CURRENT PROBLEMS

Implications of the Children Act 1989 for paediatric practice

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The Children Act 1989 will, it has been said, when implemented bring about the most fundamental change of child law this century.¹ Yet there must be a risk that members of the medical profession and of the other professions concerned with the welfare of children will not at first appreciate the significance of the new legislation in terms of their own contribution. The objective of this article is to provide—at the cost of a considerable degree of oversimplification—an outline of the main changes made by the act that are likely to have an impact on paediatricians in court related work.

Act not concerned with criminal law

It is important to stress at the outset that the act is concerned with the *civil* law. (A care order may, however, still be made in certain circumstances where a child is proved guilty of a criminal offence, and the Children Act does make some minor amendments to the relevant provisions: see schedule 12 paras 20–30.) It is in particular concerned with resolving disputes between individuals (for example, parents who are divorcing) about the upbringing of children, and with the question whether the state is to be entitled to take compulsory measures—perhaps involving permanent removal from the parents—to secure the child's welfare. The act is not directly concerned with *criminal* proceedings. Criminal proceedings involve an allegation that the defendant has committed one or more of a number of narrowly defined criminal offences (for example, incest). The primary object of criminal proceedings is the punishment of the offender; the primary—perhaps the only—object of the civil law in this context, however, is to secure the welfare of the child. Hence, criminal proceedings, which remain largely unchanged by the Children Act, emphasise the need to protect the innocent against being convicted. Accordingly there are stringent rules about the admissibility of evidence and about the standard of proof that must be satisfied before an individual can be convicted. In contrast, the civil courts, concerned with the welfare of the child, are reluctant to allow legal technicalities to be allowed to interfere with the court's task in assessing where that welfare lies. It is because of this difference of emphasis that, for the lawyer, there is nothing remotely inconsistent in saying that there is insufficient evidence to justify prosecution of a suspected

abuser, yet finding in civil proceedings that the child's welfare dictates an outcome that the parents strongly oppose.

Key concepts in the Children Act

The aim of this article is to give a general account of the structure of the act under the following headings. (1) Who is, in principle, legally entitled to take decisions affecting a child? (2) In what circumstances may individuals or public agencies bring issues relating to a child before the court? (3) If issues are properly brought before the court, what tests will the court apply in resolving those issues? (4) If the court decides that some intervention would be appropriate, what form can that intervention take—what orders can the court make? (5) What emergency powers do the courts have to protect children? (6) How will the act affect medical practitioners?

It is not intended to focus narrowly on the specific problems likely to arise in medical practice, but it is hoped that an outline of the new legal structure may assist in understanding the implications of the legislation for the medical profession. The concluding part of the article seeks to highlight some aspects of the impact that the act is likely to have in this respect.

(1) Decision taking and parental responsibility

In recent years the law has greatly restricted the rights of a parent to take decisions relating to the child's future. First, in 1969, the Family Law Reform Act (section 8) effectively made 16 the age of majority for medical treatment purposes. It specifically provided that if a 16 year old gave an effective consent it should not be necessary to obtain any consent from the parent. Secondly, in 1985 the House of Lords in the Gillick decision held that—as a general principle of the law—parental authority does not continue up to any specified age but gives way to the right of a child who has sufficient understanding and intelligence to decide matters for him or herself.² (The question whether a child *does* have the appropriate degree of understanding is an issue of fact in each case, and depends—among other things—on the complexity of the particular issue involved: hence, for example, a 14 year old might be capable of deciding on minor surgery under local anaesthetic, but not on purely cosmetic surgery involv-

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ing a significant level of risk, and certainly not on non-therapeutic procedures.) Thirdly, the courts have asserted the paramountcy of the child's welfare—as distinct from the parent's rights—in deciding on those cases that do come before the courts. Thus the court could and did overturn a mother's decision taken in reliance on proper professional advice from a consultant paediatrician and from a consultant gynaecologist because it did not agree that the procedure in question would best serve the child's interests.³ It may even be the law that certain procedures—for example, irreversible sterilisation—should not in any event be carried out on the authority of the parent unless prior court approval has been obtained.⁴ (This view was expressed by only one member of the House of Lords, but the prudent will act on it.)

Notwithstanding this substantial erosion of parental decision taking power, it remains a basic legal principle that a child does not have legal capacity, and accordingly parents or others must be entitled to act on the child's behalf. The Children Act does not greatly change the structure of the law in this area, but the statutory definition ('parental responsibility') of the collection of rights, powers, duties, and responsibilities which an adult is entitled to exercise in this way is none the less a key concept. This is because it is the person who has parental responsibility who—subject to the restrictions referred to above—is entitled to act on the child's behalf.

The act provides that the following have 'parental responsibility':

- (i) The *mother and father* of a legitimate child (or the *adoptive parents* of a child who has been legally adopted).
- (ii) The *mother* of an illegitimate child. (The act does allow the mother and father to make a formal agreement in prescribed form whereby parental responsibility will be shared between them, but in the absence of such an agreement in the proper form or of a court order, the natural father of an illegitimate child does *not* have 'parental responsibility'.)
- (iii) A guardian—the person appointed (by will or other document) to act as the child's guardian—usually only when there is no-one else who has parental responsibility.
- (iv) Finally, certain persons—for example a person with whom the child is to live under what is called a residence order (see below) and a local authority in whose favour a care order has been made—have parental responsibility as an automatic consequence of a court order.

Broadly speaking, a person who has parental responsibility may act alone; and the act imposes no requirement of consultation with others having parental responsibility. Hence it will, for example, only be necessary to obtain the authorisation of *either* the mother or the father of a legitimate child.

There are, of course, circumstances in which a person who does not technically have parental responsibility may properly act to safeguard the child: in particular, the Children Act specifically provides that a person who had the care

of a child may 'do what is reasonable in all the circumstances of the case for the purpose of safeguarding or promoting the child's welfare' (section 3(5)). (Generally speaking, references to specific provisions of the Children Act are only given in this article where the precise wording may be thought exceptionally significant.) Moreover, it seems that a person who has parental responsibility may authorise another person or persons to act on the parent's behalf (section 3(9)). Surrender or transfer of parental responsibility as a whole, however, is forbidden.

The significance of the provision that any person who has 'parental responsibility' may act without the concurrence of others is greatly increased because of the legislative policy that parental responsibility is much more difficult to shift than was formerly the case. For example, in divorce the court will no longer make a 'custody' order—which, at one time, was thought to give the custodial parent virtually complete decision taking power—but instead may make a 'residence order', naming the person with whom the child is to live (and, as an automatic consequence, giving that person parental responsibility). But such an order will *not* deprive those who would otherwise have parental responsibility of their legal authority. If it is thought to be in the child's interest to prevent the non-resident parent from exercising legal authority the court will have to make a specific order to that effect. Even if a care order—which gives parental responsibility and the right to keep the child in care to a local authority—is made, the parents or others who had parental responsibility will still retain their legal authority. This could of course create a potentially explosive and impossible situation; and accordingly the local authority may decide to restrict the extent to which a parent or guardian may meet his parental responsibility if it is satisfied this is necessary in order to safeguard or promote the child's welfare (section 33(3)(4)).

(2) Intervening in family autonomy: the right to bring matters to the court

How can issues affecting a child's future be brought before a court? This might appear to be an arid technical issue that can safely be left to the lawyers, but in fact the answer to the question determines the—often extremely sensitive—issue of whether a person (such as a child's grandparent or a local authority) can bring parental decisions for scrutiny by a court.

There are four main ways in which issues may be brought before the court.

(i) Wardship

Firstly, it will remain possible for any individual to make a child a ward of court by the simple procedure of issuing a summons; and the Children Act does not directly affect the right of *private individuals* to use this procedure. A child automatically becomes a ward on the issue of the summons, and thereafter (so long as the child remains a ward) no important step in the

child's life may be taken without leave of the court. It was, for example, by the use of wardship that a concerned social worker was able to bring to the court the mother's decision to permit her handicapped daughter to be sterilised; and it was by wardship that a commissioning parent was able to have the future of a surrogate mother's child resolved by the court.

Although the Children Act does not affect the availability of wardship in such cases, it does make an exceedingly important change in relation to the use of wardship by local authorities. The rule will be that, in principle, local authorities will not be able to use wardship. They will accordingly not be able to interfere in family autonomy unless they can satisfy the new statutory threshold provisions—as set out below—for bringing care proceedings under the Children Act. In the past, some local authorities have made frequent use of wardship where difficult medical issues have been involved; but they are unlikely to be able to do so in the future, and medical practitioners will need to understand the considerable impact of this change in the law. In essence, whereas in wardship it was only necessary to satisfy the court that a certain course of action would serve the child's interests, the local authority will be dependent on proceedings in which the child's welfare does not become a consideration unless and until a statutory threshold condition—the 'significant harm' test—has been made out.

(ii) *Divorce and other proceedings*

The second main way in which proceedings affecting a child may come before the court is in numerical terms by far the commonest: it is in consequence of parental divorce proceedings. Whenever there is a divorce affecting children the court has to be given details of the arrangements that are to be made for their upbringing and welfare, and the court has a duty to consider whether to exercise any of the powers—powers now conferred by the Children Act—which it has in respect of those children. The act changes the filtering system whereby cases which ought to be investigated are identified. It also changes the language that will be used in orders, but it does not affect the principle governing the exercise of those powers: what would best serve the child's interests?

(iii) *Freestanding private law applications*

The act provides that certain people are entitled, as of right, to apply to a court for any of the orders relating to the child's upbringing dealt with below: this favoured group are the parents and other people with parental responsibility under the rules set out above. This group effectively is intended to define those whose interest in the child's upbringing is considered to be self evident.

A rather broader category of people are entitled to apply for orders dealing with specified matters: where the child should live, or what contact should there be between the applicant and the child? This class includes step parents, and anyone with whom the child has lived for a

period of at least three years (subject to exceptions in the case of local authority foster parents). Effectively, therefore, this group is intended to cover people who are thought to have a legitimate right to claim an ongoing relationship with the child, but who should not necessarily have the right to seek the court's intervention on such specific issues as (for example) whether the child should receive medical treatment of a certain kind.

Finally, in pursuance of what is sometimes called the 'open door' policy the act permits *any* person to apply to the court for *any* of the orders referred to below, *provided* that the court has first granted leave. The act specifies matters to which the court is specifically to have regard in entertaining applications for leave—for example, what is the nature of proposed application? What risk is there that the proposed application would disrupt the child's life and cause him harm? What connection does the person concerned have with the child? A grandparent, therefore, might reasonably expect to be treated more favourably than a representative of a pressure group.

What it may well be asked is the association between all this and wardship? The act, as has already been mentioned, does not restrict the right of private individuals to start wardship proceedings, so why should anyone bother to seek leave to bring Children Act proceedings? No categorical answer to that question can be given; but it may be that the expense of wardship—only available in the High Court—will be a factor, particularly if restrictions are placed on the availability of legal aid.

(iv) *Care proceedings, etc*

Local authorities have extensive powers and duties to promote the welfare of children and in many ways it is the provisions of part III of the Children Act dealing with local authority support for children and families that are capable of having the greatest impact for good. The taking of compulsory measures by local authorities is often the last resort, and here the act takes a firm stand of principle: compulsory state intervention requires special justification. Indeed, the Lord Chancellor has said that although a broad welfare discretion may be appropriate and defensible where a court is deciding a dispute between warring members of a family, compulsory state intervention in the integrity and independence of the family can only be justified on the basis of defined minimum criteria. To do otherwise (it is said) would constitute a threat to the poor and minority groups, whose view of what is good for a child may not coincide closely with that of the majority.

The result of this approach is that the court may only make a care order (or a supervision order—that is, an order putting the child under the supervision of a local authority) if the so called 'significant harm' criterion is satisfied.

What is meant by the 'significant harm' test? The act provides that the court may only make a care or supervision order if it has first of all found: (a) that the child concerned is suffering,

or is likely to suffer, significant harm; and (b) that the harm, or likelihood of harm is attributable to either the care given to the child, or likely to be given to him if the order were not made, not being what it would be reasonable to expect a parent to give to him, or the child's being beyond parental control.

The statutory provision bristles with difficulty; and it is reasonable to suppose that there will be a great deal of litigation in the early days until principles are settled. (The act further defines 'harm' as 'ill treatment or the impairment of health or development'; 'development' means 'physical, intellectual, emotional, social, or behavioural development'; 'health' means 'physical or mental health'; and 'ill treatment' includes sexual abuse and forms of ill treatment which are not physical: section 31(9).) But—whatever the precise meaning of the statutory text—it is vital to emphasise that, although the court must be satisfied by evidence that the specified criteria have been established before it can make a care order or a supervision order, proof of the statutory criteria is simply a *necessary* condition for court intervention. Such proof is not a *sufficient* condition. The court will—as we shall see—also have to be satisfied by evidence that the making of an order would be better for the child than making of no order at all. It will have to regard the child's welfare as its paramount consideration, and it must have regard 'in particular' to certain specified matters relevant to welfare.

(3) Principles applied by the court in resolving issues

The child's welfare is the court's paramount consideration in determining any question with respect to a child's upbringing. The act provides a 'checklist' of factors that may be relevant. It also lays down other relevant principles (including the so called 'non-intervention' principle and a presumption about the effect of delay). It also contains a number of pointers about the desirability of promoting contact between a child and the family.

(i) *The welfare checklist*

The Children Act enumerates a number of matters relevant to welfare that are intended to guide the courts, achieve consistency, and encourage the parties to disputes to concentrate on issues relevant to the children's welfare. These are:

- (a) the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding);
- (b) his physical, emotional and educational needs;
- (c) the likely effect on him of any change in his circumstances;
- (d) his age, sex, background, and any characteristics of his which the court considers relevant;
- (e) any harm which he has suffered or is at risk of suffering;
- (f) how capable each of his parents, and any other person in relation to whom the court considers the question to be relevant, is of meeting his needs;

(g) the range of powers available to the court under this Act in the proceedings in question'.

These matters may be considered in any case, and will no doubt be found helpful in many. But the court *must* consider them—in effect it will have to go through the list in turn—in cases where a local authority seeks a care or supervision order and in cases where there is a *disputed* application in divorce or other family proceedings.

(ii) *The presumption that delay is harmful*

The Children Act specifically provides that the court should have regard to the 'general principle' that any delay is likely to prejudice the welfare of the child (section 1(2)). This is not, of course, to say that in some cases delay—for example, pending the exploration of alternative measures which might be taken—could not be beneficial. But the onus is on those who want to displace the general principle to do so by evidence.

(iii) *The non-intervention principle*

The Children Act provides that where a court is considering whether or not to make one or more orders under the act with respect to a child, it shall not make the order or any of the orders unless it considers that doing so would be better for the child than making no order at all (section 1(5)).

This non-intervention principle is arguably the most important single provision in the act. First, it clearly embodies the philosophy that the court does not necessarily know better than the parents what is for a child's benefit and that accordingly it should not interfere unless the court is satisfied that its interference will do good. Secondly, the act also accepts that the law is a blunt instrument. The making of orders—enforceable, in the last analysis, by the sanction of imprisonment—is not always the most effective way of achieving the best outcome, or the least detrimental outcome, that could be achieved for the child.

It seems reasonable to suppose that the non-intervention principle will be invoked in many cases—particularly, perhaps, by advocates in care cases. It will be argued that, even if the significant harm threshold is satisfied, there is no evidence that the making of the order could be better for the child than, for example, making an order that the child live with grandparents or a friend, or even leaving things to voluntary collaboration between the family—adequately supported by social services and other relevant agencies—and the local authority. Again, the need for expert evidence about the likely impact of the various options requires no emphasis.

(iv) *Promoting contact*

The Children Act embodies an assumption that continued contact between a child, parents, and the family is in principle desirable. For example, before making a care order, the court is to consider arrangements proposed for contact. If a care order is made the authority is obliged,

subject to any court order to the contrary, to allow reasonable contact, and the court has powers to entertain applications for contact with the child. Again, the question of whether contact is desirable in the particular circumstances of the case is a matter on which expert evidence seems certain frequently to be required.

(4) Orders the court can make

Under the old law, still in force at the time of writing, different courts had different powers, and proceedings affecting the same child might be pending at the same time in different courts. The Children Act will introduce two major simplifications. First the court will (for present purposes) have the same powers whether it be the High Court, the county court, or the magistrates court (which is to be renamed the 'family proceedings court'). There is to be provision to try to ensure that cases are dealt with at the appropriate level of judicial expertise—so that one would expect a complex case involving the assessment of detailed psychiatric or other medical evidence in a contested abuse case to be dealt with by the High Court. The family proceedings court would deal with the majority of the less complex cases in which local authorities seek care orders.

The second change is that all the courts concerned will be able to make the same orders selected from what is described as a 'menu'. These orders are defined in the act as follows:

Contact order: an order requiring the person with whom a child lives, or is to live, to allow the child to visit or stay with the person named in the order, or for that person and the child otherwise to have contact with each other.

Prohibited steps order: an order that no step which could be taken by a parent in meeting his parental responsibility for a child, and which is of a kind specified in the order, shall be taken by any person without consent of the court.

Residence order: an order settling the arrangements to be made as to the person with whom a child is to live.

Specific issue order: an order giving directions for the purpose of determining a specific question which has arisen, or which may arise, in connection with any aspect of parental responsibility for a child.

Family assistance order: an order requiring a probation officer or officer of a local authority to be made available to advise, assist and (where appropriate) befriend the child, or any parent or guardian, or any person with whom the child is living or in whose favour there is a contact order in force.

The above orders can be made, as stated above, whenever the child's welfare requires it in any 'family proceedings'. The act defines that term; but for present purposes it is sufficient to note that the court could for example make a residence order (in favour of a grandparent, perhaps) in a case where the applicant had asked for an adoption order. Again, as already mentioned, the court could make a residence order in care proceedings. It could even order that the child remain with the mother in the family home on condition that the father left and only

had contact with the child perhaps under supervision or in certain specified circumstances. (The act in fact gives local authorities special powers to facilitate such a solution, which might be useful in some abuse cases.)

Care and supervision orders may also be made in any 'family proceedings'; but as has already been emphasised, only if the court has satisfied itself that the 'significant harm' test has been met. Moreover, the local authority will have to go through the formality of applying for the order. There may, of course, be cases in which the court hearing a divorce case (for example) considers that a care order would be the most satisfactory remedy. In that case it may require the local authority to investigate and to consider whether to make an application for such an order.

(5) Emergency provisions

The act contains two main emergency remedies for protecting the child who is thought to be exposed to the risk of significant harm. First, the court may make an *emergency protection order* if there is reasonable cause to believe that the child is likely to suffer significant harm or if inquiries are being frustrated by the denial of access. To some extent such an order is the counterpart of the existing place of safety order, but an emergency protection order can only last for a comparatively short period (eight days) and is extendable once for a further seven more days. It is important to emphasise that both the welfare test and the no order presumption principle apply to an application for an emergency protection order.

In terms of the medical profession's involvement, it should be noted that the act specifically provides that the court making an emergency protection order may give directions for medical or psychiatric examination or other assessment of the child. It is also provided that a child of sufficient understanding may none the less refuse to submit to the examination or other assessment. It is to be expected that guidance will be given about the profession's responsibilities under this provision.

The second protective measure is the *child assessment order*. Such an order may be granted where the applicant has reasonable cause to suspect that the child is suffering or likely to suffer significant harm, that assessment of the child's health, development, or treatment is necessary to decide this, and that it is unlikely that such an assessment will be possible unless the court makes an order to that effect. The order requires any person who is in a position to produce the child to do so, and to comply with such directions relating to the assessment of the child as the court thinks fit to specify in the order. The order will specify what is to be done under the order—normally to carry out an assessment of the child's health or development—and it authorises any person carrying out the assessment 'to do so in accordance with the terms of the order'. Again, the Children Act provides that a child of sufficient understanding to make

an informed decision may refuse to submit to a medical or psychiatric examination or other assessment.

Child assessment orders are not intended to be soft options: if the court considers that there is ground to make an emergency protection order it should do so; and a child may only be kept away from home under a child assessment order in accordance with the terms of that order and so far as is necessary for the purposes of the assessment and for such period or periods as may be specified in the order.

(6) Impact of the act for medical practitioners

This article has been primarily concerned to sketch the broad structure of the act, rather than to attempt to analyse the specific responsibilities that are likely to be placed on the medical profession as a result of its implementation. But it may be helpful to indicate certain general consequences for medical practice that seem likely to follow:

(i) In routine general and hospital medical practice, it will be necessary for there to be a broad understanding of the principles of parental responsibility, particularly in terms of the power to give a valid consent to medical procedures. Again, the right of a child of sufficient understanding to refuse to undergo medical examination is of self evident importance to the profession.

(ii) It is likely that medical assessments

(including, of course, psychiatric assessments) will be called for on a much greater scale than has been the case in the past. In particular, it would seem difficult for courts to decide the issue of 'significant harm' without hearing an evaluation of the effect of what has happened to the child. Again it is not easy to see how a court could properly decide whether the making of an order would be better for the child than not doing so without being able to weigh up the developmental and other factors involved.

In essence, therefore, it would seem that courts are likely to require much more by way of expert assessment, and a significant proportion of this will be medical assessment. In private law cases doctors are likely to be involved either on the instructions of solicitors acting for one of the parties involved, or in collaboration with a *welfare officer* acting under an order made by the court in any proceedings. In care proceedings a *guardian ad litem* is to be appointed to represent the interests of the child unless the court is satisfied that it is not necessary to do so in order to safeguard the child's interests. In many cases the guardian will require medical assistance to decide on the recommendations which should be made to the court.

1 Lord Mackay of Clashfern. *House of Commons Official Report (Hansard)* 1988; vol 502 col 488.

2 *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112.

3 *Re D (A minor) (Wardship: sterilisation)* [1976] Fam 185.

4 *Re B (A minor) (Wardship: sterilisation)* [1988] AC 199.

See related article on p457.