Chapter 10 update: September 2021

These are linked to the main text as follows:

- **10.2.1 From Rights to Responsibility**
- **10.2.2 Defining Parental Responsibility**
- **10.5.2 Limitations on the Exercise of Parental Responsibility**

10.2.1 FROM RIGHTS TO RESPONSIBILITY

At pp 684-88, we talk about the meaning of parental responsibility in terms of both the parent-child and the parent-state relationship. In *Re D (Residence Order: Deprivation of Liberty)*,[1] the Supreme Court had cause to consider whether a parent could use their parental responsibility to authorise their child (age 16 and who lacked capacity to make the decision for himself) to be held in secure accommodation such that it amounts to a deprivation of the child's liberty. Although the Court of Appeal had held that the parents could consent to this accommodation under such circumstances, a 3:2 majority of the Supreme Court disagreed, holding that parental responsibility did not go that far and that court authorisation was required.

Re D (Residence Order: Deprivation of Liberty) [2019] UKSC 42

LADY HALE P:

28. It may well be that, as a general rule, parental responsibility extends to making decisions on behalf of a child of any age who lacks the capacity to make them for himself. This would always be subject to the courts' powers of intervention, whether at the behest of another parent or individual in private law proceedings under Part 2 of the Children Act 1989, or at the behest of a local authority in public law proceedings under Part 4 on the ground that the child is suffering or likely to suffer significant harm as a result of the parents' decisions. The question, however, is whether there are any limits to that general rule, and in particular whether it is within the scope of parental responsibility to make arrangements which have the effect of depriving a child of his liberty. In view of the conclusion which I have reached as to the effect of article 5 of the European Convention on Human Rights, and the interaction between parental responsibility and the child's rights under article 5, it is strictly unnecessary to reach a concluded view on that question. But I acknowledge the force of the conclusion reached by Lady Black at para 90 of her judgment. As she says, it reinforces the conclusion which I have reached for other reasons.

[1] [2019] UKSC 42.

Lady Hale went on to consider Article 5 of the ECHR, holding that if a child was being detained in a way that was beyond what a parent could normally do, then that amounted to a deprivation of liberty and was caught by Article 5. She then returned to the issue of how parental responsibility interconnected with these human rights arguments:

46. But what is the relationship between holding that the placement did deprive D of his liberty within the meaning of article 5 and the view that it might otherwise have been within the scope of parental responsibility? Parental responsibility is about the relationship between parent and child and between parents and third parties: it is essentially a private law relationship, although a public authority may also hold parental responsibility. … [H]uman rights, on the other hand, are about the relationship between individuals (or other private persons) and the state. It is, however, now agreed that any deprivation of liberty in Placement B or Placement C was attributable to the state. So is there any scope for the operation of parental responsibility to authorise what would otherwise be a deprivation of liberty?

47. There are two contexts in which a parent might attempt to use parental responsibility in this way. One is where the parent is the detainer or uses some other private person to detain the child. However, in [the European Court of Human Rights cases] it was recognised that the state has a positive obligation to protect individuals from being deprived of their liberty by private persons, which would be engaged in such circumstances.

48. In conclusion, therefore, it was not within the scope of parental responsibility for D's parents to consent to a placement which deprived him of his liberty. Although there is no doubt that they, and indeed everyone else involved, had D's best interests at heart, we cannot ignore the possibility, nay even the probability, that this will not always be the case. That is why there are safeguards required by article 5. Without such safeguards, there is no way of ensuring that those with parental responsibility exercise it in the best interests of the child…

Lady Black agreed with the outcome that Lady Hale had reached, but came to 'a firmer conclusion' in relation to the scope of parental responsibility at common law.[2] It is to be noted that while Lady Hale indicated that there was much strength in Lady Black's argument on this point, she did not expressly concur with it; Lady Arden (the third majority judge) preferred not to express a view about the issue,[3] and Lord Carnwath (dissenting, with Lord Lloyd-Jones's agreement) said that he 'remain[ed] unconvinced' that Lady Black's analysis of this issue was correct.[4]

Nonetheless, there is some interest in considering Lady Black's minority analysis in relation to the limitations of parental responsibility and the scope of the decision in *Gillick v West*

[2] Ibid, [54].

[3] Ibid, [121]

[4] Ibid, [158].

Norfolk and Wisbech AHA.[5] Lady Black conducted a thorough review of the early caselaw in relation to parental rights, and looked in detail at the *Gillick* decision. As is well known, *Gillick* held that where a young person has a sufficient maturity and understanding in relation to an issue about his or her healthcare, the young person can give valid consent to a doctor regardless of whether the parent with parental responsibility gives consent (or even knows about it). Crucially, though, as Lady Black noted, the issue in *Gillick* was about the on-going existence of the parent's rights in circumstances where the child gained capacity to make the decision him or herself: 'the question was whether the parent could *lose* his or her exclusive decision-making powers before the child reached the age of 16, if the child was capable of making his or her own decision, not whether the parent was entitled to continue to make decisions after the child reached 16, if the child was not capable'.[6]

LADY BLACK:

88. … I do not share the President's confidence [in the Court of Appeal judgment under appeal] that the *Gillick* test extends to the aspect of parental responsibility with which the present case is concerned, or that the *Gillick* decision can, without more, be treated as regulating the situation where the objective is not to contract the boundaries of parental responsibility, but to extend them. In my view, as I said above, it is of real significance that in Gillick, the House of Lords were dealing with a materially different issue. The respondent recognises that the focus of *Gillick* was specific to the issue of consent to medical treatment of children under 16, but invites this court to conclude that the test laid down there applies beyond that scope and up to the age of majority. I accept that certain things that were said in *Gillick* were capable of being interpreted as applying to a situation such as the present, but it would not, in my view, be appropriate to interpret them in that way, so as to draw into the *Gillick* net a situation which is diametrically opposed to that with which the House was concerned (not the *tempering* of parental responsibility in relation to the under 16 age group, but its *expansion* in relation to those aged 16 and 17 so as to give it a role which would not otherwise be afforded by the common law). My unwillingness to adopt this interpretation is reinforced by what I perceive to be the distinct, and rather special, features of the field of deprivation of liberty with which we are here concerned. It follows that the rights of a parent in relation to restricting the liberty of a child remain, at common law, as described in *Hewer v Bryant*.[7] The inescapable result of that is, I think, that it is not within the scope of parental responsibility for parents to give authority for their 16 year old child to be confined in a way which would, absent consent, amount to a deprivation of liberty. In so saying, I do not intend in any way to water down the important changes brought about by Gillick or to alter the way in which it has been applied in many spheres of family law. I have only been concerned to consider its application in the very specific context of confinement of children of the ages of 16 to 18.

[5] [1986] AC 112 (HL); see the extracts on pp 584-7 and 684 of the main text.

[6] [2019] UKSC 42, [69].

[7] [1970] 1 QB 357 (CA)

89. The position in relation to the confinement of children who are under 16 might be different for a variety of reasons. It could be argued, for example, that the *Gillick* decision is more readily applicable to under 16s than to over 16s, given that this was the age group with which the House was concerned. It would then be arguable that the position in relation to that group was … that the parental ability to restrict a child's liberty continues to be as described by Sachs LJ in *Hewer v Bryant*, but with a *Gillick* test rather than the previous fixed ages. But the effect of this, applied to a child who lacked capacity, would not be to leave a gap in the parent's powers to cater for the particular needs of a child with disability. On the contrary, the child not having attained *Gillick* capacity, there would be nothing to bring to an end the parent's common law power to confine the child as required in the child's interests. To put it in the terms used in this appeal, it would remain within the ambit or zone of the parent's parental responsibility. However, there would, no doubt, be other arguments to be aired on the point, and I have not formed even a preliminary view about it.

90. In summary, therefore, I would hold that as a matter of common law, parental responsibility for a child of 16 or 17 years of age does not extend to authorising the confinement of a child in circumstances which would otherwise amount to a deprivation of liberty. For me, this reinforces the conclusion to which Lady Hale has come by the route she sets out in paras 42 to 49 of her judgment. She concludes, in para 50, by saying that logically her conclusion would also apply for a younger child, but I would prefer to leave this separate question entirely open, to be decided in a case where it arises. I should also stress … that I have been looking specifically at the common law power of a parent in relation to a child's liberty. I have not intended to cast doubt on any existing understanding about the operation of parental responsibility in different spheres of a child's life. And nothing that I have said is intended to cast any doubt on the powers of the courts, recognised in the early cases to which I have referred, and still available today in both the parens patriae jurisdiction and under statute, notably the Children Act 1989, to make orders in the best interests of children up to the age of majority, with due regard to their wishes and those of their parents, but not dictated by them.

Again, it is important to stress that Lady Black's analysis here did not command the agreement of a majority of the court, and she reached a conclusion that was expressly contrary to that of Sir James Munby P in the Court of Appeal following an equally full analysis.[8] Clearly, therefore, this will not be the final word on the meaning of parental responsibility, and the scope of the *Gillick* decision remains as ambiguous as ever.

10.2.2 DEFINING PARENTAL RESPONSIBILITY

On p 689 of the main text, we quote a list of rights and duties which are commonly said to fall

[8] [2017] EWCA Civ 1695.

within the concept of parental responsibility. These include 'disposing of the child's corpse', but in fact that sad and, fortunately, uncommon issue is not connected with parental responsibility, but rather with legal parenthood. Though that issue was not at the core of the dispute, it was apparent from the High Court's decision in *Re E (A Child: Burial Arrangements)*.[9]

The parents of a young child, E, had a short, informal relationship, though this did include cohabitation with their daughter for a few months following her birth. The father was not named on E's birth certificate and did not have parental responsibility for her. Following the parents' separation, the mother moved to another part of the country with E, without the father's knowledge or agreement. There, the mother started a new relationship and, tragically, E was killed by the new partner. He was convicted of E's murder, and the mother was convicted of causing or allowing the death of a child.[10] The parents were subsequently unable to agree on the burial arrangements for E, and the mother initially disputed the father's paternity (though this was later conceded).

As the court noted, the issue of what should happen to a child's body is governed initially by the Non-Contentious Probate Rules 1987, r 22, under which the mother and the father are jointly entitled to a grant of the letters of administration for their child, which is what gives a person the legal power to dispose of a body after death. The court is then able, where there is a dispute between two people who are jointly entitled, to make a determination about which of them (if either) should be entitled to the letters of administration and, consequently, to the determination of funeral and burial arrangements. It is clear, though, that this issue is not connected to parental responsibility. The father was able to obtain a declaration of parentage in relation to E, because that can be done regardless of whether either of the relevant individuals is deceased; but it would not have been possible to grant the father parental responsibility for E after her death, and so he never had it. Nonetheless, he was jointly entitled under r 22, and the court went on to determine that he should be granted sole letters of administration so that he alone would make the arrangements for E's funeral and burial.

10.5.2 LIMITATIONS ON THE EXERCISE OF PARENTAL RESPONSIBILITY

On pp 722-3 of the main text, we talk about ways in which parents' exercise of their PR can be limited, covering both limitations imposed because of the child's own views and limitations because of the state. As we note, parents are generally the primary decision-makers, but they do not have completely free rein because there are circumstances where the state can intervene. We link this back, by way of example, to pp 600-9 of the main text, where we talk about the

[9] [2019] EWHC 3639.

[10] Domestic Violence, Crime and Victims Act 2004, s 5.

court's role in determining contested applications in relation to medical treatment.

The court's role in this area was the subject of a significant decision by the Court of Appeal in *Re H (Parental Responsibility: Vaccination)*.[11] The child in question was in local authority care under an interim care order,[12] one consequence of which is that the local authority shares parental responsibility with the parents, and is able to determine the extent to which the parents are able to exercise their own parental responsibility.[13] The question arises, though, as to when the local authority may take decisions to which the parents object, if the issue in question is not one of the issues which led to the child being in the local authority's care—the court has previously said that the local authority will be ill-advised to rely on its PR in such circumstances.[14] In such cases, the local authority has to apply for an order from the court to authorise it to make this decision if the parents object, and when a child is in local authority care the only way to do that is to seek an order under the High Court's inherent jurisdiction.[15]

The main issue for *Re H* was whether a local authority had to make such an application where the issue was about a child receiving routine vaccinations, in circumstances where there was no medical reason not to do so but the parents objected. The Court of Appeal held that there was no need for an application, and the local authority could, for vaccinations, rely on its own PR. King LJ, giving the judgment of the court, held that the benefits of vaccination were clear,[16] and that the issue overall was so non-significant,[17] that the local authority could rely on its PR without risking a breach of the parents' or the child's Article 8 ECHR rights.[18] We discuss this issue in our update to Chapter 12.

More notable in the context of the limitations of PR, though, were the Court of Appeal's comments about a counter-factual question which, though clearly obiter on the facts of the case, was considered in detail by King LJ—the question being whether, if the child is *not* in local authority care, the local authority is entitled to bring an application to over-ride the parents' decision not to have the child vaccinated. The Court of Appeal held that the local authority was not *permitted* to bring such an application, though the reasoning leading to that conclusion is doubtful.

[11] [2020] EWCA Civ 664.

[12] See 12.7.

[13] CA 1989, s 33(3)(b).

[14] See pp 893-4 of the main text.

[15] See 8.7. The reason is that s 9(1) of the CA 1989 specifically bars the court from making a specific issue order or a prohibited steps order in relation to a child who is in the care of a local authority.

[16] [2020] EWCA Civ 664, [55].

[17] Ibid, [85].

[18] Ibid, [98].

R George, 'Parental Responsibility, Vaccinations, and the Role of the Court' (2020) 136 *Law Quarterly Review* 559, 561-3

King LJ's approach imposes a narrow conception of the role of the state in family life. While it is, of course, right that the Children Act grants PR, and thus the primary decision-making powers in relation to children, to the parents in the vast majority of cases, it does not follow that the state has no role to play. For the state, in the guise of a local authority, to intervene by taking a child into care, there is a threshold of actual or likely significant harm: Children Act 1989, s 31. Likewise, if a local authority seeks orders under the High Court's inherent jurisdiction, it must satisfy the court of that same threshold of likely significant harm (s 100(4)). However, here is where the difficulty comes. The court's seemingly unbreakable determination to invoke its inherent jurisdiction, rather than considering its statutory powers, leads the court in *Re H* to impose a threshold for state intervention by a local authority—and, by a process of faultless logic, to hold indeed that there is no power for such intervention—where that is not in any sense an inevitable conclusion.

The court's argument is constructed in this way. First, considering the issue of vaccination, the court asks whether, by itself and without any other concerns, a failure to allow a child to be vaccinated can be said to amount to significant harm, which would justify the local authority in bringing care proceedings. King LJ answers this question in the negative (at [90]). …

It can be accepted, therefore that the local authority cannot bring an application for a care order in order to obtain parental responsibility for a child where failure to vaccinate is the sole issue. It follows that the local authority cannot obtain and rely on its own parental responsibility in such a case, even though if it had parental responsibility already it could legitimately use that parental responsibility to authorise the child's vaccination.

The Court of Appeal then goes on to say, therefore, that the local authority cannot in fact obtain orders for vaccination *at all* if the child is not subject to a care order for other reasons, because the threshold under s 100(4) cannot be met. King L.J. puts it this way:

> If a parent in respect of whom there are no care proceedings cannot be considered to be causing a child to be likely to suffer significant harm when they decide not to vaccinate their child, I cannot see how can it be said now, for the purposes of s100(4)(b), that that very same refusal on their part provides reasonable cause to believe that the child is likely to suffer significant harm if the inherent jurisdiction is not exercised. (at [90])

That logic is impeccable, but it only arises because the court is asking the wrong question, premised on the court's need to invoke the inherent jurisdiction rather than making a statutory order. Why should the question be: can the local authority invoke the inherent jurisdiction? The only reason for doing so is if the remedy sought cannot be obtained in some other way under the Children Act: s 100(4)(a) (see also *Re NY (A Child)* [2019] UKSC 49 and *Re N (A Child)* [2020] EWFC 35). Is this such a case?

When a child is the subject of a care order or interim care order, it is indeed the case. The

Children Act specifically bars the local authority from seeking the statutory remedies which might otherwise apply (s 9(1)). If an issue arises where—unlike the case of vaccinations, as held by the Court of Appeal in this case—a court orders is needed, the local authority does indeed have no option but to seek an order under the inherent jurisdiction: *Re C (Child in Care: Choice of Forenames)* [2016] EWCA Civ 374. This outcome appears to be an anomaly, resulting from the court's view that Article 8 rights under the European Convention on Human Rights prevent the local authority from relying on its PR where the decision involves a significant interference in family life (*Re DE (Care Order: Change of Care Plan)* [2014] EWFC 6).

Where a child is not subject to a care order or interim care order already, however, the restriction in s 9(1) does not apply. Anyone who can get the court's leave under s 10 of the Act can apply for a specific issue order or a prohibited steps order under s. 8 including … a local authority.[19] The threshold for obtaining leave to apply under s 10 has no 'significant harm' element to it: it is a simple assessment by the court taking into account the factors highlighted in s 10(9) and any other relevant considerations in the particular case (*Re B (Care Proceedings: Joinder)* [2012] EWCA Civ 737, [48]). There is no reason at all why even the most serious dispute about medical treatment cannot be resolved by way of a specific issue order or a prohibited steps order (*Re JM (A Child) (Medical Treatment)* [2015] EWHC 2832), so the issue of vaccination can certainly be determined by the making of such an order. But because the court focuses only on its inherent jurisdiction, it seems to lose sight entirely of the more obvious remedy, and ends up imposing on local authorities an unnecessary and logically unobtainable threshold for intervention—significant harm.

It makes little sense to say that a local authority that happens, for unrelated reasons, to have a child in its care is free to have that child vaccinated even when the parents object, but that another child not in the local authority's care cannot eve be the subject of an application to the court. As George says, the court asks itself the wrong question, and taking a broader look at the statutory powers would lead to a straightforward legal solution that avoided this non-sensical distinction.

The difficulty with the court's conclusion is compounded when the issue is considered from the child's own perspective. Children are not the property of their parents, and are independent rights-holders.[20] The benefits of vaccination and the risks, both to the individual child and to society as a whole, of non-vaccination, which King LJ clearly identifies in her judgment, raise serious arguments that the state is violating the rights of the children left to the whim of their parents to deny them vaccinations without medical reason. Given that some vaccinations are life-saving, while others prevent very serious diseases, children arguably have a right to such immunisations under Article 6 of the UN Convention on the Rights of the Child, which requires States Parties to 'ensure to the maximum extent possible the survival and development of the

[19] See *Re R (A Minor) (Blood Transfusion)* [1993] 2 FLR 757.

[20] Freeman (1992).

child'. Similarly, under Article 24, the child has a right to 'the enjoyment of the highest attainable standard of health', and states must 'strive to ensure that no child is deprived of his or her right of access to such health care services'. This right includes, specifically, an obligation on states to 'pursue full implementation of this right', including 'diminish[ing] infant and child mortality', 'combat[ing] disease', and 'develop[ing] preventative health care'. Nowhere in the court's judgment is there any mention of the child as having an independent position in this crucial health issue.