



Gillick v. West Norfolk and Wisbech Area Health Authority and Anr.

[1985] 3 All ER 402

Country: United Kingdom

Region: Europe

Year: 1985

Court: House of Lords

Health Topics: Child and adolescent health, Health care and health services, Health information, Informed consent, Sexual and reproductive health

Human Rights: Right to bodily integrity, Right to family life

Facts

The Department of Health and Social Security (DHSS) issued a memorandum of guidance to local health authorities that stated that, inter alia, "consultations between doctors and patients are confidential" even for children less than 16. The memorandum noted that while "it would be most unusual," a doctor could advise the child regarding contraception without parental consent.

Mrs. Gillick was a mother of four daughters and wrote to her local health authority, one of the respondents, that she forbade any medical staff to provide contraceptive or abortion advice to any of her daughters without her consent while they were under 16 years old.

When the local authority responded to Mrs. Gillick's letter stating that any treatment was up to the doctor, Mrs. Gillick brought suit challenging the memorandum as having no authority in law by unlawfully encouraging minors to engage in sex and negating parental rights as the right to consent lies with the parent.

The lowest court rejected Mrs. Gillick's suit, but the Court of Appeals found in favor of Mrs. Gillick finding that a girl under 16 could not consent to contraceptive advice or treatment. The DHSS appealed the judgment to the instant Court.

Decision and Reasoning

The Court held that there were situations when a child under 16 could provide consent and that a parent could not veto the provision of advice.

Lord Fraser:

The Lord found that a child has a general ability to give medical consent. Parliament regarded the provision of advice and treatment as medical matters. And, children are given the ability to give consent, whether for trivial medical checks or having a broken arm set.

He noted that parental rights exist for the benefit of the child. He noted that the situations at hand would only be the "most unusual." Regardless, he emphasized that as children grow, they're able to take on more responsibilities and are better able to determine what is best for themselves. In this consideration, he rejected older caselaw that viewed a parent's rights over a child as nearly absolute.

He developed a five-part test of when a doctor providing advice or treatment without the parent's consent is justified: 1) when the minor would understand the advice, 2) the doctor cannot persuade the minor to inform his or her parents, 3) the child is very likely to begin or to continue having sexual intercourse regardless of contraception, 4) lack of contraceptive advice or treatment will harm the child's physical or mental health and 5) the child's best interests require the doctor to provide the advice or treatment.

Lord Scarman:

The Lord agreed in substance with Lord Fraser.

He also found that the text of the memorandum left no doubt that a doctor is permitted to provide advice or treatment without parental consent in certain circumstances. He noted that the guidance does not clarify the certain circumstances when a parent's consent is not necessary, but this vagueness did not alter the clear text of the guidance.

He noted that the role of the Court is to apply traditional principles only when the reasonings for their creation still apply in the modern day. In particular, the welfare of the child remains paramount and that parental rights must be exercised in accordance to that principle. He noted that society had changed and that previous generations had never had to consider the availability and popularity of medical contraception.

After rejecting previous caselaw that focused on a fixed age, he emphasized the need for a flexible test that recognized the natural continuum of aging. He held that "the parental right to determine whether or not their minor child below the age of 16 will have medical treatment terminates if and when the child achieves a sufficient understanding and intelligence to enable him or her to understand fully what is proposed."

Lord Bridge:

The Lord agreed with Fraser and Scarman regarding whether a minor can give consent and whether parental consent is required.

He considered that the case had a procedural failing and should not be reviewed according to Wednesbury principles. He noted that a court does have jurisdiction to correct an error of law promulgated by a government department through a non-statutory form. However, typically a non-statutory form will not raise a clear issue of law and will have political, social or moral overtones. In this situation, courts should narrow their jurisdiction to only whether there was an error of law.

He held that as the criminal sanction (for statutory rape) does not sufficiently protect the public, it would be contrary to public policy to restrict access to contraception.

Lord Brandon:

The Lord held that providing advice or treatment is illegal as it would promote a minor to engage in sexual intercourse. He found that Parliament still strongly views an adult having sex with a minor as criminal. Sexual activity between a man and a girl has two inhibitions: the criminal law and risk of an unwanted pregnancy. The provision of contraception removes the second inhibition. Removing the inhibition unlawfully promotes the sexual intercourse. He rejected the view that sexual intercourse would occur regardless of contraception based on the ideas that if a minor seeks such advice, clearly the concern of pregnancy weighs on them and that if a legal exception is created then a minor could "blackmail" the doctor to provide contraception by threatening to have unprotected sex.

Lord Templeman:

The Lord viewed minors as unable to provide consent to the provision of contraception. While a court is guided by the welfare of the child, this will typically be the views of the parent. He accepted that parental consent is not required when there is an emergency, a court order or the parental rights have been abandoned. He distinguished the removal of tonsils or an appendix from engaging in sex, as the latter requires understanding of sex's risks and emotional impacts to have a balanced judgment that a minor below 16 is not capable of.

He emphasized a number of problems with the memorandum's approach. In particular that a doctor cannot know the best interests of a minor judged only from the information she provides; the parent will find out, which will cause more harm; and the provision of contraceptives promotes sexual intercourse, a practice that "offends basic principles of morality and religion." He found that minors are not sufficiently mature and that sex by minors "cannot be beneficial to anybody" and may harm the minor's character and personality. The provision of contraception should only occur after both the parent and doctor fail to prevent the girl from engaging in sex.

Finally, he noted that daily contraception (i.e. birth control pills) requires discipline that is often lacking in those under 16. Thus, the provision of the contraception could increase pregnancies.

Decision Excerpts

“Once the rule of the parents' absolute authority over minor children is abandoned, the solution to the problem in this appeal can no longer be found by referring to rigid parental rights at any particular age. The solution depends on a judgment of what is best for the welfare of the particular child. Nobody doubts, certainly I do not doubt, that in the overwhelming majority of cases the best judges of a child's welfare are his or her parents. Nor do I doubt that any important medical treatment of a child under 16 would normally only be carried out with the parents' approval. That is why it would and should be 'most unusual' for a doctor to advise a child without the knowledge and consent of the parents on contraceptive matters.” (Page 11, Lord Fraser)

“I do not find on a fair reading of the guidance anything to obscure or confuse its basic message that a doctor is only in exceptional circumstances to prescribe contraception for a young person under the age of 16 without the knowledge and consent of a parent. No reasonable person could read it as meaning that the doctor's discretion could ordinarily override parental right. Illustrations are given in the text of exceptional cases in which the doctor may take the 'most unusual' course of not consulting the parent. Only in exceptional cases does the guidance contemplate him exercising his clinical judgment without the parent's knowledge and consent. Lastly, there really can be no compulsion in law on a government department to spell out to a doctor what is meant by 'clinical judgment'.” (Page 19, Lord Scarman)

“The principle is that parental right or power of control of the person and property of his child exists primarily to enable the parent to discharge his duty of maintenance, protection and education until he reaches such an age as to be able to look after himself and make his own decisions. Blackstone does suggest that there was a further justification for parental right, viz as a recompense for the faithful discharge of parental duty; but the right of the father to the exclusion of the mother and the reward element as one of the reasons for the existence of the right have been swept away by the guardianship of minors legislation to which I have already referred. He also accepts that by statute and by case law varying ages of discretion have been fixed for various purposes. But it is clear that this was done to achieve certainty where it was considered necessary and in no way limits the principle that parental right endures only so long as it is needed for the protection of the child.” (Page 23, Lord Scarman)

“The law relating to parent and child is concerned with the problems of the growth and maturity of the human personality. If the law should impose on the process of 'growing up' fixed limits where nature knows only a continuous process, the price would be artificiality and a lack of realism in an area where the law must be sensitive to human development and social change.” (Page 23, Lord Scarman)

“Before a girl under 16 is supplied with contraceptive facilities, the parent who knows most about the girl and ought to have the most influence with the girl is entitled to exercise parental rights of control, supervision, guidance and advice in order that the girl may, if possible, avoid sexual intercourse until she is older. Contraception should only be considered if and when the combined efforts of parent and doctor fail to prevent the girl from participating in sexual intercourse and there remains only the possibility of protecting the girl against pregnancy resulting from sexual intercourse.” (Page 39, Lord Templeman)