
Where do I stand? Assessing children's capabilities under English law

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This paper sets out the findings of a doctrinal study that has sought to establish a child's 'standing' under English law, focussing primarily on children aged 7–11 years. It will demonstrate that the legal provisions that apply to children's everyday lives are piecemeal and inconsistent, but more importantly, it will argue that even though the child possesses a broad range of rights under the UNCRC, he or she is much more clearly recognised and acknowledged as a wrongdoer than a 'right-doer' under English law. Following a close analysis of Article 12, the author goes on to discuss emerging scholarship concerning the capabilities approach and its relationship to children's rights. This is then suggested as a possible basis for shifting our thinking and practice in this area; from a place that recognises children's capacities not only as wrongdoers and as rights holders, but also increasingly as 'potentially competent' social actors and influencers.

Introduction

This paper sets out the findings of a doctrinal study that has sought to establish a child's status or 'standing' under English law in a range of circumstances that he or she may encounter. This research was carried out during the foundational stage of the empirical research project Law in Children's Lives funded by the Economic and Social Research Council (ESRC) under its transformative research call. Using child-friendly and participatory research methods, its aim is to investigate how far, if at all, children aged 7–11 years are aware of the various legal provisions that apply to them, and to assess in particular how far children perceive themselves to be empowered by these laws in their day-to-day lives. Accordingly the law as it applies to children of these ages has been the primary focus of this study.¹

The forthcoming discussion will demonstrate that although the relevant legal provisions are piecemeal and inconsistent, it is nevertheless possible to discern a general pattern or approach that emphasises most clearly the child's ability to do wrong under law, whilst remaining silent or equivocal on matters that concern the child's ability to exert a positive influence on his or her immediate surroundings. In other words, under English law the child lacks opportunity and capacity as an active citizen, whilst bearing full capacity as an offender or tortfeasor. The child's status as a rights holder is considered, with particular reference to Article 12 of the United Nations Convention on the Rights of the Child (UNCRC) and within the context of emerging scholarship on the children's rights and the capabilities approach. The author then goes on to suggest that aspects of this scholarship – in particular its emphases on children's individual capabilities, their participation rights and their potential competency as decision-makers – provide possible bases for reforming the ways in which the child is currently defined and described under English law.

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1 Further details of the research can be found at: www.le.ac.uk/licl.

The child as wrongdoer

Children have the capacity to commit crime from the age of 10 years² and they bear the capacity to be responsible for damage caused by their own negligent acts at any age. Considering first the child's capacity to be convicted of a criminal act, we find that although children are treated differently from adults in terms of process,³ they are not treated differently concerning the court's determination of their guilt or innocence. The presumption of *doli incapax* that had applied to children aged 10–14 was abolished under section 34 of the Crime and Disorder Act 1998⁴ and consequently, as Raymond Arthur explains, 'the youth justice system now assumes that in the context of criminal proceedings, young people from the age of 10 are capable of participating meaningfully in any court case involving them'.⁵ Conversely, a child under 10 is presumed to be incapable of possessing criminal responsibility under English law. As King and Piper point out, 'the law . . . is not concerned with examining the state of mind which inspired a very young child to break the law; rather, the law perceives the child as 'innocent'. This is a statement of legal reality, which may or may not correspond with the reality created by other discourses'.⁶

This determination of legal capacity to commit crime solely by reference to age can have unfortunate consequences when applied in the context of sexual offences. With regard to certain offences under the Sexual Offences Act 2003, it is expressly stated that a child may be held criminally responsible if 'he does anything which would be an offence . . . if he were aged 18'.⁷ Kathryn Hollingsworth points out that in principle, an instance of two teenagers engaging in consensual sexual activity, such as kissing, could result in one of them being prosecuted under the Act.⁸ More importantly, she demonstrates that a child may be dealt with under the Act as an offender, rather than as a victim, if he or she engages in sexual activity with another child as a result of adult abuse. She gives the example of *R (E) v Director of Public Prosecutions*⁹ where a prosecution was brought against a girl who (when aged 12) had been groomed by an adult male over the internet, and engaged in sexual activities with her two younger sisters.¹⁰

Under English civil law, a child owes another child or adult a duty of care in a wide range of situations. Perhaps the most obvious of these is where physical injury occurs where a child has been engaging in 'rough play' or 'horse play' with another child.¹¹ But it can in principle extend to a situation where damage is caused to property because of a child's negligent act¹² and to damage caused to the reputation of another child or adult through a child's publication of

2 Children and Young Persons Act 1933, s 50 states this in negative terms: 'It shall be conclusively presumed that no child under the age of [ten] years can be guilty of any offence'. See also Crime and Disorder Act 1998, s 34.

3 Government advice summarises this as follows: 'Children between 10 and 17 can be arrested and taken to court if they commit a crime. They are treated differently from adults and are: dealt with by youth courts, given different sentences [and] sent to special secure centres for young people, not adult prisons'. See: www.gov.uk/age-of-criminal-responsibility (accessed 17 October 2015).

4 This included the abolition of the defence of *doli incapax*. See *R v JTB* [2009] UKHL 20, [2009] AC 1310.

5 R Arthur, 'Recognising children's citizenship in the youth justice system' (2015) 37 *Journal of Social Welfare and Family Law* 21, at 28.

6 M King and C Piper (eds), *How the Law thinks about Children* (Ashgate, 1995), at p 108.

7 Sexual Offences Act 2003, s 13. This applies to actions amounting to offences under ss 9–12 of the statute.

8 K Hollingsworth in A Bainham and S Gilmore, *Children: The Modern Law* (Jordan Publishing, 4th edn, 2013), at p 793. She does acknowledge that in practice a prosecution would be extremely unlikely.

9 [2011] EWHC 1465 (Admin), [2012] 1 Cr App Rep 68.

10 The decision to prosecute was subsequently quashed in the High Court. K Hollingsworth in A Bainham and S Gilmore, *Children: The Modern Law* (Jordan Publishing, 4th edn, 2013), at p 794.

11 Both of these terms were used in the Court of Appeal to describe a situation where two 15-year-old girls were 'sword-fighting' with plastic rulers, resulting in an injury to one of them. *Mullin v Richards* [1998] 1 WLR 1305, per Hutchison LJ at 923.

12 The law of tort applies to situations involving damage to property as well as damage or injury to persons. See for example *Spartan Steel & Alloys Ltd v Martin & Co (Contractors) Ltd* [1973] 1 QB 27.

defamatory statements; there being old but established case-law to support an action for slander against a child.¹³ In his close analysis of this area, Roderick Bagshaw stresses that in tort 'children are not treated as non-persons . . . they are regarded as capable of owing and being owed legal duties'.¹⁴ Therefore, a child who causes damage in breach of a duty of care will be considered personally responsible for this. The child's parents will be responsible only if they themselves were negligent in their failure to supervise the child adequately at the time when the damage occurred.¹⁵ An important 'softener' to this apparently harsh principle is that in determining the level of duty owed by the child at the time when the damage occurred, the court will not adopt the usual 'ordinarily prudent and reasonable person' test. Instead it will measure the child's behaviour and the foreseeability of injury against an 'ordinarily prudent and reasonable' child of the same age.¹⁶ This is then an area of English law where the 'evolving capacities' of the child are recognised; albeit with reference to an objective standard.

The bullying 'exception'?

'Bullying' is a term adopted by schools and in wider society to refer to 'behaviour that hurts someone else . . . usually repeated over a long period of time and can hurt a child both physically and emotionally'.¹⁷ Clearly it is a form of behaviour that a large number of children encounter in their everyday lives. Information published by the Department of Education (DoE) in 2011 estimated that 'the number of children there are currently in UK schools that could be the subject of bullying is 28.8%'¹⁸ and the National Society for the Prevention of Cruelty to Children (NSPCC) reports that 24% percent of the children aged 11 and under who contacted the children's telephone helpline 'ChildLine' in 2012/13 expressed concerns about bullying.¹⁹ More broadly, Alana James concluded in her review of the relevant literature in 2010 that 'most children will experience school bullying at some stage, be it as bullies, victims or as witnesses'.²⁰

NSPCC guidance sets out a non-exhaustive list of actions that can constitute bullying; including verbal abuse, non-verbal abuse, threatening, intimidating or humiliating someone, spreading rumours, controlling or manipulating someone, racial, sexual or homophobic bullying, physical assaults, such as hitting and pushing and online or cyberbullying.²¹ Many (or in fact most) of these behaviours are potential offences under criminal law and many will also in principle give rise to potential civil law actions, such as trespass to the person or defamation. For example,

13 See *Defries v Davis* (1835) 1 Bing NC 692 where the court refused to discharge an infant defendant in an action of slander from execution for damages and costs, and *Hodsmen v John Grissel* (1559) 74 ER 1092 involving a successful claim against a 17-year-old.

14 R Bagshaw, 'Children through Tort' in J Fionda (ed), *Legal Concepts of Childhood* (Hart Publishing, 2001), pp 127–150, at p 148.

15 In *Donaldson v McNiven* [1952] 2 All ER 691 the father of a 13-year-old boy who used an air rifle outside of his home, contrary to his father's instructions, was held not to be responsible for his son's tort. However, in *Newton v Edgerley* [1959] 1 WLR 1031 the father of a 12-year-old boy who caused an injury to another child with a firearm was held to be negligent in allowing his son to have the use of the gun when other children were present.

16 *Mullin v Richards* [1998] 1 WLR 1305.

17 NSPCC, *What is Bullying and Cyberbullying?* Available online at: www.nspcc.org.uk/preventing-abuse/child-abuse-and-neglect/bullying-and-cyberbullying/what-is-bullying-cyberbullying/ (accessed 20 October 2015).

18 Department for Education, *FOI Release: Bullying* (published online 12 January 2011). Available at: www.gov.uk/government/publications/bullying/bullying (accessed 17 October 2015). This was based on information gathered from children in years 6, 8 and 10 'as there are no other current sources of national figures on bullying for pupils below the age of 10 (year 6) in the UK'.

19 NSPCC, *ChildLine Review of 2013/14*, p 17. Available online at: www.nspcc.org.uk/globalassets/documents/research-reports/childline-review-2012-2013.pdf (accessed 17 October 2015).

20 A James, *NSPCC Research Briefing: School Bullying* (NSPCC, 2010), p 6.

21 NSPCC, *What is Bullying and Cyberbullying?* Available online at: www.nspcc.org.uk/preventing-abuse/child-abuse-and-neglect/bullying-and-cyberbullying/what-is-bullying-cyberbullying/ (accessed 20 October 2015).

just in relation to actions that fall within the definition of ‘cyber-bullying’²² the charity Cybersmile maintains that the Protection from Harassment Act 1997, Criminal Justice and Public Order Act 1994, Malicious Communications Act 1988, Communications Act 2003 and Defamation Act 2013 all have potential application.²³

Nevertheless, where these behaviours are categorised within the non-legal definition of ‘bullying’ they appear effectively to become protected from legal sanction. This is the converse of the situation discussed earlier in this paper with regard to sexual or other criminal offences carried out by children over 10 in a ‘non-bullying’ context. This is best demonstrated by pursuing further the cyber-bullying example. Crown Prosecution Service (CPS) guidelines confirm that ‘communications sent via social media are capable of amounting to criminal offences’²⁴ but they go on to severely limit the situations in which a prosecution will take place.²⁵ More importantly, the guidance stipulates that ‘the age and maturity of suspects should be given significant weight, particularly if they are under the age of 18. Children may not appreciate the potential harm and seriousness of their communications and a prosecution is rarely likely to be in the public interest’.²⁶

Whilst this paper is not calling for the wide-scale criminalisation of children who bully, it does suggest that the adult-centric domestic legislative measures to deal with school bullying are relatively weak when compared to the harsh approach adopted towards children who commit crimes in other contexts.²⁷ The situation in Wales and England is slightly different, but in both jurisdictions the responsibility for putting measures in place for ‘encouraging good behaviour and respect for others on the part of pupils and, in particular, preventing all forms of bullying among pupils’ rests with schools’ head teachers.²⁸

The limitations on the child’s capacity to influence his or her environment

The forthcoming analysis will demonstrate that there are only very limited circumstances under English law in which the child can exert an influence on his or her immediate environment. Where disputes arise concerning which parent a child will live with or see regularly; or where a local authority becomes involved in a child’s life due to parental abuse or neglect, then in principle ‘the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding)’ will guide the decision-making process.²⁹ But even here, it will be argued below, the voice of the child is in practice mediated and constrained, so limiting his or her power to influence. The same is true of the child’s level of participation in decisions about his or her education and in the democratic process, in England at least.³⁰ Primarily, until he or

22 Anne Chueng notes that ‘in the context of this information age, bullying is no longer confined to face-to-face confrontation but is rather a combination of online and offline harassment, 24 hours a day, 7 days a week’: A Cheung, ‘Tackling Cyber-bullying from a Children’s Rights perspective’ in M Freeman (ed), *Law and Childhood Studies* (Oxford University Press, 2012), pp 281–301, at p 281.

23 See: www.cybersmile.org/advice-help/category/cyberbullying-and-the-law (accessed 20 October 2015).

24 Director of Public Prosecutions, *Interim guidelines on prosecuting cases involving communications sent via social media* (19 December 2012), para 12.

25 *Ibid*, paras 12–27.

26 *Ibid*, para 41.

27 The author considers that there is scope for further research in this area; to investigate how far the types of offences for which children are prosecuted reflect an emphasis upon behaviours that adults determine to be worthy of serious attention.

28 Education and Inspections Act 2006, s 89(1)(b).

29 Children Act 1989 (CA 1989), s 1(3)(a).

30 Most of the English law provisions that are discussed in this paper apply to children in both England and Wales, but in some areas, such as education and recreation, the Welsh National Assembly has enacted legislation (or ‘Assembly Acts’) that will apply only to children in Wales: Government of Wales Act 2006, s 108 and Sch 7.

she reaches the age of 18 (or in some circumstances 16) it is the adults who are recognised in law as having 'parental responsibility' (PR) for the child who determine the circumstances in which a child will live out his or her life.³¹

The weight of parental authority

PR is a broad-ranging concept and refers to 'all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property'.³² Where it is held by the child's parent³³ then it is accompanied by long-standing common law authority 'to inflict moderate and reasonable corporal punishment' upon their child.³⁴ The effect of this common law principle is to provide a defence against criminal prosecution for a parent who can successfully argue that his or her actions constituted 'reasonable chastisement' or 'reasonable punishment'.

In *A v United Kingdom (Human Rights: Punishment of Child)*³⁵ it was successfully claimed on behalf of a child that the failure of an English court to uphold a charge of assault against his stepfather amounted to a breach of the state's obligations under Article 3.³⁶ In this case a 9-year-old boy had been repeatedly beaten with a garden cane by his stepfather in order to discipline him for bad behaviour. In his defence, the stepfather had successfully argued in the domestic courts that his actions amounted to reasonable chastisement. The European Court of Human Rights found that the UK was in breach of Article 3 but it did not go as far as requiring the UK to ban all physical punishment by parents. Rather, it held that in determining whether an unacceptable level of force had been used by a parent when disciplining a child, a court should take into account a range of factors, such as the child's physical characteristics, the type of punishment and its duration, and its likely physical and psychological effects.³⁷ The current position under English law is that the common law 'defence' of reasonable chastisement remains but section 58 of the Children Act 2004 states that if a parent disciplines a child with actions that constitute an assault³⁸ or an offence under section 1(1) of Children and Young Person's Act 1933, then none of these actions can be justified on the basis of 'reasonable punishment'.³⁹ As noted in *A v UK*, as well as giving rise to a prosecution under criminal law, any form of assault on a child 'is actionable as a form of trespass to the person, giving the

31 CA 1989, s 3(1). It is expressly acknowledged under CA 1989, s 3(4)(a) that parental responsibility and the statutory duty to maintain a child are considered to be separate issues under English law.

32 CA 1989, s 3(1).

33 This is not always the case, as only mothers and married fathers automatically hold PR. See CA 1989, s 2. A local authority and other persons connected with the child can obtain PR by application to the court.

34 The phrase is taken from Cockburn CJ's explanation of the common law position in *R v Hopley* (1860) 2 F & F 202. This most unfortunate case involved a schoolteacher who had sought and obtained the father's permission to beat the child, following his alleged misbehaviour. Secretly, and at night, the child was beaten with a thick stick for a period of two and a half hours until he died. The schoolteacher was charged and found guilty of manslaughter.

35 (1998) 27 EHRR 611, [1998] 2 FLR 959.

36 Article 3 states that: 'No one shall be subject to torture or inhuman or degrading treatment or punishment'.

37 R Smith, ' "Hands-off Parenting?" – towards a reform of the defence of reasonable chastisement' [2004] CFLQ 261, at 264.

38 Such as assault causing actual bodily harm or assault causing grievous bodily harm under s 47 and ss 18 and 20 of the Offences against the Person Act 1861.

39 Section 1(1) of the Children and Young Person's Act 1933 sets out a broad-ranging offence that applies if a person with care of a child 'wilfully assaults, ill-treats, neglects, abandons, or exposes [the child], or causes or procures [the child] to be assaulted, ill-treated, neglected, abandoned, or exposed, in a manner likely to cause [the child] unnecessary suffering or injury to health'.

aggrieved party the right to recovery of damages'.⁴⁰ As with the criminal law sanction, causing actual bodily harm to a child 'cannot be justified in any civil proceedings on the ground that it constituted reasonable punishment'.⁴¹

There are no actions that a person can take that effect an automatic removal of his or her PR for a child; not even murdering the mother of the child in the child's presence.⁴² Notably however, the Children Act 1989 (CA 1989) makes provision for a child to apply to court for the removal of an adult's PR, provided that the court is satisfied that he or she possesses 'sufficient understanding' to do so.⁴³ However, the remit of such an application is limited to unmarried fathers,⁴⁴ and commentators note that 'the body of law in this area is slim' and successful applications 'rare and unusual' since wherever possible, the court will prefer to impose an alternative order (for example allowing remote contact only).⁴⁵

Owning and dealing with real and personal property

A child cannot own a legal freehold or leasehold estate in land but can be a beneficiary under a trust of land controlled and administered by adults.⁴⁶ Where there is a dispute concerning land held in trust, a mechanism exists whereby a trustee or 'any person . . . who has an interest in the property' can apply to the court for a determination of the dispute.⁴⁷ In principle this definition could include a child beneficiary, but in practice it does not.⁴⁸ In light of this, and taking into account the similarly restrictive approach to the child's legal ownership of personal property, Bainham and Gilmore observe that 'most of the distinctive rules relating to children's interest in property stem from the common law notion that a child has no legal capacity'.⁴⁹ On this basis, it has been long established that a child cannot give valid receipt for an inheritance⁵⁰ and the same approach applies to other capital sums of money such as pension fund payments or court damages; the money will normally be held on trust for the child until he or she reaches

40 *A v United Kingdom (Human Rights: Punishment of Child)* (1998) 27 EHRR 611, [1998] 2 FLR 959, para [15]. A recent example of this is *JXL and Another v Britton* [2014] EWHC 2571, [2014] All ER (D) 22 (Aug) where two sisters (now adults) were able to recover significant sums in damages from a man who had been convicted of raping them when they were children.

41 Children Act 2004, s 58(3). For a discussion of the UK position in light of reform in other countries, see B Naylor and B Saunders, 'Parental Discipline, Criminal Laws, and Responsive Regulations' in M Freeman, above n 22, pp 506–529.

42 *Re M (A Minor) (Care Order: Threshold Conditions)* [1994] 2 AC 424, [1994] 2 FLR 577. Parental responsibility ends when the child 'reaches full age' at 18. See Family Law Reform Act 1969, s 1(1), which reduced the age of majority from 21 to 18.

43 CA 1989, s 4(2A)–(4)

44 CA 1989, s 4. This is confirmed by Singer J in *Re P (Terminating Parental Responsibility)* [1995] 1 FLR 1048, at 1052 where he states unequivocally that 'there is no provision for the revocation, removal or termination of parental responsibility in a marital parent'.

45 *CW v SG (Parental Responsibility: Consequential Orders)* [2013] EWHC 854 (Fam), [2013] 2 FLR 655. Comment: *Family and Child Law Bulletin* 175 Parental responsibility (Lexis).

46 Law of Property Act 1925, s 1(6) states; 'A legal estate is not capable of subsisting or of being created in an undivided share in land or of being held by an infant'. Section 20 of the same Act makes void any appointment of an infant as a trustee of land.

47 Trusts of Land and Appointment of Trustees Act 1996, s 14.

48 A Hudson, *Equity and Trusts* (Routledge, 8th edn, 2015), p 817. Under Trusts of Land and Appointment of Trustees Act 1996, s 15(1)(c) the court has a duty to take into account the welfare of any child living in the house when making its decision. Where a dispute over land occurs within ancillary relief proceedings, then a court may direct that the divorcing couple's children are separately represented, especially if they hold a beneficial interest in the land. See further *Currey v Currey* [2004] EWCA Civ 1799, [2005] 1 FLR 952 and Family Proceedings Rules 1991 (SI 1991/1247), r 2.57.

49 A Bainham and S Gilmore, *Children: The Modern Law* (Jordan Publishing, 4th edn, 2013), p 407.

50 *Philip v Paget* (1740) 2 Atk 80; *Re Somech; Westminster Bank Ltd v Phillips* [1957] Ch 165. Nor can a child make a legally valid will – see Wills Act 1837, s 7.

18.⁵¹ The child's ability to hold and deal with real property or capital sums of money is then severely restricted and the extent to which he or she is able to benefit from it during childhood will depend on the terms of any trust upon which the property is held, and the decisions of the adult trustees involved.⁵² The situation changes dramatically once the child attains 18, as he or she can take steps to enforce the immediate transferal of the entire trust fund under long-established 'trust-busting' powers.⁵³

Outside of the strict legal confines that relate to these particular forms of property, however, we know that children can and do possess money, and that commonly 'children aged 8–11 are shopping online, buying apps and have bank accounts'.⁵⁴ The age at which a child can hold a debit card varies among high street banks, and there are no specific legal provisions to cover this, but it appears to be assumed in law that a child can and will enter into some forms of legal transaction. Subject to statutory age limits concerning the purchase of particular goods,⁵⁵ a child can enter into a contractual agreement but generally this contract will not be enforceable against the child, unless it is a so-called 'contract for necessities'.⁵⁶ These are defined under statute to mean 'goods suitable to the condition in life of the minor . . . and to his actual requirements at the time of the sale and delivery'.⁵⁷ This means food and clothing – but also items that are necessary for the child in question to maintain his or her particular lifestyle. Hence it has been suggested that nowadays mobile phones might fall into this category.⁵⁸ Where a child enters into a contract 'for necessities' then he or she is bound to pay for any goods received. The wording that precedes this section of the statute is particularly striking, with its description of the child being assimilated to an adult who is incompetent to contract 'by reason of drunkenness'.⁵⁹ Although this description is unfortunate, it appears to operate only to restrict an adult's rights of enforcement against the child, and not vice versa. Hence it is entirely possible for a child to bring an action for breach of contract, including the breach of an implied contract term under consumer protection legislation. For example, in *Godley v Perry*⁶⁰ a six-year-old boy recovered damages from the owner of a newsagents store, after arguing successfully that the toy catapult that he purchased from the store was neither 'fit for purpose' nor of 'merchantable quality'.⁶¹

Access to housing and resources

Children do not possess any legal right to be adequately maintained and there exists 'no specific duty to maintain a child'⁶² in everyday circumstances because the general duty of parents to

51 Practice Direction 21, rule 9.3. Where an award for damages for a child is made at trial, the money is paid into court and placed into the special investment account until further investment directions are given by the court. Under rule 9.7, where the sum of money is 'very small' the court may order it to be paid into a building society account (or similar) for the child's use.

52 Where a trust has no express provision allowing trustees to advance capital sums for the benefit of the child before he or she reaches 18, trustees have power to do so under Trustee Act 1925, s 32. This power can be exercised only for the benefit of the child concerned, and not for the wider family – see *Re Pauling's Settlement Trusts* [1964] Ch 303.

53 *Saunders v Vautier* (1841) EWHC Ch J82.

54 See Personal Finance Education Group, 'Press release: Age of the app – Children spending online before getting money lessons at school' 13 September 2013. Available at: www.pfeg.org/about-us/news/press-release-age-app-children-spending-online-getting-money-lessons-school (accessed 20 October 2015).

55 For example, it is an offence to sell an animal to a person under 16, under s 11(1) of the Animal Welfare Act 2006.

56 *Benjamin's Sale of Goods* (Sweet and Maxwell, 8th edn, 2010), at 2–029.

57 Sale of Goods Act 1979, s 3(3).

58 J O'Sullivan and J Hiliard, *The Law of Contract* (Oxford University Press, 4th edn, 2010) p 309 cited in A Bainham and S Gilmore, *Children: The Modern Law* (Jordan Publishing, 4th edn, 2013), p 861.

59 Section 3(2) states: 'Where necessities are sold and delivered to a minor or to a person who by reason of drunkenness is incompetent to contract, he must pay a reasonable price for them'.

60 [1960] 1 WLR 9.

61 The relevant statutory provision at the time was Sale of Goods Act 1893, s 14(1) and (2).

62 *Re C (A Minor) (Contribution Notice)* [1994] 1 FLR 111, per Ward J, at 172.

maintain their child is not explicitly stated under law.⁶³ Rather this responsibility can be deduced from the fact that the failure of a parent or carer to adequately maintain a child can constitute a criminal act⁶⁴ and/or prompt the instigation of care proceedings.⁶⁵ Where one or both of the child's parents is absent, or not living in the same household as the child, then a duty to maintain the child is positively affirmed under statute as resting with 'any person who is in law the mother or father of the child', including a non-resident parent.⁶⁶ However a non-resident parent is deemed to have fulfilled this obligation to the child if she or he makes payments to the resident parent or 'person with care' for the child in accordance with any child maintenance calculation that has taken place at this person's request.⁶⁷ Hence Bainham and Gilmore summarise the position under this law as 'support for parents, not payments to children'.⁶⁸ They point out too that the Child Support Act 1991 applies only in the context of absent parenting; it does not provide any general guidance nor 'define the level of support appropriate to a child living under the same roof with [both] parents'.⁶⁹

A similar approach is evident with regard to social security payments, as the entitlement to weekly child benefit payments under English law rests with the parent or other person with de facto responsibility for the child.⁷⁰ The only way that a child can directly receive child benefit payments is if she herself becomes a parent. Hence Nick Wikeley concludes that although child benefit is 'very much designed to provide assistance to parents with the costs of raising children, [it] is not a benefit for children as such'.⁷¹

Every local authority is placed under a duty to 'safeguard and promote the welfare of children within their area who are in need' by providing a range of services appropriate to those children's needs.⁷² Where such support is given or is being considered, then the local authority does have a duty 'so far as is reasonably practicable and consistent with the child's welfare' to ascertain the child's wishes and feelings regarding any intended actions; and to 'give due consideration' to them.⁷³ This does seem to place the child in a decision-making capacity, at least to some extent. However, by majority the House of Lords decided in 2003 that this duty placed on local authorities to safeguard and promote the welfare of children in need is a general one. It does not provide a platform whereby individual children (or even adults acting on their behalf) can claim a right to assistance.⁷⁴ Hence the decision to intervene, or not to intervene, in the life of a child in need rests entirely with the local authority, and the child's capacity to influence that decision is limited to commenting upon any planned intervention.

63 It is acknowledged under CA 1989, s 3(4)(a) that parental responsibility and the statutory duty to maintain a child are separate issues under English law.

64 Children and Young Persons Act 1933, s 1(1) and (2). Under s 1(2)(a) a parent is deemed to have neglected a child 'if he has failed to provide adequate food, clothing, medical aid or lodging for him, or if, having been unable otherwise to provide such food, clothing, medical aid or lodging, he has failed to take steps to procure it to be provided'.

65 CA 1989, s 31.

66 Child Support Act 1991, ss 1(1) and (2).

67 See Child Support Act 1991, s 1(2). The Act also allows for parents to reach an agreement as to maintenance privately. However, any such agreement cannot restrict the right of either parent to make an application for a maintenance assessment under the statute (see s 9).

68 A Bainham and S Gilmore, *Children: The Modern Law* (Jordan Publishing, 4th edn, 2013), p 422.

69 *Ibid*, p 426. For a detailed consideration of this area see N Wikeley, *Child Support Law and Policy* (Hart Publishing, 2006).

70 Social Security Contributions and Benefits Act 1992, ss 141–143.

71 N Wikeley, 'Children and Social Security Law' in J Fionda (ed), *Legal Concepts of Childhood* (Hart Publishing, 2001), pp 223–243, at p 226.

72 CA 1989, s 17(1)(a)–(b).

73 CA 1989, s 17(4A).

74 *R (G) v Barnet London Borough Council*; *R (W) v Lambeth London Borough Council*; *R (A) v Lambeth London Borough Council* [2003] UKHL 57, [2004] 2 AC 208, [2004] 1 FLR 454.

Complications can arise where a child has needs relating to the provision of housing, since there can be confusion over which public body holds responsibility for providing assistance.⁷⁵ If a child is homeless, the local authority is obliged to provide him or her with accommodation,⁷⁶ but this obligation does not extend to housing the child's family. This wider responsibility rests instead with the local housing authority, exercising its duties under housing legislation. In the context of social housing, David Cowan and Nick Mearden describe children as 'outsiders'; their interests being 'mediated by the state (through social services and other state agencies) or by a more enfranchised subject of the discourse (eg a parent)'.⁷⁷

Contact with non-resident parents

We know that children live in diverse family circumstances. Data published in 2013 by the Office for National Statistics (ONS) indicates that of the 13.3 million dependent children living in families in the UK in 2013, 15% lived with opposite sex cohabiting couples, 63% with married couples, less than 1% lived with civil partner or same sex cohabiting couples and 22% lived in lone parent families. Within these lone parent families, the vast majority (91%) of parents were women and only 9% men.⁷⁸ Alongside this, the most recent family stability indicator⁷⁹ reports that 70% of children live with both parents; but that a significantly higher proportion of these children come from middle/high income families (76%) compared to low income families (45%).

Separate ONS statistics indicate that in 2011, 3.2% (386,000) of the 12.1 million dependent children living in England and Wales had a second parental address; indicating some form of shared care arrangements exist for some families.⁸⁰ However, Philippa Newis estimates this to be a higher figure of 9%.⁸¹ More importantly, Newis contends that:

'Critically, there is a dearth of evidence about children's experiences and views of shared care. We need more large-scale, long-term research that takes into account children's views of their care arrangements and understand from their perspective what works for them, including how different pathways into and through shared care impact upon child outcomes.'⁸²

A lack of direct consultation with children is also evident in a report on non-resident parental contact with children, published on behalf of the Ministry of Justice in 2007/08.⁸³ Although

75 See for example *R v Tower Hamlets London Borough Council ex parte Bradford and Others* [1998] 1 FCR 629.

76 CA 1989, s 20. For further information on the impact of homelessness on children see Z Mustafa, *Listen Up: The Voices of Homeless Children* (Shelter, 2004).

77 See D Cowan and N Dearden, 'The Minor as (a) Subject: The Case of Housing Law' in J Fionda (ed), *Legal Concepts of Childhood* (Hart Publishing, 2001), pp 165–182, at pp 166–167.

78 Office for National Statistics, *Statistical Bulletin, Families and Households 2013*. Available at: www.ons.gov.uk/ons/dcp171778_332633.pdf (accessed 20 October 2015). Dependent children are defined in this study as those living with their parent(s) and aged under 16, or aged 16 to 18 and in full-time education (p 7).

79 Department for Work and Pensions, *Family Stability: Indicator 1* (March 2015). Available at: www.gov.uk/government/uploads/system/uploads/attachment_data/file/410551/social-justice-framework-indicator-1.pdf (accessed 20 October 2015).

80 ONS, *Dependent Children Usually Resident in England and Wales with a Parental Second Address, 2011* (published 25 July 2014). See also L Trinder, 'Shared residence: A review of recent research evidence' [2010] CFLQ 475.

81 She maintains that: 'Parental separation affects around three million of the twelve million children in the UK' and of these children, approximately 9% will spend 'at least three days and three nights per week with each parent. See P Newis, 'Firm Foundations. Shared care in separated families: building on what works' (Gingerbread, 2011), p 5.

82 *Ibid*, p 32.

83 ONS, 'Non-resident parental contact, 2007/08: A report on research using the National Statistics National Omnibus Survey' produced on behalf of the Ministry of Justice and the Department for Children, Schools and Families, *Omnibus Survey Report No 38*. The report was based upon the responses of 265 resident parents, 170 non-resident parents and 10 respondents who were both a resident parent and a non-resident parent.

part of the report purports to provide ‘Children’s views of contact arrangements,’ its authors concede that these views were gathered entirely from parents ‘and so may not include all the child’s opinions’.⁸⁴

Where parents live separately and have made their own arrangements,⁸⁵ it is impossible to know how far the child has been consulted and no legal mechanism is in place to require this.⁸⁶ But more information is available concerning the extent to which the child is consulted where a family arrangement is to be determined by the court under a private law application.⁸⁷ In accordance with its obligations under Article 12, the UK government is placed under a duty to provide to any child ‘the opportunity to be heard’ in such circumstances, ‘either directly, or through a representative or an appropriate body’. Under English law, the implementation of this duty is found in section 1(3) of the CA 1989, requiring that the court takes into account ‘the ascertainable wishes and feelings of the child concerned (considered in light of his age and understanding)’.

Whereas in public law proceedings, children are routinely represented by a guardian ad litem, this is not the case in private proceedings.⁸⁸ The most common way in which a child’s views are gathered and reported to the court in private proceedings is where the court requests a welfare report, written by a member of the Children and Family Court Advisory and Support Service (Cafcass) following their meeting/s with the child or children concerned.⁸⁹ As Cafcass’ own guidance describes, its officer’s report ‘will usually inform the court of the child’s wishes and feelings, *but the officer will make a recommendation based on what they think is in the child’s best interests rather than just report on the child’s wishes*’ (emphasis added).⁹⁰ Whilst this practice can protect the child from the detrimental effects of being directly involved in judicial proceedings, it can also severely limit the child’s opportunity to directly express a view to the court (even via a third party) on decisions that affect them.⁹¹

Exceptionally, a child may be joined as a party to private proceedings,⁹² and where this occurs, the child will be represented by a guardian ad litem, who in turn instructs legal representatives. In *Mabon v Mabon*⁹³ Thorpe LJ describes this so-called ‘tandem model’ as ‘the Rolls Royce model’ of practice but concedes that the approach is ‘essentially paternalistic’ since the primary role of the guardian is ‘to advocate the welfare of the child he represents’.⁹⁴ Informing the court of the child’s wishes and feelings is the guardian’s ‘secondary role’.⁹⁵ As Alistair Macdonald points out, this is at least one way in which a child’s participation in proceedings can be

84 Ibid, p 28.

85 The ONS, ‘Non-resident parental contact report’, above n 83, at p 12 indicates that: ‘The majority of children had the contact arrangements with their non-resident parent arranged informally’.

86 A retrospective account is however provided by J Fortin, J Hunt and L Scanlan, ‘Taking a longer view of contact: The perspectives of young adults who experienced parental separation in their youth’ (Sussex Law School, 2012).

87 CA 1989, s 8.

88 As Fortin et al point out, ‘the courts are already hampered in their ability to order welfare reports because Cafcass is over-burdened, and separate representation is rarely ordered’. J Fortin, J Hunt and L Scanlan, ‘Taking a longer view of contact: The perspectives of young adults who experienced parental separation in their youth’ (Sussex Law School, 2012) at xix.

89 G Morris, ‘Children’s Voices’ *New Law Journal* 11 December 2009: www.newlawjournal.co.uk/nlj/content/children%E2%80%99s-voices (accessed 20 October 2015).

90 Cafcass, ‘Child Arrangement Orders’: www.cafcass.gov.uk/grown-ups/professionals/child-arrangements-orders.aspx (accessed 14 October 2015).

91 For a striking example of this, see *F v F (Welfare of Children: Immunisation)* [2013] EWHC 2683 (Fam), [2014] 1 FLR 1328 where Theis J relies entirely on the report of the Cafcass officer as the means to determining the wishes and feelings of two sisters (aged 11 and 15) despite having met them in person.

92 Either via a request from a proposed guardian ad litem, or by instruction from the court, see Family Proceedings Rules 1991, rule 9.5.

93 [2005] EWCA Civ 634, [2005] Fam 366, [2005] 2 FLR 1011.

94 Ibid, per Thorpe LJ at 372.

95 Ibid, at 372.

assured, without requiring him or her to attend court in person⁹⁶ but, as Macdonald concedes, it remains problematic. In order to be fully effective and compliant with the requirements of Article 12, taking into account the ascertainable wishes and feelings of the child 'must mean both the placing before the court of the unrefined wishes and feelings of children in their raw form (whether directly or through the agency of another) and the act of advancing to the court, by means of independent representation, the child's wider interests and perspective'.⁹⁷

It is possible for a child to request the removal of their guardian ad litem so that he or she can instruct legal representatives directly⁹⁸ and in principle; it is even possible for a child to independently issue family arrangement proceedings, provided that he or she can gain the leave of the court to do so.⁹⁹ As Jane Fortin points out, 'these two procedural methods reflect a remarkable legal acknowledgment of children's capacity to take responsibility for certain aspects of their own upbringing'.¹⁰⁰ In the months that followed the coming into force of the CA 1989, commentators announced that now 'Children have the right to be heard before legal decisions are made about them'¹⁰¹ and extreme examples of children 'divorcing their parents' were much-publicised.¹⁰² But since then, there have been a limited number of applications brought by children and with limited success.¹⁰³ Fortin describes how all section 10(8) applications were 'swiftly confined . . . to determination in the High Court'¹⁰⁴ and through the development of case-law, it became necessary for a child to demonstrate not only the capacity to form and express an opinion, but also to understand and cope with the pressures of litigation, in order to be successful in securing independent representation.¹⁰⁵

A detailed discussion of the advantages and disadvantages of involving children in judicial proceedings is beyond the scope of this paper, as is the position of children in relation to medical law decision-making. Nevertheless, the preceding discussion is sufficient to demonstrate that in civil proceedings, children's direct participation is considered always in light of an assessment of their competency. Arthur contrasts this sharply to the situation in criminal proceedings. He points out that although the court expressly acknowledged the issue of children's autonomy in *Mabon*, 'nonetheless it emphasised that a balance needed to be struck between the child's right to participate in decision-making processes . . . and the 'sufficiency of the child's understanding'.¹⁰⁶ This causes him to conclude that 'children appear only to be granted unconstrained agency and autonomy in the context of wrong-doing'.¹⁰⁷

Engaging in social and democratic processes

English law creates very few opportunities for children to inform or engage directly in formal social and democratic processes. Local authorities have a duty to consult children when

96 A MacDonald, 'The Child's Voice in Private Law: Loud Enough?' [2009] Fam Law 40, at 41.

97 Ibid, at 41.

98 As occurred in *Mabon v Mabon* [2005] EWCA Civ 634, [2005] Fam 366, [2005] 2 FLR 1011.

99 CA 1989, s 10(8).

100 J Fortin, *Children's Rights and the Developing Law* (Cambridge University Press, 2009), p 265.

101 'What the Act Does' *The Times*, Monday 14 October 1991, p 7.

102 See A Thomson, 'When a child goes to law' *The Times*, Friday 13 November 1992, p 16, reporting on the case of an 11-year-old girl obtaining a residence order to live with her grandparents and on the case of a 14-year-old girl seeking an order that would permit her to live with her boyfriend's family.

103 An application in *Re C (Residence: Child's Application for Leave)* [1995] 1 FLR 927 was successful but applications in *Re SC (A Minor) (Leave to Seek Residence Order)* [1994] 1 FLR 96 and *Re H (Residence Order: Child's Application for Leave)* [2000] 1 FLR 780 were unsuccessful.

104 By *Practice Direction* [1993] 1 All ER 820, see J Fortin, *Children's Rights and the Developing Law* (Cambridge University Press, 2009), p 265.

105 See further J Fortin, *Children's Rights and the Developing Law* (Cambridge University Press, 2009), pp 266–267.

106 R Arthur, 'Recognising children's citizenship in the youth justice system' (2015) 37 *Journal of Social Welfare and Family Law* 21, at 30.

107 Ibid.

preparing their Children and Young People's Plan¹⁰⁸ and, as stated earlier, to take into account the wishes and feelings of children who fall within their responsibility for providing services to children and families in need.¹⁰⁹ When exercising its function as a 'best value authority'¹¹⁰ a local authority may seek the views of relevant 'local persons'¹¹¹ that may include children as service users. But essentially, under English law, the opportunity for a child to influence local and/or general government does not exist until he or she reaches 18, at which time he or she can not only vote in local, general and EU elections,¹¹² but also stand for parliamentary election.¹¹³ By contrast, local authorities in Wales have recently been placed under a legislative duty to make provision about arrangements for participation of children in local authority decisions that might affect them.¹¹⁴

Participating in decisions at and about school

As noted by Neville Harris, 'the law of England and Wales does not provide an express "right to education" '¹¹⁵ for children, but instead imposes a responsibility upon the parents of children and upon their local authority to provide and secure an appropriate education for a child aged 5 and above.¹¹⁶ Where a local authority is concerned that a child is not receiving a 'suitable education' – either because arrangements to home educate the child are insufficient or the child's attendance at school is poor, then the child's parent can be issued with a school attendance order, requiring the parent to satisfy the local authority, within a specified period, that 'the child is receiving such education'.¹¹⁷ If the parent fails to comply with the order, then she or he will have committed a criminal offence and be subject to a fine.¹¹⁸ In simple terms, the effect of the current domestic law is that a child possesses neither the right to nor the responsibility for his or her own education.¹¹⁹

In the context of school, the child's Article 12 right to participate should occur both in principle and practice. As Robin Alexander states, an aim of education should be to 'enable children to become active citizens by encouraging their full participation in decision-making within the classroom and school'.¹²⁰ This calls for the creation of a school environment that develops

108 As required under Children and Young People's Plan (England) Regulations 2005 (SI 2005/2149), reg 7. Children Act 2004, s 17 defines the Children and Young People's Plan as 'a plan setting out the strategy of the persons or bodies represented on the Board for co-operating with each other with a view to improving the well-being of children and relevant young persons in the area of the authority that established the Board'. The 'board' referred to here is the multi-agency Local Safeguarding Children Board, required to be set up by each local authority under Children Act 2004, s 13.

109 CA 1989, s 17. They are also required to put complaints procedures in place for children with regard to these functions – see CA 1989, s 24D. See also Children Act Representations Procedure (England) Regulations 2006 (SI 2006/1738).

110 Local Government Act 1999, s 3: 'A best value authority must make arrangements to secure continuous improvement in the way in which its functions are exercised, having regard to a combination of economy, efficiency and effectiveness'.

111 Local Government Act 1999, s 3(2).

112 Representation of the People Act 2000, s 1(1).

113 Electoral Administration Act 2006, s 17.

114 Children and Families (Wales) Measure 2010, ss 11 and 12. See further 'Wales: A Play Friendly Country' Statutory Guidance to Local Authorities (July 2014) and Welsh Government Consultation Document, 'Local participation strategies', Draft Guidance Number: WG13434 (November 2011).

115 N Harris in A Bainham and S Gilmore, *Children: The Modern Law* (Jordan Publishing, 4th edn, 2013), p 895.

116 Education Act 1996, ss 7, 13, 13A and 14.

117 Education Act 1996, s 437.

118 Education Act 1996, s 443.

119 For a full discussion of 'Children and Education' see A Bainham and S Gilmore, *Children: The Modern Law* (Jordan Publishing, 4th edn, 2013), chapter 17.

120 R Alexander, *Introducing the Cambridge Primary Review* (University of Cambridge, 2009), p 19. See also R Alexander (ed), *Children, their World, their Education: final report and recommendations of the Cambridge Primary Review* (Routledge, 2009).

children's understanding of themselves as being part of a wider democratic society which they can positively influence when given the opportunity to do so.¹²¹

Prior to the publication of the Crick report in 1998, there were a number of school-based activities such as mock trials and youth parliament competitions taking place on an ad hoc basis.¹²² Whilst the authors of the report recognised the value of such activities, they felt that 'citizenship and the teaching of democracy . . . is so important both for schools and the life of the nation that there must be a statutory requirement on schools to ensure that it is part of the entitlement of all pupils'.¹²³ As a result of this, citizenship education was introduced into schools as a compulsory part of the national curriculum for school students aged 11–16. It is not compulsory for children aged 5–11 years.¹²⁴ However, there have been concerns that the effect of citizenship education is falling short of that which the Crick report envisaged. Katherine Covell et al explain that this has been attributed partly to a lack of adequate teacher training but more importantly, it is partly because commonly the child's ability to exercise or practice active participation is heavily constrained in the school environment.¹²⁵ They state: 'Learning occurs through experience . . . When pupils are denied participation, it is unlikely that they can conceive of themselves as moral persons able to shape their environments'.¹²⁶

Untangling the legislative provisions that apply directly to the child in school is a considerable challenge. Catrin Fflur Huws calculated (in 2012) that there were 17 statutes in force that relate to education in England and Wales.¹²⁷ The situation is further complicated by the fact that although the law in both countries operates within the same broad framework, the National Assembly for Wales has power to pass primary legislation on matters relating to education. Huws observes that 'the current political context where there are different political parties in government in Wales and Westminster, means that the scope for education law in England and education law [in Wales] to diverge has increased substantially'.¹²⁸ With regard to requiring and providing opportunities for children to participate actively in school decision-making, in line with Article 12, all Welsh schools are required to have a school council 'so that the voice of the pupil is represented in the development and implementation of school policies and procedures'.¹²⁹ The school council then nominates two of its members to serve as associate pupil governors 'to provide the voice of the school council at governing body meetings and in turn to communicate matters from the governing body to the school council'.¹³⁰ In England, school councils are not required by law but in practice most schools have them. There is no general system of child representation on the governing body that is analogous to the situation

121 See further C Robinson, *Children, their Voices and their Experiences of School: What Does the Evidence Tell Us?* (Cambridge Primary Review Trust, 2014).

122 Many of these were and still are organised by the Citizenship Foundation – see further: www.citizenshipfoundation.org.uk/.

123 Advisory Group on *Citizenship, Education for citizenship and the teaching of democracy in schools* (Qualifications and Curriculum Authority, 1998) para 1.1.

124 Citizenship forms part of the 'non-statutory framework for personal, social and health education for pupils aged 5–11 years'. See K Covell, R B Howe and J K McNeil, '“If there's a dead rat don't leave it” young children's understanding of their citizenship rights and responsibilities' (2008) 38(3) *Cambridge Journal of Education* 321.

125 For example, even where schools have school councils, only the children on the council will participate, and these children may not be elected representatives, but may have been chosen through other means.

126 K Covell, R B Howe and J K McNeil, '“If there's a dead rat don't leave it” young children's understanding of their citizenship rights and responsibilities' (2008) 38(3) *Cambridge Journal of Education* 321, at 322.

127 C F Huws, 'The Language of Education Law in England and Wales' (2012) 33(2) *Statute Law Review* 252, at 253.

128 *Ibid.*

129 See Fact File 02/08, Pupil Participation, Associate Pupil Governors and School Councils, referring to The School Council (Wales) Regulations 2005. Available at: www.governorswales.org.uk/publications/2008/10/01/02–08-pupil-participation-associate-pupil-governors-and-school-councils/ (accessed 20 October 2015).

130 *Ibid.*

in Wales.¹³¹ For both England and Wales, there is a legal requirement for school governing bodies and local authorities to ‘have regard to any guidance given from time to time by the Secretary of State (in relation to England) or the National Assembly for Wales (in relation to Wales) . . . about consultation with pupils in connection with the taking of decisions affecting them.’¹³² An additional statutory provision requiring consultation with school pupils on some matters, although enacted in 2008, is not yet in force.¹³³ Therefore the only remaining requirement for pupil participation operates in the context of school inspections, where pupils’ views must be taken into account.¹³⁴ Hence even a close investigation into the labyrinth of education legislation has failed to reveal any clear and distinct requirements for facilitating widespread pupil participation in school.

Free school meals

One very tangible way in which a child can be involved in decision-making at school is through exercising some element of choice concerning his or her meals. At the time of writing, all children in key stage 1 (aged 4–7) are eligible for free school lunches and for a child in key stage 2 (aged 7–11), a free lunch will be available if the child’s parent is in receipt of certain state benefits.¹³⁵ On its face this appears to be direct tangible benefit to children. However, it is important to note that these meals are allocated on an ‘opt in’ basis; the Education Act 1996, section 512(3)(b) requiring that ‘a request for the provision of school lunches has been made by or on behalf of [the child] to the [relevant local] authority’. Although this definition provides for a direct application to be made by the child, in practice the application process needs to be initiated by the parent.¹³⁶ Arguably this apparently minor issue is indicative of a much wider adult-centred approach that repeatedly places the parent in the capacity of decision-maker, so lessening again the child’s ability to influence his or her day-to-day environment. The death of Daniel Pelka in 2012 provides an extreme example of this. Daniel was starved, severely abused and eventually murdered by his mother and her partner but attended school throughout the period of abuse.¹³⁷ At school Daniel ‘presented as always being hungry and took food at every opportunity, sometimes scavenging in bins’,¹³⁸ but the serious case review reports that:

‘without English as his first language and because of his lack of confidence Daniel’s voice was not heard throughout this case. Whilst some school staff were able to give helpful descriptions of Daniel in their observations of him in class, overall there is no record of any conversation held with him by any professional about his home life, his experiences outside of school . . . In this way despite Daniel being the focus of concern for all of the practitioners, in reality he was rarely the focus of their interventions.’¹³⁹

Children’s rights and the capabilities approach

In the next and final part, the paper considers the child’s status as a rights holder, with particular reference to the child’s Article 12 right to participate. It then draws on recent

131 N Harris in A Bainham and S Gilmore, *Children: The Modern Law* (Jordan Publishing, 4th edn, 2013), p 918.

132 Education Act 2002, s 176(1)(a)–(b). Section 176(2) further requires that ‘a pupil’s views [are] to be considered in the light of his age and understanding’. The most recent guidance is Department for Children, Schools and Families, *Working Together Listening to the voices of children and young people* (DCSF, 2008).

133 Section 157 of the Education and Skills Act 2008 inserts a new s 29A into the Education Act 2002.

134 Education Act 2005, s 7.

135 Re key stage 1, see Children and Families Act 2014, s 106. Re key stage 2, the list of relevant benefits is set out at: www.gov.uk/apply-free-school-meals (accessed 20 October 2015).

136 This is indicated by the language adopted in government advice: ‘Check with your local council to see if your child qualifies for free school meals and find out how to apply’. See: www.gov.uk/apply-free-school-meals (accessed 28 March 2015).

137 See: www.bbc.co.uk/news/uk-england-coventry-warwickshire-24106823 (accessed 28 March 2015).

138 Coventry LSCB, *Final Overview Report of Serious Case Review re Daniel Pelka* (September 2013), para 2.4.

139 *Ibid*, para 14.5.

scholarship concerning children's rights and the capability approach and suggests this as a possible basis for defining and developing the child's status under English law.

The child as rights holder

Even prior to the UK's ratification of the UNCRC in 1991, the child had achieved some 'success' as a rights holder. For example, the prohibition of corporal punishment in both state and private schools in the UK followed judgments of the European Court of Human Rights (European Court) in cases brought by an adult acting on their own or on a child's behalf.¹⁴⁰ However, following ratification, children became recognised for the first time as the holders of a comprehensive series of rights for children. Whilst the subject of children's rights has prompted a great deal of academic discussion and debate for over two decades, the preceding discussion has sought to show that the practical implementation of these rights into English law has been a slow and inconsistent process. Unlike the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, the UN Convention has not been incorporated into domestic law, and although Optional Protocol 3 now allows a child to bring a complaint to the UN Committee on the Rights of the Child (UNCTRC) provided all domestic measures have been exhausted, the UK has not yet ratified this protocol.

A particular concern of this paper is the implementation of Article 12, known as the child's right to participation. As noted by the UNCTRC, the word 'participation' does not appear in the text of the Article¹⁴¹ and Laura Lundy expresses concern that the use of this and other abbreviations to refer to the article may reduce 'the full import' of its obligations.¹⁴² The full wording of the Article is as follows:

- '1. 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.
2. For this purpose, the child shall, in particular, be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.'

The UNCTRC advises that the term 'capable of forming his or her own views' should in no way be read as a limiting threshold, but rather 'as an obligation for States parties to assess the capacity of the child to form an autonomous opinion to the greatest extent possible'.¹⁴³ Therefore, as Lundy observes, it is clear that 'Children's right to express their views is not dependent upon their capacity to express a mature view; it is dependent only on their ability to form a view, mature or not'.¹⁴⁴ Hence in accordance with Article 12 all children who are capable of expressing a view are to be 'assured' of the opportunity to express their views in all matters affecting them, using 'non-verbal forms of communication including play, body

140 See Education Act 1996, s 548; *Tyrer v United Kingdom* (1978) 2 EHRR 1; *Costello-Roberts v United Kingdom* (1993) 19 EHRR 112, [1994] ELR 1; *Campbell and Cosans v United Kingdom* (1982) 4 EHRR 293. Note however that Jane Fortin has criticised the European Court of Human Rights's approach as lacking consistency and, as discussed earlier in the paper, its decision in *A v United Kingdom (Human Rights: Punishment of Child)* (1998) 27 EHRR 611, [1998] 2 FLR 959 had a limited impact on the law relating to the physical punishment of children by their parents. See further J Fortin, *Children's Rights and the Developing Law* (Cambridge University Press, 3rd edn, 2009), pp 67–69.

141 UNCTRC General Comment No 12 (2009), para 3.

142 L Lundy, '“Voice” is not enough: conceptualising Article 12 of the UNCRC' (2007) 33(6) *British Educational Research Journal* 927, at 933.

143 UNCTRC General Comment No 12 (2009), para 20.

144 L Lundy, '“Voice” is not enough: conceptualising Article 12 of the UNCRC' (2007) 33(6) *British Educational Research Journal* 927, at 935.

language, facial expressions, and drawing and painting' where necessary.¹⁴⁵ It is only when adult decision-makers determine the weight or import of the child's view that the child's maturity becomes relevant.

As Noam Peleg observes, 'children's participation does not mandate that children should be the only decision makers'¹⁴⁶ and it is broadly recognised that assuring a child's participation right under Article 12 must be balanced against the duty of the child's parents and the state to protect the child's best interests under Article 3. Trevor Buck sums up this apparent tension between 'the elements of protection and empowerment'¹⁴⁷ the UNCRC as follows:

'If a child cannot be regarded as fully autonomous, then it follows that there is a need for some adult or state constraint on a child's autonomy, commensurate with the maturity and competence of the developing child and the prevalent view within that society of the respective responsibilities of parents, the wider family and the state.'¹⁴⁸

Whilst it acknowledges the important relationship between Articles 3 and 12, the UNCTRC maintains that there 'is no tension' between them; maintaining 'in fact, there can be no correct application of Article 3 if the components of Article 12 are not respected'.¹⁴⁹ On this view, the child's best interests are assured and protected in a system that assures the child's participation. The extent to which the child's view will influence an adult decision-maker's conclusion will depend on the child's age and maturity, but whatever the outcome, 'the decision maker has to inform the child of the outcome of the process and explain how his or her views were considered'.¹⁵⁰

The capabilities approach and children's rights

The capabilities approach is an economic theory formulated by Amartya Sen and extended and developed over time by Sen and others, most notably Martha Nussbaum.¹⁵¹ In basic terms, Sen proposes that the most appropriate and effective way of measuring or evaluating human well-being is to ascertain how far each individual is capable of living a life that he or she values. So Sen rejects the traditional methods of measuring well-being by reference to statistics indicating economic growth, or by access to resources, and instead 'puts the focus fairly and squarely on human-beings – on what they can do and be in leading a valuable life . . . justice in terms of opportunity and freedom'.¹⁵² As Melanie Walker and Elaine Unterhalter explain, this process of 'evaluating capabilities, rather than resources or outcomes, shifts the axis of analysis to establishing and evaluating the conditions that enable individuals to take decisions based on what they have reason to value'.¹⁵³

Gunter Graf et al describe how the capabilities approach has emerged over the last decades as 'the leading alternative to standard economic frameworks for thinking about many important

145 UNCTRC General Comment No 12 (2009), para 21.

146 N Peleg, 'Reconceptualising the Child's Right to Development: Children and the Capability Approach' (2013) 21 *International Journal of Children's Rights* 523, at 541.

147 T Buck, *International Child Law* (Routledge, 3rd edn, 2014), p 30.

148 *Ibid*, p 31.

149 UNCTRC General Comment No 12 (2009), para 74.

150 *Ibid*, para 45.

151 D Stoecklin and J-M Bonvin (eds), *Children's Rights and the Capability Approach: Challenges and Prospects* (Springer, 2014), p 1.

152 M Biggeri, J Ballet and F Comim (eds), *Children and the Capability Approach* (Palgrave Macmillan, 2011), at xv.

153 M Walker and E Unterhalter (eds), *Amartya Sen's Capability Approach and Social Justice in Education* (Palgrave, 2007) at p 3.

social issues'.¹⁵⁴ However it is only in recent years that scholars have begun to draw on the capabilities approach in the field of children's rights.¹⁵⁵ Those working in this field recognise that determining the scope of the relationship between the capabilities approach and children's rights and well-being is itself an evolving process¹⁵⁶ but within the literature there is a common concern to apply Sen's emphasis on evaluating how far 'people are able to do and to be'¹⁵⁷ to the context of children's lives.

Daniel Stoecklin and Jean-Michel Bonvin point out that even without recourse to the capabilities approach, 'the rights contained in the UNCRC challenge traditional conceptions of childhood'¹⁵⁸ and there is no sense in which the literature on the capabilities approach and children's rights dismisses the concept of the child as a rights-holder. Rather it is proposed that the capabilities approach complements and extends the focus on substantive rights, 'to consider what will enable different human beings to activate and enact those rights in ways they have reason to value'.¹⁵⁹ Mario Biggeri describes this distinction between the two approaches as follows: 'the capability approach perspective considers children not simply as recipients of freedoms, but rather as active social actors and agents in their communities'.¹⁶⁰

By considering the child as a social actor we create a picture of the child as a person who is always capable of influencing his or her surroundings, but we recognise that this ability to influence will change according to the age and characteristics of the child, and to his or her external environment. Therefore our concern is to find ways in which the child can contribute, in light of this, at every stage of his or her personal and social development. This approach can be contrasted to the prevailing approach under English law that at best occasionally allows for the child's meaningful participation provided that he or she is considered to possess sufficient maturity.

In line with the guidance issued by the UNCTCR, Stoecklin and Bonvin emphasise that all children in contracting states are deemed to possess or hold participation rights, and not just those children who are considered to possess the maturity to express and critically reflect on their point of view. Therefore there must be an 'expectation that all children will, at some stage in their development be able to express their own view freely'.¹⁶¹ They argue that approaching Article 12 from this perspective places the focus on facilitating and creating an environment,

154 G Graf, O Germes-Castro and B Babic, 'Approaching Capabilities with Children in Care – An International Project to Identify Values of Children and Young People in Care' in O Leßmann, A-U Otto and H Ziegler (eds), *Closing the Capabilities Gap: Renegotiating Social Justice for the Young* (Barbara Budrich Publishers, 2011) 267, at p 268.

155 See for example, R Dixon and M Nussbaum, 'Children's Rights and a Capability Approach: The Question of Special Priority' (2011–2012) 97 *Cornell Law Review* 549; O Leßmann, A-U Otto and H Ziegler (eds), *Closing the Capabilities Gap: Renegotiating Social Justice for the Young* (Barbara Budrich Publishers, 2011), C Hart, M Biggeri and B Babic (eds), *Agency and Participation in Childhood and Youth – International Applications of the Capability Approach in Schools and Beyond* (Bloomsbury, 2014), M Biggeri, J Ballet and F Comim (eds), *Children and the Capability Approach* (Palgrave Macmillan, 2011) and D Stoecklin and J-M Bonvin (eds), *Children's Rights and the Capability Approach: Challenges and Prospects* (Springer, 2014).

156 D Stoecklin and J-M Bonvin (eds), *Children's Rights and the Capability Approach Challenges and Prospects* (Springer, 2014) p 1.

157 M Nussbaum, 'Capabilities as Fundamental Entitlements: Sen and Social Justice' (2003) 9(2–3) *Feminist Economics* 59, at 33.

158 D Stoecklin and J-M Bonvin, 'The Capability Approach and Children's Rights' in C Hart, M Biggeri and B Babic (eds), *Agency and Participation in Childhood and Youth – International Applications of the Capability Approach in Schools and Beyond* (Bloomsbury, 2014), pp 63–82.

159 C Hart, 'The Capability Approach and Educational Research' in C Hart, M Biggeri and B Babic (eds), *Agency and Participation in Childhood and Youth – International Applications of the Capability Approach in Schools and Beyond* (Bloomsbury, 2014), pp 17–43, at p 18.

160 *Ibid*, at p 44.

161 D Stoecklin and J-M Bonvin, 'The Capability Approach and Children's Rights' in C Hart, M Biggeri and B Babic (eds), *Agency and Participation in Childhood and Youth – International Applications of the Capability Approach in Schools and Beyond* (Bloomsbury, 2014), pp 63–82, at p 78.

through the development of a range of measures, whereby children of different ages and in different contexts have the opportunity to meaningfully contribute. ‘Giving due weight’ to the child’s views becomes an absolute requirement and this can ‘mean bringing the hearing techniques and procedures closer to the child and not just the child closer to the socially constructed sense of “maturity” prevailing in a specific context and in a specific period’.¹⁶²

The child and decision-making

Jérôme Ballet et al argue that where children are considered incapable of being ‘trusted’ with self-determination, that consideration is based upon the widely held belief that the child lacks the capacity to make a ‘good’ decision. However, they go on to argue convincingly that this effectively places the threshold for acknowledging the principle of self-determination in children higher than it would be if applied to adults. In fact, they suggest, ‘the problem is not about making a bad choice. After all, we are all confronted with bad choices, but the capacity to evaluate and revise choices is essential’.¹⁶³ And if it is accepted that the issue with children is ‘not so much one of choice but one of choice evaluation and possible revision, then it is necessary to provide children with a choice space, instead of making choices for them, in such a manner that rational and reasonable decision-making is favoured’.¹⁶⁴ This, it is suggested, goes even further than the participation requirements of Article 12 and provides a persuasive argument for the development of legal frameworks which present children with defined choices ‘so that [the child’s] capacity for evaluation may develop’.¹⁶⁵

Although Ballet et al cite the widespread failure to distinguish between the ability to choose and the ability to evaluate as the main reason for a paternalistic approach to children, both Noam Peleg and Caroline Hart argue that the once broadly accepted and dominant view of children as ‘human becomings’ or ‘becoming adults’ has also been highly influential.¹⁶⁶ Hart observes that ‘this thinking generated a socially constructed dichotomy between childhood and adulthood’,¹⁶⁷ a dichotomy that relied heavily upon development psychology and which is still very much apparent in English law and legal processes today. In their highly influential text *Theorizing Childhood*, Allison James et al assigned to the ‘dustbin of history . . . the realm of common sense, classical philosophy, the highly influential discipline of developmental psychology and the equally important and pervasive field of psychoanalysis’ and presented in their place their study of the social construction of childhood.¹⁶⁸ This consideration of childhood as a socially constructed phenomenon requires us to abandon all preconceptions and, crucially, to accept that even the highly regarded work of developmental psychologists such as Jean Piaget was itself influenced by pre-existing but unacknowledged social constructions.¹⁶⁹ Crucially, the work of James et al operates to ‘prise the child free of biological determinism’¹⁷⁰ and thereby causes us to at least accept the possibility that a child can exercise autonomy, and even evaluate and revise his or her decision-making, when situated in a social environment that allows for this.

162 Ibid, at p 79.

163 J Ballet, M Biggeri and F Comim, ‘Children’s Autonomy, Education and Capabilities’ in O Leßmann, A-U Otto and H Ziegler (eds), *Closing the Capabilities Gap: Renegotiating Social Justice for the Young* (Barbara Budrich Publishers, 2011) 165, at pp 168–169.

164 Ibid, at p 169.

165 Ibid, at p 169.

166 C Hart, ‘The Capability Approach and Educational Research’ in C Hart, M Biggeri and B Babic (eds), *Agency and Participation in Childhood and Youth – International Applications of the Capability Approach in Schools and Beyond* (Bloomsbury, 2014) 17, at p 21; N Peleg, ‘Reconceptualising the Child’s Right to Development: Children and the Capability Approach’ (2013) 21 *International Journal of Children’s Rights* 523, at 526–567.

167 Ibid, at p 21.

168 A James, C Jenks and A Prout, *Theorizing Childhood* (Polity Press, 1998), pp 9–10.

169 Ibid, pp 17–18.

170 Ibid, at p 28.

Conclusion

One of the acknowledged roles of the capabilities approach is to act as a 'sensitizing concept... a source of ideas and... new insights'¹⁷¹ and it is in this capacity that it is presented in this paper. In keeping with Article 12, this approach requires us to work from the assumption that all children are capable of expressing their views and feelings on all matters affecting them, and to work to create more opportunities and environments that allow them to do so. But further than this, it challenges us to reconsider our long-established assumptions about children's lack of competence in decision-making and to think about ways in which children's abilities to make and evaluate choices can be developed throughout their lives. Applying this now in the context of the child's status under English law, the following possible outcomes are suggested:

Firstly, we are prompted to reconsider the multiple ways in which children are defined and described under English law, and to consider what might happen if we replace these with a definition that recognises the child as being 'potentially competent' or in other words, almost always able to express his or her feelings, and potentially competent to make decisions in some circumstances. Scottish law concerning a child's capacity to enter into a contract provides an example of this 'potentially competent' approach. Under the Age of Legal Capacity (Scotland) Act 1991, section 2 'a person under the age of 16 years' is deemed to be capable of entering into a legally binding contract, provided that it is 'of a kind commonly entered into by persons of his age and circumstances' and 'on terms which are not unreasonable'. The description of the child as 'a person' is very welcome and provides a contrast to the language used in the analogous provision that applies in England and Wales.¹⁷² The child is afforded some protection in that the terms of the contract must be reasonable, and the nature of the contract must be appropriate, but within these restrictions the child can freely enter into a binding contract.

Secondly, we are moved to consider the legal provisions that are currently in place; to assess how far these truly encourage participation from children; to consider how far they place adult decision-makers under a duty to provide feedback to children; and to make recommendation for reform in light of this. This paper has gone some way in addressing this issue, but there is scope for further research, especially in regard to vulnerable children and the law and legal processes that relate to them. Specifically with regard to children's participation in school, Lundy makes a strong case for increased participation and sets out some practice-based strategies for achieving this.¹⁷³ Taking this one step further and emphasising in particular the need to create decision-making spaces for children, one very simple but tangible way in which many young children could begin to actively and safely participate in decision-making in school would be through the full application of the legislation that is already in place concerning free school meals. Focusing on the child's wishes, as the legislation already allows, would require the school to first record the child's views on whether or not a meal is requested, and to provide this information to the child's parent or carer. The child's choice would prevail unless the parent or carer provides a sound explanation for not doing so; and a full explanation of this decision would be provided to the child.

Thirdly, an approach that focuses on each child's capabilities causes us to question whether it is ever appropriate to determine a child's legal capacity solely by reference to his or her age. This

171 R Büttner, 'Thinking in a Capability Language' in O Leßmann, A-U Otto and H Ziegler (eds), *Closing the Capabilities Gap: Renegotiating Social Justice for the Young* (Barbara Budrich Publishers, 2011), at p 69.

172 Sales of Goods Act 1979, s 3(2) states: 'Where necessaries are sold and delivered to a minor or to a person who by reason drunkenness is incompetent to contract, he must pay a reasonable price for them'.

173 L Lundy, '“Voice” is not enough: conceptualising Article 12 of the UNCRC' (2007) 33(6) *British Educational Research Journal* 927.

is of particular relevance when determining criminal responsibility. At the time of writing, Lord Dholakia's bill to increase the age of criminal responsibility to 12 years awaits its second reading.¹⁷⁴ Whilst on the one hand this proposed amendment is welcome, at least in bringing practice in line with wider Europe, it does not remove the problem that capacity is being assumed rather than being assessed on the part of the individual child.

Lastly, in order to develop English law in a way that recognises and encourages children's capabilities, we need to take active steps to engage with children; to find out what their capabilities are; to identify issues that concern them; and to draw on their views and experiences when planning and implementing reform. As Peleg observes, 'when one listens to children, one realises just how much children know about their lives and about their world'.¹⁷⁵ Within the English legal system, the development of the Family Justice Young People's Board (FJYPB) is an example of this approach, as people aged 7–25 years with experience of the family courts are invited to participate in meetings and activities that are designed to improve the system.¹⁷⁶ However, there is also a need to take a broader view; to take into account the views and experiences of the large numbers of children who have never been and may never be directly involved in court proceedings. In her 1990s study of children's perspectives on children's rights and decision-making in England, Virginia Morrow concluded that children tended to be 'concerned with the everyday, even mundane, problems of being accorded a little dignity or respect, and having little opportunity to simply have a say and contribute to discussions' rather than lamenting their lack of opportunity to make life-changing decisions for themselves.¹⁷⁷ It is this concern with children's everyday experiences that is a central feature of the Law in Children's Lives project and it is hoped that the views expressed by the children who participated in this research will serve to influence future reform, as well as stimulating further research and debate in this area.

174 HL Bill 017 2015–16.

175 N Peleg, 'Reconceptualising the Child's Right to Development: Children and the Capability Approach' (2013) 21 *International Journal of Children's Rights* 523, at 527.

176 See further: www.cafcass.gov.uk/about-cafcass/how-we-are-organised/family-justice-young-peoples-board.aspx (accessed 19 October 2015). This is one of a number of steps that Cafcass is taking to improve child inclusivity in civil proceedings. See Cafcass, 'Striving to become fully child inclusive by Voice of the Child Conference 2015' available at: www.cafcass.gov.uk/news/2014/september/striving-to-become-fully-child-inclusive-by-voice-of-the-child-conference-2015.aspx (accessed 14 October 2015). See also J Walker and A Lake-Carroll, 'Hearing the voices of children and young people in dispute resolution processes: promoting a child-inclusive approach' [2014] *Fam Law* 1577.

177 V Morrow, '“We are people too”: Children and young people's perspectives and children's rights and the decision-making in England' (1999) 7 *The International Journal of Children's Rights* 149, at 166.