of a medical emergency, abuse, assault, incest or neglect.

However, as a result of Supreme Court rulings,<sup>138</sup> States that do not explicitly allow minors to obtain contraceptive and prenatal care services without parental consent still permit this to happen in practice, as the Court has ruled that these are services are covered by the minors' right to privacy.

As the Guttmacher Institute Report explains 'On the more stringent end of the spectrum, a handful of states require the consent or notification of both parents and one

lacks<sup>139</sup> a judicial bypass. On the other end, several states allow grandparents or other adult relatives to be involved in place of the minors' parents; in cases of neglect or abuse, some states waive the consent or notification requirement altogether.<sup>140</sup> Further diversity and a gap between law and practice has developed since the Guttmacher Institute further reports that some states courts will not give effect to laws which they regard as violating their states' constitutions while 'other similar or even more restrictive laws will be given effect in other states.'<sup>141</sup>

Notably, more than half of the states that require parental involvement for abortion permit a pregnant minor to make the decision to continue her pregnancy and to consent to prenatal care and delivery without consulting a parent.<sup>142</sup>

In addition, states appear to consider a minor who is a parent to be fully competent to make major decisions affecting the health and future of his or her child, even though many of these same states require a minor to involve her parents if she decides to terminate her pregnancy.<sup>143</sup> Thirty States and the District of Columbia currently have laws that authorize a minor parent to consent to medical care for his or her child. The remaining States have no relevant explicit policy or case law. In addition, 40 states and the District of Columbia explicitly permit a minor mother to place her child for adoption without her own parents' permission or knowledge. Twenty eight states and the District of Columbia explicitly allow minors to consent to their own child's adoption and 12 states make no distinction between minor and adult parents.<sup>144</sup> In these states, it appears, the decision to relinquish her child for adoption rests with the young mother.<sup>145</sup>

### **No Jurisprudence on Children's Rights?**

In view of the history of the law relating to a minor's right to make his or her own decisions, some commentators believe that it is arguably misleading to suggest there is even an American jurisprudence on children's rights.<sup>146</sup> As Kennedy and Mohr put it 'It is more accurate to say that there are a number of court decisions that have affected the legal rights of children.'<sup>147</sup> However, there is no doubt

<sup>132</sup> Oklahoma's new law, which requires both parental consent and notification came into force on 1 November 2006: see Guttmacher Institute: 'An Overview of Minors' Consent'. State Policies in Brief on [www.alanguttmacher.org](http://www.alanguttmacher.org) last visited on 01/11/06.

<sup>133</sup> See 'Parental Involvement in Minors' Abortions' State Policies in Brief at [www.alanguttmacher.org/statecenter/spibs/spib\\_PIMA.pdf](http://www.alanguttmacher.org/statecenter/spibs/spib_PIMA.pdf) last visited on 01/11/06.

<sup>134</sup> Ibid.

<sup>135</sup> See fn 107 (above)

<sup>136</sup> Consent of both parents is required.

<sup>137</sup> Consent of both parents is required.

<sup>138</sup> Such as *Carey v Population Services International* (1977) 431 US 678, where the Court said that 'the right to privacy in connection with decisions affecting procreation extends to minors as well as adults'.

<sup>139</sup> That is a process that does not contain any requirement for parents to be consulted or notified.

<sup>140</sup> See Guttmacher Institute 'Parental Involvement in Minors' Abortions' (fn 107 above).

<sup>141</sup> Ibid.

<sup>142</sup> Ibid.

<sup>143</sup> See Guttmacher Institute: 'Minors' Rights as Parents' State Policies in Brief. on <http://www.alanguttmacher.org> last visited 1 November 2006

<sup>144</sup> See Guttmacher Institute, *ibid.*

<sup>145</sup> See Boonstra and Nash 'Minors and the Rights to Consent to Health Care' on <http://www.guttmacher.org/pubs/tgr/03/4/gr030404.html> last visited on 02/09/06.

<sup>146</sup> See Mohr, W K & Kennedy, S 'The Conundrum of Children in the US Health System' (2005) at <http://sheilakennedy.net>, last visited on 02/09/06.

that several jurisdictions now recognise the existence of a mature minor doctrine but a noteworthy point is that while some of the Courts in these jurisdictions will recognise this doctrine,<sup>148</sup> other states will recognise this doctrine but not act on it.<sup>149</sup>

## ARE ANGLO-AMERICAN COMPARISONS VALID?

Apart from both the US and Britain being common law countries, is it valid to make Anglo-American comparisons? In the US, a considerable amount of the law in this area derives from Constitutional guarantees and Constitutional law, based on the written US Constitution. In the *Axon* Case, Silber J points out several differentiating features.<sup>150</sup> First, there is no judgment equivalent to the *Gillick* decision, and no statute equivalent to the Family Law Reform Act 1969 which confers a general right to consent upon young people aged 16 or over.

As we have seen, in the United States, anyone under 18 is a minor and may be required to notify parents about, or seek their consent to, abortion. Hence, as Silber J put it ‘The principle of autonomy is far less well-developed in the USA in the case of young people’ than under English law or under the European Convention of Human Rights.<sup>151</sup> Secondly, ‘domestic courts Human Rights Act cases have often warned against the dangers of incorporating jurisprudence from other jurisdictions which arises under Charters of Rights, which are very different from the European Convention.’

The US Constitution sets out absolute rights, leaving its courts to imply limitations on them while, as we have seen, the European Convention on Human Rights adopts a different approach. Thirdly, Silber J argues<sup>152</sup> that the social and moral values of America differ from those in the UK. There is some justification for saying that there is a greater sensitivity to the availability of abortion in America which is not necessarily as pronounced as in the UK. Finally, Silber J points out<sup>153</sup> that American courts focus on the availability of abortion in relation to Constitutional rights and do not support a general exception to the principle of confidentiality as far as medical advice to young people is concerned and their caselaw does not recognise an exception to the medical professional’s duty of confidentiality.

With respect, it is submitted that the usefulness of our

comparisons will depend on the purpose of our comparison. If we are thinking of adapting our law or policy in the light of another jurisdiction’s experience, we must be circumspect and wary of drawing superficial analogies, especially if that jurisdiction has a different legal system. However, if we are simply seeing how another jurisdiction with a similar legal structure and a strong reliance on case law has coped with a similar situation to ours, it is perfectly legitimate and instructive to note their experiences, policies, rationales and outcomes in order to look afresh at our own policies and principles.

## THE MATURE MINOR PRINCIPLE IN OTHER COMMON LAW COUNTRIES

### CANADA

Canadian cases dealing with mature minors have either supported the rights of adolescents to refuse medical treatment or those which argued that adolescents were not sufficiently mature to make life and death decisions<sup>154</sup>. However, the majority of cases supported the concept of adolescents having the right to make their own medical decisions which culminated in 1996 in the Walker Case. This was a decision by the New Brunswick Court of Appeal which declared that adolescents did have decision-making capacity for three reasons: (i) Canadian common law allows mature minors to consent to their own treatment; (ii) Section 3 of the Medical Consent of Minors Act 1976 is determinative if two medical practitioners declare the child mature; and (iii) unlike in the UK, the Medical Consent of Minors Act allows mature minors to refuse treatment.

Nevertheless, no other reported case since then has followed the Walker view: all reported have supported the English view that adolescents lack the maturity to refuse life saving treatment<sup>155</sup>.

In *H(T) v Children’s Aid Society of Metropolitan Toronto*,<sup>156</sup> the Ontario Court recognised that forcing a 13-year-old child to accept a blood transfusion against her religious belief was an infringement of her freedom of religion. But in the Court’s opinion, legislation which existed to protect minors was a reasonable justification for limiting a child’s freedom of religion. Further, the girl was not a mature minor and thus not capable of making her own treatment decisions. The court agreed the minor’s religious rights had been violated but this was justified as the intent was to save her life.

<sup>147</sup> Ibid.

<sup>148</sup> For example, Pennsylvania and Illinois.

<sup>149</sup> For example, New York State; see *In re Long Island Jewish Med. Ctr.*, 557 N.Y.S.2d 239, 243 (Supreme Court, 1990)

<sup>150</sup> See [2006] 2 FLR at 223-224, [35]-[38].

<sup>151</sup> See [2006] 2 FLR at 223, para[35].

<sup>152</sup> See [2006] 2 FLR at 224, para [37].

<sup>153</sup> Ibid.

<sup>154</sup> Woolley, S, ‘Children of Jehovah’s Witnesses and adolescent Jehovah’s Witnesses: what are their rights?’ (2005) 90 Archives of Disease in Childhood 715 at <http://adc.bmjournals.com> last visited on 24/10/06.

<sup>155</sup> See *H(T) v Children’s Aid Society of Metropolitan Toronto* (1996) 138 DLR (4th) 144; U (C) (*Next Friend of*) *v Alberta (Director of Child Welfare)* [2001] 3 WWR 575; *Alberta (Director of Child Welfare) v H(B)* [2002] 11 WWR 752.

<sup>156</sup> *H(T) v Children’s Aid Society of Metropolitan Toronto* (1996) 138 DLR (4th) 144.

In 2002, in the case of *B.H. v Alberta*<sup>157</sup> the Alberta Court agreed that the 16-year-old girl who was a Jehovah's Witness, and had refused blood transfusions and products recommended for her treatment, was a mature minor, but held that this concept was superseded by the province's child welfare legislation. Further, as she was a mature minor, her opinions about the proposed course of treatment must be considered but not necessarily followed. Moreover, although her freedom of religion and equality rights were breached under the Canadian Charter of Rights and Freedoms, this violation was held to be reasonable and justified limitations on her rights, to protect her welfare. Accordingly, a treatment order was issued which allowed the doctors to administer treatment, including blood transfusion.

In contrast, as far as the right of a minor to have an abortion is concerned, in 1986, in *C et al v Wren*,<sup>158</sup> a 16-year-old girl sought an abortion and was required by law at the time to obtain approval from the statutory committee. The parents of the girl sued the doctor and sought an injunction to stop the procedure. The Alberta Court of Appeal held that the girl did have sufficient understanding and intelligence to make up her own mind regarding the procedure. Thus, provided persons (including minors) possess sufficient intelligence and understanding of the risks and consequences of their choice, they have the capacity to consent to their own treatment. The cases confirm that although a child's opinion should be considered, the court can override the decisions of both children and parents, usually in the interests of the child's welfare or to save the child's life.<sup>159</sup> This echoes the English law approach in similar cases.

## AUSTRALIA

All legislation in Australia defines a minor as a person under 18 years. However, in 1992, the mature minor principle was accepted in Australian common law, in Marion's Case when the High Court of Australia stated that 'parental power to consent to medical treatment on behalf of a child diminishes gradually as the child's capacities and maturity grow. A minor is capable of giving informed consent when he or she achieves a sufficient understanding and intelligence to enable him/her to understand fully what is proposed.'<sup>160</sup> Hence under Australian law, the concept of a mature minor is dependent on the child's level of maturity,

with no lower age limit defined.

However, the notion of competence has been confirmed as part of Australian law<sup>161</sup>, although the courts have not listed the factors which indicate sufficient maturity which remains a matter for medical judgment.<sup>162</sup>

This case cast doubt on 'the assumption that adolescent minors were incompetent to make their own decisions about medical treatment'<sup>163</sup>. Legislation exists for a person aged 14 years and above in New South Wales for property and contracts<sup>164</sup> and for those aged 16 years for medical and dental procedures, allowing consent to their own treatment without undergoing a mature minor assessment<sup>165</sup>. In addition, children over 15 are allowed to obtain their own Medicare card. In any Australian state, a doctor may 'bulk bill' a consultation with an adolescent using the family Medicare card without having to notify the parents<sup>166</sup>. Indeed, the mature minor principle has been incorporated into legislation dealing with access to health records<sup>167</sup>.

As we have already seen in other jurisdictions, a requirement for confidentiality to be maintained is seen as a corollary of the mature-minor doctrine. In 2005, community debate about confidential health care for adolescents was sparked off by the federal government's proposal to allow parents of teenagers aged 16 years and below access to their children's Health Insurance Commission data without their consent.<sup>168</sup> According to Sancu *et al*<sup>169</sup>, there is extensive research evidence which highlights the importance of confidentiality in promoting young people's access to health care, especially for sensitive issues such as mental and sexual health, and substance use. On the contrary, evidence for any benefit from mandatory parental involvement is lacking. The Australian position seems to be that mature minors have the right to make their own decisions about their medical treatment and to receive confidential medical care.

Two points to note are that the doctor retains the right to evaluate the minor's level of maturity and that the confidentiality surrounding this treatment must be in the minor's best interests. Evaluation of maturity must take account of the 'characteristics of the young person, the gravity of the proposed treatment, family factors, and statutory restrictions'<sup>170</sup>.

There are certain Australian States which have additional clauses that will override the doctor's assessment of a young woman's capacity to consent to termination of

<sup>157</sup> (2002) 329 Alberta Reports 395 (Alberta Court of Queen's Bench).

<sup>158</sup> (1986) 35 Dominion Law Reports 419 (Alberta Court of Appeal).

<sup>159</sup> This is, of course, very much like the English law approach in the post-*Gillick* cases.

<sup>160</sup> See Department of Health v JWB and SMB (Marion's Case) (1992) CLR 218 FC

<sup>161</sup> see *DoCS v Y* [1999] NSWSC 644 (New South Wales)

<sup>162</sup> L. Skene *Law and medical practice: rights, duties, claims and defences* (2004) 2nd ed. Sydney LexisNexis Butterworths.

<sup>163</sup> Sancu, L. A. et al 'Confidential health care for adolescents: reconciling clinical evidence with family values' (2005) 183 *Medical Journal of Australia* 410.

<sup>164</sup> See s.49(2) Minors (Property and Contracts) Act 1970 (NSW).

<sup>165</sup> See s6(1) of the Consent to Medical and Dental Procedures Act 1995 (S. Australia).

<sup>166</sup> See Sancu, et al at fn 163, above.

<sup>167</sup> See s10(6) and s.25 of the Health Records (Privacy and Access) Act 1997 (Australian Capital Territory) and s85 of the Health Records Act 2001 (Victoria).

<sup>168</sup> Sancu *et al*, see fn 163, above.

<sup>169</sup> *Ibid.*

<sup>170</sup> *Ibid.*

pregnancy if she is under 16 years of age<sup>171</sup>.

As to whether a parent's right terminates or can be overridden if the court believes that this is justifiable in the child's best interest, it should be noted that there is no Australian case which has deliberated on situations similar to the English cases dealing with the child's right to choose her own legal representation and no Australian case has dealt with a normal child, only a mentally incapacitated one. Hence the *parens patriae* jurisdiction could still be exercised by the Courts irrespective of *Gillick* competence.

Exceptions to the duty of confidentiality include the patient's explicit consent or implied consent, emergency situations involving risk of death or serious injury. There are statutory exceptions for health professionals when it comes to children<sup>172</sup> in need of protection against neglect or abuse<sup>173</sup> or those infected with a notifiable disease<sup>174</sup>, and Western Australia is the only State that does not have mandatory reporting legislation. Further exceptions include acting in the patient's or public's best interests when there is a 'serious and imminent threat to the life or health' of the individual (for example, suicide) or another person (for example homicide or transmission of serious infectious disease)<sup>175</sup>.

## NEW ZEALAND <sup>176</sup>

Until 1990, New Zealand legislation restricted access to contraceptives and contraceptive services to people under 16 years of age. Under s3 of the Contraception, Sterilisation and Abortion Act 1977, it was illegal to provide contraceptives or contraceptive advice to anyone under the age of 16 although the legislation included a number of people who were exempt, including parents or guardians, registered medical practitioners, authorised representatives of any family planning clinic, pharmacists fulfilling prescriptions, social workers, counsellors and, in the case of a school, any person approved by a principal after agreement with the board of governors or school committee.<sup>177</sup>

Section 3 was repealed in 1990 so that young people of any age now have the right to access information about contraception and to be supplied with contraceptive products without parental consent. This clearly goes further than the *Gillick* principle, even in its extension in the *Axon* Case.

The basic legislation dealing with abortion law in New Zealand is also the Contraception, Sterilisation and Abortion Act 1977, which enacted parallel specifications through amendment of the Guardianship Act 1968

(retained in their Care of Children Act 2004) and Section 187A of the Crimes Act 1861. These provisions enable women (of any age) to undergo confidential medical consultation after they have seen two certifying consultant medical practitioners. It is currently legal to terminate pregnancies under 20 weeks' gestation, or over 20 weeks if continued pregnancy would harm the health of the woman.

Regulations in New Zealand require abortions after 12 weeks' gestation to be performed in a 'licensed institution' which is generally understood to be a hospital. Abortions have to be approved by two doctors, one of whom must be a gynaecologist or obstetrician and the abortion may only be allowed subject to counselling. The *Gillick* case was recognised in New Zealand law in 1985 which was seen as allowing competent minors under 16 the right to consent to reproductive healthcare choices on their own behalf. However, the Abortion Law Reform Association of New Zealand (ALRANZ) has sought wholly to decriminalise abortion but this has not yet been achieved. Voice for Life/Society for the Protection of the Unborn Child (SPUC) continues to campaign to restrict a competent minor's access to abortion if the minor is under 16, which is the official age of consent.

According to studies of adolescent sexual activity in New Zealand, by the age of 15, 8.5% of New Zealand adolescents have had sex, and in one third of cases this is unprotected. Girls aged 15 years or less are more likely than boys to have had sex.<sup>178</sup> By 18 years of age, 58% of males and 68% of females report having sexual intercourse in the past 12 months. 16% of these report having sex before they were 15 and 30% before they reached their 16th birthday.<sup>179</sup>

Section 36 of the Care of Children Act 2004, allows a child over 16 to consent to medical treatment which is in their best interests. This can be interpreted consistently with *Gillick* in order to allow mature minors under this threshold to consent. Section 36(2) provides that a child who is married, in a civil union or in a *de facto* relationship can consent to and refuse medical treatment for themselves or another person. Hence through marriage, civil union or *de facto* relationships minors can be accorded competency.

Since 1977, all women in New Zealand can consent to or refuse an abortion. The move to require parental notification was rejected in Parliament. Young males and females under 16 years have no statutory capacity to consent to medical treatment, except under s38 of the Care of Children Act 2004. Under s38, age is not determinative of capacity to consent but capacity remains relevant. However, although it allows consent to an abortion, if a

<sup>171</sup> See National Children's and Youth Law Centre. Law stuff: know your rights. NSW, 2004 available at <http://www.lawstuff.org.au>, last visited September 2005.

<sup>172</sup> Defined as aged 16, 17 or 18, depending on the State or territory.

<sup>173</sup> See s64(1A) and s.63 of the Children and Young Persons Act 1989.

<sup>174</sup> *Ibid* s.7; regulation 8 of the Health (Infectious Diseases) Regulations 2001 (Victoria).

<sup>175</sup> Source: *Sanci et al* see fn 163.

<sup>176</sup> Apart from where otherwise indicated, the main source of the information in this section is from <http://en.wikipedia.org>.

<sup>177</sup> See Collins, B 'Consistent or Conflicting? Sexual Health Legislation and Young People's Rights in New Zealand' (2000) *Social Policy Journal of New Zealand*, issue 15, p.2.

<sup>178</sup> Lynskey, M T and Fergusson, D M 'Sexual Activity and Contraceptive Use Amongst Teenagers under the Age of 15 Years' (1993) *New Zealand Medical Journal*, vol, 106, pp. 511-514.

<sup>179</sup> Dickson et al 'First sexual intercourse: age, coercion, and later regrets reported by a birth cohort' (1998) *British Medical Journal*, vol 319, pp. 29-33.

complication arises, applying s36 without Gillick competency, parents would have to consent to further treatment and would thus require sufficient information.

## CONCLUSIONS

What, then, has been the impact of the *Gillick* decision or a 'mature minor' principle? In the UK, the principle that emerged from a House of Lords ruling was taken up and developed in subsequent cases, became enshrined in an English statute and has its equivalent in other common law jurisdictions. While the original *Gillick* Fraser criteria remain, the Gillick principle has become embedded in English jurisprudence as representing a standard for legal competence for children in a variety of contexts, ranging from the right to decide medical treatment to the right to choose legal representation.

*Gillick* has also become a case frequently cited for what other courts or statutes have said about it, rather than for what it actually appeared to posit as its ratio in the original case. The cultural and political landscape of the contemporary context has also evolved considerably since 1986; children's rights are much more accepted than in pre-*Gillick* times but this has not necessarily resulted in under-age children actually being granted greater autonomy in making health decisions for themselves.

Some cases<sup>180</sup> have declared that older children should be allowed their say but not to agree to their wishes if it meant their lives would be put at risk. On the other hand, mature children who satisfy the *Gillick*/Fraser guidelines have the right to decide to have confidential contraceptive advice and treatment *and* an abortion, without parental involvement, notification or consent.

In that respect, a child's *right* to make an autonomous decision on matters affecting its sexual and reproductive health has moved a step forward, with judges continuing to regard the welfare and best interests of the child as the predominant considerations when determining such cases. At the end of the day, the child's 'best interests' might vary from case to case but this concept will continue to evolve and might eventually be a matter for individual morality and values which might not necessarily be shared by the whole community.

At another level, the *Gillick* principle as applied in the Axon Case may also be viewed as an exercise in social engineering. In an age where present-day British or American society does not want to see unwanted teenage pregnancies, the Gillick principle effectively removes, via contraception or abortion, evidence of teenage sexual activity which occurs without parental knowledge. The threat of HIV infection remains a very important consideration but pragmatism rules the day in modern Western society. This has happened largely because there appears to have been a paradigm shift in our

expectations of the standard of morality from our children. *Gillick* therefore represents a form of 'judicial social engineering.'

But it has become more than a mere legal yardstick of adolescent coming-of-age. While a product of the 1980s *zeitgeist*, *Gillick* is now a principle that has become not just well-established, but encompasses a breadth of application that has exceeded its original parameters while still fulfilling its central purpose - preserving the autonomy and confidentiality of children whom the law now considers should be allowed to decide the future not just of themselves but also of their future offspring. This remains important since teenagers, if the British surveys<sup>181</sup> are to be believed, still remain ignorant about the dangers of unprotected sex, which frequently leads to unexpected and unwanted pregnancies. Such ignorance is said to be a 'key risk factor for teenage pregnancy'<sup>182</sup>.

This brief comparative survey has shown that not only has the English notion of the mature minor been extended but that it is alive and well and has been transplanted into other countries such as the United States, Australia, New Zealand and Canada which have English common law roots. Whether by statute, case law or judicial devices like the judicial bypass or the concept of the emancipated minor, all these jurisdictions have found a way of allowing teenagers confidential access to contraceptive advice and treatment and the right to an abortion where this is believed to be in the child's best interests, sometimes such as in New Zealand irrespective of its age or whether it satisfies any *Gillick*-type requirements.

Sex may not be one of the things a girl under 16 needs to practise<sup>183</sup> but if she does practise it, becomes pregnant, and decides she wishes to have an abortion, English law would allow her to do so, provided she satisfies the Gillick/Fraser criteria. As Fortin<sup>184</sup> correctly observed, pre-Axon, English law, although rigorous in its requirements, was much more liberal than American jurisdictions in allowing sufficiently competent teenagers to have abortions without parental involvement.

Nevertheless, children, especially younger children, will frequently lack the necessary experience and knowledge to make well-balanced decisions and it is surely up to responsible adults to ensure that they are not just protected but are given a core of moral values which will sustain and guide them throughout their lives. While seeking to uphold and promote the older child's autonomy, and to prevent unwanted pregnancies, it is by no means certain that either the Gillick principle or the equivalent 'mature minor' concept provides this core of morality which is the hallmark of a civilised society.

<sup>180</sup> For example, dealing with anorexic children (*Re W, Re C (Detention)*) or children refusing life-saving medical treatment (eg *Re E, Re M*), see fns 4,5,6,8.

<sup>181</sup> see eg Wellings, K. Wadsworth, J, Johnson, A, Field, J et al 'Teenage Sexuality, fertility and life chances' (1996) Report to the Department of Health and see also 'Teenagers in no rush to have sex, biggest survey shows' *The Guardian*, 15 August 2006, reporting the results of an online poll of nearly 20,000 young people.

<sup>182</sup> See *Teenage Pregnancy* (1999) Report of the Social Exclusion Unit presented to the Prime Minister, p.36, June 1999.

<sup>183</sup> As Lord Templeman said in *Gillick*, at [1986] 2 FLR at 265E.

<sup>184</sup> See J Fortin *Children's Rights and the Developing Law* (2003) 2nd ed. LexisNexis Butterworths at p.139.

# Constitutional Implications of Rising Court Fees – Further Developments on Access to Justice in Family Cases

Lars Mosesson<sup>1</sup>

In my Article in the online journal *Family Law and Practice* in 2012<sup>2</sup>, I identified the profound constitutional issues that were raised by developments in and around the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (“LASPO”). My focus was on the impropriety of depriving most litigants of access to legal aid in cases involving Family Law.<sup>3</sup> In this article, I will consider some of the related developments since then that centre on the raising of court fees.<sup>4</sup>

## Developments since 2013

The general election in 2015 ended the coalition government, and produced a wholly-Conservative government. Chris Grayling had replaced Kenneth Clarke, who was responsible for LASPO, as Justice Secretary; and he was replaced in 2015 by Michael Gove, another non-lawyer openly committed to saving money spent by the Department.

“Enhanced Court Fees” were proposed under the coalition government in a consultation document. They were introduced by order after 2015, increasing significantly the fees for Family proceedings,<sup>5</sup> and they have been amended by the Civil Proceedings, Family Proceedings and Upper Tribunal Fees (Amendment) Order 2016.

There have been three official reports into the policies of the Department on access to justice and the fees: one by the Regulatory Policy Committee (RPC) in 2014,<sup>6</sup> and two by the Justice Select Committee of the House of Commons in 2016.<sup>7</sup> These reports show that, rather than basing new policy on published credible evidence, Ministers are increasingly driven by other considerations; and the threats to the effectiveness and propriety of the system of Family Law continue to grow. The threats would increase further, if a government managed to cause the repeal of the Human Rights Act and our withdrawal from the European Convention on Human Rights, as members of the present

government have urged.<sup>8</sup>

There has also been a new report from the UN on the UK’s record since 2009 in honouring its commitments under the International Covenant on Economic, Social and Cultural Rights of 1966. It, too, expresses concern about access to justice in the UK.<sup>9</sup>

## The Constitutional Issues

The constitutional issues I identified in my previous article<sup>10</sup> concerned how changes in the cost of access to justice might threaten the values inherent in Liberal Democracy, the Rule of Law, the requirements of the ECHR and the HRA, decisions of the ECtHR, and the possibility of the courts’ reviving their inherent powers at Common Law to invalidate manifestly unjust statutes. I will summarize the most relevant points here.

Of the many formulations of the Rule of Law, the most helpful is that by Lord Bingham.<sup>11</sup> His “basic principle” includes the requirement that all persons should be “entitled to the benefit of (the) laws”; and he amplifies this in his fourth and fifth “sub-rules”:

“4. The law must afford adequate protection of fundamental human rights.

“5. Means must be provided for resolving, without prohibitive cost or inordinate delay, bona fide civil disputes ...”

Thus, the test for the Rule of Law includes whether all persons can enjoy the benefits of the just law in practice; and affordability is a key factor in this reality.

The European Court of Human Rights (ECtHR) has taken a similar view when applying art.6 on the right to a fair trial in the determination of one’s rights. In *Airey v Ireland*<sup>12</sup> the Court made clear that legal aid must be made available in Family cases, where the interests of justice require it, particularly where a party would otherwise be unable to gain

<sup>1</sup> Lars Mosesson, LLB, LLM, PhD, Dip International Law Human Rights, FRSA, Senior Lecturer, Department of Law, Buckinghamshire New University.

<sup>2</sup> (2012) 3FLP2, p42 (no longer published, but the archive may be found on the website of this journal’s Editor, www.frburton.com, since she also edited *Family Law and Practice* 2012-2013 until it ceased publication. Since 2012, the Guardian has published a series of articles on the developments; and ukhumanrightsblog has been regularly monitoring them.

<sup>3</sup> *The Guardian* reported on 11.3.2013 that the government accepted that 600,000 people would lose access to advice and representation because of the changes to Legal Aid; and Catherine Baksi in the Law Society Gazette on 8.4.2013 reported that Shelter and the Red Cross would close advice centres, and that one-third of law of law firms would stop offering services in Family law because of the cuts.

<sup>4</sup> The main increase in court fees in England & Wales came in on 9.3.2015. The fees are governed by the Civil Proceedings and Family Proceedings Fees (Amendment) Orders of 2014 & 2015, as amended by the Civil Proceedings, Family Proceedings and Upper Tribunal Fees (Amendment) Order 2016.

<sup>5</sup> By the Civil Proceedings and Family Proceedings Fees (Amendment) Order 2015.

<sup>6</sup> Impact Assessment Opinion by Regulatory Policy Committee 20.1.2014

<sup>7</sup> House of Commons Justice Committee: “Courts & Tribunals Fees”, Second Report, published 14.6.16

<sup>8</sup> Theresa May, the current Home Secretary, has just said that she has changed her mind on withdrawal from the ECHR. She is (July 2016) standing to become leader of the Conservative Party and the next Prime Minister.

<sup>9</sup> CESCR: 58 Session, June 2016: Consideration of State Reports: UK, E/C 12/GBR/CO/6. See FN 30, below.

<sup>10</sup> See FN 2, above.

<sup>11</sup> See Cambridge Law Journal, vol 66 (2007), pp. 67-85. His formulation is a clear synthesis of the views

<sup>12</sup> [1979] ECHR 3.

access to the courts in fact. The same reasoning would apply where a party is unable to afford the fees charged by a court.<sup>13</sup>

Moreover, if Lord Woolf is correct,<sup>14</sup> these values would still be protected legally, even if the HRA were repealed and the UK withdrew from the ECHR. This is because of the Common Law power (or “responsibility”<sup>15</sup>) of the judges to uphold the Rule of Law. If the Rule of Law includes such rights as access to the courts, which seems to be incontrovertible,<sup>16</sup> the Common Law judges would have to over-ride any statute or order which violated the right.<sup>17</sup>

The three recent Ministers of Justice have all asserted that they were seeking to balance the need to cut expenditure with the need to allow justice. The current Minister, Michael Gove, put it thus: “Action needs to be taken to reduce costs in civil justice ... (and to) make access to justice easier for all.”<sup>18</sup> Whether these legitimate aims are mutually compatible is a matter to consider. There is said to be a hole of £100m in the budget of the Department; and that the Department’s finances are not ring-fenced in these times of official austerity has made a satisfactory balance even more difficult to achieve.<sup>19</sup>

The judiciary has expressed its willingness<sup>20</sup> to consider positively proposals from Ministers to save money; but the means that have been adopted in practice by the governments since 2010 have not been well received. The means adopted in the LASPO focused on cutting legal aid: more recently, the focus has been on increasing the fees charged in courts and tribunals, including in Family matters.

### The Regulatory Policy Committee Report 2014<sup>21</sup>

The main issue that has aroused concerns recently is the introduction of “Enhanced Court Fees”;<sup>22</sup> and the Regulatory Policy Committee has expressed its opinion on the matter. This is a policy to charge parties to a case more than it will cost the court (that is, HMCTS) in administrative costs, so that the surplus can be used to off-set costs elsewhere. For example, Sir James Munby calculated that the administration of

granting a divorce costs HMCTS £200, but the fee charged is now £550.<sup>23</sup> This may be seen as a tax on justice. Lord Judge, then the Lord Chief Justice, described the policy as privatizing the courts service and “selling justice”, contrary to Magna Carta. He wanted more detail on the policy<sup>24</sup>; and the RPC concluded that the policy lacks clarity as to what it is intended to achieve.<sup>25</sup>

Much of the criticism has centred on the lack of evidence to support the policy. Indeed, the government had not published its report, with its evidence, more than six months after it was meant to have been completed. Consequently, the RPC re-rated the policy as “not fit for purpose”.<sup>26</sup> The courts tend to take an absence of evidence or reasons as indicating bad faith.<sup>27</sup>

In 2015, the Law Society, although not invited to do so, responded to the proposal in similar vein, in the following strong terms:<sup>28</sup>

“The Law Society believes that this decision is wrong and will have serious consequences for access to justice...”

The proposed increases in court fees are of huge significance to access to justice in this country and are likely to lead to many unjust results. For that reason, we believe it is right to set out our concerns in detail.

In summary, the Society considers that:

It is wrong in principle for the court service to be treated as a profit centre - the courts have a vital social function which it is for the State to provide, and should not be treated as a commercial activity to subsidise other work.

The government’s decision will discourage people from bringing legitimate cases, thus reducing access to justice...

The proposals are not supported by any evidence or concrete proposals to indicate how the government will use the money gained to improve

<sup>13</sup> The fall-off of 70% in cases brought before the Employment Tribunal when the fees were increased to £1,200 shows the real consequences of these changes. Real people were unable to vindicate the rights that the law had given them on paper. See the Justice Committee Report 2016, below.

<sup>14</sup> See his article in Public Law (1995) PL 57.

<sup>15</sup> Ibid at 64. But see the largely sceptical analysis in Bradley & Ewing: Constitutional & Administrative Law, 15<sup>th</sup> ed, at 58.

<sup>16</sup> Apart from being expressed in Bingham’s formulation, it was clearly stated by the International Commission of Jurists in the Declaration of Delhi in 1959; and, at the other extreme, even narrow positivists like Joseph Raz would seem to accept this: see “The Rule of Law and its Virtue” (1977) 93 LQR 195.

<sup>17</sup> See also Mosesson, L ‘The Sleeping Dragon’, NJL Oct 24, 2014. However, it is not clear when the tipping point would be reached.

<sup>18</sup> It was claimed that the higher fees would deter spurious claims, but little evidence for this has been adduced. Moreover, the rich will not be deterred.

<sup>19</sup> In “Enhanced Court Fees: The Government Response to Part 2 of the Consultation on Reform of Court Fees” (16.1.2015), the MoJ stated in the Detail: “Having listened to the concerns of those who responded to the consultation proposals, the government has decided not to implement the proposed increase to the fee for a divorce... This has not, however, changed the financial imperative to increase income to the courts from fees.”

<sup>20</sup> Goss LJ was asked to assess the willingness of the judiciary to consider proposals, for the review by the Regulatory Policy Committee in 2013. See the Report in January 2014, below.

<sup>21</sup> Impact Assessment Opinion by the Regulatory Policy Committee, published 20.1.2014

<sup>22</sup> See the Civil Proceedings and Family Proceedings Fees (Amendment) Order 2015, following the consultation leading up to the government’s Response on 16/1/2015. See fns 5 & 6, above.

<sup>23</sup> Ibid. This is in England and Wales. See the Civil Proceedings, Family Proceedings and Upper Tribunal Fees (Amendment) Order 2016. It was originally proposed to charge over £700, but this figure was reduced.

<sup>24</sup> In a letter to the Minister of Justice in 2012, before the RPC report.

<sup>25</sup> Impact Assessment Opinion by the Regulatory Policy Committee, published 20.1.2014

<sup>26</sup> Ibid.

<sup>27</sup> See the views of the House of Lords in *Padfield v Minister of Agriculture* [1968] AC 997.

<sup>28</sup> Enhanced Court Fees – Law Society Response, 2.3.2015.



the court service.

The research on which the decision was based is inadequate.”

### **The Justice Select Committee Report 2016<sup>29</sup>**

This Committee of the House of Commons considered the general issue of the rise in fees for courts and tribunals, and this included Family matters, as well as Employment, Immigration and Judicial Review. As has been indicated above, the Committee was concerned about the lack of clear reasons for the policy and the lack of published evidence to support it. The government had not commissioned any study or report on the consequences of previous rises, and had not published such evidence as it did have. The Committee agreed with Lord Dyson that the evidence put forward by the government was “lamentable”.<sup>30</sup>

### **The CESCR Report 2016<sup>31</sup>**

The UK has committed itself to the terms of the UN International Covenant on Economic, Social and Cultural Rights 1966. The terms are binding in International Law, but there is no complaints procedure, merely a system for reporting. This Report by the CESCR covers the years since 2009: it is based on the Report submitted by the UK government and observations by Civil Society Organizations and NHRIs.

The Committee was “deeply concerned” in particular about the changes introduced by the Welfare Reform Act 2012 and the Welfare Reform and Work Act 2016, but considered other matters:

“The Committee is particularly concerned about the adverse impact of these changes and cuts on the enjoyment of the rights to social security and to an adequate standard of living by disadvantaged and marginalized individuals and groups, including women, children, persons with disabilities, low-income families and families with two or more children...

“The Committee is concerned that the reforms to the legal aid system and the introduction of employment tribunal fees have restricted access to justice, in areas such as employment, housing, education and social welfare benefits.”<sup>32</sup>

The concerns are about the increase in the practical difficulties faced by people when trying to vindicate their rights generally. Although these concerns are expressed about a range of areas, most of them affect specifically matters of Family Law.

### **Conclusions**

Financing public services, such as the system of courts and tribunals, will always be a challenge for a government. However, in a Liberal Democracy, justice is not an optional

extra, to be provided if and when there is surplus income, like building new airports: it is foundational. The (reformed) post referendum government may not be unhappy to be working on withdrawal from the EU, so that it will have fewer restrictions on what it chooses to do; but its policies and actions, driven by the criterion of “austerity”, will still be subject both to the principles of Liberal Democracy and to the supervision of Parliament, the UK courts, the ECtHR, the UN and the electorate. Even repeal of the HRA and withdrawal from the ECHR will not free it completely from the basic requirements of Liberal Democracy and some institutional protections, although they would weaken the protection and reduce our credibility in international contexts.

It is of great concern that a government seems to wish to achieve its overall financial goals without paying sufficient heed to the needs of access to justice for all on the basis of merit. We are seeing growing commercialization of the NHS, universities, the prison service and other parts of the public sector; but we must hope it is unthinkable that a government would seek to make the system of courts and tribunals self-financing - or profit-making - particularly if this means making some parties pay excessive amounts to achieve justice according to the law and the poor have no access in reality.<sup>33</sup> One step beyond this is the vision of different courts touting their services in competition with each other to attract customers, as a natural development of a free-market ideology; but it is hard to reconcile this with a Liberal Democratic state which works for the benefit of all its members.

If there were evidence provided to support the effectiveness of the policies being pursued, this might reduce the concerns; but it is more likely that the costs for the government will increase in the long run, as challenges are made to the policies in due course, resulting in greater expenditure by the government. Moreover, there would still be concerns about the merits of the policies that fail to consider the realities of the lives and needs of people caught up in situations that affect them and their families. It is a deeply impoverished view of the role of the state that holds that all its services should be for sale. Family matters in the wide sense affect rich and poor, and social deprivation makes the life-chances of the poor even worse. Little cuts after little cuts<sup>34</sup> they may be, but they steadily erode the quality of life and real hopes for justice of the already-disadvantaged. Eternal vigilance and effective action are needed to resist such developments that may tempt members of any government that is prioritizing cutting its costs. Clearly, the system of courts and tribunals must be run efficiently and effectively – but there is no justice, unless there is justice for all, not just the rich; and justice for all is a necessary cost in a free and fair society.

<sup>29</sup> Courts & Tribunals Fees, Second Report 14.6.16. See Christine Bellamy, *ukhumanrightsblog* and *The Guardian*, both on 20.6.2016. The chair of the Committee is Bob Neill MP, and the majority of members are Conservatives.

<sup>30</sup> Courts & Tribunals Fees, Second Report 14.6.16, p.38.

<sup>31</sup> CESCR: 58 Session, June 2016: Consideration of State Reports: UK, E/C 12/GBR/CO/6.

<sup>32</sup> *Ibid*: Concluding Observations.

<sup>33</sup> See, for example, the comments of the Law Society in their *Enhanced Court Fees – Law Society Response*, 2.3.2015, quoted above.

<sup>34</sup> Alas, it takes fewer than a thousand cuts to cause the death of justice.

# News from India: International Child Abduction, Surrogacy, Human Trafficking and Human Smuggling

Anil Malhotra\*

## Will India soon sign the Hague Convention?

The Law Commission of India has received a reference from the Punjab and Haryana High Court requesting examination of multiple issues involved in inter-country and inter-parental child removal among families locked in disputes.

At present, India does not recognise such abduction of children as an offence<sup>1</sup>, although the removal or retention of a child in breach of custody rights is an offence under the Hague Convention on the Civil Aspects of International Child Abduction 1980. Since India is not a signatory to the agreement, children are currently taken away, with the courts and authorities not being able to take any action. The Punjab and Haryana High Court has, however, forwarded a reference to the Law Commission and the Ministry of Women and Child Development to examine the issue and thereafter to consider whether recommendations should be made for enacting a suitable law on the subject and for signing the Hague Convention.

Justice Rajive Bhalla of the High Court made the order recently in a matter involving a minor child, who was removed from the *de jure* custody of the court by misusing an interim order of 2006. Despite the efforts of the *amicus curiae*<sup>2</sup> and the Central Bureau of Investigation, the child remains untraceable. When it became clear that the minor had been spirited away to the United Kingdom on a fake passport after the petitioners were allowed to retain her custody, the Court transferred the investigation to the CBI. The child was found in the U.K. by the British Police in 2008 and was placed in foster care. The High Court of Justice, Family Division, London, delivered a judgment in April 2009 declaring that it would order summary return of the girl to India. However, on 24 April 2009, the child left school from a playground in the company of “an unidentified Asian male”.

Efforts by the British Police and various agencies to trace her have since met with failure. The Court noted that its *amicus curiae*, Anil Malhotra, and (despite their stellar efforts) the CBI, had been thwarted at every step on the way, primarily for the reason that India is not a signatory to the Hague Convention.

Taking on record a report submitted by the *amicus curiae*, Justice Bhalla observed in his six page order that for want of the Indian government acceding to the Hague Convention or enacting a domestic law, children would continue to be spirited away from and to India, with courts and authorities “standing by in despair”. Currently, India does not recognise such Law Commission references from the High Court on inter-parental child ‘removal’ or abduction’ of children as an offence.

The Court forwarded the *amicus curiae*'s report on the subject with the reference and adjourned the matter to a later date. The report stated that it was not any longer possible for Indian courts to stretch their limits to adapt to foreign court orders arising in different jurisdictions.

The present writer has authored several books on the related subjects, and practises in the field of interpretation and application of foreign court orders regarding divorce decrees, child abduction, custody, maintenance, adoption and family-related issues for non-resident Indians, and handles family law litigation across the country. In his report submitted to the Court, he has concluded that it is the need of the hour for India to have a codified and statutory law on inter-country and inter-parental child removal. Despite the Law Commission's recommendation in its 218th Report in 2009, India has not signed the Hague Convention and no domestic law defines or governs this problem up to the present date<sup>3</sup>.

## Perspectives on Surrogacy in India

India was the first country to legalise commercial surrogacy. Britain has, however, created history by voting in favour of changing the existing English law to legalise the conception of babies by three parents using *in vitro* fertilisation (IVF) technology. The three parent IVF baby born from a genetically modified embryo will have genes from a father, a mother and another female donor. Though hailed in frenzy and euphoria as “historic”, axiomatically, the use of this positive scientific research potential must be forthwith regulated by an equally forceful corresponding legislation which will resist creation of three parent babies exclusively and only in established cases which are duly certified by a competent authority as essential to prevent hereditary genetic diseases from being genetically passed on to children.

Learning from the Indian experience of commercial surrogacy which involves the use of IVF for the fertilisation of natural or donor sperms or eggs, and in which embryos are nurtured in a rented surrogate womb to give birth to a child, much can be said about the aftermath as to what happens in stark reality upon a surrogate baby being born. Without an enabling legislation defining parentage, identifying nationality, defining the roles of the parties, settling the terms of the surrogate mother, and providing legislative safeguards to prevent the abuse of such a process, taking over a natural process to provide three parent designer babies is a thoroughly ‘dodgy’ proposition.

The Assisted Reproductive (Regulatory) Technology Bill was first presented in 2008, and has then been amended in

\*Advocate at Malhotra & Malhotra, Chandigarh, India. anilmalhotra1960@gmail.com.

<sup>1</sup> Although the Indian Civil Aspects of International Child Abduction Bill 2016 drafted by the ministry of Women and Child Development (WCD) aims to facilitate signing up to the Convention by India by providing enabling legislation.

<sup>2</sup> Anil Malhotra was appointed as *amicus curiae* to the Court in 2008.

<sup>3</sup> An enlarged version of this section of this article was previously published in the Indian monthly *Lawyers Update*, April 2016.

2010, 2013, 2014 and 2015, during which period the National Guidelines for the Accreditation, Supervision and Regulation of ART<sup>4</sup> Clinics in India 2005 (made by the Indian Council for Medical Research, the ICMR) have regulated surrogacy practices in India, However being non-statutory and not enforceable, these Guidelines do not provide any legislative answers besides not giving much needed solutions to perplexing questions which hound such relationships.

There is need for a regulatory law. Surrogacy often creates stateless children with disputed questions of citizenship, nationality and parentage being recorded on official documentation. Unfortunate surrogate children have also been abandoned without any legal recourse. Legislation is needed to check malpractice and to curb the unethical surrogacy trade which exists against a backdrop of financial transactions. Maintaining anonymity of the surrogate mother needs to be balanced between the right of privacy and the right of an individual to know his original parents. Legislation needs to have extra-territorial application as well as stamping out the illegal trade in gametes and embryos<sup>5</sup>.

However there is much criticism of the proposed statute, the 'Art Bill', since it now recognises commercial surrogacy but bans surrogacy practices in India for foreigners and proposes some provisions which mutually exclusive with the ICMR Guidelines: see Anil Malhotra 'Giving Birth to Dictatorship in Surrogacy'<sup>6</sup>.

It is suggested that the ICMR must set up a multi-dimensional body to look into and finalise the challenges and issues which arise from commercial surrogacy, a practice here to stay<sup>7</sup>. The present writer has published a definitive title on *Surrogacy in India*<sup>8</sup>.

### Addressing Human Trafficking and Human Smuggling

Guarantees against trafficking are part of the child protection laws of India which should ensure equality for children before the law as much as other rights, such as free and compulsory primary education, but it seems that the strength of such child protection law is doubted<sup>9</sup>. After India acceded to the UN Convention on the Rights of the Child in 1992, the Commission for Protection of Child Rights Act 2005 (CPCRA) was enacted to provide for the creation of a National Commission and State Commissions for Protection of Child Rights (NPCR) and speedy courts for the trial of offences against children and violation of Child Rights. India,

with reportedly the largest child population in the world, unfortunately has the weakest machinery for the protection of Child Rights. The law exists but not the mandate to implement it.

However, India has also taken an initiative in passing the Punjab Travel Professionals Regulation Act 2012 aimed at preventing human smuggling e.g. of illegal migrants who often end in entrapment into slave labour, Punjab being the first state in India to take this legislative action. This statute, which follows the Punjab Prevention of Human Smuggling Act 2010<sup>10</sup>, paved the way for the enforcement of a regulatory regime in the travel industry which was previously unregulated<sup>11</sup>. This is not the first time that India has acted to achieve through regulation of travel the harmful consequences of activities which should themselves be regulated by statute, whereas substantive legislative intervention to address the perceived mischiefs directly is slow to be enacted: see, for example, Anil Malhotra, 'Note From Our India Correspondent on India's innovative decision to regulate surrogacy through immigration controls'<sup>12</sup> in view of the absence of specific Parliamentary intervention to regulate what he refers to as 'the burgeoning surrogacy industry...propelled by the absence of cohesive legislation and the mushrooming Assisted Reproduction Technology (ART) clinics which wantonly advertise services for providing "Wombs for Rent"<sup>13</sup>.

### Conclusion

Despite concerns about Parliamentary delays in addressing perceived primary legislative need in India, as expressed by the writer of this article, Indian judges and practitioners are clearly not unaware of the important issues highlighted therein, and commendably innovative ways are being found of dealing with some of them even in the absence of that essentially specific primary legislation which would be preferred so as to provide the necessary substantive regulation. When English Law has for some time been suffering a similar lack of government focus on essential legislative needs in Family Law, the experience of another common law jurisdiction owing its origins to English Law provides valuable confirmation that in the wider Family Law community around the world all is not yet perfect either, and international cooperation has a role to play in harmonising the law relating to cross border issues. [Editor].

<sup>4</sup> Assisted Reproductive Technology.

<sup>5</sup> Such sales being actually banned by the Transplantation of Human Organs Act 1994.

<sup>6</sup> *The Tribune*, 3 December 2015.

<sup>7</sup> An enlarged version of this section of the text appeared in the Indian *Lawyers Update* of March 2015.

<sup>8</sup> Anil Malhotra and Ranjit Malhotra, *Surrogacy in India, A Law in the Making*, Universal Law Publishing co, New Delhi, India.

<sup>9</sup> See Anil Malhotra, Editorial & Opinion, *Daily Post*, 'Child rights protection law needs amendment for ensuring children equality before law, free and compulsory primary education, prohibition of trafficking et al'. 19 August 2015.

<sup>10</sup> On which Ranjit Malhotra has written in detail in *The Tribune* on line edition of 17 December, 2010.

<sup>11</sup> See Anil Malhotra, 'Regulatory but not a Restrictive Law' in the *Lawyers Update* of August 2015.

<sup>12</sup> (2012) 3 FLP 2 at p47. This on line journal, *Family Law and Practice*, a predecessor of the present journal, is no longer published, but the archive is to be found on the Editor's own website, www.frburton.com.

<sup>13</sup> *Ibid*, p47.

# The Scottish Approach to Family Law Reform

Frances Burton\*

News of a proposed new lobby of Parliament this autumn for reform of the English Law of Divorce once again raises the obvious query as to why apparently essential law reform is so easy in Scotland but so difficult in England and Wales. The new initiative is once again led by Resolution, the Solicitors' Family Law Association, and is this time aimed at achieving Parliamentary support for No Fault Divorce, which has long been advocated by the current Resolution Chairman, Nigel Shepherd.

There are many good reasons why English law should now adopt No Fault Divorce, not least that the modernisation of Family Justice generally is now increasingly relying on automated online systems for routine procedures, and if this is to succeed in the new, ever modernising, Family Court, a less complex system than that of the Matrimonial Causes Act 1973 will sooner or later inevitably be essential. However, if this latest initiative follows the path of earlier Resolution supported goals, such as the last 15 years' of failed Cohabitation Bills, some lessons might be learned from examining the Scottish approach – which, since such power was devolved to the Scottish Executive and Parliament, has achieved some success in Family Law reform generally, although their cohabitation reforms are perhaps the best known.

It is now nearly 10 years since the English Law Commission's reports on *their* Cohabitation work<sup>1</sup> was rejected by the Labour government which commissioned it, and over 5 years since the Coalition Government rejected the early evaluation of the Scottish Cohabitation Reforms by the Cambridge academic team<sup>2</sup>, for which it had earlier been said Ministers were waiting before taking any decision about implementing the reforms proposed by the English Law Commission in 2007: it is nearly as long since the Coalition decided that, in particular, Scotland's example was of no relevance to English law, since when the now conservative majority government has done nothing to further cohabitation reform, although they could well have supported the private members' Bill started in the House of Lords by Lord Marks of Henley on Thames (Jonathan Marks QC of the Family Bar) but have apparently declined to do so.

In the last ten years, however, Scotland has gone on to consider other Family Law reforms, for example, in 2009 the Scottish Law Commission published a report on Succession<sup>3</sup> followed by research conducted by the Scottish Consumer Council into awareness in Scotland of the importance of making a Will<sup>4</sup>, which resulted in a 2015 Bill which has now become the Succession (Scotland) Act 2016, given the Royal Assent in March 2016. A similar process updated Adoption Law in Scotland<sup>5</sup> where legislation followed the 2005 publication of the research report<sup>6</sup>, *Adoption: Better Choice for Our Children*. It is interesting to note that these research reports and subsequent legislation appear to start from a position of what would be appropriate or desirable for 'our' children<sup>7</sup> or families or indeed 'all' of Scotland's people<sup>8</sup>, which is possibly the foundation for the pragmatism which apparently characterises Scottish Family Law reform and propels the legislative process there.

It is appreciated that Scotland's Parliament is a much smaller legislative entity for a much smaller population than those of England and Wales, and with less extensive responsibilities and pressure of work, but it nevertheless seems surprising that Scotland can effect essential legislation for its people while the government and Parliament at Westminster appear even not to want to struggle to pass similarly important legislation for the English and Welsh. The clue may perhaps be in the focus employed, which is evident in the very title of the research report, Adoption 'for Our Children' and, famously, in the case of Cohabitation in Scotland, in the text of the Memorandum to the Scottish Parliament of 2005 which led to the Family Law (Scotland) Act 2006, which referred to benefits 'for all Scotland's families'<sup>9</sup>. It is also possibly a problem that the Westminster government has no specialist lawyer's leadership in the Cabinet on these issues, in that there has not been a legally qualified Lord Chancellor and Minister of Justice since the early days of the Coalition Government which took office in 2010. There may also be some influence of the Scottish pride in independence and effective ordering of issues concerning Scotland and Scottish people.

\*Senior Lecturer in Law, Buckinghamshire New University, Co-Director, International Centre for Family Law, Policy and Practice<sup>1</sup> Law Com No 179, Cohabitation: Financial Consequences of Relationship Breakdown, Consultation paper, 2006, and Law Com 307, Cohabitation: Financial Consequences of Relationship Breakdown, Final Report, 2007.

<sup>2</sup> Wasoff, F, Miles, J and Mordaunt, E, *Legal Practitioners' Perspectives on the Cohabitation Provisions of the Family Law (Scotland) Act 2006*, (2010) University of Cambridge Faculty of Law Research Paper No 11/03, available on SSRN, was also the subject of a subsequent article 'Cohabitation: Lessons From Research North of the Border' (2011) 23 *CFLQ* pp.302-322.

<sup>3</sup> SLC No 215.

<sup>4</sup> Wills and Awareness of Inheritance Rights in Scotland, [webarchive.nationalarchives.gov.uk](http://webarchive.nationalarchives.gov.uk).

<sup>5</sup> Adoption (Scotland) Act 2007.

<sup>6</sup> Of the Adoption Policy Review Group, [www.gov.scot/publications/2005/06/27140607/06107](http://www.gov.scot/publications/2005/06/27140607/06107).

<sup>7</sup> Terminology used in the title as well as the text of the Adoption research report.

<sup>8</sup> Terminology used in the Scottish Executives' Memorandum to the Scottish Parliament in 2005, ahead of the cohabitation reforms in the Family Law (Scotland) Act 2006.

<sup>9</sup> Scottish Executive. Family Law (Scotland) Bill, Policy memorandum 2005 ('the Memorandum'), [www.scottish.parliament.uk](http://www.scottish.parliament.uk),

## The background to Scottish reform

Scotland has always had its own legal heritage, sources of law and influences on both, and is proud of these differences, including its own Family Law (Scotland) Act 1985 dealing with financial provision on divorce, which demonstrates some strong distinctions from the equivalent English law, not least in how it deals with dividing the parties' assets on divorce and avoiding long term dependence of one party on the other (an issue on which English law has increasingly focussed recently in reported cases in which it has been suggested that this dependence is inappropriate in modern times, but without any firm underlying theory on such long term dependence being extracted).

It is not thus surprising that the Scots took the earliest opportunity they could to create some of their own legislation when the Scottish Executive decided in 2005 to reform a particular aspect of its Family Law by modernising its treatment of cohabiting families. Amongst other catalysts they have their own Law Commission, separate from England and Wales's<sup>10</sup> and which is taken very seriously in Scotland where Scots have remained jealous of their traditions and way of life, which have in any case been easy for them to highlight and maintain, as it is a country with a small population, spread over a wild, disparate and relatively large rural landscape. Thus they have not had to absorb immigrants and *their* cultures in the same way as has happened in England and Wales (particularly England). The Scots clearly see themselves as essentially separate from England, English Law and the English, whatever the political union within the EU: indeed recent events indicate that the feeling is probably mutual.

The Scots' unique discrete statutory regime addressing cohabitants' asset distribution claims on separation thus currently comes from the enactment of the Family Law (Scotland) Act 2006 ('the 2006 Act' or 'the Scottish Act') and is to some extent influenced by the background set out above. In this connection it must be noted that, in comparative law classificatory terms, Scotland is not technically a common law jurisdiction like England and Wales, but has a mixed common and civil law system.

Owing to the Union with England and Wales since 1707, it also follows that despite the fact that Scotland now has its own Parliament and Scottish Executive, there is also still some English legislation which applies to Scotland as well as the rest of the UK, but that this is alongside its own civil law influenced principles which endure in some contexts. This civil law element is because of certain civil law origins in the *ius civile*, - that is. Roman law - although the *ius civile* did not come directly from the Roman occupation but through the canon law of the Church: the Roman Empire never had much impact in Scotland which the Empire found unruly - quickly withdrawing behind the wall erected in the time of the Emperor Hadrian under whom construction began in AD122 to mark the northern extremity of their rule. Successive

provincial governors from the time of Caesar in 44BC had incessant trouble with the Scots from the moment of their invasion and colonisation of 'Britannia' (as they called England, Wales and Scotland), and never succeeded in subduing the Celts who lived there.

Thus the Scots originally ingested the Roman Law influence, which was well established by the time of Charlemagne, from their association with France, and the English never did anything to eradicate that, even after they repressed the Jacobite risings of 1715 and 1745, nor, as it happened, in the time of George IV (1820-1830) who actually tried to woo the Scots to a closer relationship with England, by adopting their tartans and appreciating their art and architecture, certainly a contrast of approach with, but no more successfully than, his great uncle, the Duke of Cumberland, who had repressed their rebellion with great severity in the previous century.

As a result of this historic 'baggage' and the civil law influence, it is perhaps not so surprising that the potential for learning any lessons from the Family Law (Scotland) Act 2006 was not received by government in England and Wales with much apparent enthusiasm, but a short summary of the Scots methodology and legislative process indicates the merit that has been overlooked.

## Nature of the Scottish scheme

Some brief detail of the Scottish cohabitation scheme indicates the broad outline of the system that Baroness Hale considers good enough that she was able to add, in - the now famous - paragraph 56 of her Supreme Court judgment in *Gow v Grant*, the view that 'English and Welsh cohabitants deserve nothing less'. It also gives some clues to why Family law reform is successfully achieved in a timely manner in Scotland and not at Westminster.

The Scottish cohabitants' legislation is an 'opt out' scheme as the parties can avoid the consequences by agreement in life or by will on death if they do not wish its provisions to apply to them. Compared to some other jurisdictions, such as Australia and New Zealand which more or less equate married and unmarried couples, the changes are modest.

Scottish cohabitants are defined in s 25(1) of the 2006 Act as a couple who 'are (or were) living together as if they were' husband and wife or civil partners: and the Act gives statutory guidance in s 25(2) as to how this is to be determined. Moreover this is done in a manner not dissimilar to the methodology historically widely used by UK welfare benefits assessments: that is to say, relevant factors include length and nature of the relationship and of any financial arrangements, although the Act does not refer to the existence of children nor to a minimum qualifying period as most other jurisdictions' schemes do.

Nevertheless, while first impressions of the provisions of the 2006 Scottish reforms are perhaps that they are not as

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<sup>10</sup> Law Commissions Act 1965, a statute of the UK Parliament, setting up the distinct English and Scottish Law Commissions. The Scottish Commission has the equivalent task in Scotland as that in London has for England, to advise the government on the law, in the Scottish Commission's case to review Scottish law.

clear and comprehensive as the Family Law (Scotland) Act 1985 is in respect of the law applying to spouses, the 2006 Act is undoubtedly superior to present provision for cohabitants' relationship breakdown in England and Wales, which still relies on the non-specific TOLATA remedies already mentioned, which are all that is currently available to separating cohabitants in English Law. An examination of the statute indicates its pragmatism and obvious rejection of any opportunity to get involved in the side issues which appear to have bedevilled the equivalent unsuccessful English attempts at similar reform. One of the clues to this Scottish success is the language employed: Scottish Family Law reform appears to be all about communication, as evidenced in the Scottish Executive's 2005 Memorandum to the Scottish Parliament, which was presented as 'not radical reform' but merely 'easing of certain legal difficulties'.

### **Framework of the Family Law (Scotland) Act 2006: the policy of 'easing of certain legal difficulties'<sup>11</sup>**

In accordance with the original 1992 aim of such reform, which had its origins in a Scottish Law Commission report of that time suggesting that reform was needed, the core provisions of the 2006 Act are not as comprehensive as those in respect of spouses in the 1985 Act, which provides a financial provision scheme effective on marriage breakdown and dissolution, and which shows the French influence in Scotland as it is based on valuing and dividing property and capital rather than awarding maintenance<sup>12</sup>.

The 1985 Act is itself not a community of property system as such, although it is not unlike those which pertain in European countries with civil codes. It nevertheless demonstrates some similarities to those systems, which, as already suggested, may owe something to a combination of the historical medieval treaty relationship with France known as 'the Auld Alliance'<sup>13</sup> and thus the long established influence of civil law.

The basic principle of the Scottish cohabitation scheme is that, as has been the case for spouses since the Family Law (Scotland) Act 1985 on separation and divorce, maintenance (known as 'aliment' in Scotland) is not usual but only awarded exceptionally, so that the financial consequences are normally confined to capital and property division together with maintenance for children only, but none for adults: although there *can* be ongoing support under the 1985 Act for a spouse in appropriate circumstances, this is neither routine nor usual unless there are special circumstances and then it would be short term and the 2006 Act, creating the cohabitants' system, follows the capital and property approach of the 1985 Act,

save that in the cohabitant system there is no power to order any maintenance payments at all.

The 1985 Act is without doubt a clearer, more articulated, system than English Law's Matrimonial Causes Act 1973, as Sir Mark Potter, the then President of the High Court Family Division, identified, when he commented on its 'clarity and certainty in the case of *Charman v Charman* (No 4) (2007). It is therefore no surprise that the 2006 Act, dealing with the breakdown of a cohabitation relationship, makes no provision for maintenance for a cohabitant either during or after cohabitation.

Instead s 28 provides capital orders of 3 sorts:

s 28(2)(a) (capital order in compensation for economic advantage gained by the defender from the pursuer's contributions, and for the pursuer's economic disadvantage suffered thereby);

s 28(2)(b) (capital order for payment towards the future 'economic burden' of child care;

s28(2)(c) (an interim order)

any of which must be applied for within one year of the cessation of cohabitation.

The Scottish academic, Professor Elaine Sutherland, is critical of the drafting of these provisions, in that there is lack of guidance on economic advantage and disadvantage in s 28(2)(a); 'untidy' language in s 29(2)(b) which does not make it clear whether periodical payments would be permitted instead of a capital payment, and which also does not cover the position of an 'accepted child' - the equivalent of the child 'treated' under English law as a 'child of the family'); and in all cases she finds that the one year time limit on application from the date of separation is too short, would lead to rushes to litigate and inhibit attempts to settle out of court. Baroness Hale agrees with her on the latter point: see further below.

Sutherland also examines the case law accumulated during the initial five year period 2006-2011 and concludes that judges were being frustrated by the comparative lack of guidance in determining economic advantage and disadvantage in s 28(2)(a) cases - especially compared to the 'crispness' of the 1985 Act for spouses and civil partners - and because there was no guidance in the Act as to the relevance of conduct, or of the existence of resources in making an award. It is, of course, possible that this might have been a concern in the minds of the ministers at Westminster when they decided to do nothing until further evidence of the Scottish experience was available, but one that could easily have been addressed in English drafting if the basic principles of the Scots scheme was found a useful prototype.

Sutherland also considers - as Baroness Hale does when

<sup>11</sup> This now famous phraseology was initially that of the 1992 Scottish Law Commission report on general reform of Scottish Family Law, which was then preserved in the Memorandum of the Scottish Executive to the Scottish Parliament when proposing the legislation in the 2006 Act. That legislation was presented not as radical reform but as a means of dealing with the Scottish cohabitants' social problem, which was the fact that the rising number of cohabitant families was not adequately addressed by their own outdated legal provision of recognising cohabitation as a common law concept of marriage by habit and repute, which might be compared to the inconvenience of English Law's unsuitable remedy of resort to TOLATA 1996. In Scotland, their antiquated law was of the common law marriage by habit and repute was formally abolished by the 2006 Act.

<sup>12</sup> Elaine Sutherland *Child and Family Law*, 2<sup>nd</sup> ed, (2008) W Green, paragraphs 16-017 to 16-186.

<sup>13</sup> Operative 1200 to 1564 when the canny Scottish government suddenly disclaimed their treaty of friendship with France and made a new treaty with England, in preparation for what they hoped would be recognition of their Stuart sovereigns as eventual successors to the English Crown owing to the common descent of Mary, Queen of Scots and Elizabeth I from Henry VII of England.

delivering judgment in *Gow v Grant* - that a s28(2)(b) order should permit periodical payments, and also variation when circumstances change, and that it should be made clear that the carer's loss of earnings should be relevant. Sutherland further considers that the position of caring costs for the 'accepted child' and 'what it means to be a step-parent' require further examination.

She acknowledges that some further guidance on s 28(2)(a) was given by the Inner House of the Court of Session - (on the Scottish leg of the *Gow v Grant* case - when that appeal was heard by that Court on 22 March 2011, before subsequent appeal to the Supreme Court). However she also commented that the Court of Session had not approached the matter with 'much enthusiasm' and had thus deprived future courts of useful guidance in interpreting terms. It is possible that the further consideration of the case when appealed to the Supreme Court in London has supplied any such deficiency in enthusiasm by the Court of Session, since - as may be seen below - Baroness Hale, herself a former academic who makes clear in her judgment that she has read the same research as Professor Sutherland, fortunately took the opportunity to address these and other practical issues.

However, Sutherland's<sup>14</sup> main comment is that the initiative for this legislation was so long prior to its enactment - 1992, over 20 years prior - and that while some of the problems identified could be addressed by statutory amendment, the more fundamental question of what is the *correct* legal provision for contemporary cohabitants is urgent, since she says that some judges have questioned whether the Act's 'modest reforms' are *adequate* for the legal recognition of cohabitants in an era of increased 'popularity and social acceptability over the intervening years'.

While this may be true of the Scottish Act, since it is clear that the Executive was initially cautious in introducing its reforms as their Memorandum prepared for the Scottish Parliament indicates, any imperfection in the detail is also a clear reason why Scotland manages to enact reforming Family Law statutes, thus exhibiting superior proactive creativity to that of England and Wales where the preferred approach has seemed, over a long period in which reform has been clearly needed, to be not to address the matter at all.

In view of the fact that all the English evidence gathered, both at the Law Commission in their 2006-7 work and elsewhere, of the need for such reform, it must be asked why the English government has persisted in its stubbornly negative stance, which does not adequately explain the absence of any drive for reform at all, besides which some initial, potentially valid, questions were duly answered by the Wasoff et al early research on the operation of the Scottish scheme.

### **Why did the English government really decline to implement the Law Commission's recommendations and why did they blame that on the Scots?**

In fact, there were, apparently, a number of reasons, apart

from mere petulance with the Scots, which in the context of the paucity of official statement on the matter seem mainly to be summarised as

- (i) potential costs of legislating for England and Wales, and
- (ii) a belief that the Scottish system was not appropriate for English law. There are, nevertheless, as strong arguments *against* these two reasons, as it appears have been claimed by the only official statements advanced for maintaining the clearly unsatisfactory English law *status quo*.

### **Cost of reform**

The 'costs' argument originates in 2008, following the publication of the Law Commission's 2007 recommendations in the Final Report on their work of 2006-7, when Bridget Prentice, the Justice Minister of the time, announced in Parliament that the government would not take any further action until the likely costs and benefits to the jurisdiction of England and Wales had been evaluated. For this, it was intended to await further empirical research. This research<sup>15</sup> by the Wasoff et al team - funded by the Nuffield Foundation - sought to capture Scottish practitioners' practical experience of the operation of the new Scottish law over a 3 year period from its implementation.

The study was not restricted to cases which had reached court but was based on interviews with 97 legal practitioners, mostly solicitors, whose clients had consulted them about cohabitation under the new legislation. The project used questionnaires and 19 follow up telephone interviews. It enabled the researchers to do precisely what the Minister had highlighted in 2008 as important for England and Wales, that is, to extrapolate from their research the conclusion that there was no significant likely extra delivery cost in adopting a similar scheme in our own jurisdiction. Although fairly quickly available, this research was surprisingly rejected as inapplicable to a decision about English law, by a further statement in 2011: surprisingly, because the research addressed precisely what the English government wanted to know about costs.

Taking the costs argument first, it is hard to see why, even if the Scottish scheme was thought to be a useless prototype, the Law Commissioner's project was not taken forward in England and Wales, or at least something similar introduced - even perhaps *simpler* if there were thought to be likely Parliamentary difficulties in agreeing detail. At the lowest level of change, perhaps some suitably adjusted version of the outline scheme suggested by the Law Commission's work could have been beneficial. Absence of *any* legislation at all is now particularly disadvantageous.

Given the obvious professional and public unease about both contemporary lack of legal aid for litigation, and lack of either any specific legislation for the large and growing cohabitant constituency to resolve their own disputes

<sup>14</sup> Elaine Sutherland 'The Easing of Certain Legal Difficulties: Limited Legal Recognition of Cohabitation Under Scots Law', in Bill Atkin (ed) *The International Survey of Family Law 2011*, Jordan Publishing 2011, pp335-366.

<sup>15</sup> Wasoff, F, et al, fn2 above.

themselves, or any clarity of the law on the subject of their legal position on separation so that they might consider autonomous agreements on entering their relationships, there would be some merit in legislation that would go some way to address these concerns, despite the sterling efforts of the Supreme Court in clarifying, in so far as they can, the TOLATA regime which currently governs cohabitants' asset division on separation.

The lowest level requirement, now urgent, is obviously to achieve clarity in some straightforward legislation which might be understood by separating cohabitants with average lay appreciation of access to justice. The level of understanding required is that suitable for addressing litigants in person, either seeking an agreed settlement with their former partners, or the prospect of litigation: moreover this urgent need is highlighted by the most recent cohabitants' case to come before the High Court, *Seagrove v Sullivan*<sup>16</sup> where excess costs had already been run up in attempts to litigate the property aspects in the Chancery Division before the case was consolidated with a Child Law application in the Family Court.

The present basic lack of information is clearly unsatisfactory for the ordinary citizen in both practical and jurisprudential terms, since the present position in the context of current legal aid constraints is broadly of official encouragement to settle all legal disputes by mediation, if necessary without legal advice unless the parties can pay for that privately; and for costs not to be wasted on unnecessary litigation: that is, neither costs of the individuals concerned, nor those of the courts and judiciary. How can the public policy work towards this goal without legal aid, and without clear legislation which a lay person acting as an LIP can understand?

Such a non-court dispute resolution policy clearly needs to be supported with accessible infrastructure, which adoption in some form of the Law Commission's 2006-7 work would at least have supplied. It may be argued that the position has now years later been recently slightly improved by the Supreme Court's clarification in *Jones v Kernott* of the English Law of Trusts as it applies to the family home, whether that home is of a married or unmarried couple. However the latest potential for improvement in the processes open to *cohabitants* on separation is because of a judgment of Mr Justice Holman as recently as 3 December 2014 in what may now turn out to be the watershed case of *Seagrove v Sullivan*<sup>17</sup> precisely because it addressed the enormous cost of TOLATA 1996 litigation.

However this judgment was obviously directed not at the lay participants in the case, or at other potential lay litigants in the same sort of dispute, but at the specialist professional advisers, the practitioners normally involved where the parties can afford to pay them. Holman J's signposting on the significant Supreme Court judicial clarification cohabitants in *Jones v Kernott*, points out that such cases now only require

citation of that Court's two most recent seminal cases, *Stack v Dowden* in 2007 and *Jones v Kernott* in 2011, rather than the dozens previously habitually relied on by practitioners.

Nevertheless it is still likely to be the case that the average litigant in person will not be particularly grateful, or well served, to be told that it is only necessary to master two long complex judgments of the country's highest appeal court, especially when one of those is still *Stack v Dowden*, not one of the easiest to understand, even with the sufficient background in Legal Method of a qualifying law degree, from which the average 'LIP' usually has not benefited!

Moreover, *Seagrove v Sullivan* inadvertently came before a Family-judge - rather than the substantive hearing being placed in a Chancery list - because it was consolidated with a Children Act 1989 application, which must be made in the Family Court, so that the TOLATA portion of the dispute was able to be moved from the Chancery Division where the child issues could not conveniently be determined. It was also a case where the judge was particularly outspoken about both the excess paper and excessive cost incurred by the parties in unnecessarily citing to him 32 authorities now overtaken by the analyses of the Supreme Court in the two key cases cited that he actually considered relevant. Thus, he was able to say, it should no longer be 'necessary to look beyond those two authorities', making the remaining 30 largely redundant - though he did also concede, without going into further detail, that some of those *might* be relevant to a particular theme being pursued by counsel for one of the parties.

The judge in this case nevertheless also highlighted that the substantive dispute was only over £500,000 making the costs aspect of the court fight disproportionate, and added that the male cohabitant, a businessman, should have realised this.

A businessman is not, however, a lawyer (unless he also happens to be so qualified) and it is, of course, a giant leap of logic, to suggest that because a party to such a dispute is a businessman, he should, as a layman also be expected himself to research the law, which happily was not necessary in that case since the parties had been able to afford legal advice - unlike many 'ordinary' lay cohabitants, since the Law Commission in 2006-7 identified that cohabitation is a classless syndrome.

It is also important to note that the major strand of the judge's attack on the excess of authority being presented to him was in connection with the overriding objective of both the CPR 1998 and the FPR 2010, that is to decide cases justly *and at minimum cost*, a consideration which should have been firmly in the mind of the government Minister when she made her announcement about rejection of any analogy to be drawn for English law from the Scottish system in 2008.

It is therefore extremely difficult to defend the Minister's 2008 announcement, even more so in 2016 than in 2008, since it is now known that the origins of the subsequent public funding crisis which ultimately resulted in the LASPO

<sup>16</sup> [2014] EWHC Fam 1410.

<sup>17</sup> *Ibid.*



2012 legal aid cuts lay in precisely the same period, and indeed also coincided with the initiative for the most recent official investigations of costs limitation, which was, first, that taken on by Lord Justice Jackson in November 2008, immediately following, secondly, the Master of the Rolls' Costs Review also in 2008, of at least of the second of which the Justice Minister might be supposed to have been aware when she made her statement in September 2008, only two months previously.

As a result of these civil litigation cost cutting initiatives, Lord Justice Jackson went immediately to work on his review, so quickly that he delivered his Preliminary Report in May 2009 and his eventual findings in his Final Report in 2010. In short, it would therefore seem that the Labour government in which Bridget Prentice was Justice Minister in 2008 was well aware of the ongoing crises in civil litigation generally and legal aid in particular, both of which had been bedevilling access to justice since initiatives in the era of Lord Mackay of Clashfern as Lord Chancellor in the late 1980s when he published his Green Paper<sup>18</sup> which initiated the long period of civil costs reviews which have followed ever since, and indeed have been a matter of government concern since the Royal Commission on Legal Services chaired by Sir Henry Benson, ten years earlier<sup>19</sup>.

It may therefore be safely concluded that despite this plethora of evidence in 2008 that costs saving was at least as urgent as it had been for many years, it was more likely that there was simply no political will to legislate for cohabitants, so that waiting for evaluation of the Scottish scheme in terms of costs and benefits to the jurisdiction of England and Wales was a fairly threadbare excuse, only just credible even at that date. Even then it was not believed by Resolution, which went straight into a project to support the first of Lord Lester's 2008 and 2009 private member's Bills in the House of Lords.

How the government stance on the irrelevance of the Scottish Act was maintainable *after* the publication of the Wasoff *et al* research in 2010 is even more difficult to understand, as the Supreme Court has made clear in the most recent of the Justices' seminal judgments, *Jones v Kernott* in 2011, another point referred to by Holman J.

The Supreme Court would no doubt be pleased to agree with his views expressed in the *Seagrove v Sullivan* judgment, since their own collected judgments specifically comment, in the latter of their two key cases to which he refers, on the fact that, in the absence of discrete legislation catering for separating cohabitants, the judiciary has been obliged to fill the gap<sup>20</sup>. Particularly apt in that respect is the comment of Lord Wilson in *Jones v Kernott*:

'In the light of the continued failure of Parliament to confer upon the courts limited redistributive powers in relation to the property of each party upon the breakdown of a non-marital relationship, I

warmly applaud the development of the law of equity, spear-headed by Lady Hale and Lord Walker in their speeches in *Stack v Dowden* ([2007] AC 432, and reiterated in their judgment in the present appeal, that the common intention which impresses a constructive trust upon the legal ownership of the family home can be *imputed* to the parties to the relationship'<sup>21</sup>.

Nevertheless, this is hardly a satisfactory source for the average LIP cohabitant to access in order to discern the likely application of the law in relation to his or her own case, in particular because until the 2007 case of *Stack v Dowden* was clarified in *Jones v Kernott* in 2011, even Holman J could not have made the statement he now has in *Seagrove v Sullivan*, a situation which perhaps might also have been obvious to the Minister at the time of her 2008 statement recorded in Hansard. This is because in 2008 the Supreme Court would have been the first to admit that their reasoning in *Stack v Dowden* – progress as it was – was nevertheless not by any means a final clarification of the law, because they explicitly took the opportunity in *Jones v Kernott* in 2011 to update and – in their own words – 'to clarify' that earlier decision.

Moreover, there was certainly no evidence to suggest that any new concerns might have arisen in the intervening two years between the Minister's statement in 2008 and the researchers' conclusions in 2010. Similarities of principle and practical application between the Scottish system and the Law Commission's recommendations had already been confirmed by the Law Commissioner, Stuart Bridge, at the time that the Commission had considered the then only just available Scottish legislation while their English project was still ongoing<sup>22</sup>. It might therefore have at least been thought that perhaps the availability of such a scheme in England and Wales might have had a costs neutral impact on existing expense, rather than causing an explosion of unaffordable costs.

Further, this result might not least have been achievable since the commonly used remedies available to cohabitants in England and Wales have always been to resort to the standard trust remedies provided by either fully contested TOLATA applications, that is. under the Trusts of Land and Appointment of Trustees Act 1996, commonly called 'TOLATA 1996', or under Schedule 1 and s 15 of the Children Act 1989, neither of which has ever been conspicuously inexpensive in terms of judicial time, court costs and legal aid, even before Holman, J protested about the plethora of lever arch files containing the 30 surplus authorities of which he has been recently complaining.

On the other hand, a discrete system might have actually *saved* costs, in terms of public awareness, consideration by lawyers and clients alike of the developing culture of DR or private settlement through solicitor negotiation, not to

<sup>18</sup> Lord Mackay of Clashfern 'The Work and Organisation of the Legal Profession', Lord Chancellor's Department, 1989.

<sup>19</sup> Sir Henry Benson, GBE, *Royal Commission on Legal Services, Final Report*, HMSO, 1979.

<sup>20</sup> *Kernott v Jones* [2011] UKSC 53, *per* Lord Collins [57].

<sup>21</sup> *Ibid*, [70].

<sup>22</sup> Bridge, S, 'Money, Marriage and Cohabitation', (2006) *36 Family Law*, p.641.

mention client satisfaction in avoiding litigation at all.

Indeed this is precisely what Wasoff *et al* concluded in stating that

‘reform would not simply create new business. It would, to some extent, displace existing remedies, and provide a more appropriate, productive and possibly more cost effective avenue’<sup>23</sup>.

If the costs saving aspect was not readily obvious to the government spokesperson in 2008, it must surely have been so by the time of the next statement, on 6 September 2011, when the then Justice Minister Jonathan Djanogly announced in a written statement that, following the Wasoff *et al* research, there were no plans to take forward any reforms in England and Wales. The subsequent audible silence from the recent coalition government, which in effect confirmed this stance, was equally illogical, since it has been their five years of office, 2010-2015, which has had to contend with the problems of austerity in general, and the implementation of severely truncated legal aid from April 2013 in particular, and it goes without saying that one thing that the present Conservative government could do to save some public money would be to provide support to an easily accessible government sponsored Cohabitants’ Rights Bill.

### **The Scottish scheme and English law**

The second reason for declining any assistance from the Scottish scheme seems to have been adopted by the government because what might have been a valid costs argument eventually appeared clearly not to have force, so that it was soon obvious that it would be necessary to rely on the alternative ground of resistance at which both Bridget Prentice and Jonathan Djanogly had respectively hinted, that is that there is some perception that the Scottish system is in some way inappropriate to form even a signpost towards a similar scheme for England and Wales – or perhaps even a *dissimilar* scheme if the Scots system was not for some reason attractive.

The only result of this is arguably that it has allowed time to show that the very scheme already now established in Scotland *works for the Scots*, and has also now been firmly supported by Lady Hale in the Supreme Court, in judgments in both *Jones v Kernott* and *Gow v Grant*, in the latter of which she had the opportunity to consider the practicality of the application of the Scots scheme in the first appeal to reach the Westminster Supreme Court judiciary under the very same Family Law (Scotland) Act 2006 which is apparently not welcomed on behalf of the Westminster government by the UK Ministry of Justice.

On the face of it, the apparent reluctance to take any inspiration from Scotland is difficult to follow, given that this is a part of the United Kingdom which is not only adjacent to England but in such geographical proximity that there are already certain irritants in different systems in other fields which can vary widely depending on whether a claimant lives North or South of the Border<sup>24</sup>.

With regard to the law, while there is a certain divergence in many areas of, respectively, Scottish and English law, and some unfamiliar points of terminology, any study of reports of the cases decided to date under the 2006 Act in Scotland is easy to follow, although it is true that procedural systems and the legal vocabulary in Scotland are different

However it does not appear from any evidence currently available that there is an identifiably distinct division of opinion in either moral or policy terms in connection with potential reform of the law relating to cohabitants, in either Scotland, on the one hand, or England and Wales on the other. Much has been made in England and Wales of not equating marriage and cohabitation in any way, but Scotland has specifically followed this approach also. The Scottish Ministers said so explicitly in their first announcements of their intention to legislate ‘for Scottish families’<sup>25</sup>.

It seems, therefore, that there must be some other reason for the early rejection by English Ministers of valuable practical insights that might otherwise be obtained from the Scottish reforms, especially as the United Kingdom has not been slow to follow even more fundamental initiatives where other jurisdictions, both common and civil law, have been proactive and innovative in leading.

### **Further academic evaluation five years from the Act**

The tardiness and scepticism of the English government at Westminster in progressing the Law Commission’s recommendations has been widely criticised, both in the media and academe<sup>26</sup>. Professor Elaine Sutherland of Stirling Law School in the University of Stirling has looked in more depth at the operation of the Act in a chapter for the International Society of Family Law’s annual survey in 2011 and at the problem of making Scottish law more accessible and appropriate for Scottish people in the annual survey of 2013<sup>27</sup>. She has suggested both that there should be some amendments to the legislation but that, on assessing the first five years of judicial decisions as to whether they are ‘realising the modest goals set for them’, there should also be a ‘fresh evaluation of the goals the legal system should be seeking to achieve in regulating cohabitation’.

Similarly, Frankie McCarthy<sup>28</sup> has analysed some of the

<sup>23</sup> See fn2 above.

<sup>24</sup> For example, different, more advantageous, treatment of university fees and prescription charges in Scotland, in respect of which much ‘grumbling’ can often be heard in the Northern Counties of England, where these benefits are not available!

<sup>25</sup> See further below in connection with the original Memorandum by Scottish Ministers to the Scottish Parliament where they set out their stall for Scottish people.

<sup>26</sup> Melissa Darnborough, ‘Untidy Lives: A Missed Opportunity for Reform’, School of Law, Manchester Metropolitan University.

<sup>27</sup> Elaine Sutherland, ‘The Easing of Certain Legal Difficulties’, in Bill Atkin (ed) *International Survey of Family Law 2011*, Family Law, Jordan Publishing Limited, p335; in Bill Atkin (ed) *International Survey of Family Law 2013*, ‘Can Family Law Be Made More Accessible Family Law, Jordan Publishing, p333.

<sup>28</sup> Frankie McCarthy, ‘Cohabitation: lessons from North of the Border?’ (2011) *CFLQ* 277. Frankie McCarthy, ‘Playing the Percentages: New Zealand, Scotland and a global solution to the consequences of non-marital relationships’ (2011) *23 CFLQ*, 277.

early 2006 Act cases and commented on the confusion caused by the judiciary's lack of adequate guidance in the Act as to the underlying principles relevant to the distributive orders that may be made under s 28. This article offers three redistributive rationales based on analysis of the first 15 cases under the Act, which are distinguished as the partnership, compensation and restitution models. However this article dates from 2011 before *Gow v Grant* reached the Supreme Court and the Act found at least limited favour with Baroness Hale who shared Professor Sutherland's criticisms, but overall found the scheme workable. A further article by McCarthy in the *New Zealand Universities Law Review*<sup>29</sup>, also in 2011, compares Scotland's and New Zealand's schemes and finds the New Zealand system, which is based on amendments to their Property Relationships Act to include cohabitants, is considered more useful since it approaches the problem from the point of view of existing spousal provision on marital breakdown. Indeed, this possibility is also canvassed in the CFLQ article already mentioned<sup>30</sup>.

There are also other new commentators on the 2006 Act who agree with McCarthy's concerns about lack of guidance for judges deciding cases under s 28, for example Malcolm, Kendall and Kellas<sup>31</sup> share McCarthy's issues with the uncertainty of outcomes under the present statute. Their monograph, which is practitioner focussed, both favours the abolition of the former – more uncertain-outcomes of the old cohabitation doctrine of irregular marriage by habit and repute and compares the fact of legislation in Scotland favourably with the position in England, on which they include some coverage in case their readers have a client south of the border. This really highlights the practical concerns about a scheme in Scotland and nothing in England and Wales, since one cannot compare TOLATA, even clarified by the Supreme Court, with the Scots 2006 Act for practicality and user friendliness.

The Wasoff *et al* team have also written further on their research project in 2012<sup>32</sup> in the *Journal of Social Welfare*, although it is unlikely that the Ministry of Justice in Westminster would have had the opportunity to read these later comments on cohabitation law reform. Perhaps the academic and practitioner comments on the Scottish scheme is the basis of the caution exhibited at Westminster. If so, the government has obviously not looked any further into either the background or the ongoing implementation of the 2006 Act in Scotland, which clearly had defined goals and has had some positive results, and which did not really need to be subjected to the perfectionism that the Westminster government has been claiming, especially since what England

and Wales has at present with *no cohabitation reform at all* is far from perfect!

### What Scotland was trying to achieve

The 'goal' of the Scottish reform is to be found in a recommendation of the original Scottish Law Commission's Report, which was that any reform

'should neither undermine marriage, nor undermine the freedom of those who have deliberately opted out of marriage ... [and] ... should be confined to the easing of certain legal difficulties and the remedying of certain situations which are widely perceived as being harsh and unfair.'<sup>33</sup>

This, so far, is almost exactly on all fours with the ultra-cautious approach of the English Law Commission in 2006-7. This very similar Scottish recommendation was not implemented until after Devolution, when the Scottish Executive set out in the *Family Law (Scotland) Bill: Policy Memorandum*, usually referred to as 'the Memorandum', which was presented to the Scottish Parliament on 5 February 2005, that the goal was

'to provide a clearer statutory basis for recognising when a relationship is a cohabiting relationship; and a set of principles and basic rights to protect vulnerable people either on the breakdown of a relationship, or when a partner dies. The Scottish Ministers do not intend to create a new legal status for cohabitants. It is not the intention that marriage-equivalent legal rights should accrue to cohabiting couples, nor is it the intention to undermine the freedom of those who have deliberately opted out of marriage or of civil partnership.'

This again is a mirror of the English Law Commission's approach, in which the Commission was absolutely committed, in 2006-7, to *not* creating a new cohabitant status but providing some practical alternative to the complex and inappropriate litigation which was otherwise the only official way of resolving disputes not addressed by separating cohabitants themselves. These twin points of 'no separate status' and 'no undermining of marriage' are significant, and should obviously be noted as key positive factors if the Scottish scheme is to be any effective signpost for potential English legislation. They also appear historically always to have been key non-negotiable issues in England and Wales – whether or not that is now still appropriate, which is entirely another matter for debate, now that much more time has passed and other developments have occurred in English Family Law and in the perception of the family<sup>34</sup>. Not least of

<sup>29</sup> Frankie McCarthy, 'Playing the Percentages: New Zealand, Scotland and a global solution to the consequences of non-marital relationships' (2011) 24(4) *NZULR* 499-522.

<sup>30</sup> See fn2.

<sup>31</sup> Kirsty Malcolm, Fiona Kendall and Dorothy Kellas, *Cohabitation*, 2<sup>nd</sup> edn, 2011, Sweet & Maxwell.

<sup>32</sup> Miles, J, Wasoff, F and Mordaunt, E, 'Reforming Family Law – the case of cohabitation: 'things may not work out as you expect' (2012) 34(2) *Journal of Social Welfare and Family*, 167,

<sup>33</sup> Scottish Law Commission, *Report on Family Law*, 1992, Scot Law Com Mo 135.2, para 16.1.

<sup>34</sup> Such as the Human Fertilisation and Embryology Act 2008 (recognition of 2 female parents of a child with no legal father); Marriage (Same Sex Couples) Act 2013 (legal marriage of same sex couples effected by amendment of the Marriage Act 1949 and Matrimonial Causes Act 1973) which have between them completely reconfigured the concept of the family including for procreative purposes.

these other and later developments must be included the ONS' discovery in the statistics from the 2011 Census that the influence of religion has now significantly declined in English life.

But while this overall Scottish stance looks very similar to the English Law Commission's recommendations towards reform - in particular in not establishing a separate status of 'cohabitant' - when the Scottish scheme was finally rolled out, the Scottish Act in fact went further in making provision for some rebuttable presumptions about equal ownership of property during cohabitation. The statute includes provisions on the ownership of household chattels (but not motor vehicles, securities and animals) and money (which includes any housekeeper's allowance), as well as providing for very similar legal redress on relationship breakdown as the English Law Commission's. It has also provided for applications on a partner's death: in other words, addressing important practicalities, and despite the criticisms about lack of guidance for the s 28 orders, the Act also includes a practical criteria checklist for judges to determine whether there was a 'cohabitation' in the first place: Family Law (Scotland) Act 2006, s 25, a feature replicated in New Zealand.

In effect, it must therefore be recognised that Scotland *has*, therefore, created a recognisably separate identity for the cohabitants' situation - a manner of living which has legal consequences but does not claim to be a 'status' as such. Indeed it is on the contrary formally stated that as a matter of policy this is neither the intention nor the effect of the reform. Possibly this statement was made with the intention of providing a convenient fig leaf behind which the average Scot, being content with the statement, would not look in detail, and as such a practical strategy designed to push the new enactment through with minimum likely media fuss. Alternatively, perhaps this was intended to avoid other disturbance which might rock the boat on what, on the face of it, already seemed utterly calm waters, since adverse media attention does not seem to have been evident.

This, of course, is fundamentally unlike the public reaction which was generated by the *Daily Mail* in England and Wales when the Family Act 1996 was being debated in Parliament, with a view to giving cohabitants quite modest protection from domestic violence alongside spouses - albeit explicitly on a lower level - an occurrence which seems to have had a lasting impact in England and Wales whenever any further cohabitation reform is contemplated.

What the Scots have *not* done, as was stated in the Memorandum they would *not* wish to do, is to *replicate* marriage in any way, either exactly, or in a reduced 'second class' form. This Scottish scheme and its apparently peaceful reception in Scotland should, therefore, in theory have chimed harmoniously with the expressed intentions of the English Law Commission's approach, although the methods are in no way identical.

Nevertheless, while it cannot be said that there has been

no criticism, the academic, judicial and professional comment, either from legal or lay sources, has been of the nature of suggested improvement rather than fundamental objection, and as such what has been done has comparative value for the purposes of considering a potential scheme for England and Wales, Scotland's near territorial and political neighbour.

In particular, Sutherland's contribution to the debate, in the *International Survey of Family Law 2011*, is useful, since she spends only half the year in Scotland annually: for the other half of each year she holds a similar professorial appointment in the USA, where cohabitants' rights differ according to the individual state, and brings to her expertise in the field her background at Lewis & Clark Law School in Portland, Oregon, a state which does *not* in fact give either the same or similar rights to cohabitants as to married couples, who must otherwise make a cohabitation agreement if they wish to address their situation formally.

### **The impact in English Law of *Gow v Grant* (correctly on appeal *Grant v Gow*) in the Supreme Court**

Anecdotally, both academics and practitioners remember Baroness Hale expressly commenting on the *complexity* which she then perceived of the English Law Commission's recommendations at the time of their 2007 Final Report, and then on the early Scottish decisions where initial impressions were that the Scottish judges were experiencing difficulties of interpretation of Scotland's 2006 Act, such as in the early conflicting decisions on a point of interpretation by two Scottish Judges, Lord Matthews in *M v S* (in 2008)<sup>35</sup>, and Sheriff Hogg in *Jamieson v Rodhouse* (in 2009)<sup>36</sup>, as to whether ss 8-10 of the 1985 Act were relevant to determinations under that of 2006, which was only settled by the decision of the Inner House in the *Gow v Grant* appeal there, that the 1985 Act was *not relevant*, owing to the radically different purposes of the two Acts.

However when *Gow v Grant* finally came to the Supreme Court she appears to have had no such concerns, at least about the Scottish Act. While she did not give the leading judgment in the case which was that of Lord Hope, the Deputy President, she agreed that 'the appeal should be allowed for the reasons given by Lord Hope'<sup>37</sup> and then elected to 'add a few words because there are lessons to be learned from this case for England and Wales'.

It is in respect of this detailed commentary in her paragraphs 44-56 that she delivers significant argument for reform in English law, although both suggesting some potential amendments which might benefit Scotland and drawing attention to some practical problems that might be relevant to a scheme for England and Wales. She went on to highlight both the government apathy in 2008 and 2011, including its finally ignoring the Wasoff *et al* research mentioned above. She further included mention of the Law Commission's much more proactive response, delivered by Professor Cooke, who was leading the Family team at the

<sup>35</sup> *M v S* (2008) SLT 871.

<sup>36</sup> *Jamieson v Rodhouse* (2009) Fam LR 34.

<sup>37</sup> [2012] UKSC 29 [44].

Commission, but working on other issues by then, at the time of the Djanogly announcement in 2011 of abandonment of their scheme.

### **Baroness Hale's commentary: Five lessons to be learned**

Baroness Hale conveniently marshalled her commentary in paragraphs 44-56 in grouping no less than five observable outcomes of experience of the Scottish scheme which do significantly build on the 2006-7 work of the Law Commission:

- (i) Need for reform in English Law.
- (ii) Any reform needs to cater for a wide variety of situations, as the Law Commission's exemplar case studies in its Reports did not, for example, include engaged couples who were intending to marry, and that the marriage might never happen, still allowing disadvantage of one partner to arise, even without necessary advantage to the other. The relevance of this was obvious, as Mrs Gow had only moved in with Mr Grant on this basis and had left the relationship the worse off.
- (iii) Lack of definition of cohabitation or length of the period of cohabitation had not proved a problem in Scotland.
- (iv) Compensation principles were sometimes difficult to apply and a provision to enable a court to do what was 'just and equitable', as contained in one of Lord Lester's Bills, might be more appropriate.
- (v) Flexibility of remedy is important – the Scottish system was preferable in this instance rather than the Law Commission's more rigid compensatory approach, though both schemes had recommendations of value: for example a checklist might help the English scheme and the potential for periodical payments assist the Scots'.

### **Baroness Hale's Three key points**

In respect of the first of these lessons to be learned Lady Hale identified three separate key points which could be extracted in relation to a possible English system, and which considering her background as a distinguished career academic, teaching and writing extensively on Family law, and her subsequent experience in the High Court and Court of Appeal, unsurprisingly could not be better targeted:

#### **The need for such a scheme in England and Wales.**

The Hale commentary loses no opportunity to highlight this, a relevant point since the Law Commission - while invited by the government, apparently urgently, to undertake the 2006-7 work - was clearly disappointed not to have seen its recommendations adopted<sup>38</sup>. This was, moreover, although

their recommendations were broadly similar to those of the Scottish scheme, in that there was no intention to replicate in any way the incidence of financial provision on breakdown of formal marriage in the case of cohabitation breakdown, nor to involve cohabitants, who had chosen that alternative to marriage, in any similar principles of sharing of property nor maintenance of one another if they wished to make alternative arrangements. Instead, the two systems adopted the similar approach of a compensation scheme for economic advantages and disadvantages, although the detail of each was distinct from the other.

#### **The fact that the government had not apparently given any weight to the conclusion in the Wasoff *et al* research.**

This was that

'the introduction of broadly similar provisions in England and Wales would not place significant additional demands on court and legal aid resources'<sup>39</sup>.

She coupled this with the fact that Professor Elizabeth Cooke, the Law Commissioner most recently still in charge of the Family Law programme at the Law Commission, had, on the Minister's announcement that the government would not take forward any reform at the present time, expressed the hope that 'implementation would not be delayed beyond the early days of the next Parliament in view of the hardship and injustice caused by the present law', which was 'uncertain and expensive to apply', 'not designed for cohabitants' and often giving 'rise to results that are unjust'. She also drew attention to a further useful research item in the 'Miles *et al*' article in a leading Family law journal<sup>40</sup> on the Law Commission's approach to cost effectively addressing quantification of retained benefit which was the core of their system.

#### **The fact that there had already been ample justification for change in the law.**

She found this justification in the 'long standing judicial calls for reform - dating back at least as far as the case of *Burns v Burns* in 1984 - and in 'the Law Commission's analysis of the deficiencies in the present law and the injustices which can result'; the demographic evidence of births to cohabitants outside marriage, and by the widespread belief in the non-existent status of 'common law marriage', so that 'there was no need to wait for experience from north of the border to make the case for reform'<sup>41</sup>.

The other two points made were (a) that any definition of cohabitation should not be too prescriptive since the Law Commission's Reports' example case studies did not include some obvious cohabitation contexts, such as those of couples who were only cohabiting as they were engaged to be married,

<sup>38</sup> Bridge, S, 'Cohabitation: The Law Commission's Recommendations for Reform of the Law', Family Law Week, www.familylawweek.co.uk, 2007 Archive; Elizabeth Cooke, *Response from the Law Commission*, 6 September 2011 also published in *The Times* and other broadsheets.

<sup>39</sup> See fn2 above.

<sup>40</sup> This was in fact the Wasoff *et al* article in CFLQ, cited in n2 above.

<sup>41</sup> *Gow v Grant*, UKSC 29 [50].

e.g. Mrs Gow who only agreed to move in with Mr Grant if they were engaged and were ultimately to marry<sup>42</sup>, a situation which she said was widely supported by research of Barlow *et al*; and (b) flexibility of remedy and ability to address a situation in a way that was flexible and fair, as to which see further below.

These three main points which emerge from Baroness Hale's first additional 'few words' are a powerful summary in themselves of the rationale for considering whether there should be some harmonisation with new law in a part of the United Kingdom which has not only grappled with what appear to be identical social and demographic pressures to those found in England and Wales, but in doing so has achieved a result, whereas the English Law Commission has, for some reason, not had its recommendations received with any official enthusiasm. This in itself seems worth closer examination in that appeals from what are now two widely different systems in relation to cohabitants arrive at the same highest court, the Supreme Court in London, which cannot be convenient or appropriate. This must be especially so, for example, when potential appellants under the two disparate systems may reside respectively in either Northumberland or the Scottish Borders and live no more than a dozen miles apart, which is little distance justifying determination under the completely different systems of law which will apply to their respective circumstances when both are UK citizens and citizens of the same EU member state.

Indeed, if there are arguments for harmonisation of *marital* property systems within the European Union, because of the professional, employment and therefore family mobility which contributes significantly to the child abduction problems addressed by the Hague Convention with the aim of preventing adverse impact on children and their families, there must be no less potential adverse impact on children and their families in disparate *cohabitation* provision. Such cross border problems were often articulated in international property cases by Lord Justice Thorpe, when Head of International Family Justice. Again, this must be especially so when in Scotland there is a coherent scheme, albeit that it has room for improvement, but a few miles south of the border in England and Wales there is *none*.

Thus besides the argument for a scheme for England and Wales - now that Scotland has legislated - there must be some argument for at least some basic similarity of provision, even if detail differs, as indeed it does between English and Scottish law in some other respects, just as there are distinctions between different legislation either said of the English Channel.

The second of Baroness Hale's observations on the Scottish experience was that the worked examples in Appendix B of the Law Commission's Final Report did not identify *all* the likely cohabitation cases which could commonly arise, and thus require judicial attention in any

scheme which attempted to provide better than the fragmented provision already available under existing English law.

This seems to be a further powerful argument for a very simple umbrella system for England and Wales which merely provides basic protective remedies in a normative framework, so that a wide variety of circumstances could potentially be covered, although it has been shown in New Zealand that an intention to provide very wide coverage can have its own problems. Put another way, this would address Lady Hale's suggested 'flexibility' requirement both as to actual remedy, as in proprietary estoppels, and as to its practical articulation, for example in an ability to make either periodical payments or capital orders.

In addition to acknowledging the common example of the young couple where the child carer suffers disadvantage capable of financial compensation under both the Law Commission's and Scottish schemes, Baroness Hale flags up the case - demographically equally common in contemporary society - of the mature couple such as Mrs Gow and Mr Grant whose positions post-cessation of cohabitation can quite easily be sufficiently impacted upon by one of them having given up a home, and either all or part of an income, and the other not being so affected.

In particular Baroness Hale articulates the potential for a widow's occupational pension being lost by cohabitation as much as by remarriage. Here, Lady Hale's well known interest in Equality and Diversity issues enables her to bring to the evaluation of any cohabitants' rights scheme her valuable experience in indirect discrimination issues alongside her expertise in Family law.

Baroness Hale's third 'lesson' is that there is probably no need for concerns expressed in the Law Commission's work about difficulties in establishing whether the parties involved were cohabiting or not, nor about the optimum period of cohabitation for couples without children to be able to qualify for remedies. She says at paragraph 52 of the judgment that 'people have not disputed whether they were cohabitants, though they have sometimes disputed when their cohabitation came to an end', and suggests that it might reduce disputes for the Scottish system to drop the requirement to bring proceedings within one year of the cessation of cohabitation, and for the Law Commission's scheme to omit any initial qualifying period before a claim could be made, in support of which she refers again to the Wasoff *et al* research, and to the researchers' subsequent article in *Child and Family Law Quarterly*<sup>43</sup>. Baroness Hale's fourth observation, the most crucial, both of her valuable comments on the occasion of this first Scottish appeal to the Supreme Court, and in any potential updating of the Law Commission's English 'advantage/disadvantage' model, is that it appears to be entirely true that the compensation principle, although attractive in theory, can be difficult to apply in practice because

<sup>42</sup> Ibid [51].

<sup>43</sup> See fn2 above. However, while it should be noted that this issue of how best to establish when a cohabitation relationship has *begun* has been found to be a problem in New Zealand, as to there seems a simple remedy for this in England and Wales since cohabitants residing together are already obliged to register for council tax and the head of a household to include residents' particulars on the electoral roll.

of the problems of identifying and valuing those advantages and disadvantages’.

She relies for this conclusion on the fact that Lord Lester’s 2009 Bill, which did not pass beyond a second reading in the House of Lords in March of that year, favoured a much wider discretionary power to do what was ‘just and equitable’ in the particular context whereas the Law Commission had, in its 2006-7 work, already seen the problems associated with micro-analysis of every ‘past gain and loss over the course of a long relationship’ by ‘focussing on the end of the relationship’. As she says, the case of Mrs Gow and Mr Grant ‘illustrates the problem very well’ since, while it is *not* possible - as well as being disproportionate - accurately to reflect every advantage and disadvantage in terms of payments made and benefits in kind received, besides that not being the way in which ‘living together in an intimate relationship is all about’, it is possible to assess net advantage and disadvantage if the parties’ positions are examined at the point of entry and exit from their relationship, which appears to be the approach that is permitted by the Scottish legislation.

Baroness Hale’s final point, and conclusion, is in essence a hint that an approach to the ultimate disposal under either the Scottish or any potential English scheme could perhaps be more akin to that in a case of proprietary estoppel than to the more exact analysis demanded by an interest under the concept of trust to which English claimants must currently still apply their energies if they seek to establish any compensatory award to redress the disadvantageous impact of unmarried cohabitation. In short, she says, the order should fit the circumstances - which is precisely the unique approach of proprietary estoppel - and overall approves the flexibility of the Scottish scheme, which largely permits this, over the rigidity of the Law Commission’s proposals, which in effect propose that ‘the losses should be shared equally’. Nevertheless, she likes the Law Commission’s structured ‘factors to be taken into account’ and would also like the Scottish system to permit a periodical payments order for ‘the rare cases where it is not practicable to make an order for a lump sum to be paid by instalments’.

Her overall conclusion, in the now famous paragraph 56, is that ‘.. a remedy such as this is both practicable and fair. It does not impose on unmarried couples the responsibilities of marriage, but redresses the gains and losses flowing from their relationship’ and repeats the comment of the researchers: ‘The Act has undoubtedly achieved a lot for Scottish cohabitants and their children. English and Welsh cohabitants and their children deserve no less’.

### **The Scottish Philosophy behind the 2006 Act**

Despite criticism of the long period of gestation since 1992, the philosophy behind the 2006 Act is clearly that of the Memorandum of March 2005, presented by the Scottish Executive to the Scottish Parliament and archived on their website<sup>44</sup>, following which the Bill it supported, which had been introduced into the Scottish Parliament on 7 February

2005, was enacted the following year.

It seems clear from this Memorandum that the Scottish Executive had determined ‘that action should be taken’ in the interests of ‘Scottish families’ and ‘all of Scotland’s people’ which are expressly referred to in the Memorandum, and that they had then proceeded expeditiously to achievement of the task they had set themselves. The only further comment relevant here appears to be a congratulatory one, for the fact that a small jurisdiction, serving a population of approximately only five and a half million, should have made this legislation a priority and achieved its introduction so speedily when all the resources of the Westminster government had not, apparently, been able similarly to address clearly urgent demand south of the border.

The Scottish system may not be perfect, in the eyes of either all academics - Scottish or other - or practitioners, including the Scottish judiciary which seems to have identified some practical complexity; but this is not uncommon in relation to any new legislation, especially of a radical nature. There are in fact also many English and Welsh statutes which have undergone later polishing after their initial introduction, and some that have undergone much fairly fundamental amendment. Not to achieve perfection at first introduction is not a fundamental flaw sufficient to preclude any such introduction at all, or unconstructive criticism from jurisdictions which have not achieved a similar reform.

The 2005 Memorandum thus set out the aim to ‘provide legal protection and safeguards for children and adults in today’s family structures’. It articulates support for a commitment to ‘legislate to reform family law for all of Scotland’s people’ and made clear that the role of government was seen as enabling rather than prescriptive, but that it was sought to reduce anomalies, to clarify the law and to respond to the reality of family life and contemporary family formations, in particular because children were often the powerless ‘extras’ in the family dramas in which their childhood and upbringing proceeded. This approach cannot in principle be criticised since it addresses those issues which governments are supposed, by their very existence, to address in a liberal democracy.

The Memorandum did also indicate that it was firmly based on data obtained in research<sup>45</sup> in which a significant section of the public indicated, as in England and Wales, that unmarried cohabitation was no longer regarded as unusual or socially deviant; and indicated that, as in England and Wales, that Scotland had also suffered from the ‘common law marriage myth’ which had in certain circumstances been addressed at common law through the process of recognising irregular marriage by ‘cohabitation with habit and repute’. Thus, although the impetus for the Scottish legislation was based in the - by 2005, somewhat elderly - 1990s Scottish Law Commission research, the Scottish Executive appeared to obtain up to date attitude survey data before taking forward the initial concept of addressing social change in Scotland. It is difficult to see what else they could, or should, have done

<sup>44</sup> Scottish Executive. Family Law (Scotland) Bill, Policy memorandum 2005 (‘the Memorandum’), [www.scottish.parliament.uk](http://www.scottish.parliament.uk).

<sup>45</sup> Scottish Executive, *Family Formations and Dissolutions: Trends and attitudes among the Scottish population*, <https://www.scotland.gov.uk/cru/resfinds/lis/f43-00.asp>.

without delaying matters for further Scottish Law Commission research to update their original early 1990s report.

Rather, in proceeding expeditiously to provide some relatively simple reform, the Scottish Ministers appear to have taken the obvious pragmatic decision, that some prompt reform was the way forward, even if further refinement might be required. Limited fieldwork in connection with the operation of the Scottish legislation indicates that there is indeed some evidence that the Scottish legal profession - which is very small, like the Scottish population in relation to the much larger population of England and Wales - has shared views and experiences about the operation of the 2006 Act in practice and does not have an overall negative opinion of its application, albeit that there are suggestions for practical improvements. This limited fieldwork which it was possible to undertake appears to support Baroness Hale's suggestions for amendments, but no one has said that that is a justification for wholesale condemnation of a system which was not initially 100% perfect, nor for dismissal by English ministers in London of any comparative value of the Scottish system as an indicator for the validity of reform in England and Wales.

This is not the place to examine the jurisprudential basis of recognition of the former Scottish concept of irregular marriage which the 2006 Act has now overtaken, but it *does* seem that the deficiencies of that situation was one of the reasons for the formality of enacting the Scottish legislation, just as the French ultimately replaced their former long standing practice of recognising *concubinage* with the formal PACS system. Moreover, while the Scottish Executive may have formally said in their Memorandum that they did not see the creation of a separate status of cohabitant, as an alternative to marriage, as a formal part of their scheme, it seems that they have in fact recognised a 'state' of living in such a relationship even if not a formal change of status. This too might well be of interest in ultimately considering the optimum provision for England and Wales. This reassessment of the position in England and Wales is clearly what is now required.

The underlying theory of the impact of the 2006 Act on this prior state of irregular marriage is therefore worth examining because of its potential relevance to the common law marriage myth in England and Wales, which is in fact one of the most important core mischiefs of the lack of any normative regime for cohabitants' rights in English law. The not dissimilar position in Scotland must be looked for in the pre- 2006 history.

### **Cohabitation in Scotland before the 2006 Act**

Looking at this historical background, it is fair to say that

in Scotland there was, perhaps, more reason than in England and Wales for an erroneous belief in common law marriage since, prior to the 2006 Act which abolished it, Scotland has long enjoyed a *custom or culture*, enshrined in the common law of that country, of *recognising* for certain purposes a state, if not a status as such, of 'marriage by cohabitation with habit and repute'. However, this was more recently felt by some academics and practitioners to be undesirable, owing to the necessary legal process in order to establish such a state in any particular circumstances, and because of the fact that jurisprudentially it was more properly a part of the Law of Succession rather than the law applicable to either marriage or cohabitation.

Thus it seems that in the eye of the ordinary Scot there *was* a concept of irregular marriage attached to a practical state of cohabitation, but that in reality it had status in law only in the certain circumstances to which it in practice applied and was otherwise no more 'common law marriage' than those 'common law marriages' in which the English public affects to believe.

For example, in No 6 of his *Commentaries*<sup>46</sup> Professor Kenneth Norrie is critical of the initial decision of the Scottish Executive, in their response to their 1999 consultation setting out proposed changes arising from Scottish Law Commission work, to retain the concept of marriage by habit and repute, 'on the basis that it continues to serve some useful function' - to which the author of the Commentary immediately adds the - presumably rhetorical - request 'Perhaps someone can explain what that useful function is, for it is beyond me'.

It appeared that at the time of Professor Norrie's originally writing this Commentary - July 2000 - there had been two recent cases in which the Court of Session had been asked to grant a 'declarator' of marriage on the basis of cohabitation with habit and repute, which in one case was granted and in the other refused in the cases of *Ackerman v Logan* in 2000<sup>47</sup> where habit was established, but repute missing, and *Vosilius v Vosilius* in 2000<sup>48</sup>, where habit and repute were both existing,

The Commentary goes on to illustrate, through the facts of the cases, the author's conclusion that this concept was illogical and unfair, and to point out the close relationship of the doctrine to the Law of Succession in respect of which 'the law is attempting to ameliorate the otherwise harsh and unfair position that cohabitants would otherwise find themselves in - that of having no claim against the estate of the person with whom they have spent 'a considerable period'. In other words, the concept was little different from the provision for cohabitants available, where the criteria of that statute can be met, under the English legislation contained in the Inheritance (Provision for Family and Dependents) Act 1975.

<sup>46</sup> Kenneth Norrie, *Commentaries on Family Law*, University of Dundee Press, 2011.

<sup>47</sup> (2000) EX 2000 SLT 37.

<sup>48</sup> (2000) Fam R 58.



Professor Norrie's update to this situation, immediately prior to his publication in 2011, thus much approves the impact of the passage of the Family Law (Scotland) Act 2006 in stating

'Marriage by cohabitation with habit and repute was partially abolished by section 3 of the Family Law (Scotland) Act 2006. It survives only to preserve the validity of marriages contracted abroad which, for some technical reason, are otherwise invalid'.

This is also replicated by provision in English law for recognition of such marriages by the common law where formalities might be defective for good reason, such as in cases like *Taczanowska v Taczanowski* in 1957<sup>49</sup> where the Marriage Act 1949 could not be complied with owing to wartime conditions. This was a case where the parties were both foreign nationals who could also not be expected to comply with local law owing to one being a member of occupying forces but nevertheless other requirements of a valid marriage - such as the vows and the presence of an episcopally ordained priest - were present.

His commentary continues:

'The major importance of the 2006 Act is that it rendered irregular marriage entirely pointless by creating proper claims for financial provision for cohabitants, both when the couple separate and when one dies. These claims do not depend, as irregular marriage depended, on the parties being economical with the truth. Whatever flaws there are in the 2006 Act, the legislation is far more principled and far better reflects today's society than does the old common law doctrine, which had long outstayed its welcome'.

In fact it thus seems that the old common law doctrine of recognising irregular marriage by cohabitation with habit and repute is no different from the same common law doctrine which would also permit English law to recognise an irregular foreign marriage in appropriate and unusual circumstances, such as where a religious marriage was contracted with irregular formalities in occupied territory in time of war as in the case mentioned above.

### **The post 2006 situation of cohabitants in Scotland**

Thus it seems possible that vernacular social familiarity with the old Scottish common law practice of recognising *marriages* effected by cohabitation with habit and repute may have had some influence on the reform now benefiting Scottish cohabitants, not least as it is recorded in the Memorandum of March 2005 that research had shown that some Scots believed that after 10 years cohabitation the parties

had the same rights as married couples<sup>50</sup>. However, the main driver appears to have been the Memorandum itself, in which the Executive recorded that its 1999 consultation document *Family Matters: Improving Scottish Family Law*<sup>51</sup> 'focussed on the need to consult further to refresh thinking, and, in particular, to canvass opinion on which a settled view had not been reached'. Included in this category of issues were "provisions for cohabiting couples".

It would appear likely, therefore, that both Professor Norrie's 2000 condemnation of marriage by cohabitation with habit and repute, and his 2011 update, both mentioned above, had something to do with response to these consultations, since the Memorandum also mentions that the 1999 consultation document *Family Matters: Improving Scottish Family Law* 'picked up the outstanding Scottish Law Commission proposals relevant to addressing the legal vulnerabilities experienced by families in Scotland today'.

The Memorandum goes on to set out the key data relevant to legal safeguards for cohabitants, showing the demographic evidence for reform, and concluding that 38% of cohabiting couples at the 2001 census had children (10% of Scotland's 1,072,669 children therefore living in a cohabiting couple family) although it was conceded that there was 'no robust data' to identify how many of such couples were legally married elsewhere.

A particularly interesting feature of the Memorandum is that it records that while 'the available evidence suggests that cohabitation has moved from a minority to a dominant family type in the UK' it also records that cohabitations rarely last long term'.

Nevertheless the Scots have legislated as they have because of research information available to them, in contrast to the approach in England, where, on the one hand the English Law Commission has recommended reform although not dismissing short cohabiting durations as counter arguments to legislating for breakdown of relationships, but on the other hand the government at Westminster has obviously perceived no pressures in the Government Actuary's predictions on rising numbers of cohabiting families towards 2030, as set out in the legal professional press, for example. Jordan's Family Law Newswatch in 2009, which commented in September of that year on the Family and Parenting Policy unit's report issued in the same month<sup>52</sup>, projecting a likely doubling of the numbers, then 2 million, a figure which could even be conservative since 10 years ago the number - in the absence of accurate data - was thought to be about 1 million.

It would therefore seem that the Scottish Executive has done what the Westminster government *should* have done, i.e. taken a policy decision in accordance with research available

<sup>49</sup> [1957] 2 All ER 583.

<sup>50</sup> See fn45 above.

<sup>51</sup> Scottish Office, Consultation paper. <https://pure.strath.ac.uk/portal/en/publications/...scottish.../export.html>.

<sup>52</sup> National Families Parenting and Policy Institute, *Families Since the 1950s*, NFPPU, 2009.

to them and in accordance with what they perceived to be acceptable to contemporary culture and society, since in Scotland the Memorandum states that

‘the policy objective is to introduce greater certainty, fairness and clarity into the law by establishing a firm statutory foundation for disentangling the shared life of cohabitants when their relationship ends...The Scottish Ministers consider that the legal vulnerability arising from the current absence of systematic regulation sits uncomfortably alongside the increasing number of cohabiting couple and the increasing number of Scotland’s children living in cohabiting-couple families’.

It is notable that the Memorandum continues

The Scottish Ministers aim to provide a clearer statutory basis for recognising when a relationship is a cohabiting relationship; and a set of principles and basic rights to protect vulnerable people either on the breakdown of a relationship or when a partner dies’.

This ‘greater certainty, fairness and clarity’ in the law, is exactly what was needed in England and Wales in 2008, or at the latest in 2011 – not complete dismissal of all the indications that legislation south of the border was urgently needed.

Further content of the Memorandum in fact considers the alternative of ‘information and raising awareness’ but rejects this course as ‘unlikely to result in all cohabiting couples making adequate private arrangements, leaving a significant number of cohabiting couples and their children without legal protection’. This does not suggest that Scotland, in 2005, was placing any reliance on the success of the concurrent English approach to ‘education’, that is the Westminster Government’s *Living Together* Campaign which has since apparently utterly failed! – another important signpost from Scotland that could have benefited English law.

Similarly, any alignment with marriage is rejected in the Memorandum, since it is stated that the Scottish Ministers ‘are clear that marriage has a special place in society and that its distinctive legal status should be preserved’. Registration and an alternative status for cohabitants were alike rejected but ‘a list of factors that a court shall have regard to in determining a legally relevant cohabitation’ is mentioned (and, as already mentioned, then appeared in the 2006 Act). It is not inconceivable that these clear statements, directly addressing potential objections from the stricter Scottish churches and also from any more conservative sections of society, were the direct cause of lack of objections to what, on the face of the

legislation, appears to give more or less the same practical results to cohabitants as to spouses. It is unclear, in these circumstances, whether the question really needs to be asked as to whether it matters if the Family Law (Scotland) Act 2006 *does* provide much the same practical end result for separating cohabitants as for divorcing spouses, when the Scottish Executive expressly states an aim to benefit ‘Scottish families’ in general and ‘all’ of ‘Scotland’s people’

## Conclusion

In the circumstances the Scottish scheme appears not to be in any way an adverse comparable for a potentially successful scheme in English law. Of course improvements can be made especially with the benefit now of almost a decade’s experience, and comparative evidence from other jurisdictions as well, none of which the English Law Commission undertook. Their reports look much more like scoping documents than law reform proposals.

The Scottish scheme does not appear to endanger the status of marriage at all, nor to impose on cohabitants any matrimonial obligations or rights, yet it protects the vulnerable, both adults and children, in a compensation based scheme, which – though distinct – resonates with that devised in England and Wales by the Law Commission.

While not appropriate to replicate the Scottish Act in any detail –English law would not benefit from any clone but would be potentially enhanced by import of comparator ideas – it is a powerful signpost to potential reform for cohabitants in England and Wales, especially as certain amendments are suggested by both academics and the Deputy President of the UK Supreme Court who – besides having had the experience of hearing the first appeal to Westminster under the 2006 Act – has a long standing academic background in Family law.

The principles of the Scottish scheme appear to be both practical and inherently unobjectionable, and of value in comparative terms in the study and development of other such potential systems. Above all, as generally in English Family law in England, it preserves some discretionary element in addressing the relationship generated advantage and disadvantage which the inappropriate TOLATA 1996 provisions are unable to deliver: although in paragraph 55 of her judgment in *Gow v Grant* Baroness Hale reviews – with practical examples – the remedial scope of the flexible Scottish scheme which permits precisely the same range of outcomes in the order awarded as in the common law remedy of proprietary estoppel under English law.

# **International Family Law, Policy and Practice**

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Author, title of work + full reference, unless previously mentioned, in which case a shortened form of the reference may be used, e.g. (first mention) J Bloggs, *Title of work* (in italics) (Oxbridge University Press, 2010); (second mention) if repeating the reference - J Bloggs (2010) but if the reference is already directly above, - J Bloggs, above, p 000 will be sufficient, although it is accepted that some authors still use "ibid" despite having abandoned most other Latin terms.

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1 May 2010

2010–2011 (not 2010-11)

## Page references

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Numbers from one to nine should be in words. Numbers from 10 onwards should be in numerals.

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The full case names without abbreviation should be italicised and given in the text the first time the case is mentioned; its citation should be given as a footnote. Full neutral citation, where available, should be given in the text the first time the case is cited along with the case name. Thereafter a well known abbreviation such as the Petitioner's or Appellant's surname is acceptable e.g. *Livesey (formerly Jenkins) v Jenkins* [1985] AC 424 should be cited in full when first

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Schedule 1 to the Children Act 1989

rule 4.1 of the Family Proceedings Rules 1991

Article 8 of the European Convention for the Protection of Human Rights 1950 (European Convention)

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Children Act 1989, Sch 1

Family Proceedings Rules 1991 (SI 1991/1247), r 4.1 (SI number to given in first reference)

Art 8 of the European Convention

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J. Bloggs and J. Doe 'Title' [2010] Fam Law 200

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