[1985] 3 All ER 402

Gillick v West Norfolk and Wisbech Area Health Authority and another

HOUSE OF LORDS
LORD FRASER OF TULLYBELTON, LORD SCARMAN, LORD BRIDGE OF HARWICH, LORD BRANDON OF OAKBROOK AND LORD TEMPLEMAN

24, 25, 26, 27 JUNE, 1, 2, 3, 4 JULY, 17 OCTOBER 1985

John Laws and Ian Kennedy for the DHSS.
Gerard Wright QC, David Poole QC and Patrick Field for Mrs Gillick.
The area health authority was not represented.

Their Lordships took time for consideration

17 October 1985. The following opinions were delivered.

LORD FRASER OF TULLYBELTON.

My Lords, the main question in this appeal is whether a doctor can lawfully prescribe contraception for a girl under 16 years of age without the consent of her parents. The second appellant, the Department of Health and Social Security (the DHSS), maintains that a doctor can do so. The respondent, Mrs Gillick, maintains that he cannot. The first appellant, West Norfolk and Wisbech Area Health Authority, was not represented when the appeal reached this House, but in the Court of Appeal it was represented by the same counsel as the DHSS.

[1985] 3 All ER 402 at 405

In December 1980 the DHSS issued guidance on family planning services for young people, which was a revised version of earlier guidance on the same subject, and which stated, or implied, that, at least in certain cases which were described as 'exceptional', a doctor could lawfully prescribe contraception for a girl under 16 without her parents' consent. Mrs Gillick, who is the mother of five daughters under the age of 16, objected to the guidance and she instituted the proceedings which have led to this appeal, and in which she claims a declaration against both appellants that the advice given in the guidance was unlawful. She also claims a further declaration against the first appellant alone, but it is of less general importance than the declaration to which I have already referred, and I defer consideration of it until later in this speech.

It will be convenient to dispose at once of some preliminary matters. In the first place, Mrs Gillick's husband is not a party to the present proceedings, but we were informed that he is in full agreement with Mrs Gillick's contention, and I proceed on that basis. Second, there is no suggestion that Mrs Gillick's relationship with her daughters is other

than normal and happy, nor is it suggested that there is any present likelihood of any of the daughters seeking contraceptive advice or treatment without the consent of their mother.

Third, I must mention a procedural matter. The declaration which is claimed against the DHSS, to the effect that the advice given in the guidance was unlawful, amounts to an assertion that the Secretary of State for Health and Social Security has acted illegally, in the sense of ultra vires. The remedy claimed is in the field of public law and, since the decision of your Lordships' House in O'Reilly v Mackman [1982] 3 All ER 1124, [1983] 2 AC 237, it is one which should normally be claimed in an application for judicial review. But the writ and statement of claim in this action were issued on 5 August 1982, three months before the decision in O'Reilly, which was on 25 November 1982. Accordingly, counsel for the DHSS merely mentioned the procedural point but he did not submit that the procedure was out of order. I have had the benefit of reading in draft the speech prepared by my noble and learned friend Lord Scarman and I agree with him that, for the reasons explained by him, Mrs Gillick was fully entitled to proceed in the case by ordinary action.

The advice, the lawfulness of which is in dispute, is a revised version of part of a comprehensive memorandum of guidance on the family planning service which had been issued to health authorities in May 1974 under cover of a circular (Health Service circular (interim series) (HSC(IS) 32)) from the DHSS. The memorandum of guidance was divided into a number of sections, one of which was section G, which was headed 'The Young'. The revised section G, which contains the disputed advice, is as follows:

> 'Clinic sessions should be available for people of all ages, but it may be helpful to make separate, less formal arrangements for young people. The staff should be experienced in dealing with young people and their problems. There is widespread concern about counselling and treatment for children under 16. Special care is needed not to undermine parental responsibility and family stability. The Department would therefore hope that in any case where a doctor or other professional worker is approached by a person under the age of 16 for advice in these matters, the doctor, or other professional, will always seek to persuade the child to involve the parent or guardian (or other person in loco parentis) at the earliest stage of consultation, and will proceed from the assumption that it would be most unusual to provide advice about contraception without parental consent. It is, however, widely accepted that consultations between doctors and patients are confidential; and the Department recognises the importance which doctors and patients attach to this principle. It is a principle which applies also to the other professions concerned. To abandon this principle for children under 16 might cause some not to seek professional advice at all. They could then be exposed to the immediate risks of pregnancy and of sexually-transmitted diseases, as well as other long-term physical, psychological and emotional consequences which are equally a threat to stable family life. This would apply particularly to young people whose parents are, for

> example, unconcerned, entirely unresponsive, or grossly disturbed. Some of these young people are away from their parents and in the care of local authorities or voluntary organisations standing in loco parentis. The Department realises that in such exceptional cases the nature of any counselling must be a matter for the doctor or other professional worker concerned and that the decision whether or not to prescribe contraception must be for the clinical judgment of a doctor.'

That advice emphasised, more strongly than section G in its original form had done, that the cases in which a doctor could properly advise a girl under 16 years of age about contraception without parental consent would be most unusual. If the advice had been contained in a legal document there might well have been room for argument as to its exact effect, but, in my view, it is perfectly clear that it would convey to any doctor or other person who read it that the decision whether or not to prescribe contraception for a girl under 16 was in the last resort a matter for the clinical judgment of a doctor, even if the girl's parents had not been informed that she had consulted the doctor, and even if they had expressed disapproval of contraception being prescribed for her. Mrs Gillick objected to the guidance, in its amended form, and after some correspondence with the area health authority, she wrote to the acting area administrator on 3 March 1981 a letter which included this paragraph:

> 'I formally FORBID any medical staff employed by Norfolk A.H.A. to give any contraceptive or abortion advice or treatment whatsoever to my four daughters, while they are under 16 years without my consent.'

Mrs Gillick's youngest (fifth) daughter has been born since that letter was sent. The acting administrator replied on 9 March 1981 acknowledging the letter and stating that the area health authority held to the view 'that treatment prescribed by a doctor is a matter for that doctor's clinical judgment, taking into account all the factors of the case'.

On 5 August 1982 Mrs Gillick began these proceedings against the area health authority and the DHSS, in which she seeks the following declarations (as amended before the master):

> '(i) a declaration against the [area health authority] and the [DHSS] on a true construction of the said Notice and in the events which have happened, including and in particular the publication and the circulation of the said Notice, the said Notice has no authority in law and gives advice which is unlawful and wrong, and which adversely affects or which may adversely affect the welfare of [Mrs Gillick's] said children, and/or the rights of [Mrs Gillick] as parent and custodian of the said children, and/or the ability of [Mrs Gillick] properly and effectively to discharge her duties as such parent and custodian; (ii) a declaration against the [area health authority] that no doctor or other professional person employed by the [area health authority] either in the Family Planning Service or otherwise may give any contraceptive and/or abortion advice and/or treatment to any child of [Mrs Gillick] below the age of 16 without the prior knowledge and consent of the said child's parent or

guardian.'

Woolf J refused to grant the declarations sought by Mrs Gillick and dismissed the action (see [1984] 1 All ER 365, [1984] QB 581). The Court of Appeal (Eveleigh, Fox and Parker LJJ) ([1985] 1 All ER 533, [1985] 2 WLR 413) allowed the appeal and granted the declarations. Against that decision the DHSS now appeals.

The central issue in the appeal is whether a doctor can ever, in any circumstances, lawfully give contraceptive advice or treatment to a girl under the age of 16 without her parents' consent. The effect of the Court of Appeal's judgment is to answer that question in the negative. The answer is subject certainly to one exception, in the case of an order by a competent court; this exception was recognised by Parker LJ in the Court of Appeal (see [1985] 1 All ER 533 at 539, [1985] 2 WLR 413 at 420), and it is accepted in Mrs Gillick's printed case. But it is of theoretical rather than practical importance, because it would inevitably involve disclosing to the parents the doctor's advice to the girl, and thus

would destroy its confidentiality, and also because the delay and expense of obtaining a court order makes frequent use of such procedure impracticable. There must, I think, be a second exception for cases in which the parents, or the sole surviving parent, have deliberately abandoned their parental responsibilities; in such cases it would, in my opinion, be wrong to allow them to emerge from the shadows solely in order to veto contraceptive advice or treatment for their daughter. But these exceptions do not touch the principle which is at issue in the appeal.

The guidance is addressed to regional health authorities and other authorities concerned in administering the national health service (the NHS), and the appeal therefore only directly concerns doctors and other persons working in the NHS. I shall refer throughout to doctors, to include brevitatis causa other professional persons working in the NHS.

The first statutory provision for contraceptive advice and treatment in the NHS was made by s 1 of the National Health Service (Family Planning) Act 1967. That section empowered local health authorities in England and Wales, with the approval of the Minister of Health, to make arrangements for giving advice on contraception, for medical examination of persons seeking such advice and for the supply of contraceptive substances and appliances. There appears to have been no similar provision applying to Scotland. The 1967 Act was repealed by the National Health Service Reorganisation Act 1973, which, by s 4, replaced the power of local health authorities to provide such advice and treatment with a duty on the Secretary of State to do so. A similar duty was placed on the Secretary of State for Scotland by s 8 of the National Health Service (Scotland) Act 1972. The 1973 provision for England and Wales has now been superseded by the National Health Service Act 1977, which by s 5(1)(b) imposes a duty on the Secretary of State—

> 'to arrange, to such extent as he considers necessary to meet all reasonable requirements in England and Wales, for the giving of advice on contraception, the medical examination of persons seeking advice on contraception, the treatment of such persons and the supply of

contraceptive substances and appliances.'

These, and other, provisions show that Parliament regarded 'advice' and 'treatment' on contraception and the supply of appliances for contraception as essentially medical matters. So they are, but they may also raise moral and social questions on which many people feel deeply, and in that respect they differ from ordinary medical advice and treatment. None of the provisions to which I have referred placed any limit on the age (or the sex) of the persons to whom such advice or treatment might be supplied.

Three strands of argument are raised by the appeal. These are: (1) whether a girl under the age of 16 has the legal capacity to give valid consent to contraceptive advice and treatment including medical examination;(2) whether giving such advice and treatment to a girl under 16 without her parents' consent infringes the parents' rights and (3) whether a doctor who gives such advice or treatment to a girl under 16 without her parents' consent incurs criminal liability. I shall consider these strands in order.

1. The legal capacity of a girl under 16 to consent to contraceptive advice, examination and treatment

There are some indications in statutory provisions to which we were referred that a girl under 16 years of age in England and Wales does not have the capacity to give valid consent to contraceptive advice and treatment. If she does not have the capacity, then any physical examination or touching of her body without her parents' consent would be an assault by the examiner. One of those provisions is s 8 of the Family Law Reform Act 1969, which is in the following terms:

> '(1) The consent of a minor who has attained the age of sixteen years to any surgical, medical or dental treatment which, in the absence of consent, would constitute a trespass to his person, shall be as effective as it would be if he were of full age; and where a minor has by virtue of this section given an effective consent to any treatment it shall not be necessary to obtain any consent for it from his parent or guardian …

[1985] 3 All ER 402 at 408

> (3) Nothing in this section shall be construed as making ineffective any consent which would have been effective if this section had not been enacted.'

The contention on behalf of Mrs Gillick was that sub-s (1) of s 8 shows that, apart from the subsection, the consent of a minor to such treatment would not be effective. But I do not accept that contention because sub-s (3) leaves open the question whether consent by a minor under the age of 16 would have been effective if the section had not been enacted. That question is not answered by the section, and sub-s (1) is, in my opinion, merely for the avoidance of doubt.

Another statutory provision which was referred to in this connection is the National Health Service (General Medical and Pharmaceutical Services) Regulations 1974, SI 1974/160, as amended by the National Health Service (General Medical and Pharmaceutical Services) Amendment Regulations 1975, SI 1975/719. The regulations

prescribe the mechanism by which the relationship of doctor and patient under the NHS is created. Contraceptive services, along with maternity medical services, are treated as somewhat apart from other medical services in respect that only a doctor who specially offers to provide contraceptive or maternity medical services is obliged to provide them: see the definition of 'medical card' and 'treatment' in reg 2(1); see also regs 6(1)(a) and 14(2)(a) and Sch 1, para 13. But nothing turns on this fact. Two points in those regulations have a bearing on the present question although, in my opinion, only an indirect bearing. The first is that by reg 14 any 'woman' may apply to a doctor to be accepted by him for the provision of contraceptive services. The word 'woman' is not defined so as to exclude a girl under 16 or under any other age. But reg 32 provides as follows:

> 'An application to a doctor for inclusion on his list … may be made, either—(a) on behalf of any person under 16 years of age, by the mother, or in her absence, the father, or in the absence of both parents the guardian or other adult person who has the care of the child; or (b) on behalf of any other person who is incapable of making such an application by a relative or other adult person who has the care of such person … '

The words in para (b) which I have emphasised are said, by counsel for Mrs Gillick, to imply that a person under 16 years of age is incapable of applying to a doctor for services and therefore give some support to the argument on behalf of Mrs Gillick. But I do not regard the implication as a strong one because the provision is merely that an application 'may' be made by the mother or other parent or guardian and it applies to the doctor's list for the provision of all ordinary medical services as well as to his list for the provision of contraception services. I do not believe that a person aged 15, who may be living away from home, is incapable of applying on his own behalf for inclusion in the list of a doctor for medical services of an ordinary kind not connected with contraception.

Another provision, in a different branch of medicine, which is said to carry a similar implication is contained in the Mental Health Act 1983, s 131, which provides for informal admission of patients to mental hospitals. It provides by sub-s (2):

> 'In the case of a minor who has attained the age of 16 years and is capable of expressing his own wishes, any such arrangements as are mentioned in subsection (1) above [for informal admission] may be made, carried out and determined notwithstanding any right of custody or control vested by law in his parent or guardian.'

That provision has only a remote bearing on the present question because there is no doubt that a minor under the age of 16 is in the custody of his or her parents. The question is whether such custody necessarily involves the right to veto contraceptive advice or treatment being given to the girl.

Reference was also made to the Education Act 1944, s 48, which dealt with medical inspection and treatment of pupils at state schools. Section 48(3), which imposed on the local education authority a duty to provide for medical and dental inspection of pupils, was repealed and superseded by the National Health Service Reorganisation Act 1973, s

and Sch 5. The 1973 Act in turn was replaced by the National Health Service Act 1977, s 5(1)(a). Section 48(4) of the Education Act 1944, which has not been repealed, imposes a duty on the local education authority to arrange for encouraging pupils to take advantage of any medical treatment so provided, but it includes a proviso in the following terms:

> 'Provided that if the parent of any pupil gives to the authority notice that he objects to the pupil availing himself of any of the provision [for medical treatment etc] so made the pupil shall not be encouraged … so to do.'

I do not regard that provision as throwing light on the present question. It does not prohibit a child under the stipulated age from availing himself of medical treatment or an education authority from providing it for him. If the child, without encouragement from the education authority, 'wishes to avail himself of medical treatment' the section imposes no obstacle in his way. Accordingly, in my opinion, the proviso gives no support to the contention from Mrs Gillick, but on the contrary points in the opposite direction.

The statutory provisions to which I have referred do not differentiate so far as the capacity of a minor under 16 is concerned between contraceptive advice and treatment and other forms of medical advice and treatment. It would, therefore, appear that, if the inference which Mrs Gillick's advisers seek to draw from the provisions is justified, a minor under the age of 16 has no capacity to authorise any kind of medical advice or treatment or examination of his own body. That seems to me so surprising that I cannot accept it in the absence of clear provisions to that effect. It seems to me verging on the absurd to suggest that a girl or a boy aged 15 could not effectively consent, for example, to have a medical examination of some trivial injury to his body or even to have a broken arm set. Of course the consent of the parents should normally be asked, but they may not be immediately available. Provided the patient, whether a boy or a girl, is capable of understanding what is proposed, and of expressing his or her own wishes, I see no good reason for holding that he or she lacks the capacity to express them validly and effectively and to authorise the medical man to make the examination or give the treatment which he advises. After all, a minor under the age of 16 can, within certain limits, enter into a contract. He or she can also sue and be sued, and can give evidence on oath. Moreover, a girl under 16 can give sufficiently effective consent to sexual intercourse to lead to the legal result that the man involved does not commit the crime of rape: see R v Howard [1965] 3 All ER 684 at 685, [1966] 1 WLR 13 at 15, when Lord Parker CJ said:

> '… in the case of a girl under sixteen, the prosecution, in order to prove rape, must prove either that she physically resisted, or if she did not, that her understanding and knowledge were such that she was not in a position to decide whether to consent or resist … there are many girls under sixteen who know full well what it is all about and can properly consent.'

Accordingly, I am not disposed to hold now, for the first time, that a girl aged less than 16 lacks the power to give valid consent to contraceptive advice or treatment, merely on account of her age.

Out of respect for the comprehensive and fully researched argument submitted by counsel for the DHSS I should notice briefly two old Acts to which he referred, but which do not appear to me to be helpful. One of these is the Act 4 & 5 Ph & M c 8(abduction (1557)) for punishing 'such as shall take away maidens that be inheritors, being within the age of sixteen years, or that marry them, without consent of their parents'. That Act was evidently passed for the protection of property rather than for protection of the virtue of maidens. It was repealed by the Act 9 Geo 4 c 31(offences against the person (1828)). We were referred to s 20 of the 1828 Act, but that section was concerned only with punishing abduction of any unmarried girl under the age of 16 and appears to me to have little or no bearing on the present problem.

On this part of the case accordingly I conclude that there is no statutory provision which compels me to hold that a girl under the age of 16 lacks the legal capacity to consent to contraceptive advice, examination and treatment provided that she has

sufficient understanding and intelligence to know what they involve. I can deal with the case law more conveniently in what follows.

2. The parents' rights and duties in respect of medical treatment of their child

The amended guidance expressly states that the doctor will proceed from the assumption that it would be 'most unusual' to provide advice about contraception without parental consent. It also refers to certain cases where difficulties might arise if the doctor refused to promise that his advice would remain confidential and it concludes that the department realises that 'in such exceptional cases' the decision whether or not to prescribe contraception must be for the clinical judgment of a doctor. Mrs Gillick's contention that the guidance adversely affects her rights and duties as a parent must, therefore, involve the assertion of an absolute right to be informed of and to veto such advice or treatment being given to her daughters even in the 'most unusual' cases which might arise (subject, no doubt, to the qualifications applying to the case of court order or to abandonment of parents' duties).

It was, I think, accepted both by Mrs Gillick and by the DHSS, and in any event I hold, that parental rights to control a child do not exist for the benefit of the parent. They exist for the benefit of the child and they are justified only in so far as they enable the parent to perform his duties towards the child, and towards other children in the family. If necessary, this proposition can be supported by reference to Blackstone's Commentaries (1 Bl Com (17th edn, 1830) 452), where he wrote: 'The power of parents over their children is derived from … their duty.' The proposition is also consistent with the provisions of the Guardianship of Minors Act 1971, s 1, as amended, as follows:

> 'Where in any proceedings before any court … (a) the legal custody or upbringing of a minor … is in question, the court, in deciding that question, shall regard the welfare of the minor as the first and paramount

> consideration, and shall not take into consideration whether from any other point of view the claim of the father in respect of such legal custody, upbringing, administration or application is superior to that of the mother, or the claim of the mother is superior to that of the father.'

From the parents' right and duty of custody flows their right and duty of control of the child, but the fact that custody is its origin throws but little light on the question of the legal extent of control at any particular age. Counsel for Mrs Gillick placed some reliance on the Children Act 1975. Section 85(1) provides that in that Act the expression 'the parental rights and duties' means 'all the rights and duties which by law the mother and father have in relation to a legitimate child and his property', but the subsection does not define the extent of the rights and duties which by law the mother and father have. Section 86 of the Act provides:

> 'In this Act, unless the context otherwise requires, "legal custody" means, as respects a child, so much of the parental rights and duties as relate to the person of the child (including the place and manner in which his time is spent) … '

In the Court of Appeal Parker LJ attached much importance to that section, especially to the words in brackets. He considered that the right relating to the place and manner in which the child's time is spent included the right, as he put it, 'completely to control the child' subject of course always to the intervention of the court. Parker LJ went on thus ([1985] 1 All ER 533 at 540, [1985] 2 WLR 413 at 423):

> 'Indeed there must, it seems to me, be such a right from birth to a fixed age unless whenever, short of majority, a question arises it must be determined, in relation to a particular child and a particular matter, whether he or she is of sufficient understanding to make a responsible and reasonable decision. This alternative appears to me singularly unattractive and impracticable, particularly in the context of medical treatment.'

My Lords, I have, with the utmost respect, reached a different conclusion from that of Parker LJ. It is, in my view, contrary to the ordinary experience of mankind, at least in

Western Europe in the present century, to say that a child or a young person remains in fact under the complete control of his parents until he attains the definite age of majority, now 18 in the United Kingdom, and that on attaining that age he suddenly acquires independence. In practice most wise parents relax their control gradually as the child develops and encourage him or her to become increasingly independent. Moreover, the degree of parental control actually exercised over a particular child does in practice vary considerably according to his understanding and intelligence and it would, in my opinion, be unrealistic for the courts not to recognise these facts. Social customs change, and the law ought to, and does in fact, have regard to such changes when they are of major importance. An example of such recognition is to be found in the view recently expressed in your Lordships' House by Lord Brandon, with which the other noble and learned Lords who were present agreed, in R v D [1984] 2 All ER 449 at 457, [1984] AC 778 at 806. Dealing with the question of whether the consent of a child to being taken

away by a stranger would be a good defence to a charge of kidnapping, Lord Brandon said:

> 'In the case of a very young child, it would not have the understanding or the intelligence to give its consent, so that absence of consent would be a necessary inference from its age. In the case of an older child, however, it must, I think be a question of fact for a jury whether the child concerned has sufficient understanding and intelligence to give its consent if, but only if, the jury considers that a child has these qualities, it must then go on to consider whether it has been proved that the child did not give its consent. While the matter will always be for the jury alone to decide, I should not expect a jury to find at all frequently that a child under 14 had sufficient understanding and intelligence to give its consent.'

That expression of opinion seems to me entirely contradictory of the view expressed by Cockburn CJ in R v Howes (1860) 1 E & E 332 at 336–337, 121 ER 467 at 468–469:

> 'We repudiate utterly, as most dangerous, the notion that any intellectual precocity in an individual female child can hasten the period which appears to have been fixed by statute for the arrival at the age of discretion; for that very precocity, if uncontrolled, might very probably lead to her irreparable injury. The Legislature has given us a guide, which we may safely follow, in pointing out sixteen as the age up to which the father's right to custody of his female child is to continue; and short of which such a child has no discretion to consent to leaving him.'

The question for decision in that case was different from that in the present, but the view that the child's intellectual ability is irrelevant cannot, in my opinion, now be accepted. It is a question of fact for the judge (or jury) to decide whether a particular child can give effective consent to contraceptive treatment.

In times gone by the father had almost absolute authority over his children until they attained majority. A rather remarkable example of such authority being upheld by the court was Re Agar-Ellis, Agar-Ellis v Lascelles (1883) 24 Ch D 317, which was much relied on by the Court of Appeal. The father in that case restricted the communication which his daugher aged 17 was allowed to have with her mother, against whose moral character nothing was alleged, to an extent that would be universally condemned today as quite unreasonable. The case has been much criticised in recent years and, in my opinion, with good reason. In Hewer v Bryant [1969] 3 All ER 578 at 582, [1970] 1 QB 357 at 369 Lord Denning MR said:

> 'I would get rid of the rule in Re Agar-Ellis and of the suggested exceptions to it. That case was decided in the year 1883. It reflects the attitude of a Victorian parent towards his children. He expected unquestioning obedience to his commands. If a son disobeyed, his father would cut him off with 1s. If a daughter had an illegitimate child, he would turn her out of the house. His power only ceased when the child became 21. I decline to accept a view so much out of date. The common law can, and should, keep pace with the times. It should declare, in

conformity with the

> recent report on the Age of Majority (Report of the Committee on the Age of Majority (Cmnd 3342) under the chairmanship of Latey J, published in July 1967), that the legal right of a parent to the custody of a child ends at the eighteenth birthday; and even up till then, it is a dwindling right which the courts will hesitate to enforce against the wishes of the child, the older he is. It starts with a right of control and ends with little more than advice.'

I respectfully agree with every word of that and especially with the description of the father's authority as a dwindling right. In J v C [1969] 1 All ER 788, [1970] AC 668 Lord Guest and Lord MacDermott referred to the decision in Re Agar-Ellis as an example of the almost absolute power asserted by the father over his children before the Supreme Court of Judicature Act 1873 and plainly thought such an assertion was out of place at the present time: see per Lord MacDermott ([1969] 1 All ER 788 at 814–815, [1970] AC 668 at 703–704). In R v D [1984] 2 All ER 449, [1984] AC 778 Lord Brandon cited Re Agar-Ellis as an example of the older view of a father's authority which his Lordship and the other members of the House rejected. In my opinion, the view of absolute paternal authority continuing until a child attains majority which was applied in Re Agar-Ellis is so out of line with present-day views that it should no longer be treated as having any authority. I regard it as a historical curiosity. As Fox LJ pointed out in the Court of Appeal (see [1985] 1 All ER 533 at 554, [1985] 2 WLR 413 at 439), the Agar-Ellis cases (1878) 10 Ch D 49, (1883) 24 Ch D 317 seemed to have been regarded as somewhat extreme even in their own day, as they were quickly followed by the Guardianship of Infants Act 1886, which, by s 5, provided that the court may—

> 'upon the application of the mother of any infant [whether under 16 or not] … make such order as it may think fit regarding the custody of such infant and the right of access thereto of either parent, having regard to the welfare of the infant, and to the conduct of the parents … '

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. But, as I have already pointed out, Mrs Gillick has to go further if she is to obtain the first declaration that she seeks. She has to justify the absolute right of veto in a parent. But there may be circumstances in which a doctor is a better judge of the medical advice and treatment which will conduce to a girl's welfare than her parents. It is notorious that children of both sexes are often reluctant to confide in their parents about sexual matters, and the DHSS guidance under consideration shows that to abandon the principle of confidentiality for contraceptive advice to girls under 16 might cause some of them not to seek professional advice at all, with the consequence of

exposing them to 'the immediate risks of pregnancy and of sexually-transmitted diseases'. No doubt the risk could be avoided if the patient were to abstain from sexual intercourse, and one of the doctor's responsibilities will be to decide whether a particular patient can reasonably be expected to act on advice to abstain. We were told that in a significant number of cases such abstinence could not reasonably be expected. An example is Re P (a minor) (1981) 80 LGR 301, in which Butler-Sloss J ordered that a girl aged 15 who had been pregnant for the second time and who was in the care of a local authority should be fitted with a contraceptive appliance because, as the judge is reported to have said (at 312)—

> 'I assume that it is impossible for this local authority to monitor her sexual activities, and, therefore, contraception appears to be the only alternative.'

There may well be other cases where the doctor feels that because the girl is under the influence of her sexual partner or for some other reason there is no realistic prospect of her abstaining from intercourse. If that is right it points strongly to the desirability of the doctor being entitled in some cases, in the girl's best interest, to give her contraceptive advice and treatment if necessary without the consent or even the knowledge of her parents. The only practicable course is, in my opinion, to entrust the doctor with a discretion to act in accordance with his view of what is best in the interests of the girl who is his patient. He should, of course, always seek to persuade her to tell her parents that she is seeking contraceptive advice, and the nature of the advice that she receives. At least he should seek to persuade her to agree to the doctor's informing the parents. But there may well be cases, and I think there will be some cases, where the girl refuses either to tell the parents herself or to permit the doctor to do so and in such cases the doctor will, in my opinion, be justified in proceeding without the parents' consent or even knowledge provided he is satisfied on the following matters: (1) that the girl (although under 16 years of age) will understand his advice; (2) that he cannot persuade her to inform her parents or to allow him to inform the parents that she is seeking contraceptive advice; (3) that she is very likely to begin or to continue having sexual intercourse with or without contraceptive treatment; (4) that unless she receives contraceptive advice or treatment her physical or mental health or both are likely to suffer; (5) that her best interests require him to give her contraceptive advice, treatment or both without the parental consent.

That result ought not to be regarded as a licence for doctors to disregard the wishes of parents on this matter whenever they find it convenient to do so. Any doctor who behaves in such a way would, in my opinion, be failing to discharge his professional responsibilities, and I would expect him to be disciplined by his own professional body accordingly. The medical profession have in modern times come to be entrusted with very wide discretionary powers going beyond the strict limits of clinical judgment and, in my opinion, there is nothing strange about entrusting them with this further responsibility which they alone are in a position to discharge satisfactorily.

3. Is a doctor who gives contraceptive advice or treatment to a girl under 16 without her parents' consent likely to incur criminal liability?

The submission was made to Woolf J on behalf of Mrs Gillick that a doctor who

provided contraceptive advice and treatment to a girl under 16 without her parents' authority would be committing an offence under s 28 of the Sexual Offences Act 1956 by aiding and abetting the commission of unlawful sexual intercourse. When the case reached the Court of Appeal counsel on both sides conceded that whether a doctor who followed the guidelines would be committing an offence or not would depend on the circumstances. It would depend on the doctor's intentions; this appeal is concerned with doctors who honestly intend to act in the best interests of the girl, and I think it is unlikely that a doctor who gives contraceptive advice or treatment with that intention would commit an offence under s 28. It must be remembered that a girl under 16 who has sexual intercourse does not thereby commit an offence herself, although her partner does: see the Sexual Offences Act 1956, ss 5 and 6. In any event, even if the doctor would be committing an offence, the fact that he had acted with the parents' consent would not exculpate him as Woolf J pointed out ([1984] 1 All ER 365 at 373, [1984] QB 581 at 595). Accordingly, I regard this contention as irrelevant to the question that we have to answer in this appeal. Parker LJ in the Court of Appeal dealt at some length with the provisions of criminal law intended to protect girls under the age of 16 from being seduced, and perhaps also to protect them from their own weakness. Parker LJ expressed his conclusion on this part of the case as follows ([1985] 1 All ER 533 at 550, [1985] 2 WLR 413 at 435):

> 'It appears to me that it is wholly incongruous, when the act of intercourse is criminal, when permitting it to take place on one's premises is criminal and when, if the girl were under 13, failing to report an act of intercourse to the police would up to 1967 have been criminal, that either the department or the area health

[1985] 3 All ER 402 at 414

> authority should provide facilities which would enable girls under 16 the more readily to commit such acts. It seems to me equally incongruous to assert that doctors have the right to accept the young, down, apparently, to any age, as patients, and to provide them with contraceptive advice and treatment without reference to their parents and even against their known wishes.'

My Lords, the first of those two sentences is directed to the question, which is not in issue in this appeal, of whether contraceptive facilities should be available at all under the NHS for girls under 16. I have already explained my reasons for thinking that the legislation does not limit the duty of providing such facilities to women of 16 or more. The second sentence, which does bear directly on the question in the appeal, does not appear to me to follow necessarily from the first and with respect I cannot agree with it. If the doctor complies with the first of the conditions which I have specified, that is to say if he satisfies himself that the girl can understand his advice, there will be no question of his giving contraceptive advice to very young girls.

For those reasons I do not consider that the guidance interferes with the parents' rights.

The second declaration

The second declaration is directed only against the area health authority. Its practical

importance would be minimal because doctors are not 'employed' by the area health authority in the family planning service and, if they were, the declaration could easily be avoided by the girl going to a doctor in a different area. The Court of Appeal made the declaration sought, and the authority has not appealed against its decision. I am, therefore, of opinion that we should not reverse the decision of the Court of Appeal on this part of the case. But it is clearly inconsistent with the views I have expressed on the first declaration, and I agree with Lord Scarman that it should be overruled.

I would allow the appeal against the first declaration granted by the Court of Appeal, and I would overrule the second declaration as being erroneous.

LORD SCARMAN.

My Lords, I have had the advantage of reading in draft the speech delivered by my noble and learned friend Lord Fraser. Agreeing with it, I shall endeavour in delivering my opinion to avoid repetition. The importance of the case is, however, such that I believe it necessary, even at the cost of some repetition, to deliver my opinion in my own words. The case is the beginning, not the conclusion, of a legal development in a field glimpsed by one or two judges in recent times (notably Butler-Sloss J in Re P (a minor) (1981) 80 LGR 301) but not yet fully explored. Mrs Gillick, even though she may lose the appeal, has performed a notable public service in directing judicial attention to the problems arising from the interaction of parental right and a doctor's duty in a field of medicine unknown to our fathers but of immense consequence to our society. The contraceptive pill has introduced a new independence, and offers new options, for women; but has it in the process undermined parental right and duty? In my judgment, the answer is No, even though parental right may not be as extensive or as long lasting as she believes it to be.

Victoria Gillick, mother of five daughters under the age of 16, challenges the lawfulness of a memorandum of guidance issued by the Department of Health and Social Security which she says encourages and in certain circumstances recommends health authorities, doctors and others concerned in operating the department's family planning services to provide contraceptive advice and treatment to girls under the age of 16 without the knowledge or consent of a parent. Mrs Gillick is a wife and mother living in a united family with her husband and their children. The husband supports the action being taken, as they both see it, to protect their daughters. Nothing further need be said of their family situation in deciding this appeal.

Mrs Gillick began her proceedings by the issue of a writ against two defendants, the health authority for the area in which she lives and the department. She claims in an ordinary civil action declaratory relief against both defendants that the guidance is unlawful, and against the area health authority alone a declaration that no doctor or other

person in its employ may give contraception or abortion advice to Mrs Gillick's children under the age of 16 without her prior knowledge and consent. The area health authority has taken no part in the litigation, but the department; has fought the case strenuously. The appeal to the House is that of the department the health authority has not appealed

and is not represented.

The written case submitted on Mrs Gillick's behalf to the House formulates three propositions of law, any one of which, if made good, would suffice to entitle her to relief. They are as follows: (i) parental rights should be protected from any invasion or interference neither authorised by a competent court nor expressly authorised by statute (the parental rights case); (ii) the provision of contraceptive treatment to girls under the age of 16 either constitutes criminal conduct in itself or is so closely analogous thereto as to be contrary to public policy (the criminal law case); (iii) a girl below the age of 16 is not capable in law of giving a valid consent to medical treatment and in the particular context of this case to contraceptive or abortion treatment (the age of consent point).

Before, however, considering these propositions, it is necessary to clear out of the way certain procedural questions, which, though not urged on our attention, do call for a brief consideration.

Procedure

Three procedural questions have emerged in the course of the litigation. First, Mr Simon Brown, who before his elevation to the Bench had the conduct of the case as counsel for the department, raised at the trial the question as to the propriety of the civil court granting a declaration in a case which involved the criminal law. The judge saw no reason why he should be inhibited on this ground from dealing with the issues in the action; and I agree with him. It was not contended that the issue of the guidance was itself a crime; the case against the department was simply that the guidance, if followed, would result in unlawful acts and that the department by issuing it was exercising a statutory discretion in a wholly unreasonable way, ie the classical Wednesbury case for judicial review: see Associated Provincial Picture Houses Ltd v Wednesbury Corp [1947] 2 All ER 680, [1948] 1 KB 223.

The second question is as to the propriety of proceeding in this case by ordinary civil action. Should not Mrs Gillick have proceeded by way of judicial review under RSC Ord 53? No point was taken at trial or in the Court of Appeal against Mrs Gillick that she should have proceeded not by issuing a writ but by applying for judicial review. Woolf J did, however, mention the matter only to hold that there was a relevant precedent for proceeding by writ in this House's decision in Royal College of Nursing of the UK v Dept of Health and Social Security [1981] 1 All ER 545, [1981] AC 800.

The point having been brought to the attention of the House I think it desirable to consider it if only because of the later decision of the House in O'Reilly v Mackman [1982] 3 All ER 1124 at 1134, [1983] 2 AC 237 at 285, where Lord Diplock, with whose opinion their other Lordships agreed, laid down a rule in these terms:

> 'Now that those disadvantages [i e those previously associated with prerogative order procedure] to applicants have been removed and all remedies for infringements of rights protected by public law can be obtained on an application for judicial review, as can also remedies for infringements of rights under private law if such infringements should also be involved, it would in my view as a general rule [my emphasis] be contrary to public policy, and as such an abuse of the process of the court,

> to permit a person seeking to establish that a decision of a public authority infringed rights to which he was entitled to protection under public law to proceed by way of an ordinary action and by this means to evade the provisions of Ord 53 for the protection of such authorities.'

If there be in the present case an abuse of the process of the court, the House cannot overlook it, even if the parties are prepared to do so, and even though the writ in this case was issued before the decision of the House in O'Reilly's case.

[1985] 3 All ER 402 at 416

Mrs Gillick's action is essentially to protect what she alleges to be her rights as a parent under private law. Although she is proceeding against two public authorities and invokes the criminal law and public policy in support of her case, she claims as a parent whose right of custody and guardianship in respect of her children under the age of 16 is (she says) threatened by the guidance given by the department to area health authorities, doctors and others concerned in the provision by the department of a family health service. This is a very different case from O'Reilly v Mackman, where it could not be contended that there was any infringement or threat of infringement of any right derived from private law. For the appellants in O'Reilly's case were convicted prisoners faced with forfeiture of remission, and they were held to have not a right to remission of their prison sentences but merely 'a legitimate expectation' which could, if the necessary facts were established, entitle them 'to a remedy in public law'. They had, therefore, no private right in the matter, and could rely only on the 'public law' doctrine of legitimate expectation.

It is unnecessary to embark on an analysis of the newly fledged distinction in English law between public and private law, for I do not see Mrs Gillick's claim as falling under the embargo imposed by O'Reilly's case. If I should be wrong in this view, I would nevertheless think that the private law content of her claim was so great as to make her case an exception to the general rule. Lord Diplock recognised that the general rule which he was laying down admitted of exceptions, including cases—

> 'where the invalidity of the [public authority's] decision arises as a collateral issue in a claim for infringement of a right of the plaintiff arising under private law, or where none of the parties objects to the adoption of the procedure by writ or originating summons.'

(See [1982] 3 All ER 1124 at 1134, [1982] 2 AC 237 at 285.)

Both these exceptions can be said to apply in the present case. Like Lord Diplock, I think that procedural problems in the field of public law must be left to be decided on a case to case basis. Mrs Gillick was, in my opinion, fully entitled to proceed by ordinary action, even though she could also have proceeded by way of judicial review.

The third and final procedural question is a mere technicality; as such, it creates (no lawyer would be surprised) more trouble than the other two. If the House should allow the department's appeal against the guidance declaration, what is to be done about the other declaration granted exclusively against the area health authority? As a matter of common sense, if Mrs Gillick fails to establish that the department's guidance is

unlawful, she cannot on the evidence in this case establish her entitlement to the other declaration against the health authority. The Court of Appeal treated the second declaration as consequential on the guidance declaration, which on the evidence it was plainly right to do. But there is a difficulty in allowing an appeal where there is no appellant and no appeal. Fortunately in this case there is no issue between the parties as to costs. If the department succeeds, it does not ask for costs against Mrs Gillick here or below; and the area health authority has incurred no costs. Two courses are open to the House: one would be to ignore the technicalities, allow the appeal (if that be the view of the House), and set aside both declarations; the other, which is strictly correct, would be to allow the department's appeal and to declare that the reasoning was also applicable to the Court of Appeal's decision in favour of the health authority, which must, therefore, be held to be overruled. If the second course should be taken, the only order to be made by the House would be to allow the department's appeal and set aside the 'guidance' declaration. I favour the second course.

The department's guidance

In 1974 the department assumed statutory responsibility for the provision of family planning services on a national basis. This involved a reorganisation which included a transfer of services from the agencies previously concerned to area health authorities. In the course of the reorganisation, which took some two years to complete, the department issued guidance as to the duties and responsibilities of doctors and others concerned with

the provision of such services. It was empowered so to do by its assumption, pursuant to statute, of responsibility for the provision of such services. In May 1974 the department circulated a memorandum of guidance HN (80) 46; it included a section (section G) as to the provision of services to young people. The text of section G aroused some public concern, and in December 1980 a revised section G was issued to replace the earlier text. It is this revision which lies at the heart of the case, being the subject of Mrs Gillick's challenge. I set it out in full:

> 'REVISED SECTION G—THE YOUNG
>
> Clinic sessions should be available for people of all ages, but it may be helpful to make separate, less formal arrangements for young people. The staff should be experienced in dealing with young people and their problems. There is widespread concern about counselling and treatment for children under 16. Special care is needed not to undermine parental responsibility and family stability. The Department would therefore hope that in any case where a doctor or other professional worker is approached by a person under the age of 16 for advice in these matters, the doctor, or other professional, will always seek to persuade the child to involve the parent or guardian (or other person in loco parentis) at the earliest stage of consultation, and will proceed from the assumption that it would be most unusual to provide advice about contraception without parental consent. It is, however, widely accepted that consultations between doctors and patients are confidential; and the Department recognises the importance which doctors and patients attach to this

> principle. It is a principle which applies also to the other professions concerned. To abandon this principle for children under 16 might cause some not to seek professional advice at all. They could then be exposed to the immediate risks of pregnancy and of sexually-transmitted disease, as well as other long-term physical, psychological and emotional consequences which are equally a threat to stable family life. This would apply particularly to young people whose parents are, for example, unconcerned, entirely unresponsive, or grossly disturbed. Some of these young people are away from their parents and in the care of local authorities or voluntary organisations standing in loco parentis. The Department realises that in such exceptional cases the nature of any counselling must be a matter for the doctor or other professional worker concerned and that the decision whether or not to prescribe contraception must be for the clinical judgment of a doctor.'

The first question in the appeal is simply: what is the true meaning of this text? Does it, or does it not, permit doctors concerned in the provision of a statutory service to prescribe contraceptive treatment for a girl under 16 without the knowledge and consent of her parents? And, if it does, in what circumstances?

There can be no doubt that it does permit doctors to prescribe in certain circumstances contraception for girls under 16 without the knowledge and consent of a parent or guardian. (In this opinion I shall use the term 'parent' to include 'guardian'.) The text is not, however, clear as to the circumstances (variously described as 'unusual' and 'exceptional') which justify a doctor in so doing. The House must be careful not to construe the guidance as though it was a statute or even to analyse it in the way appropriate to a judgment. The question to be asked is: what would a doctor understand to be the guidance offered to him if he should be faced with a girl under 16 seeking contraceptive treatment without the knowledge or consent of her parents?

He would know that it was his duty to seek to persuade the girl to let him bring into consultation her parents (or one of them). If she refused, he (or the counsellor to whom the girl had gone) must ask himself whether the case was one of those exceptional cases in which the guidance permitted a doctor to prescribe contraception without the knowledge or consent of a parent (provided always that in the exercise of his clinical judgment he thought this course to be in the true interest of his patient). In my judgment the guidance clearly implies that in exceptional cases the parental right to make decisions as to the care of their children, which derives from their right of custody, can lawfully be overridden, and that in such cases the doctor may without parental consultation or

consent prescribe contraceptive treatment in the exercise of his clinical judgment. And the guidance reminds the doctor that in such cases he owes the duty of confidentiality to his patient, by which is meant that the doctor would be in breach of his duty to her if he did communicate with her parents.

The guidance leaves two areas of the doctor's responsibility in some obscurity. Though it provides illustrations of exceptional cases, it offers no definition. And it gives no clue as

to what is meant by 'clinical judgment' other than that it must at least include the professional judgment of a doctor as to what is the medically appropriate advice or treatment to be offered to his patient.

This lack of definition does not, in my judgment, assist Mrs Gillick. If, contrary to her submission, the law recognises that exceptional cases can arise in which it is lawful for a doctor to prescribe contraceptive treatment for a girl under 16 without the knowledge and consent of a parent, the guidance would be within the law notwithstanding its lack of precision, unless its vagueness created so obscure a darkness that it could reasonably be understood by a doctor as authorising him to prescribe without the parent's consent whenever he should think fit.

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'.

The question in the appeal

It is only if the guidance permits or encourages unlawful conduct in the provision of contraceptive services that it can be set aside as being the exercise of a statutory discretionary power in an unreasonable way.

The question, therefore, for the House is: can a doctor in any circumstances lawfully prescribe contraception for a girl under 16 without the knowledge and consent of a parent?

Before discussing the question, I put out of the way the two exceptions which I understand both parties to the appeal accept, namely the order of a competent court and emergency. Nobody disputes the existence of the court exception, nor does the other situation call for more than a brief mention.

If, as is clear in the light of s 5 of the National Health Service Act 1977 (re-enacting earlier legislation) and s 41 of the National Health Service (Scotland) Act 1978, contraceptive medical treatment is recognised as a legitimate and beneficial treatment in cases in which it is medically indicated, it must be an available option for the doctor in an emergency where treatment is urgently needed and the consent of the patient or his parent cannot be obtained either in time or at all. And the case of a teenage girl abandoned by her parents and not yet received into the care of a local authority or placed under the protection of a responsible adult in loco parentis can be seen to be a true emergency. Both Mrs Gillick, as I understand her case, and the department accept these exceptions to the general rule that a parent must be consulted and give consent and I say no more than that it would be unthinkable for the law not to recognise them.

Parental right and the age of consent

Mrs Gillick relies on both the statute law and the case law to establish her proposition that parental consent is in all other circumstances necessary. The only statutory provision directly in point is s 8 of the Family Law Reform Act 1969. Subsection (1) of the section provides that the consent of a minor who has attained the age of 16 to any surgical, mental or dental treatment which in the absence of consent would constitute a trespass

to his person shall be as effective as if he were of full age and that the consent of his parent or guardian need not be obtained. Subsection (3) of the section provides:

> 'Nothing in this section shall be construed as making ineffective any consent which would have been effective if this section had not been enacted.'

I cannot accept the submission made on Mrs Gillick's behalf that sub-s (1) necessarily implies that prior to its enactment the consent of a minor to medical treatment could not be effective in law. Subsection (3) leaves open the question whether the consent of a minor under 16 could be an effective consent. Like my noble and learned friend Lord Fraser, I read the section as clarifying the law without conveying any indication as to what the law was before it was enacted. So far as minors under 16 are concerned, the law today is as it was before the enactment of the section.

Nor do I find in the provisions of the statute law to which Parker LJ refers in his judgment in the Court of Appeal (see [1985] 1 All ER 533, [1985] 2 WLR 413) any encouragement, let alone any compelling reason, for holding that Parliament has accepted that a child under 16 cannot consent to medical treatment. I respectfully agree with the reasoning and conclusion of my noble and learned friend Lord Fraser on this point.

The law has, therefore, to be found by a search in the judge-made law for the true principle. The legal difficulty is that in our search we find ourselves in a field of medical practice where parental right and a doctor's duty may point us in different directions. This is not surprising. Three features have emerged in today's society which were not known to our predecessors: (1) contraception as a subject for medical advice and treatment; (2) the increasing independence of young people; and (3) the changed status of women. In times past contraception was rarely a matter for the doctor; but with the development of the contraceptive pill for women it has become part and parcel of every-day medical practice, as is made clear by the department's Handbook of Contraceptive Practice (1984 revision) esp para 1.2. Family planning services are now available under statutory powers to all without any express limitation as to age or marital status. Young people, once they have attained the age of 16, are capable of consenting to contraceptive treatment, since it is medical treatment; and, however extensive be parental right in the care and upbringing of children, it cannot prevail so as to nullify the 16-year-old's capacity to consent which is now conferred by statute. Furthermore, women have obtained by the availability of the pill a choice of life-style with a degree of independence and of opportunity undreamed of until this generation and greater, I would

add, than any law of equal opportunity could by itself effect.

The law ignores these developments at its peril. The House's task, therefore, as the supreme court in a legal system largely based on rules of law evolved over the years by the judicial process is to search the overfull and cluttered shelves of the law reports for a principle or set of principles recognised by the judges over the years but stripped of the detail which, however appropriate in their day, would, if applied today, lay the judges open to a justified criticism for failing to keep the law abreast of the society in which they live and work.

It is, of course, a judicial commonplace to proclaim the adaptability and flexibility of the judge-made common law. But this is more frequently proclaimed than acted on. The mark of the great judge from Coke through Mansfield to our day has been the capacity and the will to search out principle, to discard the detail appropriate (perhaps) to earlier times and to apply principle in such a way as to satisfy the needs of his own time. If judge-made law is to survive as a living and relevant body of law, we must make the effort, however inadequately, to follow the lead of the great masters of the judicial art.

In this appeal, therefore, there is much in the earlier case law which the House must discard almost everything I would say but its principle. For example, the horrendous Agar-Ellis decisions (see Re Agar-Ellis, Agar-Ellis v Lascelles (1878) 10 Ch D 49, (1883) 24 Ch D 317) of the late nineteenth century asserting the power of the father over his child were rightly remaindered to the history books by the Court of Appeal in Hewer v Bryant [1969] 3 All ER 578, [1970] 1 QB 357, an important case to which I shall return later.

[1985] 3 All ER 402 at 420

Yet the decisions of earlier generations may well afford clues to the true principle of the law: eg R v Howes (1860) 3 E & E 332 at 336, 121 ER 467 at 468, which I also later quote. It is the duty of this House to look at, through and past the decisions of earlier generations so that it may identify the principle which lies behind them. Even Lord Eldon (no legal revolutionary) once remarked, when invited to study precedent (the strength of which he never underrated):

> '… all law ought to stand upon principle, and unless decision has removed out of the way all argument and all principle; so as to make it impossible to apply them to the case before you, you must find out what is the principle upon which it must be decided.'

(See Queensberry Leases Case (1819) 1 Bli 339 at 486–487, 4 ER 127 at 179, quoted by Lord Campbell Lives of the Lord Chancellors (4th edn, 1857) vol 10, ch 213, p 244.)

Approaching the earlier law in this way, one finds plenty of indications as to the principles governing the law's approach to parental right and the child's right to make his or her own decision. Parental rights clearly do exist, and they do not wholly disappear until the age of majority. Parental rights relate to both the person and the property of the child: custody, care and control of the person and guardianship of the property of the child. But the common law has never treated such rights as sovereign or beyond review and control. Nor has our law ever treated the child as other than a person with capacities

and rights recognised by law. The principle of the law, as I shall endeavour to show, is that parental rights are derived from parental duty and exist only so long as they are needed for the protection of the person and property of the child. The principle has been subjected to certain age limits set by statute for certain purposes; and in some cases the courts have declared an age of discretion at which a child acquires before the age of majority the right to make his (or her) own decision. But these limitations in no way undermine the principle of the law, and should not be allowed to obscure it.

Let me make good, quite shortly, the proposition of principle.

First, the guardianship legislation. Section 5 of the Guardianship of Infants Act 1886 began the process which is now complete of establishing the equal rights of mother and father. In doing so the legislation, which is currently embodied in s 1 of the Guardianship of Minors Act 1971, took over from the Chancery courts a rule which they had long followed (it was certainly applied by Lord Eldon during his quarter of a century as Lord Chancellor, as Parker LJ in this case (see [1985] 1 All ER 533 at 541, [1985] 2 WLR 413 at 424), quoting Heilbron J, reminds us) that when a court has before it a question as to the care and upbringing of a child it must treat the welfare of the child as the paramount consideration in determining the order to be made. There is here a principle which limits and governs the exercise of parental rights of custody, care and control. It is a principle perfectly consistent with the law's recognition of the parent as the natural guardian of the child; but it is also a warning that parental right must be exercised in accordance with the welfare principle and can be challenged, even overridden, if it be not.

Second, there is the common law's understanding of the nature of parental right. We are not concerned in this appeal to catalogue all that is contained in what Sachs LJ has felicitously described as the 'bundle of rights' which together constitute the rights of custody, care and control (see Hewer v Bryant [1969] 3 All ER 578 at 585, [1970] 1 QB 357 at 373). It is abundantly plain that the law recognises that there is a right and a duty of parents to determine whether or not to seek medical advice in respect of their child, and, having received advice, to give or withhold consent to medical treatment. The question in the appeal is as to the extent and duration of the right and the circumstances in which outside the two admitted exceptions to which I have earlier referred it can be overridden by the exercise of medical judgment.

As Parker and Fox LJJ noted in the Court of Appeal, the modern statute law recognises the existence of parental right: e g ss 85 and 86 of the Children Act 1975 and ss 2, 3 and 4 of the Child Care Act 1980. It is derived from parental duty. A most illuminating discussion of parental right is to be found in Blackstone's Commentaries (1 Bl Com (17th

edn, 1830) vol 1, chs 16 and 17). He analyses the duty of the parent as the 'maintenance … protection, and … education' of the child (at p 446). He declares that the power of parents over their children is derived from their duty and exists 'to enable the parent more effectually to perform his duty, and partly as a recompense for his care and trouble in the faithful discharge of it' (at p 452). In ch 17 he discusses the relation of guardian and ward. It is, he points out, a relation 'derived out of [the relation of parent and child]:

the guardian being only a temporary parent, that is, for so long a time as the ward is an infant, or under age' (at p 460). A little later in the same chapter he again emphasises that the power and reciprocal duty of a guardian and ward are the same, pro tempore, as that of a father and child and adds that the guardian, when the ward comes of age (as also the father who becomes guardian 'at common law' if an estate be left to his child), must account to the child for all that he has transacted on his behalf (at pp 462–463). He then embarks on a discussion of the different ages at which for different purposes a child comes of sufficient age to make his own decision; and he cites examples, viz a boy might at 12 years old take the oath of allegiance; at 14 he might consent to marriage or choose his guardian 'and, if his discretion be actually proved, may make his testament of his personal estate'; at 18 he could be an executor: all these rights and responsibilities being capable of his acquiring before reaching the age of majority at 21(at p 463).

The two chapters provide a valuable insight into the principle and flexibility of the common law. 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.

Although statute has intervened in respect of a child's capacity to consent to medical treatment from the age of 16 onwards, neither statute nor the case law has ruled on the extent and duration of parental right in respect of children under the age of 16. More specifically, there is no rule yet applied to contraceptive treatment, which has special problems of its own and is a late comer in medical practice. It is open, therefore, to the House to formulate a rule. The Court of Appeal favoured a fixed age limit of 16, basing itself on a view of the statute law which I do not share and on its view of the effect of the older case law which for the reasons already given I cannot accept. It sought to justify the limit by the public interest in the law being certain. Certainty is always an advantage in the law, and in some branches of the law it is a necessity. But it brings with it an inflexibility and a rigidity which in some branches of the law can obstruct justice, impede the law's development and stamp on the law the mark of obsolescence where what is needed is the capacity for development. 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. If certainty be thought desirable, it is better that the rigid demarcations necessary to achieve it should be laid down by legislation after a full consideration of all the relevant factors than by the courts, confined as they are by the forensic process to the evidence adduced by the parties and to whatever may properly fall within the judicial notice of judges. Unless and until Parliament should think fit to intervene, the courts should establish a principle flexible enough to enable justice to be achieved by its application to the particular

circumstances proved by the evidence placed before them.

The underlying principle of the law was exposed by Blackstone and can be seen to

have been acknowledged in the case law. It is that parental right yields to the child's right to make his own decisions when he reaches a sufficient understanding and intelligence to be capable of making up his own mind on the matter requiring decision. Lord Denning MR captured the spirit and principle of the law when he said in Hewer v Bryant [1969] 3 All ER 578 at 582, [1970] 1 QB 337 at 369:

> 'I would get rid of the rule in Re Agar-Ellis ((1883) 24 Ch D 317) and of the suggested exceptions to it. That case was decided in the year 1883. It reflects the attitude of a Victorian parent towards his children. He expected unquestioning obedience to his commands. If a son disobeyed, his father would cut him off with 1s. If a daughter had an illegitimate child, he would turn her out of the house. His power only ceased when the child became 21. I decline to accept a view so much out of date. The common law can, and should, keep pace with the times. It should declare, in conformity with the recent report on the Age of Majority (Report of the Committee on the Age of Majority (Cmnd 3342) under the chairmanship of Latey J, published in July 1967), that the legal right of a parent to the custody of a child ends at the eighteenth birthday; and even up till then, it is a dwindling right which the courts will hesitate to enforce against the wishes of the child, the older he is. It starts with a right of control and ends with little more than advice.'

But his is by no means a solitary voice. It is consistent with the opinion expressed by the House in J v C [1969] 1 All ER 788, [1970] AC 668, where their Lordships clearly recognised as out of place the assertion in the Agar-Ellis cases (1878) 10 Ch D 49, (1883) 24 Ch D 318 of a father's power bordering on 'patria potestas'. It is consistent with the view of Lord Parker CJ in R v Howard [1965] 3 All ER 684 at 685, [1966] 1 WLR 13 at 15, where he ruled that in the case of a prosecution charging rape of a girl under 16 the Crown must prove either lack of her consent or that she was not in a position to decide whether to consent or resist and added the comment that 'there are many girls who know full well what it is all about and can properly consent'. And it is consistent with the views of the House in the recent criminal case where a father was accused of kidnapping his own child, R v D [1984] 2 All ER 449 [1984] AC 778, a case to which I shall return.

For the reasons which I have endeavoured to develop, the case law of the nineteenth and earlier centuries is no guide to the application of the law in the conditions of today. The Agar-Ellis cases (the power of the father) cannot live with the modern statute law. The habeas corpus 'age of discretion' cases are also no guide as to the limits which should be accepted today in marking out the bounds of parental right, of a child's capacity to make his or her own decision and of a doctor's duty to his patient. Nevertheless the 'age of discretion' cases are helpful in that they do reveal the judges as accepting that a minor can in law achieve an age of discretion before coming of full age. The 'age of discretion' cases are cases in which a parent or guardian (usually the father) has applied for habeas

corpus to secure the return of his child who has left home without his consent. The courts would refuse an order if the child had attained the age of discretion, which came to be regarded as 14 for boys and 16 for girls, and did not wish to return. The principle underlying them was plainly that an order would be refused if the child had sufficient intelligence and understanding to make up his own mind. A passage from the judgment of Cockburn CJ in R v Howes (1860) 3 E & E 332 at 336–337, 121 ER 467 at 468–469, which Parker LJ quoted in the Court of Appeal, illustrates their reasoning and shows how a fixed age was used as a working rule to establish an age at which the requisite 'discretion' could be held to be achieved by the child. Cockburn CJ said:

> 'Now the cases which have been decided on this subject shew that, although a father is entitled to the custody of his children till they attain the age of twenty-one, this Court will not grant a habeas corpus to hand a child which is below that age over to its father, provided that it has attained an age of sufficient discretion to enable it to exercise a wise choice for its own interests. The whole question is, what is that age of discretion? We repudiate utterly, as most dangerous, the notion that any intellectual precocity in an individual female child can hasten the period which

> appears to have been fixed by statute for the arrival of the age of discretion; for that very precocity, if uncontrolled, might very probably lead to her irreparable injury. The legislature has given us a guide, which we may safely follow, in pointing out sixteen as the age up to which the father's right to the custody of his female child is to continue; and short of which such a child has no discretion to consent to leaving him.'

The principle is clear; and a fixed age of discretion was accepted by the courts by analogy from the Abduction Acts (the first being the Act 4 & 5 Ph & M c 8(1557)). While it is unrealistic today to treat a sixteenth century Act as a safe guide in the matter of a girl's discretion, and while no modern judge would dismiss the intelligence of a teenage girl as 'intellectual precocity', we can agree with Cockburn CJ as to the principle of the law: the attainment by a child of an age of sufficient discretion to enable him or her to exercise a wise choice in his or her own interests.

The modern law governing parental right and a child's capacity to make his own decisions was considered in R v D [1984] 2 All ER 449, [1984] AC 778. The House must, in my view, be understood as having in that case accepted that, save where statute otherwise provides, a minor's capacity to make his or her own decision depends on the minor having sufficient understanding and intelligence to make the decision and is not to be determined by reference to any judicially fixed age limit. The House was faced with a submission that a father, even if he had taken his child away by force or fraud, could not be guilty of a criminal offence of any kind. Lord Brandon, with whom their other Lordships agreed, commented that this might well have been the view of the legislature and the courts in the nineteenth century, but had this to say about parental right and a child's capacity in our time to give or withhold a valid consent ([1984] 2 All ER 449 at 456, [1984] AC 778 at 804–805):

> 'This is because in those times both the generally accepted conventions of society and the courts by which such conventions were buttressed and enforced, regarded a father as having absolute and paramount authority, as against all the world, over any children of his who were still under the age of majority (then 21), except for a married daughter. The nature of this view of a father's rights appears clearly from various reported cases, including, as a typical example, Re Agar-Ellis, Agar-Ellis v Lascelles (1883) 24 Ch D 317. The common law, however, while generally immutable in its principles, unless different principles are laid down by statute, is not immutable in the way in which it adapts, develops and applies those principles in a radically changing world and against the background of radically changed social conventions and conditions.'

Later he said ([1984] 2 All ER 449 at 457, [1984] AC 778 at 806):

> 'I see no good reason why, in relation to the kidnapping of a child, it should not in all cases be the absence of the child's consent which is material, whatever its age may be. In the case of a very young child, it would not have the understanding or the intelligence to give its consent, so that absence of consent would be a necessary inference from its age. In the case of an older child, however, it must, I think, be a question of fact for a jury whether the child concerned has sufficient understanding and intelligence to give its consent; if, but only if, the jury considers that a child has these qualities, it must then go on to consider whether it has been proved that the child did not give its consent. While the matter will always be for the jury alone to decide, I should not expect a jury to find at all frequently that a child under 14 had sufficient understanding and intelligence to give its consent.'

In the light of the foregoing I would hold that as a matter of law 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. It will be a question of fact whether a child seeking advice has sufficient understanding of what is involved to give a consent valid in law. Until the child achieves the capacity to consent,

the parental right to make the decision continues save only in exceptional circumstances. Emergency, parental neglect, abandonment of the child or inability to find the parent are examples of exceptional situations justifying the doctor proceeding to treat the child without parental knowledge and consent; but there will arise, no doubt, other exceptional situations in which it will be reasonable for the doctor to proceed without the parent's consent.

When applying these conclusions to contraceptive advice and treatment it has to be borne in mind that there is much that has to be understood by a girl under the age of 16 if she is to have legal capacity to consent to such treatment. It is not enough that she should understand the nature of the advice which is being given: she must also have a sufficient maturity to understand what is involved. There are moral and family questions,

especially her relationship with her parents; long-term problems associated with the emotional impact of pregnancy and its termination; and there are the risks to health of sexual intercourse at her age, risks which contraception may diminish but cannot eliminate. It follows that a doctor will have to satisfy himself that she is able to appraise these factors before he can safely proceed on the basis that she has at law capacity to consent to contraceptive treatment. And it further follows that ordinarily the proper course will be for him, as the guidance lays down, first to seek to persuade the girl to bring her parents into consultation, and, if she refuses, not to prescribe contraceptive treatment unless he is satisfied that her circumstances are such that he ought to proceed without parental knowledge and consent.

Like Woolf J, I find illuminating and helpful the judgment of Addy J of the Ontario High Court in Johnston v Wellesley Hospital (1970) 17 DLR (3d) 139, a passage from which he quotes in his judgment in this case ([1984] 1 All ER 365 at 374, [1984] QB 581 at 597). The key passage bears repetition (17 DLR (3d) 139 at 144–145):

> 'But, regardless of modern trend, I can find nothing in any of the old reported cases, except where infants of tender age or young children were involved, where the Courts have found that a person under 21 years of age was legally incapable of consenting to medical treatment. If a person under 21 years were unable to consent to medical treatment, he would also be incapable of consenting to other types of bodily interference. A proposition purporting to establish that any bodily interference acquiesced in by a youth of 20 years would nevertheless constitute an assault would be absurd. If such were the case, sexual intercourse with a girl under 21 years would constitute rape. Until the minimum age of consent to sexual acts was fixed at 14 years by a statute, the Courts often held that infants were capable of consenting at a considerably earlier age than 14 years. I feel that the law on this point is well expressed in the volume on Medical Negligence (1957) by Lord Nathan (p 176): "It is suggested that the most satisfactory solution of the problem is to rule that an infant who is capable of appreciating fully the nature and consequences of a particular operation or of particular treatment can give an effective consent thereto, and in such cases the consent of the guardian is unnecessary; but that where the infant is without the capacity, any apparent consent by him or her will be a nullity, the sole right to consent being vested in the guardian."

I am, therefore, satisfied that the department's guidance can be followed without involving the doctor in any infringement of parental right. Unless, therefore, to prescribe contraceptive treatment for a girl under the age of 16 is either a criminal offence or so close to one that to prescribe such treatment is contrary to public policy, the department's appeal must succeed.

The criminal law case

If this case should be made good, the discussion of parental right is, of course, an irrelevance. If it be criminal or contrary to public policy to prescribe contraception for a girl under the age of 16 on the ground that sexual intercourse with her is unlawful and a crime on the part of her male partner, the fact that her parent knew and consented would not make it any less so. I confess that I find the submission based on criminality or

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[1985] 3 All ER 402 at 425

policy surprising. So far as criminality is concerned, I am happy to rest on the judgment of Woolf J, whose approach to the problem I believe to be correct. Clearly a doctor who gives a girl contraceptive advice or treatment not because in his clinical judgment the treatment is medically indicated for the maintenance or restoration of her health but with the intention of facilitating her having unlawful sexual intercourse may well be guilty of a criminal offence. It would depend, as my noble and learned friend Lord Fraser observes, on the doctor's intention, a conclusion hardly to be wondered at in the field of the criminal law. The department's guidance avoids the trap of declaring that the decision to prescribe the treatment is wholly a matter of the doctor's discretion. He may prescribe only if she has the capacity to consent or if exceptional circumstances exist which justify him in exercising his clinical judgment without parental consent. The adjective 'clinical' emphasises that it must be a medical judgment based on what he honestly believes to be necessary for the physical, mental and emotional health of his patient. The bona fide exercise by a doctor of his clinical judgment must be a complete negation of the guilty mind which is an essential ingredient of the criminal offence of aiding and abetting the commission of unlawful sexual intercourse.

The public policy point fails for the same reason. It cannot be said that there is anything necessarily contrary to public policy in medical contraceptive treatment if it be medically indicated as in the interest of the patient's health; for the provision of such treatment is recognised as legitimate by Parliament: see s 5 of the National Health Service Act 1977. If it should be prescribed for a girl under 16 the fact that it may eliminate a health risk in the event of the girl having unlawful sexual intercourse is an irrelevance unless the doctor intends to encourage her to have that intercourse. If the prescription is the bona fide exercise of his clinical judgment as to what is best for his patient's health, he has nothing to fear from the criminal law or from any public policy based on the criminality of a man having sexual intercourse with her.

It can be said by way of criticism of this view of the law that it will result in uncertainty and leave the law in the hands of the doctors. The uncertainty is the price which has to be paid to keep the law in line with social experience, which is that many girls are fully able to make sensible decisions about many matters before they reach the age of 16. I accept that great responsibilities will lie on the medical profession. It is, however, a learned and highly trained profession regulated by statute and governed by a strict ethical code which is vigorously enforced. Abuse of the power to prescribe contraceptive treatment for girls under the age of 16 would render a doctor liable to severe professional penalty. The truth may well be that the rights of parents and children in this sensitive area are better protected by the professional standards of the medical profession than by a priori legal lines of division between capacity and lack of capacity to consent since any such general dividing line is sure to produce in some cases injustice, hardship and injury to health.

For these reasons I would allow the department's appeal, and set aside the declaration that the guidance is unlawful. I would add that, since the second declaration granted by the Court of Appeal, which concerns only the area health authority, was based on the same reasoning as the first, it must be held to have been wrongly granted. The Court of

Appeal's decision to grant it should be, in my opinion, overruled as erroneous in law.

LORD BRIDGE OF HARWICH.

My Lords, the prelude to the proceedings from which this appeal arises was an exchange of correspondence between the present respondent, Mrs Victoria Gillick, and her local area health authority in which she sought, but failed to obtain, an assurance that in no circumstances would any of her daughters when under 16 be offered contraceptive advice or treatment. Mrs Gillick now has her declaration against the health authority, from which it does not appeal. I should suppose that in such a family as Mrs Gillick's the possibility of any of her daughters under 16 seeking to use contraceptives secretly was in any event so remote as to make the issue in the proceedings against the health authority purely academic. But what prompted the correspondence was a memorandum of guidance (to which I will refer simply as 'the memorandum') on the subject of contraceptive advice and treatment for children under

16 issued to all health authorities by the present appellant, the Department of Health and Social Security (DHSS). The terms of the memorandum are set out in full in the speeches of my noble and learned friends Lord Fraser and Lord Scarman. The memorandum has been declared by the Court of Appeal to be contrary to law and it is that declaration that gives rise to the only live issue in this appeal. It is against the ethos expressed in the memorandum that Mrs Gillick's crusade, as my noble and learned friend Lord Templeman aptly calls it, is primarily directed.

Throughout the hearing of the argument in the appeal and in subsequent reflection on the questions to which it gives rise I have felt doubt and difficulty as to the basis of the jurisdiction which Mrs Gillick invokes in her claim to a declaration against the DHSS. If the claim is well founded, it must surely lie in the field of public rather than private law. Mrs Gillick has no private right which she is in a position to assert against the DHSS. But the point which troubles me has nothing to do with the purely procedural technicality that the proceedings were commenced by writ rather than by application for judicial review. I agree that no objection has been, nor could now be, raised on that ground. My difficulty is more fundamental. I ask myself what is the nature of the action or decision taken by the DHSS in the exercise of a power conferred on it which entitles a court of law to intervene and declare that it has stepped beyond the proper limits of its power. I frame the question in that way because I believe that hitherto, certainly in general terms, the court's supervisory jurisdiction over the conduct of administrative authorities has been confined to ensuring that their actions or decisions were taken within the scope of the power which they purported to exercise or conversely to providing a remedy for an authority's failure to act or to decide in circumstances where some appropriate statutory action or decision was called for.

Now it is true that the Secretary of State for Health and Social Security under s 5(1)(b) of the National Health Service Act 1977 has a general responsibility for the provision within the national health service of what may be described shortly as family planning services. But only in a very loose sense could the issue of the memorandum be considered as part of the discharge of that responsibility. The memorandum itself has no

statutory force whatever. It is not and does not purport to be issued in the exercise of any statutory power or in the performance of any statutory function. It is purely advisory in character and practitioners in the national health service are, as a matter of law, in no way bound by it.

In the light of these considerations I cannot, with all respect, agree that the memorandum is open to review on Wednesbury principles (see Associated Provincial Picture Houses Ltd v Wednesbury Corp [1947] 2 All ER 680, [1948] 1 KB 223) on the ground that it involves an unreasonable exercise of a statutory discretion. Such a review must always begin by examining the nature of the statutory power which the administrative authority whose action is called in question has purported to exercise, and asking, in the light of that examination, what were, and what were not, relevant considerations for the authority to take into account in deciding to exercise that power. It is only against such a specific statutory background that the question whether the authority has acted unreasonably, in the Wednesbury sense, can properly be asked and answered. Here there is no specific statutory background by reference to which the appropriate Wednesbury questions could be formulated.

The issue by a department of government with administrative responsibility in a particular field of non-statutory guidance to subordinate authorities operating in the same field is a familiar feature of modern administration. The innumerable circulars issued over the years by successive departments responsible in the field of town and country planning spring to mind as presenting a familiar example. The question whether the advice tendered in such non-statutory guidance is good or bad, reasonable or unreasonable cannot, as a general rule, be subject to any form of judicial review. But the question arises whether there is any exception to that general rule.

Your Lordships have been referred to the House's decision in Royal College of Nursing of the UK v Dept of Health and Social Security [1981] 1 All ER 545, [1981] AC 800. The background to that case was exceptional, as only becomes fully clear when one reads the

judgment of Woolf J at first instance (see [1981] 1 All ER 545). The Royal College of Nursing (the RCN) and the DHSS had received conflicting legal advice whether or not it was lawful, on the true construction of certain provisions of the Abortion Act 1967, for nurses to perform particular functions in the course of a novel medical procedure for the termination of pregnancy, when acting on the orders and under the general supervision of a registered medical practitioner but not necessarily in his presence. The RCN had issued a memorandum and a later circular to its members to the effect that it was not lawful. The DHSS had issued a circular advising that it was lawful. The desirability of an authoritative resolution of this dispute on a pure question of law was obvious in the interests both of the nursing profession and of the public. The proceedings took the form of a claim by the RCN against the DHSS for a suitable declaration and the DHSS in due course counterclaimed a declaration to the opposite effect. As Woolf J pointed out, neither side took any point as to the jurisdiction of the court to grant a declaration. Woolf J himself felt it necessary to raise and examine certain questions as to the locus standi of the RCN to bring the proceedings and as to the propriety of their form. He answered these questions in a favourable sense to enable him to decide the disputed question of

law on its merits. No technical question bearing on jurisdiction attracted any mention in the Court of Appeal (see [1981] 1 All ER 545, [1981] AC 800) or in this House. In the litigation the original conflict between the parties was reflected in a conflict of judicial opinion. On a count of judicial heads a majority of five to four favoured the RCN. But by a majority of three to two in your Lordships' House the DHSS carried the day and obtained the declaration it sought.

Against this background it would have been surprising indeed if the courts had declined jurisdiction. But I think it must be recognised that the decision (whether or not it was so intended) does effect a significant extension of the court's power of judicial review. We must now say that if a government department, in a field of administration in which it exercises responsibility, promulgates in a public document, albeit non-statutory in form, advice which is erroneous in law, then the court, in proceedings in appropriate form commenced by an applicant or plaintiff who possesses the necessary locus standi, has jurisdiction to correct the error of law by an appropriate declaration. Such an extended jurisdiction is no doubt a salutary and indeed a necessary one in certain circumstances, as the Royal College of Nursing case itself well illustrates. But the occasions of a departmental non-statutory publication raising, as in that case, a clearly defined issue of law, unclouded by political, social or moral overtones, will be rare. In cases where any proposition of law implicit in a departmental advisory document is interwoven with questions of social and ethical controversy, the court should, in my opinion, exercise its jurisdiction with the utmost restraint, confine itself to deciding whether the proposition of law is erroneous and avoid either expressing ex cathedra opinions in areas of social and ethical controversy in which it has no claim to speak with authority or proffering answers to hypothetical questions of law which do not strictly arise for decision.

My Lords, the memorandum, in expressing the view that in exceptional and unusual cases it may be proper for a doctor to offer contraceptive advice and treatment to a girl under 16 without the knowledge or consent of her parent, guardian or other person in loco parentis, implies that the law does not prohibit the doctor from so acting. The exceptional and unusual cases contemplated are clearly not confined to cases of children abandoned by their parents and not yet taken into care by a local authority or to cases of 'emergency', whatever meaning one may give to that word in this context. I am content to assume, without deciding, that Mrs Gillick, in view of her dispute with the health authority, has sufficient locus standi to contest the issue of the lawfulness of the memorandum. To succeed in her action against the DHSS she must at least establish that, leaving aside cases of abandoned children or emergencies, the law does absolutely prohibit the prescription of contraception for a girl under 16 without parental consent or an order of the court.

The most direct support for that proposition is to be found in the opinion of my noble and learned friend Lord Brandon that to prescribe contraception for a girl under 16, with or without parental consent, is either to aid and abet the offence which will be committed

by the man with whom she has intercourse, or at least so far to facilitate his criminal conduct as to be contrary to public policy. I appreciate the logical cogency of my noble and learned friend's reasoning, but I cannot agree with his conclusion. With reference to the possible criminal complicity of the doctor I am content gratefully to adopt the

relevant passage from the judgment of Woolf J (see [1984] 1 All ER 365 at 371–373, [1984] QB 581 at 593–595), with which I fully agree. On the issue of public policy, it seems to me that the policy consideration underlying the criminal sanction imposed by statute on men who have intercourse with girls under 16 is the protection of young girls from the untoward consequences of intercourse. Foremost among these must surely be the risk of pregnancy leading either to abortion or the birth of a child to an immature and irresponsible mother. In circumstances where it is apparent that the criminal sanction will not, or is unlikely to, afford the necessary protection it cannot, in my opinion, be contrary to public policy to prescribe contraception as the only effective means of avoiding a wholly undesirable pregnancy. On the facts presented to Butler-Sloss J in Re P (a minor) (1981) LGR 301, I think, if I may respectfully say so, that she took an eminently sensible and entirely proper course.

The alternative and more extensively argued ground on which Mrs Gillick challenges the lawfulness of the memorandum depends on the two closely related propositions: (a) that no girl under 16 can have the capacity in law to give a valid consent to submit to contraceptive treatment; (b) that the prescription of such treatment without parental consent is an unlawful invasion of parental rights. Both these propositions are comprehensively examined in the speeches of my noble and learned friends Lord Fraser and Lord Scarman. I fully agree with the reasons expressed by both my noble and learned friends for reaching the conclusion that neither proposition is well founded in law.

Accordingly I would allow the appeal of the DHSS to the extent of setting aside the declaration made by the Court of Appeal that the memorandum was contrary to law.

LORD BRANDON OF OAKBROOK.

My Lords, in this case your Lordships are concerned with the legal aspect of three activities relating to the sexual conduct of girls who are under the age of 16. The first activity is the giving to such girls by professional persons other than doctors (e g social workers) of advice about contraception. The second activity is the physical examination of such girls by doctors with a view to their using one or other form of contraception. The third activity is the prescribing for such girls of contraceptive treatment, especially that form which is commonly called 'the pill'.

The question with regard to these three activities which has been raised in the two courts below, and again in your Lordships' House, is whether such activities can be lawfully carried on without the prior knowledge and consent of the parents of any girl of the age concerned.

In my opinion the formulation of the question for decision in this way involves the rolling up in one composite question of two quite separate and distinct points of law. The first point of law is whether the three activities to which I have referred can be carried on lawfully in any circumstances whatever. If, on the one hand, the right answer to the first point of law is No, then no second point of law arises for decision. If, on the other hand, the answer to the first question is Yes, then a second point of law arises, namely whether the three activities referred to can only be lawfully carried on with the prior knowledge

and consent of the parents of the girl concerned.

The first point of law appears to me to be one of public policy, the answer to which is to be gathered from an examination of the statutory provisions which Parliament has enacted from time to time in relation to men having sexual intercourse with girls either under the age of 13 or between the ages of 13 and 16.

It is, I think, sufficient to begin with the Criminal Law Amendment Act 1885 and then to go on to the Sexual Offences Act 1956, by which the former Act was repealed and largely replaced.

Part I of the 1885 Act, which contained ss 2 to 12, had the cross-heading 'Protection of Women and Girls'. Sections 4 and 5 provided, so far as material:

[1985] 3 All ER 402 at 429

> '4. Any person who unlawfully and carnally knows any girl under the age of thirteen years shall be guilty of felony, and being convicted thereof shall be liable at the discretion of the court to be kept in penal servitude for life, or for any term not less than five years, or to be imprisoned for any term not exceeding two years, with or without hard labour …
>
> 5. Any person who—(1.) Unlawfully and carnally knows or attempts to have unlawful carnal knowledge of any girl being of or above the age of thirteen years and under the age of sixteen years … shall be guilty of a misdemeanour, and being convicted thereof shall be liable at the discretion of the court to be imprisoned for any term not exceeding two years, with or without hard labour … '

In R v Tyrrell [1894] 1 QB 710, [1891–4] All ER Rep 1215 it was held by the Court for Crown Cases Reserved that it was not a criminal offence for a girl between the ages of 13 and 16 to aid and abet a man in committing, or to incite him to commit, the misdemeanour of having carnal knowledge of her contrary to s 5 of the Criminal Law Amendment Act 1885 set out above. The ground of this decision was that the 1885 Act had been passed for the purpose of protecting women and girls against themselves: see the judgment of Lord Coleridge CJ ([1894] 1 QB 710 at 712, [1891–4] All ER Rep 1215 at 1215–1216):

The Sexual Offences Act 1956 represents the latest pronouncement of Parliament on these matters. Sections 5 and 6 provide, so far as material:

> '5. It is a felony for a man to have unlawful sexual intercourse with a girl under the age of thirteen.
>
> 6.—(1) It is an offence … for a man to have unlawful sexual intercourse with a girl under the age of sixteen … '

Further, by s 37 and Sch 2, the maximum punishment for an offence under s 5 is imprisonment for life, and that for an offence under s 6 imprisonment for two years. Since the passing of the 1956 Act the distinction between felonies and misdemeanours

has been abolished. For the purposes of this case, however, nothing turns on this change of terminology.

My Lords, the inescapable inference from the statutory provisions of the 1885 and 1956 Acts to which I have referred is that Parliament has for the past century regarded, and still regards today, sexual intercourse between a man and a girl under 16 as a serious criminal offence so far as the man who has such intercourse is concerned. So far as the girl is concerned, she does not commit any criminal offence, even if she aids, abets or incites the having of such intercourse. The reason for this, as explained earlier, is that the relevant statutory provisions have been enacted by Parliament for the purpose of protecting the girl from herself. The having of such intercourse is, however, unlawful, and the circumstance that the man is guilty of a criminal offence, while the girl is not, cannot alter that situation.

On the footing that the having of sexual intercourse by a man with a girl under 16 is an unlawful act, it follows necessarily that for any person to promote, encourage or facilitate the commission of such an act may itself be a criminal offence, and must, in any event, be contrary to public policy. Nor can it make any difference that the person who promotes, encourages or facilitates the commission of such an act is a parent or a doctor or a social worker.

The question then arises whether the three activities to which I referred earlier should properly be regarded as, directly or indirectly, promoting, encouraging or facilitating the having, contrary to public policy, of sexual intercourse between a man and a girl under 16. In my opinion there can be only one answer to this question, namely that to give such a girl advice about contraception, to examine her with a view to her using one or more forms of protection and finally to prescribe contraceptive treatment for her, necessarily involves promoting, encouraging or facilitating the having of sexual intercourse, contrary to public policy, by that girl with a man.

The inhibitions against the having of sexual intercourse between a man and a girl under 16 are primarily twofold. So far as the man is concerned there is the inhibition of the criminal law as contained in ss 5 and 6 of the 1956 Act. So far as both are concerned there is the inhibition arising from the risk of an unwanted pregnancy. To give the girl contraceptive treatment, following appropriate advice and examination, is to remove largely the second of these two inhibitions. Such removal must involve promoting, encouraging or facilitating the having of sexual intercourse between the girl and the man.

It has been argued that some girls under 16 will have sexual intercourse with a man whether contraceptive treatment is made available to them or not, and that the provision of such treatment does not, therefore, promote, encourage or facilitate the having of such intercourse. In my opinion this argument should be rejected for two quite separate reasons. The first reason is that the mere fact that a girl under 16 seeks contraceptive advice and treatment, whether of her own accord or at the suggestion of others, itself indicates that she, and probably also the man with whom she is having, or contemplating having, sexual intercourse, are conscious of the inhibition arising from the risk of an unwanted pregnancy. They are conscious of it and are more likely to indulge their desires if it can be removed. The second reason is that, if all a girl under 16 needs to do

in order to obtain contraceptive treatment is to threaten that she will go ahead with, or continue, unlawful sexual intercourse with a man unless she is given such treatment, a situation tantamount to blackmail will arise which no legal system ought to tolerate. The only answer which the law should give to such a threat is, 'Wait till you are 16.'

The DHSS has contended that s 5(1) of the National Health Service Act 1977 imposes on it a statutory duty to carry out, in relation to girls under 16 as well as to older girls or women, the three activities to which I referred earlier. That provision reads:

> 'It is the Secretary of State's duty … (b) to arrange, to such extent as he considers necessary to meet all reasonable requirements in England and Wales, for the giving of advice on contraception, the medical examination of persons seeking advice on contraception, the treatment of such persons and the supply of contraceptive substances and appliances.'

This provision does not define the 'persons' who are the subject matter of it, nor is there any definition of that expresssion anywhere else in the Act. In these circumstances it seems to me that a court, in interpreting the provision, must do so in a way which conforms with considerations of public policy rather than in a way which conflicts with them. For the reasons which I have given earlier, I am of the opinion that, in the case of girls under 16, the giving of advice about contraception medical examination with a view to the use of one or other form of contraception, and the prescribing of contraceptive treatment are all contrary to public policy. It follows that I would interpret the expression 'persons' in s 5(1)(b) above as not including girls under 16. Alternatively, I would say that the expression 'all reasonable requirements', which occurs earlier in the provision, cannot be interpreted as including the requirements of a girl under 16 which, if satisfied, will promote, encourage or facilitate unlawful acts of sexual intercourse between a man and her.

My Lords, reference was made in the course of the argument before you to a decision of Butler-Sloss J in Re P (a minor) (1981) LGR 301. In that case the judge, in wardship proceedings, ordered that a girl of 15, who had been pregnant for the second time and was in the care of a local authority, should be fitted with a contraceptive appliance because it appeared that it was impossible for the local authority, in whose care she was, to control her sexual conduct. It was contended that this decision was authority for the proposition that, in wardship proceedings at any rate, an order could lawfully be made for the supply and fitting of a contraceptive appliance to a girl under 16.

I do not know what arguments were or were not addressed to Butler-Sloss J in that case, and it is, in any event, unnecessary for your Lordships to decide in these proceedings the limits of the powers of a court exercising wardship jurisdiction. As at present advised, however, I am of opinion, with great respect to Butler-Sloss J, that the order which she made was not one which she could lawfully make.

My Lords, great play was made in the argument before you of the disastrous consequences for a girl under 16 of becoming pregnant as a result of her willingly having unlawful sexual intercourse with a man. I am fully conscious of these considerations, but I do not consider that, if the views which I have so far expressed are

right in law, those considerations can alter the position.

It is sometimes said that the age of consent for girls is presently 16. This is, however, an inaccurate way of putting the matter, since, if a man has sexual intercourse with a girl under 16 without her consent, the crime which he thereby commits is that of rape. The right way to put the matter is that 16 is the age of a girl below which a man cannot lawfully have sexual intercourse with her. It was open to Parliament in 1956, when the Sexual Offences Act of that year was passed, and it has remained open to Parliament throughout the 29 years which have since elapsed, to pass legislation providing for some lower age than 16, if it thought fit to do so. Parliament has not thought fit to do so, and I do not consider that it would be right for your Lordships' House, by holding that girls under 16 can lawfully be provided with contraceptive facilities, to undermine or circumvent the criminal law which Parliament has enacted. The criminal law and the civil law should, as it seems to me, march hand in hand on all issues, including that raised in this case, and to allow inconsistency or contradiction between them would, in my view, serve only to discredit the rule of law as a whole.

Since I am of opinion that the first question which I posed earlier, namely whether the provision of contraceptive facilities to girls under 16 was lawful in any circumstances at all, should be answered in the negative, the second question which I posed, relating to the need for prior parental knowledge and consent, does not arise. This is because, on the view which I take of the law, making contraception available to girls under 16 is unlawful, whether their parents know of and consent to it or not.

My Lords, it remains for me to indicate what order I consider that the House should make on this appeal. With regard to the first declaration made by the Court of Appeal, I would uphold it, albeit on grounds wider than those on which it was founded in that court. With regard to the second declaration, there is no appeal against it and I would uphold it also, although, for the reasons which I have given, I regard the four lines which follow the words 'the age of 16' (namely 'without the prior knowledge and/or consent of the said child's parent or guardian save in cases of emergency or with the leave of the Court') as surplusage.

In the result, I would dismiss the appeal of the DHSS with costs.

LORD TEMPLEMAN.

My Lords, this appeal involves consideration of the independence of a teenager, the powers of a parent and the duties of a doctor. The question is: who has the right to decide whether an unmarried girl under the age of 16 may practice contraception?

An unmarried girl under the age of 16 does not, in my opinion, possess the power in law to decide for herself to practise contraception. Section 6 of the Sexual Offences Act 1956 makes it an offence for a man to have unlawful sexual intercourse with a girl under the age of 16. Consent by the girl does not afford a defence to the man or constitute an offence by the girl. Parliament has thus indicated that an unmarried girl under the age of 16 is not sufficiently mature to be allowed to decide for herself that she will take part in sexual intercourse. Such a girl cannot therefore be regarded as sufficiently mature to be allowed to decide for herself that she will practise contraception for the purpose of

frequent or regular or casual sexual intercourse. Section 6 of the Sexual Offences Act 1956 does not, however, in my view, prevent parent and doctor from deciding that contraceptive facilities shall be made available to an unmarried girl under the age of 16 whose sexual activities are recognised to be uncontrolled and uncontrollable. Section 6 is designed to protect the girl from sexual intercourse. But if the girl cannot be deterred then contraceptive facilities may be provided, not for the purpose of aiding and abetting an offence under s 6 but for the purpose of avoiding the consequences, principally pregnancy, which the girl may suffer from illegal sexual intercourse where sexual intercourse cannot be prevented. In general, where parent and doctor agree that any

form of treatment, including contraceptive treatment, is in the best interests of the girl, there is, in my opinion, no legal bar to that treatment.

Difficulties arise when parent and doctor differ. The parent, claiming the right to decide what is in the best interests of a girl in the custody of that parent, may forbid the provision of contraceptive facilities. A doctor, claiming the right to decide what is in the best interests of a patient, may wish to override the parent's objections. A conflict which is express may be resolved by the court, which may accept the view of either parent or doctor or modify the views of both of them as to what is in the best interests of the girl. The present appeal is concerned with a conflict which is known to the doctor but is concealed from the parent and from the court. The girl, aware that the parent will forbid contraception, requests the doctor to provide and the doctor agrees to provide contraceptive facilities and to keep the parent in ignorance.

A parent is the natural and legal guardian of an infant under the age of 18 and is responsible for the upbringing of an infant who is in the custody of that parent. The practical exercise of parental powers varies from control and supervision to guidance and advice depending on the discipline enforced by the parent and the age and temperament of the infant. Parental power must be exercised in the best interests of the infant and the court may intervene in the interests of the infant at the behest of the parent or at the behest of a third party. The court may enforce parental right, control the misuse of parental power or uphold independent views asserted by the infant. The court will be guided by the principle that the welfare of the infant is paramount. But, subject to the discretion of the court to differ from the views of the parent, the court will, in my opinion, uphold the right of the parent having custody of the infant to decide on behalf of the infant all matters which the infant is not competent to decide. The prudent parent will pay attention to the wishes of the infant and will normally accept them as the infant approaches adulthood. The parent is not bound by the infant's wishes, but an infant approaching adulthood may be able to flout the wishes of the parent with ease.

A doctor tenders advice and offers treatment which the doctor considers to be in the best interests of the patient. A patient is free to reject the advice and refuse the treatment: see Sidaway v Bethlem Royal Hospital Governors [1985] 1 All ER 643 at 665, [1985] 2 WLR 480 at 508. Where the patient is an infant, the medical profession accept that a parent having custody and being responsible for the infant is entitled on behalf of the infant to consent to or reject treatment if the parent considers that the best interests of the infant so require. Where doctor and parent disagree, the court can decide and is not slow to act. I accept that if there is no time to obtain a decision from the court, a doctor may

safely carry out treatment in an emergency if the doctor believes the treatment to be vital to the survival or health of an infant and notwithstanding the opposition of a parent or the impossibility of alerting the parent before the treatment is carried out. In such a case the doctor must have the courage of his convictions that the treatment is necessary and urgent in the interests of the patient and the court will, if necessary, approve after the event treatment which the court would have authorised in advance, even if the treatment proves to be unsuccessful.

I accept also that a doctor may lawfully carry out some forms of treatment with the consent of an infant patient and against the opposition of a parent based on religious or any other grounds. The effect of the consent of the infant depends on the nature of the treatment and the age and understanding of the infant. For example, a doctor with the consent of an intelligent boy or girl of 15 could in my opinion safely remove tonsils or a troublesome appendix. But any decision on the part of a girl to practise sex and contraception requires not only knowledge of the facts of life and of the dangers of pregnancy and disease but also an understanding of the emotional and other consequences to her family, her male partner and to herself. I doubt whether a girl under the age of 16 is capable of a balanced judgment to embark on frequent, regular or casual sexual intercourse fortified by the illusion that medical science can protect her in mind and body and ignoring the danger of leaping from childhood to adulthood without the difficult formative transitional experiences of adolescence. There are many things which a girl under 16 needs to practise but sex is not one of them. Parliament could declare this

view to be out of date. But in my opinion the statutory provisions discussed in the speech of noble and learned friend Lord Fraser and the provisions of s 6 of the Sexual Offences Act 1956 indicate that as the law now stands an unmarried girl under 16 is not competent to decided to practise sex and contraception.

In the present case it is submitted that a doctor may lawfully make a decision on behalf of the girl and in so doing may overrule or ignore the parent who has custody of the girl. It is submitted that a doctor may at the request of a girl under 16 provide contraceptive facilities against the known or assumed wishes of the parent and on terms that the parent shall be kept in ignorance of the treatment. The justification is advanced that, if the girl's request is not met, the girl may persist in sexual intercourse and run the risk of pregnancy. It is not in the interests of a girl under 16 to become pregnant and therefore the doctor may, in her interests, confidentially provide contraceptive facilities unless the doctor can persuade the girl to abstain from sexual intercourse or can persuade her to ensure that precautions are taken by the male participant. The doctor is not bound to provide contraceptive facilities but, it is said, is entitled to do so in the best interests of the girl. The girl must be assured that the doctor will be pledged to secrecy otherwise the girl may not seek advice or treatment but will run all the risks of disease and pregnancy involved in sexual activities without adequate knowledge or mature consideration and preparation. The Department of Health and Social Security (DHSS) memorandum instructs a doctor to seek to persuade the girl to involve the parent but concludes that 'the decision whether or not to prescribe contraception must be for the clinical judgment of a doctor'.

There are several objections to this approach. The first objection is that a doctor, acting

without the views of the parent, cannot form a 'clinical' or any other reliable judgment that the best interests of the girl require the provision of contraceptive facilities. The doctor at the family planning clinic only knows that which the girl chooses to tell him. The family doctor may know some of the circumstances of some of the families who form his registered patients but his information may be incomplete or misleading. The doctor who provides contraceptive facilities without the knowledge of the parent deprives the parent of the opportunity to protect the girl from sexual intercourse by persuading and helping her to avoid sexual intercourse or by the exercise of parental power which may prevent sexual intercourse. The parent might be able to bring pressure on a male participant to desist from the commission of the offence of sexual intercourse with a girl under 16. The parent might be able and willing to exercise parental power by removing the family or the girl to a different neighbourhood and environment and away from the danger of sexual intercourse.

The second objection is that a parent will sooner or later find out the truth, probably sooner, and may do so in circumstances which bring about a complete rupture of good relations between members of the family and between the family and the doctor. It is inevitable that, when the parent discovers that the girl is practising sexual intercourse, the girl will in self-justification and in an attempt to reassure the parent reveal that she is relying on contraceptive facilities provided by the doctor in order to avoid pregnancy. The girl and the doctor will be the loser by this revelation.

The third and main objection advanced on behalf of the respondent parent, Mrs Gillick, in this appeal is that the secret provision of contraceptive facilities for a girl under 16 will, it is said, encourage participation by the girl in sexual intercourse and this practice offends basic principles of morality and religion which ought not to be sabotaged in stealth by kind permission of the national health service. The interests of a girl under 16 require her to be protected against sexual intercourse. Such a girl is not sufficiently mature to be allowed to decide to flout the accepted rules of society. The pornographic press and the lascivious film may falsely pretend that sexual intercourse is a form of entertainment available to females on request and to males on demand but the regular, frequent or casual practice of sexual intercourse by a girl or a boy under the age of 16 cannot be beneficial to anybody and may cause harm to character and personality. 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.

These arguments have provoked great controversy which is not legal in character. Some doctors approve and some doctors disapprove of the idea that a doctor may decide to provide contraception for a girl under 16 without the knowledge of the parent. Some parents agree and some parents disagree with the proposition that the decision must depend on the judgment of the doctor. Those who favour doctor power assert that the

failure to provide confidential contraceptive treatment will lead to an increase in pregnancies amongst girls under 16. As a general proposition, this assertion is not supported by evidence in this case, is not susceptible to proof and in my opinion is of doubtful validity. Availability of confidential contraceptive treatment may increase the demand for such treatment. Contraceptive treatment for females usually requires daily discipline in order to be effective and girls under 16 frequently lack that discipline. The total number of pregnancies amongst girls of under 16 may, therefore, be increased and not decreased by the availability of contraceptive treatment. But there is no doubt that an individual girl who is denied the opportunity of confidential contraceptive treatment may invite or succumb to sexual intercourse and thereby become pregnant. Those who favour parental power assert that the availability of confidential contraceptive treatment will increase sexual activity by girls under 16. This argument is also not supported by evidence in the present case and is not susceptible to proof. But it is clear that contraception removes or gives an illusion of removing the possibility of pregnancy and therefore removes restraint on sexual intercourse. Some girls would come under pressure if contraceptive facilities were known to be available and some girls under 16 are susceptible to male domination.

Parliament could decide whether it is better to have more contraception with the possibility of fewer pregnancies and less disease or whether it is better to have less contraception with the possibility of reduced sexual activity by girls under 16. Parliament could ensure that the doctor prevailed over the parent by reducing the age of consent or by expressly authorising a doctor to provide contraceptive facilities for any girl without informing the parent, provided the doctor considered that his actions were for the benefit of the girl. Parliament could, on the other hand, ensure that the parent prevailed over the doctor by forbidding contraceptive treatment for a girl under 16 save by or on the recommendation of the girl's general medical practitioner and with the consent of the parent who has registered the girl as a patient of that general practitioner. Some girls, it is said, might pretend to be over 16 but a doctor in doubt could always require confirmation from the girl's registered medical practitioner.

This appeal falls to be determined by the existing law. No authority has been cited which prevents an infant from seeking medical or any other advice or which forbids a doctor to advise an infant who has not been tendered by the parent as a patient. No authority compels a doctor to disclose to a parent, otherwise than in the course of litigation, any information obtained as a result of a conversation between the doctor and the infant. On the other hand, in my opinion, confidentiality owed to an infant is not breached by disclosure to a parent responsible for that infant if the doctor considers that such disclosure is necessary in the interests of the infant. A doctor who gave a pledge to a girl under 16 that he would not disclose the fact or content of a conversation would no doubt honour that pledge, but the doctor ought to hesitate before committing himself. A doctor who gave an unconditional pledge of confidentiality to a girl under 16 would, for example, be in a difficult position if the girl then disclosed information which made the doctor suspect that she was being introduced to sexual intercourse by a man who was also introducing her to drugs.

Although a doctor is entitled to give confidential advice to an infant, the law will, in my opinion, uphold the right of a parent to make a decision which the infant is not competent to make. The decision to authorise and accept medical examination and

treatment for contraception is a decision which a girl under 16 is not competent to make. In my opinion a doctor may not lawfully provide a girl under 16 with contraceptive facilities without the approval of the parent responsible for the girl save pursuant to a court order, or in the case of emergency or in exceptional cases where the parent has abandoned or forfeited by abuse the right to be consulted. Parental rights cannot be insisted on by a parent who is not responsible for the custody and upbringing of an infant or where the parent has abandoned or abused parental rights. And a doctor is not obliged to give effect to parental rights in an emergency.

A girl under 16 is usually living with a parent and is usually attending school. It is sufficient for the doctor to obtain the consent of the parent or guardian with whom the girl is living. It seems to me to be contrary to law and offensive to professional standards that a doctor should provide contraceptive facilities against the known or presumed wishes of such a parent and that the doctor should conspire with the girl to keep the parent in ignorance of the fact that the girl intends to participate in frequent, regular or casual sexual intercourse in the belief that the only bar to sexual intercourse is the risk of pregnancy and in complacent reliance on the doctor's contraceptive facilities to obviate that risk.

But parental rights may have been abandoned. If the doctor discovers, for example, that the girl is not living with a parent but has been allowed to live in an environment in which the danger of sexual intercourse is pressing, the doctor may lawfully provide facilities for contraception until the parent has been alerted to the danger and has been afforded the opportunity to reassert parental rights and to protect the girl by means other than contraception. The court will uphold the doctor's actions if the doctor reasonably believes that parental rights have, for the time being at any rate, been abandoned.

Parental rights may have been abused. The dangers of sexual intercourse may emanate from the girl's home. The doctor would be entitled to provide the girl with contraceptive facilities but would then be bound to consider whether the local welfare authorities should be alerted to the possibility that the girl is in need of care and protection. Again, the doctor may be satisfied that the parent is a brute and that the girl has been driven to seek solace outside the family. The doctor might decide that it was necessary to provide contraceptive facilities for the girl without informing the parent but the doctor would be bound to consider the possible consequences if the parent, known to be brutal, discovered the truth.

The doctor may also be faced with circumstances which could properly be described as a medical emergency. The doctor may decide that the girl is unable to control her sexual appetite or is acting under an influence which cannot be counteracted immediately. The doctor would be entitled to provide contraceptive facilities as a temporary measure but would, in my opinion, be bound to inform the parent. A subsequent decision to continue contraceptive treatment would be open to the doctor and the parent acting jointly; in default of agreement between them, the welfare authority or the court could be asked to intervene.

There may be other exceptional circumstances and emergencies which would impel the doctor to provide contraceptive facilities without the prior consent of the parent but in

most cases the doctor would be bound to inform the parent as soon as possible in order that the parent might have the opportunity of exercising parental rights in such manner as to deter or prevent the girl from indulging in sexual intercourse.

The position seems to me to be as follows. A doctor is not entitled to decide whether a girl under the age of 16 shall be provided with contraceptive facilities if a parent who is in charge of the girl is ready and willing to make that decision in exercise of parental rights. The doctor is entitled in exceptional circumstances and in emergencies to make provision, normally temporary provision, for contraception but in most cases would be bound to inform the parent of the treatment. The court would not hold the doctor liable for providing contraceptive facilities if the doctor had reasonable grounds for believing that the parent had abandoned or abused parental rights or that there was no parent immediately available for consultation or that there was no parent who was responsible for the girl. But exceptional circumstances and emergencies cannot be expanded into a

general discretion for the doctor to provide contraceptive facilities without the knowledge of the parent because of the possibility that a girl to whom contraceptive facilities are not available may irresponsibly court the risk of pregnancy. Such a discretion would enable any girl to obtain contraception on request by threatening to sleep with a man.

In the present state of the law the DHSS memorandum appears to me to be defective. The principal defect lies in the assertion that 'the decision whether or not to prescribe contraception must be for the clinical judgment of a doctor'. In my opinion a decision by a doctor to provide contraceptive facilities for an unmarried girl of 16 against the known or presumed wishes of a parent who has custody of the girl and without the knowledge of the parent would constitute an unlawful interference with the rights of the parent, subject to the intervention of the court, to make that decision on behalf of the girl and an unlawful interference with the right of the parent to influence the conduct of the girl by the exercise of parental powers of control, guidance and advice.

There are two further defects. The memorandum asserts 'that consultations between doctors and patients are confidential' without making any distinction between adult patients and infant patients. The memorandum also suggests that doctors should consider providing contraceptive facilities without the knowledge of the parent where 'parents are, for example, unconcerned, entirely unresponsive or grossly disturbed'. Of course a doctor must protect a girl against a parent who is grossly disturbed although the doctor must also consider the possible consequences if such a parent discovers that the daughter has been practising sexual intercourse with the ostensible approval of the doctor manifested by the secret supply of contraceptives. And if it is plain that the parent is 'unconcerned' in the sense that parental control has been abandoned, then the provision of contraceptive facilities without the prior knowledge of the parent would be lawful. But any girl who is anxious to practise sexual intercourse may plausibly represent that the parent is 'entirely unresponsive'. On behalf of Mrs Gillick it was urged with some force that the practical effect of the memorandum couched in this opaque language was to enable an inexperienced doctor in a family planning clinic, exuding sympathy and veiled in ignorance of the girl's personality and history, to provide contraceptives as if they were sweets withheld from a deprived child by an unfeeling parent; and that any

parent who was concerned with the girl's immortal soul or with moral or religious principles might be said to be 'entirely unresponsive' to a proposal that an unmarried girl under the age of 16 should be provided with contraceptives. As the memorandum now stands, a 'clinical judgment' by the doctor may amount to no more than a belief that a parent will not consent to contraception and a fear that the girl my practise sex without contraception.

These defects in the memorandum constitute in my opinion a mistake of law on the part of the DHSS. The memorandum assumes and asserts that the doctor is entitled by himself to decide whether an unmarried girl under the age of 16 shall be provided with contraceptive facilities and that the doctor is entitled to conceal that decision from the parent. In my opinion the decision cannot lawfully be made without the consent of the parent in charge of the girl unless the parent has abandoned or abused parental powers or is not available. If the memorandum is defective by reason of a mistake of law and if, in consequence, a doctor making a decision in reliance on the views expressed in the memorandum may unlawfully interfere with the rights of a parent and make and act on a decision which the doctor is in law not entitled to make, then in my opinion the DHSS, which is responsible for the memorandum, is amenable to the remedies of judicial review. It matters not whether the memorandum constitutes an order or guidance or advice or a mere expression of views directed to the medical profession or directed to doctors who are engaged in the national health service. This issue is not whether the DHSS is exercising a statutory decretion in a reasonable way but whether by mistake of law the DHSS, a public authority, purports by the memorandum to authorise or approve an unlawful interference with parental rights. In this respect I gratefully acknowledge and accept the observations of my noble and learned friend Lord Bridge and his warning against the involvement of the courts in areas of social and ethical controversy or hypothetical questions. Nevertheless the questions raised by this appeal must now be

answered and, differing from a majority of your Lordships, I consider that Mrs Gillick has succeeded in her crusade and is entitled in judicial review proceedings to a declaration that the memorandum is unlawful in so far as it purports to authorise or approve of the provision of contraceptive facilities for an unmarried girl under the age of 16 without the knowledge of a parent who holds custody of the girl and has not abandoned or abused the parental right to decide whether such facilities shall be provided. The danger that other parents or individuals may exploit judicial review proceedings by referring social problems to the courts or by seeking general pronouncements of law based on hypothetical facts can be averted by the exercise of the judicial discretion to refuse leave to prosecute judicial review proceedings. In the present case the proceedings are not in form judicial review proceedings but at this stage the technicality can be ignored because the legal issues raised in these proceedings cannot be allowed to remain unanswered. I would therefore grant the relief I have indicated in substitution for the declarations made by the Court of Appeal and I would order Mrs Gillick's costs to be paid by the DHSS.

My Lords, in this appeal social issues are entangled with legal issues. In my view the law is consistent with social policy in forbidding the provision of contraceptive facilities for young girls who are under the care and protection of a parent without the involvement of the parent. But social issues need not finally be determined and are not best determined

by lawyers or by doctors.

Appeal allowed.
Solicitors: Treasury Solicitor; Berrymans agents for Ollard & Bentley, March (for Mrs Gillick).
Mary Rose Plummer Barrister.
[1985] 3 All ER 402 at 438