**HEWER**

**V.**

**BRYANT**

10 JULY 1968

**LEX (1969) – 1 ALL E.R 13**

**OTHER CITATIONS**

2PLR/1969/50 (SC)

[1969] 1 All ER 13

**BEFORE:**

Lord PAULL J

**REPRESENTATION**

LOVELL, WHITE & KING (for the plaintiff);

W.M EASTON & SONS (for the defendant)

K DIANA PHILLIPS Barrister

**ISSUES FROM THE CAUSE(S) OF ACTION**

TORT AND PERSONAL INJURIES LAW: Motor accident occasioning bodily injury to 15 year old boy living and working on farm as trainee away from parents and financially independent on agricultural wages – Negligence – Competency of action brought 3 years after the limitation law had rendered it statute barred – Necessity of proving plaintiff was at all material times an infant who was not in the custody of a parent – Effect of failure thereto

TRANSPORT AND MOTOR VEHICLE LAW:- Action for damages arising from motor accident – Negligence – How proved – Age of plaintiff – Relevance

CHILDREN AND WOMEN LAW:- *Young people and Education* – *Young people and justice administration – Young people and custody* – Vocational education in a farming education facility for a minor not academically proficient - A parent’s right of custody over child in an education or vocational training facility – Nature of – Parent’s right to his children in their law-suits without being guilty of the legal crime of maintaining quarrels – Persons entitled to sue as child’s next friend

CHILDREN AND WOMEN LAW:- Infants/Minors and Custody of parent – Legal Meaning of Parental Custody – How ascertained - Test to be applied - When to infer that infant is in the custody of a parent – Where the father or some other parent is or is not away from the infant for a period or periods – Where the parent allows the infant the freedom to do as he likes – where someone else has temporarily been given the duty of the day-to-day control of the infant - Whether in all such cases the custody remains - Whether an essential characteristic of such custody is the right to control the infant’s life coupled with the capacity to exercise that control, whether arising from economic circumstances or otherwise

EDUCATION AND LAW: Custody of young people in public schools, vocation centers or boarding house – Whether still resides in their parents or temporarily in their care-givers – Relevant considerations

**PRACTICE AND PROCEDURE ISSUES**

INTERPRETATION OF STATUTES:- S. 22(2)(b) of the Limitation Act, 1939, as amended – Whether “as long as the infant is in the custody of his or her parent, it will be clearly the natural duty and conduct of the parent in a proper case to help the child by becoming the child’s next friend for the purpose of any action by the child, but that where there is no such custody then there is nobody who has the duty, nobody who ought to make himself responsible for the costs, and that it is only in those exceptional cases that the child is given an opportunity to bring the action as soon as he attains his majority”

WORDS AND PHRASES: "Parent" in s 22 Limitation Act, 1939 – Whether has the same meaning as in the Fatal Accidents Act, 1846, as extended by s 2 of the Law Reform (Miscellaneous Provisions) Act, 1934 – Whether includes father, the mother, the grandfather, the grandmother, the stepfather and the stepmother, and applies in the case of illegitimacy or adoption

**MAIN JUDGEMENT**

10 July 1968.

**PAULL J.** read the following judgment.

By a writ issued on 16 January 1968, Fergus Radbourn Hewer sues David Colin Bryant, claiming damages for personal injuries which he suffered on 15 August 1962, by reason of the negligent driving by the defendant of a pick-up truck in which the plaintiff was a passenger. In his defence, the defendant, in addition to denying negligence, alleges that the plaintiff’s claim is statute-barred, the writ having been issued more than three years after the accident. The plaintiff in his reply contends that he was at all material times an infant who was not in the custody of a parent, and that he became of full age only on 27 December 1967. The question whether the claim is barred has been ordered to be tried as a preliminary question.

By the Law Reform (Limitation of Actions, &c) Act, 1954, s 22 of the Limitation Act, 1939, was amended. The material words of s 22 of the Act of 1939, as amended by the Act of 1954, enact that in the case of actions for damages for negligence or breach of statutory duty, where the damages claimed consist wholly or in part of damages for personal injuries, then the right of a person under a disability when the right of action accrued is to bring his action at any time within three years from the date when he ceased to be under the disability, notwithstanding that the period of limitation has expired. It is further enacted that this right shall not apply in the case of an infant unless the plaintiff proves that the person under disability was not, at the time when the right of action accrued to him, in the custody of a parent. Since at the time of the accident the subject-matter of this action, the plaintiff, was fifteen years eight months old, if he can prove that he was not at that time in the custody of a parent, the result is that he could have issued his writ at any time up to 26 December 1970, that is to say over eight years after the accident had happened. It follows that, in such a case as this, the defendant might not have any idea that an action was even contemplated until this period was about to elapse. In Duncan v London Borough of Lambeth, it might have been over fifteen years before the writ was issued. The meaning of the phrase "in the custody of a parent" is clearly an important one. As, unfortunately, I find myself unable completely to agree with either Melford Stevenson J, or Donaldson J, in the way in which they looked at the meaning of the word "custody" in s 22(2) (b) of the Act of 1939 in the cases of Brook v Hoar and in Duncan’s case, I feel I must first set out the facts of the present case somewhat carefully and then try to set out my approach to the problem.

Fergus Radbourn Hewer is the third son of his father and mother. His father, John David Radbourn Hewer (whom I will call his father) is a veterinary surgeon, and quite clearly he and his wife and their five children constitute a typical reasonably well-off, but not wealthy, family living in harmony with each other. The eldest child of the family is a son now aged twenty-seven; next to him comes another son now aged twenty-five. Both these sons, when boys, were sent to private schools partly in England and partly in Ireland. The eldest went on from Clongo College (his school in Ireland) to Trinity College, Dublin, and became a doctor; the second son, when he left Clongo College, studied law at Guildford. The plaintiff is the third son, then come two girls, the elder of whom is sixteen and the younger of whom is twelve. The two girls, too, are being educated in private schools. The plaintiff, when he was young, himself went to private schools. Unfortunately, he had not the type of brain that can pass examinations and he failed in his common entrance examination. As a consequence, his father and mother thought it would be wiser if he went to a comprehensive school near where they lived, and until he got to the school-leaving age of fifteen he was at such a school. The plaintiff’s main interest was in farming, and he himself felt that he would like to be trained as a farmer with a view to emigrating to Canada later if he found that idea attractive after farming experience in this country. Shortly before he became fifteen, the plaintiff and his father consulted the careers adviser attached to the comprehensive school, and this adviser suggested that it might be a good thing if the plaintiff left school as soon as he became fifteen and went to a YMCA farm training centre where he could be trained as a farmer and be placed in farm employment. As a result, he went to North Cadbury Court, near Yeovil in Somerset.

North Cadbury Court is run by the YMCA under a scheme of theirs known as "British Boys for British Farms". The pamphlet which I have before me shows that boys going there have eight to ten weeks’ residential training and then have practical training on farms connected with the centre where experience is gained in farming duties. The pamphlet states that every encouragement is given to boys who are suitable to go on to agricultural colleges or institutes, or to take up apprenticeships, and that parents or guardians are expected to make some contribution in accordance with their means. The boy himself has to sign a form in which he agrees that he will work, and work hard, be medically examined and if found fit, that he will accept the farm employment selected for him by the YMCA, that he will remain in farm employment for a minimum period of one year after the first placement, and will not leave his work without consulting the placement officer. The parent has to agree to his son going to the training centre, he signs permission for him to be placed in farming employment and undertakes not to withdraw him from the scheme without the consent of the secretary. The parent is expected to pay according to his means, and the father paid just over £35 to the YMCA.

During the first week that a boy is at North Cadbury Court he lives in and remains at the centre. After the first week he goes to a local farmer and is paid by the farmer 10s a week, but goes back to North Cadbury Court each night. After eight to ten weeks he is sent away to a farm and is paid the appropriate wage according to the Agricultural Wages Board’s scale, that is some £3 15s a week, plus keep, and some unspecified bonuses each month or six weeks. He lives with the farmer and his family in the farmhouse. He has one weekend in five free in addition to certain hours during each weekend. He is entitled to go home for the one weekend in five if he desires so to do; if he does so, he pays his own fares. The plaintiff told me that during the short period he was there he bought a few clothes for himself, e.g., jeans, and paid his own fares home. He also put certain small sums into a post office savings account. His father did not make him any allowance, but said that he would have done so had it been necessary. He had no say in deciding to which farm the plaintiff should go, or what his pay should be.

The farm to which he was sent after eight weeks was a farm near Glastonbury which was owned and run by a Major Neave. There were several trainees living in the house as part of the family. On 15 August 1962, Major Neave gave permission for some of the trainees to use a van. The van was driven by the defendant, who was another of the trainees. There is no dispute but that the van left the road and that the plaintiff was so seriously injured that he did not recover consciousness until after he had been transferred from one hospital to another hospital.  
The relationship between the plaintiff and his father was the usual relationship between a father and son in a happy family. As the father said, he was doing his best to guide his son into the best career for him. He thought the son would get benefit from going to North Cadbury Court and from going into agriculture. Had his son been found suitable to go on to an agricultural college, he would have paid the necessary fees and in any event would, as might be expected, have helped him financially if necessary. The father said he treated all his sons alike, prepared to do the best for them until, if I may use the expression, they were grown up, but that he did not expect to put his hands in his pocket in respect of this son so long as he was on the farm earning agricultural wages. His son was, to use the father’s expression, on his own. Needless to say, after the accident the father and mother did everything possible for the plaintiff. It was at his father’s request that the plaintiff was sent to the second hospital, and, as soon as he was able to do so, the plaintiff came home to live with his parents until he was fit to take further agricultural work on a farm. The question whether his father should issue a writ as next friend of the plaintiff to recover damages for the very serious injuries the plaintiff had suffered was considered. His father told me that he had found that Major Neave had gone bankrupt. His enquiries seemed to show that there was no insurance policy in respect of passengers in the van, and that after his son had had a certain medical examination and certain medical results of the accident had been found, he came to the conclusion that from a practical point of view it would be unwise to bring the action. Later, however, he found that he had been given wrong information as to the insurance position, and in 1966, as next friend of the plaintiff, he issued a writ against the present defendant. The three years’ period set by the Statute of Limitations had by then expired. He therefore made an application for leave to proceed with the action, notwithstanding that the writ had been issued out of time. That application was heard and leave was refused. As a consequence of this refusal, the action could not, of course, be continued and, in consequence, the present plaintiff brings his action after attaining the age of twenty-one.

The question I have to determine is whether, on the facts I have outlined, the plaintiff was in the custody of his father on 15 August 1962. It is that date which is the crucial date. Counsel for the plaintiff has contended that what happened after that date is quite immaterial. If, as seems to have been indicated in the two earlier cases to which I have referred, custody under s 22 of the Act of 1939, as amended, exists or does not exist from time to time according to the way the father is treating his child, or the child his or her father, or according to whether the child has been taken into the immediate control of some person or body for the time being, this may well be so. I am not satisfied that the true concept of the word "custody" as used in the Act is of this nature.

Before coming to the true meaning of the word "custody" in s 22(2) (b) of the Act of 1939 as amended, it is as well to look at the word "disability" in the section. It clearly has a very restricted meaning. A man who breaks his leg has a disability in the ordinary sense of the word in as much as he cannot run. Many persons have a disability of the mind or of the senses; one cannot hear, another cannot talk or hear, another cannot concentrate for more than a short time. The Act, however, is dealing with legal proceedings, "disability" must clearly mean that the disability is such that the law will not allow the person under the disability to issue a writ, or instruct a solicitor to issue a writ on his or her behalf. If he or she or his or her solicitor does so, the courts will not allow the proceedings to continue.  
So looked at, there are really only two classes of persons affected—persons of unsound mind and infants. A person of unsound mind must sue through a next friend, but that next friend is not a party to the action and is not responsible for costs (see Pink v J A Sharwood & Co Ltd.) In the case of an infant, the next friend is a party and is responsible for costs. It follows that an infant may, if left on his own, find some difficulty in obtaining a next friend. It is to be noted that in Kirby v Leather, the court did not attempt to put a different interpretation on the word "custody" from that which it bears at common law. Their trouble in that case was that, given that meaning, the word is not applicable to a person of unsound mind who is of full age. Lord Denning MR said ([1965] 2 All ER at p 443; [1965] 2 QB at p383.):

"If he is of unsound mind, he may be tended or cared for by his parent, but he is not in his parent’s custody."

In the case of an infant born legitimately, the infant is at common law in the custody of the father. That does not mean physical custody; it means the right to control (Willis v Willis). In Re Agar-Ellis, Agar-Ellis v Lascelles ((1883), 24 Ch D 317 at p 326.) Sir Baliol Brett MR said:

"… the law of England … is, that the father has the control over the person, education, and conduct of his children until they are twenty-one years of age."

In the same case, when counsel was arguing that as the courts will not normally grant habeas corpus to the father against the will of a child over fourteen in the case of a boy, and sixteen in the case of a girl, and, therefore, there was no custody, Bowen LJ pointed out that that did not mean that custody had ceased. He said during the argument ((1883), 24 Ch D at p 321.):

"According to your argument a young lady of sixteen who was stopped by her father from going to Gretna Green might bring an action for false imprisonment."

Quite clearly, therefore, if that be the right way of looking at the word "custody", one has to do more than look at any temporary circumstances which might at the time of the accident have arisen.

Custody can, of course, cease during infancy; the court, for instance, can take away the right of custody. If the father dies, the mother has the right of custody in the usual course of events. If both die, a close relative may so act or be prepared to act that the court may decide that the relative has taken over, or shall take over, the custody—in effect, adopt the infant. Indeed, no doubt, if the father agrees that the infant shall be adopted and the child is adopted, the custody passes to the adopter provided the adoption is a legal one. If the father disappeared for a long period he would no doubt be deemed to have lost the right of custody at the time when he disappeared. Temporary absence, however, does not terminate custody. Hallett J was quite unsatisfied that the father had lost the custody of his child when the father was in the Royal Navy and might be right at the other end of the world (see Woodward v Mayor of Hastings ([1944] 2 All ER 119 at p 122; [1944] KB 671 at p 676.)). Even if a father declares that his son is beyond control and an order is made giving a local authority temporary control, it does not seem to me that custody is ipso facto lost. Quite commonly in divorce proceedings care and control is given to the mother, but custody is ordered to remain with the father. The mere fact that the day-to-day control is given to another does not mean that the basic control of custody is ipso facto lost to the father.

Now, the right of custody is one thing. The duties of the person having the custody is another. Curiously enough, there appears to be almost a complete absence of authority, as far as I can find out, as to what precisely are the legal duties, if any, of the person having the custody of the infant, but there does not seem to be anything contradicting the statement in 2 Coke’s Institutes (1799), pp 563, 564 (quoted in 21 Halsbury’s Laws Of England (3rd Edn) p 189). "It is the natural duty", says Coke "of a parent to uphold and maintain a child in a law suit." Coke adds: "It is nature’s protection for the son", and, in Latin, sets out some various ways in which protection is exercised, including legal troubles. Blackstone in his Commentaries (17th Edn, 1830), vol I, p 450, said:

"From the duty of maintenance we may easily pass to that of protection, which is also a natural duty, but rather permitted than enjoined by any municipal laws: nature, in this respect, working so strongly as to need rather a check than a spur. A parent may by our laws maintain and uphold his children in their law-suits without being guilty of the legal crime of maintaining quarrels."

And then he goes on to state the other matters that a parent may do which a stranger cannot do. In Chambers On Infancy, which was published in 1842, there appears at p 757 the following words:

"The Party so instituting the suit on behalf of the infant is called his next friend, because it is presumed that the person who will step forward to assert his rights, and to avenge his wrongs, will be his nearest relation; but as it frequently happens that the nearest relative himself withholds the right, or inflicts the injury, or neglects to move for the protection of the infant, the Court, as indeed we have before had occasion to consider, will permit any person to institute suits on behalf of infants; and whoever thus acts the part which the nearest relation ought to take, is also styled the next friend of the infant, and as such is named in the bill."

It seems to me that the concept lying behind the words used in s 22(2)(b) of the Limitation Act, 1939, as amended, is that as long as the infant is in the custody of his or her parent (using the word "custody" in what I shall call "the common law concept"), it will be clearly the natural duty and conduct of the parent in a proper case to help the child by becoming the child’s next friend for the purpose of any action by the child, but that where there is no such custody then there is nobody who has the duty, nobody who ought to make himself responsible for the costs, and that it is only in those exceptional cases that the child is given an opportunity to bring the action as soon as he attains his majority.

The word "parent" in s 22 has the same meaning as in the Fatal Accidents Act, 1846, as extended by s 2 of the Law Reform (Miscellaneous Provisions) Act, 1934; that is to say, the word includes the father, the mother, the grandfather, the grandmother, the stepfather and the stepmother, and this applies in the case of illegitimacy or adoption. From the point of view of common law, custody, of course, in the case of illegitimacy will exclude the father and his family. In the case of adoption, the adopting parents are deemed to take the place of the natural parents. I can see no difficulty in fitting all this in with the interpretation of the word "custody" as being custody in accordance with the common law concept. It seems to me that the principle lying behind the section is that if the infant is in the custody of any one of such classes of persons, it will be the natural duty for that person to undertake and be responsible for the bringing of a proper action to uphold the infant’s rights where the infant has been injured, and the defendant should not be prejudiced if that course is not taken. There may, however, be cases where there is no such custody, and in those cases there is nobody whose natural duty or natural conduct would be to assist the infant and run the risk of paying costs. And, if that be the position, then, as I construe the Act, time does not run.

If I be right in the way in which I have looked at the problem, then it seems to me that the test to be applied whether the infant is in the custody of a parent, is not whether or not the father or some other parent is or is not away from the infant for a period or periods; it is not whether or not the parent allows the infant the freedom to do as he likes; it is not whether someone else has temporarily been given the duty of the day-to-day control of the infant; in all such cases the custody remains, and if the infant be injured it is still the natural duty which one would expect to be carried out. Indeed, on many occasions, such as in this case, the mere fact that the infant has been injured at once restores the dependency of the infant on his parent, which is the essence of the idea behind the word "custody".

In Brook v Hoar ([1967] 3 All ER at p 398; [1967] 1 WLR at p 1341.), Melford Stevenson J stated that the question whether an infant is or is not in the custody of the parent is a question of fact. With that I agree, but I would add that the fact must be decided after applying the concept of custody under the common law. Melford Stevenson J then goes on to state that ([1967] 3 All ER at p 398; [1967] 1 WLR at p 1341.

"… an essential characteristic of such custody [that is custody under the Act] is the right to control the infant’s life coupled with the capacity to exercise that control, whether arising from economic circumstances or otherwise."

It is the last few words with which I find myself in disagreement. It seems to me, with all due respect, that economic circumstances have nothing to do with the concept of custody of an infant in English law. It is, I think, confusing the right of day-to-day control ("care and control") with the altogether different right, that of custody, which is the control remaining outside the day-to-day control. The fact that the father in Brook’s case looked on his son "as a young lodger" does not seem to me to matter. The infant cannot make a bargain contrary to his interests. Has the father the right to "slip out of" custody because the son does not realise that he may want the father’s help later on? Suppose six months later the son in that case had said to his father, "I am tired of being a lodger; please treat me as a son". What is the position? It seems to me that the concept of the word "custody" does not allow the kind of test which was made in Brook’s case unless the word "custody" in the Act has a new meaning, which I rather think Melford Stevenson J thought, and I cannot see that that is necessary in order to make sense of the section.

In Duncan v London Borough of Lambeth ([1968] 1 All ER at p 92; [1968] 1 QB at p 763.), Donaldson J said that he thought the father would be surprised to be told that he had retained his right to safeguard the child’s legal rights. It was the father who had applied that the child should be received into the care of the London County Council (Fact 2) ([1968] 1 All ER at p 86; [1968] 1 QB at p 750.). The father regularly visited her, and she went home most bank holidays and some weekends (Fact 6) ([1968] 1 All ER at p 86; [1968] 1 QB at p 750.). When she became eleven, and when, therefore, she was able to look after herself to some extent, apparently she went back home to live with her father (Facts 1 and 2) ([1968] 1 All ER at p 86; [1968] 1 QB at p 750.). I should myself have thought that the first thought of the father when he discovered the child had been injured through the negligence of those into whose care he had put the infant would have been to see a solicitor and obtain legal aid if necessary to bring an action with himself as next friend. It would be unlikely that the authority would encourage an action against themselves. I cannot see that the situation in Duncan’s case was very different from the situation which constantly arises when a child is sent to a boarding school, especially if the father is in the services and is temporarily abroad so that the child may spend his or her holidays with relations or friends. Logically, in the way in which Brook’s case and Duncan’s case were looked at, no child at a public school would be in the custody of his father while he was at school, or when he was staying in the holidays with a relative or friend. Counsel for the plaintiff does not contend that this can be the law.

It follows from what I have said that in this case there can be no question of the father’s custody being terminated. It is true that the infant was away from home and might never return again except for short periods. It is true that he was earning his own living, but nothing had occurred which left the infant without anyone whose natural duty and natural conduct would be to support the infant in any proper proceedings to be brought in respect of the injuries. If that be the position, in my judgment the plaintiff has not proved that he comes within the provisions of s 22(2) (b) of the Limitation Act, 1939.

Judgment for the defendant.

CASES CITED:-

Agar-Ellis, Re, Agar-Ellis v. Lascelles (1883), 24 ChD 317; 53 LJCh 10; 50 LT 161, 28 Digest (Repl) 606

Brook v. Hoar [1967] 3 All ER 395, [1967] 1 WLR 1336; Digest (Repl) Supp.

Duncan v. Lambeth London Borough Council [1968] 1 QB 747; [1968] 1 All ER 84 [1968] 2 WLR 88

Kirby v. Leather [1965] 2 All ER 441, [1965] 2 QB 367, [1965] 2 WLR 1318 HL, [1965] 3 All ER 927, [1965] 1 WLR 1489, Digest (Cont Vol B) 498, 338Aa

Pink v. Sharwood (J A) & Co Ltd [1913] 2 Ch 286, 82 LJCh 542, 108 LT 1017, 18 Digest (Repl) 26, 190

Willis v. Willis [1928] P 10, 96 LJP 177, 137 LT 621: 27 Digest (Repl) 231, 1863

Woodward v. Mayor of Hastings [1944] 2 All ER 119, [1944] KB 671, 171 LT 231, revsd CA, [1944] 2 All ER 565, [1945] KB 174, 114 LJKB 211, 172 LT 16, 100 JP 41, 38 Digest (Repl) 113, 791