Max Planck Institute
for Social Anthropology
Department 'Law & Anthropology'

Weighing the Constitutional Balance

Question(s) at stake:

Whether the parental refusal to consent to a medical diagnostic test on the basis of a conscientious objection constituted a failure in duty towards a child.

Outcome of the ruling:

The Supreme Court held that State intervention to vindicate the child's constitutional rights was not required as it had not been established that this case was "exceptional" on the grounds of parental failure of duty towards the child for physical or moral reasons.

Topic(s):

- The Human Body

Keywords:

- Balancing act
- Best interests of the child
- Healthcare and medical interventions
- Parents
- Right to respect for family life

Tag(s):

- Public health screening test
- Blood test

Author(s):

- Flynn, Michelle (Max Planck Institute for Social Anthropology, Department Law and Anthropology, Germany)

Country:

Ireland

Official citation:

North Western Health Board v. H.W. & anor [2001] IESC 90

Link to the decision:

https://www.courts.ie/search/judgments/%22%20type%3AJudgment%22%20AND%20%22filter%3Aalfresco_radio.title%22%20AND%20%22filter%3Aalfresco_NeutralCitation.%5B2001%5D%20IESC%2090%22

ECLI:

No ECLI number / ECLI number unknown

Date:

08 November 2001

Jurisdiction / Court / Chamber:

Supreme Court

Remedy / Procedural stage:

Appeal

Previous stages:

- High Court (Judgment dated 27 October 2000), *North Western Health Board v H.W. and C.W.* [2000] IEHC 199

Subsequent stages:

None

Branches / Areas of law:

Constitutional law, family law, child law

Facts:

The PKU test is a public health screening test normally given to infants a few days old and it identifies five potentially harmful conditions; four metabolic conditions and one endocrine condition. In the absence of early detection, each of these conditions cause either intellectual disability or life-threatening illness. The PKU test involves blood being extracted from the infant by pricking the skin on the infant's heel with a lancet which has a guard to ensure that it can only penetrate the skin to a limited extent. Droplets of blood are collected and sent for analysis. The test involves a minimal risk to the child and if carried out incorrectly it may cause an infection in the skin or bone, however there was no evidence that this had ever occurred since testing commenced in Ireland in 1966. Whilst the test is not compulsory, parents are nonetheless advised to consent.

The defendants were the parents of a new-born infant who refused to give their consent for the carrying out of the PKU test involving the taking of a blood sample. The defendants asserted that their objection was religiously motivated but stated that they had no objection against a non-invasive PKU test being carried out and suggested that a hair or urine sample could be taken. Medical evidence indicated, however, that the blood test was the most effective, and indeed the urine test had been abandoned in the 1960s in favour of the blood sample.

The plaintiff was a statutory body with responsibility for the welfare of children in its geographical area. More specifically, the plaintiff was responsible for ensuring that infants were screened for these conditions. Thus, the plaintiff applied to the High Court seeking permission to carry out the screening test and for an order restraining the infant's parents from impeding the carrying out of the test. Crucially however, the plaintiff sought to obtain a ruling of general application.

The High Court, in refusing the application, noted that Article 41 of the Constitution placed the family in a special position as the natural, primary, and fundamental unit group of society which possessed rights antecedent and superior to positive law. The duty of the State to vindicate the rights of children

arose only in exceptional cases where there had been a failure by the parents in their duty for physical or moral reasons. The State was not, however, entitled to intervene in every case where parental opinion differed from a professional opinion or where the State considered that the parents were wrong in a decision.

The plaintiff appealed to the Supreme Court wherein the appeal was dismissed.

Despite the initial assertion that the refusal was based upon a religious belief, this did not arise in the subsequent affidavits. During the hearing, the Court was informed that the basis for the refusal for the blood screening test to be carried out on their child was not religious in the sense of an identified faith but was in more general terms. The Supreme Court thereafter expressly stated that this case did not engage the balancing of a religious element. Nevertheless, the Supreme Court noted that a religious objection could be central in a subsequent case.

Ruling:

The Supreme Court, in dismissing the plaintiff's appeal, held the following:

- State intervention was not required to vindicate the child's constitutional rights as it had not been established that this case was "exceptional" on the grounds of parental failure of duty towards the child for physical or moral reasons.

- The State recognized the family as the natural, primary, and fundamental unit in society and as a distinct moral institution with rights superior and anterior to positive law as protected by Article 41 of the Constitution.

- There was a constitutional presumption that the welfare of the child (religious, moral, intellectual, physical, and social) was rooted within the family. Therefore, parents had the primary responsibility for the upbringing and welfare of their children. The Constitution placed the State in a subordinate and subsidiary role.

Main quotations on cultural or religious diversity:

High Court Judgment per Judge McCracken

[Citations per original hard copy version of this judgment]

- “Article 41.1 places the family in a very special position as being the natural primary and fundamental unit group of society. It also provides that the family possess rights which are antecedent and superior to all positive law. It is indeed probably the provision in the constitution which comes nearest to accepting that there is a natural law in the theological sense. There have been a number of cases which have spoken of a hierarchy of rights under the Constitution, but the wording of Article 41.1 certainly would appear to place the rights of the family and therefore presumably the rights of the parents in relation to their children, very high up in this hierarchy.” (pp. 12 and 13)
- “If the State were entitled to intervene in every case where professional opinion differed from that of parents, or where the State considered the parents were wrong in a decision, we would be rapidly stepping towards the Brave New World in which the State always knows best. In my view that situation would be totally at variance with both the spirit and the word of the Constitution.” (p. 14)

Supreme Court Judgments

[Citations per Supreme Court judgments available online]

Per Chief Justice Keane (dissenting)

- “These articles [Articles 41 and 42] are described in Kelly on *The Irish Constitution*, 3rd Ed. p.991 as ‘among the most innovatory in the entire Constitution’. The learned editors also comment that the articles are generally thought to have been inspired by papal encyclicals and by Catholic teaching: they point out, however, that the 1919 Weimar Constitution contained a declaration of the special status, and the State’s special protection, of marriage and motherhood, as well as of parents’ rights and duties.” (p. 8)
- “What is beyond argument is that the emphatic language used by the Constitution in Article 41 reflects the Christian belief that the greatest of

human virtues is love which, in its necessarily imperfect human form, reflects the divine love of the creator for all his creation. Of the various forms which human love can take, the love of parents for their children is the purest and most protective, at least in that period of their development when they are so dependent on, and in need of, that love and protection." (p. 8)

- "I have already pointed out that we are not concerned in the instant case with a refusal based on sincerely held religious beliefs, such as those which so troubled the court in the case of *In re E. (a minor)*. That is not to say, however, that in another case, however improbable it may now seem, the court might be asked to refuse the order on specific religious grounds which require, at the least, respectful consideration." (p. 15)
- "The trial judge was concerned in this case with what he saw as a rapid progression towards 'the Brave New World in which the State always knows best'. I think that this, with respect, is a mistaken view. The plaintiffs in this case, as an administrative body charged with promoting the welfare of children in their area, who may be regarded as an emanation of the State, ultimately do not claim to know best: they undoubtedly, however, approach this case on the basis that the scientists know best. It can, of course, be said with some truth that not all the advances of science in our time have been beneficial, although the scientists would doubtless argue that this was because of the misuse which states and other organisations have made of their discoveries and inventions. No doubt, scientists, in common with other groups in society, can also be arrogant and complacent. The fact remains that in our daily lives we constantly proceed on the basis that they do indeed know best. When we board an aircraft, we like to think that the captain is guided by his or her technical manuals and not by what he or she has been told by an astrologer. If we have to undergo brain surgery, we would hope that the surgeon conducts the operation in accordance with the latest state of scientific knowledge and not in accordance with the requirements of some

arcane religious cult.” (pp. 15 and 16)

- “What is beyond doubt is that, if this test is not administered and in the course of the next few years, he suffers death or serious brain damage as a result, the responsibility will not be that of the defendants alone. In this case, the defendants have refused to protect and vindicate, so far as practicable, the constitutional right of Paul to be guarded against unnecessary and avoidable dangers to his health and welfare. The courts, in my view, can and should.” (p. 16)

Per Judge Denham

- “In assessing the balance to be achieved in this case it is an important fact that there is no family history which makes it more than the most remote possibility that the child could have the illness to be tested for. His siblings have been tested and the result is negative. It would be relevant if the child had a real or significant chance of having the disease being screened. On the facts of this case this is not likely. Statistics are not the basis on which any decision will rest. Every child is cherished under the Constitution, cherished in accordance with the principles of the Constitution. However, perhaps statistics would illustrate how a hard case has the potential to make bad law.” (p. 7)
- “Every day, all over the State, parents make decisions relating to the welfare, including physical, of their children. Having received information and advice they make a decision. It may not be the decision advised by the doctor (or teacher, or social worker, or psychologist, or priest or other expert) but it is the decision made, usually responsibly, by parents and is abided by as being in the child’s best interest. Having been given the information and advice, responsibility remains with parents to make a decision for their child. The parents are responsible and liability rests with them as to the child’s welfare.” (p. 7)

- “It is not suggested that the child be removed from the defendants in this case; the child will remain within the family no matter what the decision. However, any intervention by the courts in the delicate filigree of relationships within the family has profound effects.” (p. 8)
- “In relation to the child, the fundamental principle is the welfare of the child. The welfare of the child includes religious, moral, intellectual, physical and social welfare.” (p. 8)

Per Judge Murphy

- “I confess that I would be impatient with the attitude of the Defendants/Respondents. I am alarmed by the real possibility (happily not a probability) that the young boy may be a victim of one of the metabolic conditions which the PKU test could so easily detect and that, because of the absence of detection and treatment, he could suffer appalling consequences. In that event at least the North Western Health Board will have the comfort of knowing that they took every possible step to secure the welfare of the infant. The only solace for myself and those Judges taking a view similar to mine would be that we interpreted the Constitution and the law to the best of our fallible ability.” (p. 2)
- “The Thomistic philosophy - the influence of which on the Constitution has been so frequently recognised in the judgments and writings of Mr Justice Walsh - confers an autonomy on parents which is clearly reflected in these express terms of the Constitution which relegate the State to a subordinate and subsidiary role.” (p. 2)
- “The objection of the parents centres exclusively upon the invasion or puncture - as they see it - of the blood cells of the child. No reasoning based on any scientific view or any religious doctrine or practice was cited in support of this firmly stated objection. Nevertheless I do not accept that a particular ill advised decision made by parents (whose care and devotion

generally to their child was not disputed) could be properly categorised as such a default by the parents of their moral and constitutional duty so as to bring into operation the supportive role of the State." (p. 2)

Per Judge Murray

- "Parents with unorthodox or unpopular views or lifestyles with a consequential influence on their children might for that reason *alone* find themselves subject to intervention by the State or by one of the agencies of the State. Similar consequence could flow where a parental decision was simply considered unwise. That would give the State a general power of intervention and would risk introducing a method of social control in which the State or its agencies would be substituted for the family. That would be an infringement of liberties guaranteed to the family." (p. 3)
- "Decisions which are sometimes taken by parents concerning their children may be a source of discomfort or even distress to the rational and objective bystander, but it seems to me that there must be something exceptional arising from a failure of duty [...] before the State can intervene in the interest of the individual child." (p. 3)

Per Judge Hardiman

- "I do not intend the term 'non-rational' to be necessarily derogatory: many of mankind's dearest and most beneficent beliefs have been non-rational in the sense of being incapable of purely rational justification. So, of course, have some of its greatest and most maleficent illusions. And not infrequently these latter have assumed a cloak of scientific irrefutability." (p. 3, para. 23)
- "It does not seem to me possible to hold that the respondent parents have failed in their duty towards their children. I entirely endorse what the learned trial judge has said in this regard. I do not view a conscientious disagreement with the public health authorities as constituting either a failure in duty or an exceptional case justifying State intervention." (p. 8,

para. 74)

- “It has been observed that Article 41 and 42 of the Constitution ‘are generally thought to have been inspired by papal encyclicals and by Catholic teaching’. (Kelly, The Irish Constitution third edition page 991). Counsel for the Respondents in this case have submitted, in my view convincingly, that the same approach can be grounded otherwise and have referred us to an American academic authority, Professor Joseph Goldstein. The latter suggests that the common law ‘reflecting Bentham’s view, has a strong presumption in favour of parental authority free of coercive intrusions by agents of the State’. I would endorse this as a description of the Irish constitutional dispensation, even if any reflection of the views of Jeremy Bentham is coincidental. I do not regard the approach to the issue in the present case mandated by Articles 41 and 42 of the Constitution as reflecting uniquely any confessional view.” (p. 8, para. 76)

Main legal texts quoted in the decision:

Relevant provisions of the Irish Constitution:

- Article 40.3.2
- Article 41.1.1
- Article 41.1.2
- Article 42.1
- Article 42.5

Relevant Irish legislative provisions:

- Child Care Act 1991
- Health Act 1953, s 4(2)

Cases cited in the decision:

Relevant Irish case law:

- *F.N. v Minister for Education* (High Court, 24 March 1995), [1995] 1 IR 409
- *G. v An Bord Uchtála* (Supreme Court, 19 December 1978), [1980] IR 32
- *In re a Ward of Court (withholding medical treatments) No. 2* (Supreme Court, 27 July 1995), [1996] 2 IR 79
- *Ryan v Attorney General* (Supreme Court, 3 July 1964), [1965] IR 294
- *The Adoption (No. 2) Bill, 1987* (Supreme Court, 26 July 1988), [1989] IR 656

Relevant UK case law:

- *Re C (A Child) (H.I.V. Testing)* (Fam. D) [2000] Fam 48
- *Re E (A Minor) (Wardship: Medical Treatment)* [1993] 1 FLR 386
- *Re O (A Minor) (Medical Treatment)* [1993] 2 FLR 149
- *Re T (A Minor) (Wardship: Medical Treatment)* (CA) [1997] 1 All ER 906

Relevant US case law:

- *Meyer v Nebraska* (1923) 262 US 390
- *Pierce v Society of Sisters* (1925) 268 US 510

Commentary

Weighing the Constitutional Balance

This case remains one of the strongest legal authorities in Ireland for demarcating the line between parental rights and State intervention. It is noteworthy that whilst the religious basis for the objection was not pursued at the hearing of the case, it nonetheless provided a framework for the initial objection. Four of the five judges of the Supreme Court - Judge Denham, Judge Murphy, Judge Murray, and Judge Hardiman - were in agreement in dismissing the appeal. Nevertheless, each Judge furnished a separate opinion. Chief Justice Keane was the sole dissentient and additionally furnished a separate opinion. These judgments, including the judgment from Judge McCracken in the High Court, consider the ambit of the constitutional protection afforded to parents in the making of decisions in respect of their children. Two particularly interesting aspects emerge in respect of these judgments; the first relates to the balancing of constitutional rights, and the

second relates to the issue of consent and medical treatment. Each aspect will be considered in turn.

Balancing of constitutional rights

This case involved the balancing of constitutional provisions including Article 40.1 (personal rights), Article 41 (protection of the family), and Article 42.5, as it then was, (allowing for State intervention in exceptional cases where parents failed in their duty to a child). Had the court ordered that the PKU test be given in this case, it would possibly have resulted in the test becoming compulsory in Ireland as the defendants sought an order of general application. Furthermore, such a decision would have resulted in the Court effectively acting as a legislator. Crucially, however, it would have set a low threshold for court intervention in subsequent cases related to parental authority.

The focus of this case was placed firmly upon the recognition of the family as being the natural, primary, and fundamental unit of society. In recognizing the ambit of the constitutional protection afforded to the family, Judge McCracken in the High Court noted that: “If the State were entitled to intervene in every case where professional opinion differed from that of parents, or where the State considered the parents were wrong in a decision, we would be rapidly stepping towards the Brave New World in which the State always knows best. In my view that situation would be totally at variance with both the spirit and the word of the Constitution.” (*North Western Health Board v H.W. and C.W.* [2000] IEHC 199, at p. 14). In the Supreme Court, Judge Hardiman expressed agreement with this observation, whilst Chief Justice Keane reached a different conclusion in opining that Judge McCracken had been mistaken and that the State had approached the matter on the basis of scientific evidence.

It is also of note that in considering the constitutional rights of the child, Chief Justice Keane, and Judges Denham, Murphy, and Hardiman referred to the quotation of Judge Finlay, former President of the High Court, in the case of *G v An Bord Uachtála* [1980] IR 32 wherein he stated that a child has a constitutional right to bodily integrity and “an unenumerated right to be reared with due regard

to her religious, moral, intellectual, physical and social welfare. The State, having regard to the provisions of Article 40, s.3, sub-s. 1, of the Constitution, must by its laws defend and vindicate these rights as far as practicable". (p. 44) Judge Murray equally focused on the status of the family within Irish constitutional law.

Consent and medical treatment

In noting the dangers of upholding compulsory medical examinations or treatment, Judge Hardiman stated that "it is better to hesitate at the threshold of compulsion, even in its most benevolent form, than to adopt an easy but reductionist utilitarianism whose consequences may be unpredictable. Ample scope must be given to the fundamental values of human dignity, as well as those of positive logic." (p. 4, para. 27) Judge Hardiman also noted that s 4(2) of the Health Act 1953 provided that a person "shall not be under any obligation to submit himself or any person for whom he is responsible to a health examination or treatment which is contrary to the teaching of his religion".

In refusing the appeal, Judge Hardiman noted that the plaintiff had failed to identify limits to the proposed simple "medical benefit" test. Judge Hardiman stated that: "Though they disclaimed any present intention but the application of the PKU test to a small number of children, they declined to limit the application of a 'medical benefit' criterion in any express fashion and even declined, in answer to a specific question, to concede that the approach could never be used to justify the compulsory treatment of an adult person of sound mind. These omissions perhaps underline the complexity of the subject matter and the unpredictability of future developments of the deceptively simple test the Health Board proposes." (p. 8, para. 80).

Conclusion

This case demanded a complex analysis of core constitutional provisions arising from the question as to whether the vindication of the rights of the child required that the parental refusal for the PKU test should be overridden. In dismissing the appeal, the Supreme Court held that it had not been established that this was an "exceptional" case requiring State intervention to vindicate the child's

constitutional rights, where the parents had failed for physical or moral reasons in their duty to the child. In doing so, the Supreme Court set the threshold in respect of decisions involving the refusal of medical treatment by adults and parental refusal concerning a child's medical treatment. Subsequent cases concerning the refusal of medical treatment on the grounds of religious belief have considered this landmark case, including *Fitzpatrick and Ryan v F.K. and the Attorney General* [2008] IEHC 104 and *Children's University Hospital Temple Street v C.D. and E.F.* [2011] IEHC 1 . During the hearing in the case of *Fitzpatrick and Ryan v F.K. and the Attorney* General, the ambit of the ruling in *North Western Health Board v H.W. and C.W.* was relied upon in submissions concerning the circumstances in which the State could intervene to override parental refusal on religious grounds to consent to life-saving treatment, and whether it arose where there was a real and substantial risk to the life and welfare of the child. In the case of *Children's University Hospital Temple Street v. C.D. and E.F.* , Judge Hogan in the High Court considered the circumstances in which the State can intervene where there is parental refusal on religious grounds to consent to a blood transfusion for an infant child. Judge Hogan applied the decision in *North Western Health Board v H.W. and C.W.* stating that the right of the State to intervene and thus override the constitutional rights of parents is expressly circumscribed by the language of Article 42.5 of the Irish Constitution. There was a requirement for the circumstances to be exceptional and the intervention to be proportionate. There must also have been a failure of duty on the part of parents. It was affirmed that a court can intervene in a case where "the child's life, general welfare and other vital interests are at stake". (para. 36)

In 2015, Article 42A.2.1° was added to the Irish Constitution and provides that: "In exceptional cases, where the parents, regardless of their marital status, fail in their duty towards their children to such extent that the safety or welfare of any of their children is likely to be prejudicially affected, the State as guardian of the common good shall, by proportionate means as provided by law, endeavour to supply the place of the parents, but always with due regard for the natural and imprescriptible rights of the child". Thus, the ambit of the constitutional right continues to limit State intervention to only "exceptional cases" of a parental

failure in duty towards a child. Twenty years later, the decision of the Supreme Court in *North Western Health Board v H.W. and C.W.* continues to be oft cited and frequently relied upon.

Literature related to the main issue(s) at stake:

Specific legal literature on the case:

- Enright, Máiréad. 2004. "Abraham, Isaac and the North Western Health Board". *Hibernian Law Journal* 5 (1): 25-52.
- Enright, Máiréad. 2008. "Interrogating the Natural Order: Hierarchies of Rights in Irish Child Law". *Irish Journal of Family Law* 11 (1): 3-9.
- Martin, Frank. 2001. "Parental Rights to Withhold Consent to Medical Treatment for their Child: A Conflict of Rights?". *Irish Law Times* 19 (19): 114-119.

General legal literature on the topic:

- Davidson, Hope and Jennifer Schweppe. 2015. "Time for Legislative Clarity on Consent to Medical Treatment: Children, Young People and the 'Mature Minor'". *Medico-Legal Journal of Ireland* 21 (2): 65-75.
- Enright, Máiréad. 2007. "Whither White Western Values? Comparative Perspectives on Culturally Motivated Decision-making for the Child". *Hibernian Law Journal* 7 (1): 1-16.
- Ranton, Duncan. 2013. "Parental religious beliefs when making decisions for terminally ill children". *Family Law* 684-692.

CC BY ND

This case-law comment is licensed under a Creative Commons Attribution-NoDerivatives 4.0 International License (CC BY-ND 4.0) .

You may share this material, provided that appropriate credit is given. No derivatives or adaptations of this material are permitted.

Suggested citation of this case-law comment:

Flynn, Michelle (2026): Weighing the Constitutional Balance, Department of Law and Anthropology, Max Planck Institute for Social Anthropology, Halle (Saale), Germany, CUREDI021IE003, https://www.doi.org/10.48509/CUREDI021IE003.