The Law Reports (Appeal Cases) **[1986] AC 112**

[HOUSE OF LORDS]

GILLICK RESPONDENT AND WEST NORFOLK AND WISBECH AREA HEALTH AUTHORITY FIRST APPELLANTS AND DEPARTMENT OF HEALTH AND SOCIAL SECURITY SECOND APPELLANTS

1984 Nov. 19, 20, 21, 22; Dec. 20
1985 June 24, 25, 26, 27; July 1, 2, 3, 4; Oct. 17

Eveleigh , Fox and Parker L.JJ. Lord Fraser of Tullybelton , Lord Scarman , Lord Bridge of Harwich , Lord Brandon of Oakbrook and Lord Templeman

20 December. The following judgments were handed down.

PARKER L.J. By section 1 of the National Health Service (Family Planning) Act 1967, local health authorities in England and Wales were empowered, with the approval of the Minister of Health and to such extent as he might direct, to make arrangements for the giving of advice on contraception, the medical examination of persons seeking advice on contraception for the purpose of determining what advice to give and the supply of contraceptive substances and contraceptive appliances. This was, so far as is known, the first occasion upon which Parliament had made any provision for what may be described simply as contraceptive advice and treatment. The Act of 1967 was repealed by the National Health Service Reorganisation

Act 1973, which Act, by section 4, replaced the power of local health authorities to provide for such advice and treatment with a duty upon the Secretary of State to do so. Section 4 has now been replaced in like terms by section 5(1) (*b*) of the National Health Service Act 1977 which provides that it is the Secretary of State's duty:

> "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."

It is to be noted in passing that neither the original power of the local health authority nor the subsequent duty of the Secretary of State to provide for contraceptive advice and treatment was subject to any limitation upon the age of the persons to whom such service was to be accorded.

In pursuance of his duty under section 5(1) (*b*), the Secretary of State made arrangements, and in May 1974 the Department of Health and Social Security, who are the second respondents in this appeal, issued an explanatory circular concerning such arrangements to which was attached a Memorandum of Guidance, section G of which was entitled "The Young." The relevant parts of it are set out in full in the report of the judgment of Woolf J. presently under appeal, at [1984] Q.B. 581, 588, 589. In view of that and the fact that section G was amended in 1980 it is unnecessary to do more here than mention that it states: (1) that in the light of the fact that there were 1,490 births and 2,804 induced abortions among girls under 16 there was a clear need for contraceptive services to be available for and accessible to young people at risk of pregnancy irrespective of age. (2) That it was for the doctor to decide whether to provide contraceptive advice and treatment. (3) That the Medical Defence Union had advised that the parents of a child, of whatever age, should not be contacted by any staff without his or her permission.

The Memorandum of Guidance with its plain acceptance, if not encouragement, of the idea that contraceptive advice and treatment could be given to girls, not merely under 16 but well under 16, without the consent or even the knowledge of parents, not unnaturally provoked much concern and in December 1980 the department issued a notice containing section G, the terms of which are directly challenged in the appeal and which I therefore quote in full:

> "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 on 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."

This revised text is, no doubt, less forthright than its predecessor in its acceptance of the position that the young can be advised and treated without the knowledge or consent of their parents, but that position is plainly still accepted.

As a result of the issue of the revised text Mrs. Gillick, the appellant, a Roman Catholic who then had four, but now has five, daughters under the age of 16, wrote on 21 January 1981 to the local health authority in the following terms:

> "Concerning the new D.H.S.S. guidelines on the contraceptive and abortion treatment of children under both the legal and medical age of consent, without the knowledge or consent of the parents, can I please ask you for a written assurance that in no circumstances whatsoever will any of my daughters (Beatrice, Hannah, Jessie and Sarah) be given contraceptive or abortion treatment whilst they are under 16 in any of the family planning clinics under your control, without my prior knowledge, and irrefutable evidence of my consent? Also, should any of them seek advice in them, can I have your assurance that I would be automatically contacted in the interests of my children's safety and welfare? If you are in any doubt about giving me such assurances, can I please ask you to seek legal medical advice.
>
> Yours faithfully, Mrs. Victoria Gillick."

She received the following reply on 27 January 1981:

> "Thank you for your letter of 21 January addressed to the chairman and he has asked me to reply to you on his behalf. I enclose for your information a copy of the official guidance issued in May 1980, together with a copy of a recent press statement made by the Minister of Health on this important matter. You will see that the Minister emphasises that it would be most unusual to provide advice about contraception without parental consent, but it does go on to say that the final decision must be for the doctor's clinical judgment. We would expect our doctors to work within these guidelines but, as the Minister has stated, the final decision in these matters must be one of clinical judgment."

This did not satisfy Mrs. Gillick and further correspondence ensued until on 3 March 1981

Mrs. Gillick wrote a final letter making her position clear:

> "I formally FORBID any medical staff employed by Norfolk A.H.A. to give any contraception or abortion advice or treatment whatsoever to my four daughters, while they are under 16 years, without my consent. Will you please acknowledge this letter and agree wholeheartedly to advise your doctors etc. to abide by my forbidding."

This produced no change in attitude and eventually on 5 August 1982, Mrs. Gillick commenced proceedings against both the area health authority and the department. By her specially indorsed writ she claimed two declarations, the first against the area health authority and the department and the second against the area health authority only. The declarations sought are:

> "(i) a declaration against the first defendants and the second defendants 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 the plaintiff's said children, and/or the rights of the plaintiff as parent and custodian of the children, and/or the ability of the plaintiff properly and effectively to discharge her duties as such parent and custodian; (ii) a declaration against the first defendants that no doctor or other professional person employed by the first defendants either in the Family Planning Service or otherwise may given any contraceptive and/or abortion advice and/or treatment to any child of the plaintiff below the age of 16 without the prior knowledge and/or consent of the said child's parent or guardian."

On 26 July 1983, Mrs. Gillick's action was dismissed by Woolf J. and she now appeals to this court. It must be stated at the outset that Mrs. Gillick's purpose in bringing the action is to establish the extent of parental rights and duties in respect of girls under 16, for there is not the slightest suggestion that any of her daughters is likely, when under 16, to need contraceptive or abortion advice or treatment much less to seek it and accept it without her knowledge and consent. Indeed only her three eldest daughters can realistically be regarded as being at risk of pregnancy and capable of seeking and accepting contraceptive advice or treatment even if they did form a sudden desire to indulge in sexual activity and yielded to it. These three were aged respectively 13, 12 and 10 at the date of the writ. The fourth daughter was then aged 5 and the fifth not yet born.

It is however clear that even in the best of families something may go suddenly and badly wrong and that, if and when it does, a parent may either be unaware of the fact or left with little time in which to act. She has therefore in my opinion ample interest to justify her attempt to establish the extent of her rights and duties and to do so by way of action for a declaration rather than by way of judicial review. Neither of the defendants indeed contended to the contrary and Mr. Laws for the department conceded that if Mrs. Gillick could establish the right which she asserted it must follow that the department's notice was contrary to law and must be struck down on one or other of the heads recognized in Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation [1948] 1 KB 223 .

It is clear that respectable and responsible people may hold different, strong and sincere views as to whether and, if so, in what circumstances, doctors should on medical, social, moral,

religious or ethical grounds, either (i) fail to inform a parent that a child under 16 had sought contraceptive advice; or (ii) provide contraceptive advice or treatment without the parents' knowledge and consent.

This appeal, however, is concerned only with the legal position, albeit that in the course of ascertaining the legal position the court may resort to established public policy which itself may be based on some social, moral or other non-legal judgment. Accordingly this court does not seek to determine, and indeed has no material on which it could determine whether, for example, it is "better" on some such ground (1) that mothers of young children should be kept in ignorance of what their children are doing lest young girls be deterred from seeking contraceptive advice and treatment with, so it is said, increased risks of pregnancy, more unwanted babies, more back street abortions and so on, or (2) that mothers should always be informed and their consent obtained despite the alleged disadvantages mentioned above and possible family friction, because otherwise the stability of families will be threatened, the parents' ability to carry out their rights and obligations will be impaired, etc. Whether Mrs. Gillick is right or wrong in her contentions, such matters will have to be determined in another forum, and the law, if necessary, altered by Parliament. Such matters are not for this court.

Although the contentions advanced on behalf of the plaintiff were divided under a number of heads and are clearly set out in a most helpful skeleton argument, there were before Woolf J. and in this court in essence two matters to be investigated, namely: (a) the extent of a parent's rights and duties with respect to the medical treatment of a girl under 16; and (b) the extent to which, if at all, the provisions of the criminal law assist in the determination of the extent of the parents' rights and duties in relation specifically to contraceptive or abortion advice and treatment.

In relation to the first of these two matters it is contended for the plaintiff that a parent has a right to determine whether advice shall be given or not and a further right to determine whether, if treatment is recommended, it shall be given. This is in effect a right to withhold consent and it is contended that this right cannot be overridden by anyone save the court. If a doctor disagrees with a parent he must, it is submitted, seek the ruling of the court. This is quite apart from the question of trespass. If, however, the treatment would, apart from consent, constitute a trespass no consent given by a child under 16 will prevent it being such.

In relation to the second of the two matters the plaintiff contends that in the specific case of contraception the provisions of the criminal law are such that any doctor giving contraceptive advice or treatment will either commit a criminal offence or will be acting against a clearly defined public policy.

With this preliminary I turn to these two matters considering, in relation to each of them, first the statutory background and then any relevant case law.

The extent of a parent's rights and duties with respect to the medical treatment of a child

(*a) The statutory background*

Until the Family Law Reform Act 1969, by section 1 of which the age of majority was reduced from 21 to 18, there was no statutory provision with regard to a minor's consent to surgical, medical or dental treatment, but section 8 of that Act provided:

"(1) The consent of a minor who has attained the age of 16 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. (2) In this section 'surgical, medical or dental treatment' includes any procedure undertaken for the purposes of diagnosis, and this section applies to any procedure (including, in particular, the administration of an anaesthetic) which is ancillary to any treatment as it applies to that treatment. (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 construction of this section is the subject of dispute. For the plaintiff it is contended that, but for section 8, no consent could be given by a minor, and that the effect of subsection (1) is to lower the age of consent in the particular case to 16 but that at any lesser age, if consent is required, it can only be given by a parent or guardian. Subsection (3) is, it is submitted, merely to make it clear that, where a parent's consent has been obtained, it is not made ineffective because a consent from the minor could be or could have been obtained under subsection (1).

For the defendants, however, it is contended that all that the section was doing was to make it clear (i) that in the case of a person who had attained the age of 16 the doctor had no need to satisfy himself that the minor was of sufficient understanding to give consent and (ii) that the purpose of subsection (3) was merely to ensure that a consent by a minor under 16 which would have been valid prior to the Act could still be relied on.

There is no decided case that, prior to the Act, the consent of a minor under the age of 16 would have been effective and there are many indications that it would not, as I shall in due course show.

Although prior to 1969 there was no statutory provision relating to consent to treatment, the National Health Service (General Medical and Pharmaceutical Services) Regulations 1962 (S.I. 1962 No. 2248) gave to a person who had attained the age of 16 the right to choose his own doctor by providing that until such age the right should be exercised on his behalf by a parent, guardian or other person who had the care of the child; and the Mental Health Act 1959, section 5(2) (which deals with the informal admission of patients requiring treatment for a men disorder) provides:

> "In the case of an infant who has attained the age of 16 years and is capable of expressing his own wishes, any such arrangements as are mentioned in the foregoing subsection may be made, carried out and determined notwithstanding any right of custody or control vested by law in his parent or guardian."

This last provision plainly proceeds on the basis that the right of custody or control vested in a parent or guardian carried with it the right to prevent a minor submitting to treatment for mental disorder or admitting himself to a hospital or nursing home therefore and qualifies that right in respect, but only in respect, of minors who have attained the age of 16 years *and* are capable of expressing their own wishes. This as it seems to me is but one aspect of what is inherent in the right to custody or control. In this connection certain provisions of the Children Act 1975 are of some assistance. Section 85 provides:

> "(1) In this Act, unless the context otherwise requires, 'the parental rights and

> duties' means as respects a particular child (whether legitimate or not), all the rights and duties which by law the mother and father have in relation to a legitimate child and his property; and references to a parental right or duty shall be construed accordingly and shall include a right of access and any other element included in a right or duty. (2) Subject to section 1(2) of the Guardianship Act 1973 (which relates to separation agreements between husband and wife), a person cannot surrender or transfer to another any parental right or duty he has as respects a child."

It will be observed that there is a recognition that the father and mother have both rights and duties in respect of the child himself and his property and that, subject to the specific exception, a person is incapable of surrendering or transferring any parental right or duty. Under this provision, therefore, a parent cannot opt out of his rights and duties whatever they may be. Sections 86 and 87(2) then deal with the question of legal custody and actual custody:

> "86. 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*); but a person shall not by virtue of having legal custody of a child be entitled to effect or arrange for his emigration from the United Kingdom unless he is a parent or guardian of the child.
>
> "87(2) While a person not having legal custody of a child has actual custody of the child he has the like duties in relation to the child as a custodian would have by virtue of his legal custody." (The emphasis is mine).

Thus a legal custodian and actual custodian for so long as the child is in his actual custody has, it is recognised, all the parental rights and duties relating to the person of the child including specifically the place at which and manner in which his time is spent. For the purposes of the Act a child is, in effect, a minor: see section 107.

On the face of it, if there is a right and duty to determine the place and manner in which a child's time is spent, such right or duty must cover the right and duty completely to control the child, subject of course always to the intervention of the court. 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. If a child seeks medical advice the doctor has first to decide whether to accept him or her as a patient. At this stage, however, unless the child is going to his or her own general practitioner, which in the present context is unlikely, the doctor will know nothing about the child. If he decides to accept the child as a patient then, it is said, there is an inviolable duty of confidence and the parent cannot be informed or his or her consent sought without the child's permission. The doctor is entitled to decide what advice or treatment to administer.

Finally in this section it is necessary to mention section 48 of the Education Act 1944. Subsection (3) places a duty upon every local education authority to make arrangements for seeing that comprehensive facilities for free medical treatment should be available to pupils in attendance at every school or county college maintained by it and empowers it to make such arrangements for senior pupils at any other educational establishment maintained by it.

Subsection (4) places upon every local education authority the further duty to make arrangements for encouraging and assisting pupils to take advantage of such facilities but contains the following proviso:

> "Provided that if the parent of any pupil gives to the authority notice that he objects to the pupil availing himself of any medical treatment provided under this section, the pupil shall not be encouraged ... so to do."

A senior pupil is by section 114 a person between the ages of 12 and 19. The age of majority was, at the time, 21. This provision appears to me a plain recognition of the right of a parent to control the treatment provided for a child up to the age of 19. Taken together, the statutory provisions in my opinion support Mrs. Gillick's contentions.

(*b) The case law*

There are two classes of case to be considered: first those cases which are specifically concerned with medical treatment, and secondly those which are not. In the first class of case I refer first to In re D (A Minor) (Wardship: Sterilisation) [1976] Fam. 185. In that case a child, D., was severely handicapped and, for reasons which do not matter, her parents decided, when she was very young, to seek to have her sterilised when she reached about 18. She reached puberty at the age of 10 and her mother, who had over the years discussed the possibility of sterilisation with a consultant paediatrician, a Dr. Gordon, raised the matter with him again. He and the mother agreed that the sterilisation operation should be performed provided that a Miss Duncan, a consultant gynaecologist, also agreed. Miss Duncan did agree and D. was accordingly booked into a hospital in order that a hysterectomy might be performed. The former and present headmasters of D.'s school, a social worker involved with the family and the plaintiff, Mrs. Hamidi, and an educational psychologist who had seen D. on a number of occasions, disagreed with what was proposed. An attempt was made by them to secure a change of views but this failed. The plaintiff therefore instituted wardship proceedings and sought the ruling of the court as to what should be done. The matter was heard by Heilbron J. in chambers but a full judgment was given in open court. There were two issues: (1) whether the wardship should be continued and (2) whether the proposed sterilisation should take place. Heilbron J. decided that wardship should continue and that the operation should not take place. As to the first issue the judge said, at pp. 193–194:

> "This operation could, if necessary, be delayed or prevented if the child were to remain a ward of court and, as Lord Eldon L.C. so vividly expressed it in Wellesley's case, 2 Russ. 1, 18: '... it has always been the principle of this court, not to risk the incurring of damage to children which it cannot repair, but rather to prevent the damage being done.' I think this is the very type of case where this court should 'throw some care around this child,' and I propose to continue her wardship which, in my judgment, is appropriate in this case."

As to the second, she continued:

> "In considering this vital matter, I want to make it quite clear that I have well in mind the natural feelings of a parent's heart, and though in wardship proceedings parents' *rights* can be superseded the court will not do so lightly and only in pursuance of well-known principles laid down over the years. The exercise of the

> court's jurisdiction is paternal, and it must be exercised judicially, and the judge must act, as far as humanly possible, on the evidence, *as a wise parent would act.* " (The emphasis is mine).

The first of these passages recognises explicitly that unless the wardship was continued the mother could and would proceed with the proposed operation, and the second that in refusing leave to have the operation performed the court was superseding the parents' rights.

Two further matters require mention before I leave this case. First, Dr. Gordon asserted that provided he had the consent of the mother the decision whether the operation should be performed was within his and Miss Duncan's sole clinical judgment. As to this the judge said, at p. 196:

> "I cannot believe, and the evidence does not warrant the view, that a decision to carry out an operation of this nature performed for non-therapeutic purposes on a minor can be held to be within the doctor's sole clinical judgment."

It is to be noted that in the present case an even larger claim is asserted namely, on the basis of clinical judgment alone to proceed *without the parent's consent,* and contrary to her known wishes and express prohibition. Secondly, albeit it may not need stating since there is no dispute, the judge made it quite clear that once a child is a ward of court no important step in the life of that child can be taken without the consent of the court.

It was not seriously contended by Mr. Laws that the giving of contraceptive advice and treatment to a girl under 16 would be other than an important step in her life. Assuming that it would be, it follows that, in the case of a ward, a doctor who was approached for contraceptive advice and treatment in the case of such a person would be obliged to inform the court and obtain its consent. Since, in wardship, the court is under a duty to act as a wise parent would act it is submitted that, if there is no wardship, parental consent must be sought in order that he or she should have the opportunity to act wisely. Such contention appears to me to have considerable force.

The next case, In re P. (A Minor) (1981) 80 L.G.R. 301, is a decision of Butler-Sloss J. in chambers, reported with her permission. P. was aged 15 and had become pregnant for the second time. She was in the care of the local authority. They and P. were in favour of an abortion but her parents, whose consent the local authority had, albeit not obliged to do so, properly sought, objected strongly on religious grounds When they objected, the local authority instituted wardship proceedings. The parents' wishes were overridden but since the child was in care this is not of particular significance. What is of some importance, however, is that Butler-Sloss J. not only ordered that an abortion should take place against the parents' wishes, but ordered further that, with the approval and at the request of the mother, she be fitted thereafter with a suitable internal contraceptive device. As to this the judge said, at p. 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."

Butler-Sloss J. stated that, in reaching her conclusions, she had found helpful what had been said by the House of Lords about parental rights and obligations in a case much relied on by Mr. Laws for the defendants, namely J. v. C. [1970] AC 668 . That case, however, affords little assistance as to what rights and obligations (or duties) are comprised in parental rights and obligations, for the question was whether section 1 of the Guardianship of Infants Act 1925

(which makes the welfare of the infant the first and paramount consideration in proceedings in which custody or upbringing is in question) applies only to disputes between parents or whether it also applies to disputes between parents and strangers. In so far as parental rights and obligations figured at all it was therefore in relation to the weight to be given to them in reaching a conclusion under the Act as to what was best for the child and not In relation to their extent. The defendants' reliance on this case is in my opinion misplaced. In re N. (Minors) (Parental Rights) [1974] Fam. 40 was also relied on but that case also affords no real assistance.

The cases which do in my opinion assist are those cases relating to the age of discretion relied upon by the plaintiff, all of which Mr. Laws submits should be disregarded on the ground that they related to custody.

In Reg. v. Howes (1860) 3 E. & E. 332 the question was whether a father was, by habeas corpus, entitled to recover the custody of a child between 15 and 16 notwithstanding that the child did not desire to be in his custody. Cockburn C.J., giving the judgment of the court on the father's application for the return of the child to his custody, said, at pp. 336–337:

> "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 21, 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 16 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 repudiation of the notion that intellectual precocity can hasten the age at which a minor can be considered to be of sufficient discretion to exercise a wise choice for its own interests and the fixing of a single age is to be noted.

In In re Agar-Ellis (1883) 24 Ch D 317 , a father put restrictions on his 17-year-old daughter's intercourse with her mother. The girl was at the time a ward of court. Sir William Brett M.R. said, at p. 326: "the father has the control over the person, education, and conduct of his children until they are 21 years of age. That is the law." It had been argued that because in habeas corpus proceedings a girl of 16 or more would not be delivered up to her father if she was content to remain where she was, this showed that the father's right of custody and control terminated altogether at age 16, but this argument was rejected on the ground that habeas corpus was a special case. Cotton L.J., having quoted the passage from Cockburn C.J. in Reg. v. Howes, 3 E. & E. 332 set out above, said, at p. 331:

> "Therefore the Lord Chief Justice there most distinctly recognises what, having regard to the Act, I should have thought was beyond dispute, that during infancy and over 16 the right of the father still continues."

The Act referred to was the Tenures Abolition Act 1660 (12 Car. 2c.24), section 8 of which gave the father the right to dispose of the custody and tuition of his children up to the age of 21.

The judgment which, however, I find of most assistance is that of Bowen L.J. at pp. 335–336, from which I quote at greater length:

> "Now a good deal of this discussion has turned upon the exact limits of parental authority. As far as one can see, some little confusion has been caused by the use in earlier law books of distinctions by which the law now no longer strictly stands. The strict common law gave to the father the guardianship of his children during the age of nurture and until the age of discretion. The limit was fixed at 14 years in the case of a boy, and 16 years in the case of a girl; but beyond this, except in the case of the heir apparent, if one is to take the strict terminology of the older law the father had no actual guardianship except only in the case of the heir apparent, in which case he was guardian by nature till 21. That was what was called guardianship by nature in strict law. But for a great number of years the term 'guardian by nature' has not been confined, so far as the father is concerned, to the case of heirs apparent, but has been used on the contrary to denote that sort of guardianship which the ordinary law of nature entrusts to the father till the age of infancy has completely passed and gone.
>
> "I do not desire to elaborate the matter more than is necessary. The history I think of the term 'natural guardianship' and of its extension, more especially in Courts of Equity, to the father's natural custody and to the authority which a father has over his child up to the complete age of 21, will be found in *Hargreave's* note to *Coke* (Co. Lit. 88b.). There is, therefore, a natural paternal jurisdiction between the age of discretion and the age of 21, which the law will recognise. It has not only been recognised by the common law and by the Court of Chancery but it has also been recognised by statute. The [Tenures Abolition] Act of 12 Car. 2 enables the father by his will to dispose of the custody and tuition of his child or children until they attain the age of 21 years. It seems to me to follow that if a father can dispose of the custody and tuition of his children by will until the age of 21, it must be because the law recognises, to some extent, that he has himself an authority over the children till that age is reached. To neglect the natural jurisdiction of the father over the child until the age of 21 would be really to set aside the whole course and order of nature and it seems to me it would disturb the very foundation of family life."

This case has been subject to some trenchant criticism since, but it makes it perfectly clear that the father had a legal right of custody until 21, the then age of majority, and that that right included a right of control over the person. It also specifies as being established one age of discretion for boys and one for girls.

The trenchant criticism above referred to appears in Hewer v. Bryant [1970] 1 Q.B. 357, a case in which the matter for decision was the meaning of the words "in the custody of a parent" in section 22(2) (*b*) of the Limitation Act 1939 as amended by the Law Reform (Limitation of Actions, etc.) Act 1954. In that section the court construed the words as covering a case where, as a matter of fact, the minor was in the effective care and control of the parent. There was, however, considerable discussion of the more general aspect of parental rights which is presently of assistance. The trenchant criticism appears in the judgment of Lord Denning M.R. where he said, at p. 369:

> "I would get rid of the rule in In re Agar-Ellis, 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 a shilling. 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 of the Committee on the Age of Majority [Cmnd. 3342, 1967], that the legal right of a parent to the custody of a child ends at the 18th birthday: and even up till then, it is a dwindling right which the courts will hesitate to enforce against the wishes of the child, and the more so the older he is. It starts with a right of control and ends with little more than advice."

The more general discussion appears in the judgment of Sachs L.J., at pp. 372–373, of which I quote only that part of it from p. 373:

> "In its wider meaning the word 'custody' is used as if it were almost the equivalent of 'guardianship' in the fullest sense — whether the guardianship is by nature, by nurture, by testamentary disposition, or by order of a court. (I use the words 'fullest sense' because guardianship may be limited to give control only over the person or only over the administration of the assets of an infant.) Adapting the convenient phraseology of counsel, such guardianship embraces a 'bundle of rights,' or to be more exact, a 'bundle of powers,' which continue until a male infant attains 21, or a female infant marries. These include power to control education, the choice of religion, and the administration of the infant's property. They include entitlement to veto the issue of a passport and to withhold consent to marriage. They include, also, both the personal power physically to control the infant until the years of discretion and the right (originally only if some property was concerned) to apply to the courts to exercise the powers of the Crown as parens patriae. It is thus clear that somewhat confusingly one of the powers conferred by custody in its wide meaning is custody in its limited meaning, namely, such personal power of physical control as a parent or guardian may have."

Despite his view concerning In re Agar-Ellis, 24 Ch D. 317, Lord Denning M.R. was clearly of the view that the legal right to custody continues, and should continue, up to but not beyond the child's eighteenth birthday (which it does) albeit that the right was a dwindling one. This it clearly is, if only because a boy of 14 or a girl of 16 can give an adequate consent to being out of its father's custody or in that of another so as to defeat any claim of the father by habeas corpus to have it back. Furthermore, albeit there may remain until 18 a legal right of control, it may, as the child grows older, be necessary for the parents, because physical control is no longer practical, to seek the assistance of the court to buttress and support the legal right. As to Sachs L.J.'s observation it does not appear to me to matter whether one refers to the parent or guardian having a bundle of powers or a bundle of rights. What is important is the recognition of the wide area in which, subject always to intervention by the court, a parent or guardian is entitled (by the exercise of a power or right) to control a child.

The next in this group of cases which requires mention is Reg. v. D. [1984] A.C. 778 where the House of Lords had, in a criminal matter, to consider two certified questions, namely: (a)

whether the common law offence of kidnapping exists in the case of a child victim under the age of 14 years; and (b) whether, in any circumstances, a parent may be convicted of such an offence where the child victim is unmarried and under the age of majority.

Both questions were answered in the affirmative. For present purposes it is only necessary to refer to it by reason of certain comments made by Lord Brandon of Oakbrook (with whose speech all other members of the Appellate Committee agreed) concerning the Irish case People v. Edge [1943] I.R. 115, a case in which the history of the parental right to custody is the subject of exhaustive discussion. With regard to the decision itself he said, [1984] A.C. 778, 803:

> "There is, in my view, nothing in Edge's case, to show that the Irish Supreme Court were of the opinion that there did not exist any common law offence of kidnapping a child under 14. On the contrary, it is implicit in their decision that they considered that such an offence did exist, but that, in order to establish it, the taking or carrying away of such a child would have to be shown to have been without the consent of the child's parent or other lawful guardian, rather than without the consent of the child himself. It will be necessary to consider later whether this distinction, between a child over 14 and one under 14, accords with the English law of kidnapping."

He reverted to this matter in these terms, at p. 806:

> "In my opinion, to accept that doctrine as applicable under English law would not be consistent with the formulation of the third ingredient of the common law offence of kidnapping which I made earlier on the basis of the wide body of authority to which your Lordships were referred. That third ingredient, as I formulated it earlier, consists of the absence of consent on the part of the person taken or carried away. 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. "I should add that, while the absence of the consent of the person having custody or care and control of a child is not material to what I have stated to be the third ingredient of the common law offence of kidnapping, the giving of consent by such a person may be very relevant to the fourth such ingredient, in that, depending on all the circumstances, it might well support a defence of lawful excuse."

Although Lord Brandon is dealing with the criminal law and we are not, the opinion of the Appellate Committee that a child under 14 can in certain circumstances for the purposes of kidnapping give a valid consent may clearly be of significance and requires examination.

By way of preliminary I must, with respect, point out that in Edge's case the age of 14 was considered of significance because in that case the allegedly kidnapped child was a boy and for a boy the age of discretion was 14, whereas in the case of a girl it was 16. The passages which I have quoted must therefore be considered with appropriate amendments to cover the two cases.

As to the passage at p. 806, Lord Brandon envisages for the purposes of the criminal law three questions: (1) Whether the child was so young that absence of consent would be a necessary or legal inference from its age. This he regards as a matter of ruling by the judge although he does not give any guidance as to how young a child must be before any such inference is drawn. (2) Whether, if the judge does not rule that absence of consent is presumed, the particular child had at the time sufficient understanding and intelligence to give its consent — a question for the jury. (3) If the jury are satisfied that the particular child had such understanding and intelligence whether they are also satisfied that he or she did not give consent.

It appears to me that if at some *age* there is a necessary inference that consent is absent that age must be a fixed age even for the purposes of the criminal law. The fixed age might be different for girls and boys but I am unable to see how it can vary as between individual girls and boys. It is apparent that Lord Brandon regarded the age as being below 14 and, since the child concerned was there aged five, more than five, but this leaves a nine-year gap which at some time will need to be resolved.

Whatever may be the case with regard to the criminal law and kidnapping, however, and clearly very different considerations apply there, it still seems to be the case that consent of the child is no answer to habeas corpus unless the child has attained the age of either 14 or 16 as the case may be.

In relation to other aspects of custody and control there must also be a fixed age in order that parents, children, and those dealing with children may know where they stand and what are their powers, rights, duties or obligations. It is difficult to see why any other age than the age of discretion should be applicable and there is nothing in the authorities to point to any lower age.

So far as kidnapping is concerned, if the victim is old enough for consent to be legally possible there can be no objection to an investigation at the trial and a finding of fact by the jury on the two questions mentioned. Indeed such findings would be essential before a person were convicted.

In the field which is presently under consideration, however, I regard any such consideration as both impractical and undesirable. A child may be of sufficient understanding and intelligence to give a consent before, or not until after, it has attained whatever may be the fixed age, but if there be no such age then neither parent, child, nor strangers will know what their respective positions are. In the present field I would not therefore, unless driven, accept that the position is as the House of Lords have held it to be for the purposes of a charge of kidnapping. I am not so driven.

It is important to remember that, wherever a child is concerned, the court is in the background in order that, in the event of dispute, it may override, in effect, everyone, in the interests of the child. In the case of medical treatment, contraceptive or otherwise. it cannot exercise its jurisdiction to protect children unless the doctor either seeks the court's ruling himself or informs the parent of what he proposes to do, so that the parent may either consent or him or herself seek the court's ruling. If the doctor takes either course the parent is necessarily

informed. It is however a vital part of the defendants' case that, save with the child's permission, the parent shall not be told but that the matter must be left to the clinical judgment of the doctor, who may for example have been told “if Dad knew he'd beat me up.”

Talk of clinical judgment is in my view misplaced. I can see nothing particularly clinical in a decision to fit an intra-uterine device in a Roman Catholic girl aged 13 on the ground that she wishes to *start* having sexual intercourse with a boyfriend and because attempts with a sheath have been a disastrous failure, even if the girl or boy or both assert that they will otherwise proceed without any contraceptive measures. The doctor in such circumstances cannot help taking into account his views on the moral, social, religious, etc. aspects.

I fully appreciate that information to the parent may lead to family trouble and that knowledge that going to the doctor involves disclosure to parents may deter others from seeking advice and treatment with, possibly, highly undesirable or even tragic results. A parent who, for example, had fought hard for the rights which Mrs. Gillick seeks and had won the battle, might thereafter wish that she had never fought it, for it might lead to pregnancy, a back street abortion and even death. Such matters are, however, matters for debate elsewhere. If it be the law that until a girl is 16 no one may, save by the intervention of the court, afford advice or treatment without the parent's consent, then that law must be observed until it is altered by the legislature. The common law must, it is true, move with the times or keep up to date whenever it legitimately can but if, as the law presently stands, the relevant age is 16, then it cannot in my opinion legitimately change that position. Even if the case went to the House of Lords and all the judges were unanimous, the decision would be one of nine men only without the materials on which to act.

I have mentioned the foregoing wider aspects in order that it should be clear that I have not forgotten them. Before passing to another subject I mention one further matter. If a child can, without a parent's knowledge and consent, seek and receive contraceptive advice and treatment, he or she can, logically, also presumably do so in respect of other treatment. There are clearly inherent dangers in this. A mother who, for example, does not know that her child has had some particular injection or is taking some form of drug, may, if the child is in an accident and unconscious, assure the doctor that she has not had that injection and is not taking any drugs. This may have serious and possibly fatal consequences. I give this particular example because it is, I hope and believe, free from the strong feelings aroused by the particular advice and treatment here under consideration.

So far as civil law is concerned I have not found anything in any case which supports the view that at *least* up to the age of discretion either a child itself or anyone dealing with the child can lawfully interfere with the parents' rights flowing from custody.

That such rights (and duties) exist cannot be doubted. Nor can it be doubted that up to *some* age no one save the court is entitled to interfere. The only question it seems to me to be determined is what that age is.

Under the common law it appears to me to be plain that, In general, that age is the age of majority so far as outsiders are concerned, albeit that in habeas corpus proceedings someone who has reached the age of discretion may give a consent which will prevent a parent recovering custody and that for the purposes of a defence to a common law charge of kidnapping the consent of someone under the age of discretion may suffice.

I am of opinion that the present law is that, save in so far as changed by statute or by such recognised exceptions as marriage or joining the armed forces, the age of majority prevails. Indeed, if it does not, the jurisdiction of the court which lasts till the age of majority can be

stultified, for decisions can be taken which may be against the interests of the child without the parents knowing and thus having the opportunity to resort to the court for its assistance.

The criminal aspects

Before Woolf J., consideration of the question of the possible criminal liability of a doctor providing contraceptive advice and treatment to a girl under 16 was much canvassed, the plaintiff contending that a doctor who did so would be committing an offence, under section 28 of the Sexual Offences Act 1956, of aiding and abetting an offence under section 6 of that Act.

Whether in an individual case a doctor who followed the guidance notes would commit a criminal offence of either kind must depend on the circumstances. Mr. Wright for the plaintiff conceded that in some cases he would not and Mr. Laws conceded that in some cases he would. Both of these concessions were inescapable. They make it both unnecessary and undesirable to consider the direct impact of the criminal law upon the position of doctors proceeding in accordance with the notes of guidance. However, the provisions already referred to and other provisions of the Act remain of importance, as providing a clear indication of public policy. Furthermore, some assistance is to be found in this connection from other sections and from both earlier and later statutory history.

Sections 50 and 51 of the Offences against the Person Act 1861 (24 & 25 Vict.c. 100) created the offences of having unlawful carnal knowledge respectively of a girl under the age of 10 years and a girl between the ages of 10 and 12 years. The former offence was a felony carrying a minimum sentence of three years' penal servitude and a maximum of penal servitude for life or a maximum of two years' imprisonment with or without hard labour. The latter offence was a misdemeanour carrying a sentence of three years' penal servitude or imprisonment with or without hard labour for a term not exceeding two years.

By the Offences against the Person Act 1875 (38 & 39 Vict.c. 94) the foregoing sections were repealed and re-enacted with amendments (1) substituting the ages of 12 and 13 for the ages of 10 and 12, (2) raising the minimum term of penal servitude for the graver offence from three to five years, (3) removing the possible sentence of penal servitude in the case of the lesser offence and (4) expressly stating in the case of the lesser offence that it was committed "whether with or without her consent." This last specific provision was presumably because by raising the age, there were being brought within the criminal law cases in which hitherto consent would have prevented any offence existing at all.

Ten years later, the Criminal Law Amendment Act 1885 (48 & 49 Vict.c. 69) repealed the Act of 1875 and by sections 4 and 5 re-enacted the earlier provision with amendments (1) raising the respective ages to 13 and 16, (2) making attempts to commit either of the offences, offences in themselves and (3) providing in the case of the lesser offence the defence that the person charged had reasonable cause to believe that the girl was of or above the age of 16 years.

The Act of 1885 remained in force until it was repealed by the Sexual Offences Act 1956, the relevant sections being replaced by sections 5 and 6 of the new Act. Under the new sections the graver offence remained a felony carrying a maximum sentence of imprisonment for life and the lesser offence remained a misdemeanour carrying a maximum sentence of two years' imprisonment. The respective ages remained unchanged. Attempts were, in both cases, preserved as separate offences in themselves, carrying maximum sentences of two years' imprisonment in both cases. As before, there were no special defences in respect of the graver offence, but in the case of the lesser offence there were two special defences provided by sections 6(2) and (3) which provided:

> "(2) Where a marriage is invalid under section two of the Marriage Act, 1949, or section one of the Age of Marriage Act, 1929 (the wife being a girl under the age of 16), the invalidity does not make the husband guilty of an offence under this section because he has sexual intercourse with her, if he believes her to be his wife and has reasonable cause for the belief. (3) A man is not guilty of an offence under this section because he has unlawful sexual intercourse with a girl under the age of 16, if he is under the age of 24 and has not previously been charged with a like offence, and he believes her to be of the age of 16 or over and has reasonable cause for the belief. In this subsection, 'a like offence' means an offence under this section or an attempt to commit one, or an offence under paragraph (1) of section 5 of the Criminal Law Amendment Act, 1885 (the provision replaced for England and Wales by this section)."

Since 1956 there have been two changes of importance. First by section 2 of the Indecency with Children Act 1960 the maximum penalty for an attempt to commit the graver offence was increased from two years to seven years. Secondly, in 1967, as a result of the abolition of the distinction between felony and misdemeanour, certain procedural changes were made. An incidental result of this was that concealment of the graver crime, which previously would itself have constituted a crime, namely misprision of felony, ceased to be a crime.

So far as these two particular offences are concerned it will thus be seen that from 1861 to 1960 Parliament has seen fit, by way of the criminal law, progressively to increase the protection to the young, raising the ages at which their consent would prevent intercourse from being a crime from 12 to 13 to 16 and that, as late as 1960, additional protection was accorded to the under 13's by raising the maximum penalty for an offence of attempt from two years to seven years. It will also be seen that in the case of the lesser offence the defence provided by the Act of 1885 was severely limited by the Act of 1956.

As to the graver crime, until 1967 anyone who was aware that an offence had been committed would have been under a positive duty to report it to the police or other lawful authority and would have been guilty of a common law offence if he failed to do so. Whether this applied also in the case of contemplated felonies had not been decided when the offence ceased to exist. In *Sykes v. Director of Public Prosecutions* [1962] A.C. 528, Lord Denning suggested that there might be exceptions to the general rule, including amongst such possible exceptions a doctor and his patient. He recognised, however, that parent and child was not an exception.

For present purposes the precise limits of the offence are of no importance. What is or may be of some importance, however, is that the graver crime was, until 1967, considered so serious that there was a public duty to report it.

Other sections of the Act of 1956 which have some bearing are (1) section 14, which provides that it is an offence (subject to a special exception) to commit an indecent assault on a woman and also, by subsection (2), that a girl under 16 "cannot in law give any consent which would prevent an act being an assault for the purposes of this section." (2) Section 19 which, subject to an exception, makes it an offence to take an unmarried girl under the age of 18 out of the possession of her parent or guardian against *his* will. (3) Section 20, which creates the like offence, but without the exception in the case of a girl under 16; and (4) sections 25 and 26 which provide, in the case respectively of girls under 13 and those between 13 and 16, that it is an offence for the owner of premises and certain others to permit the girl to resort to or be on the premises for the purpose of having unlawful sexual intercourse with men or a particular man. The former offence was originally a felony subject to a maximum sentence of life

imprisonment. It still is so subject. The latter offence was and is subject to a maximum sentence of two years.

As to section 14, a normal preliminary to contraceptive advice and treatment is a vaginal examination, and some contraceptive devices involve in their fitting that which would, without consent, prima facie be indecent assaults. It may be that a doctor, who without the consent of a woman examines her vagina for medical purposes, commits no indecent assault, but there are clearly strong arguments the other way. In my view a doctor who, for example, examines a 10-year-old, is at least at risk of prosecution unless he has the consent of a parent and this is so up to the age of 16 when, if the child consents the consent is valid by statute and the offence ceases. Moreover, it has always been the law that for a plain civil trespass to a child a parent had his own right to sue in certain circumstances.

Section 19 affords a parent greater protection than habeas corpus, for in that case if a girl is 16, she can in that connection give a valid consent. The position with regard to girls under 16 is in like case for both crime and habeas corpus, but between 16 and 18, although habeas corpus will not avail if the child consents, her consent is irrelevant to the crime. However, between 18 and 21, which was the then age of majority, the parent was unprotected either by habeas corpus or by the criminal law. This does not, however, mean that the right to custody ceased at 18, merely that from then on, albeit the child was under age, her consent was valid for criminal and habeas corpus purposes.

Since by sections 25 and 26 anyone who allowed sexual intercourse with a girl under 16 to take place on his premises would commit an offence and, if the girl were under 13, would until 1967 have committed a felony, it would, as it seems to me, be odd to say the least if it was perfectly lawful to take action which would go some way to lessen the inhibitions of a girl under 16 and a man against sexual intercourse by protecting them from any ensuing undesirable consequences.

These sections are the successors of like provisions in the Act of 1885 under which a mother was convicted for allowing her 14-year-old illegitimate daughter to have intercourse with a man in their joint home: see Reg. v. Webster (1885) 16 Q.B.D. 134. A mother or father, therefore, clearly has a duty to prevent the act of intercourse where by virtue of ownership of premises she or he can control the situation.

The provisions of the criminal law all appear to me to support the view which I have already expressed. It is true that prior to 1885 the consent of a girl under 16 would prevent intercourse with her being a crime, but since then girls under 16 have been consistently treated as being unable to give consent.

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 authority should provide facilities which will 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.

It may well be that it would be highly unlikely that, in the case of a girl aged, say, 10, a doctor would do any such thing, but that is in my view irrelevant. The question is simply whether a doctor is entitled to do so or whether in doing so he would infringe the parents' legal rights.

I can find no additional cases on the criminal aspects which assists in relation to the limited area in which for present purposes it is relevant.

In the final analysis the position is in my view as follows. (1) It is clearly established that a parent or guardian has, as such, a parcel of rights in relation to children in his custody. (2) By statute, subject to an exception, such rights can be neither abandoned nor transferred. (3) Such rights include the right to control the manner in which and the place at which the child spends his or her time. (4) Those rights will be enforced by the courts subject to the right of the court to override the parental rights in the interests of the child. (5) There is no authority of any kind to suggest that anyone other than the court can interfere with the parents' rights otherwise than by resort to the courts, or pursuant to specific statutory powers or exceptions. (6) It is clearly recognised that there is some age below which a child is incapable as a matter of law of giving any valid consent or making any valid decision for itself in regard to its custody or upbringing. (7) The authorities indicate that this age is 16 in the case of girls and 14 in the case of boys at all events for the purposes of habeas corpus. (8) So far as girls are concerned, the provisions of the criminal law show that Parliament has taken the view that the consent of a girl under 16 in the matter of sexual intercourse is a nullity.

In the light of the above, I conclude that as a matter of law a girl under 16 can give no valid consent to anything in the areas under consideration which apart from consent would constitute an assault, whether civil or criminal, and can impose no valid prohibition on a doctor against seeking parental consent.

I conclude further that any doctor who advises a girl under 16 as to contraceptive steps to be taken or affords contraceptive or abortion treatment to such a girl without the knowledge and consent of the parent, save in an emergency which would render consent in any event unnecessary, infringes the legal rights of the parent or guardian. Save in emergency, his proper course is to seek parental consent or apply to the court.

I express no view whether 16 should or should not be the age below which a girl can give no valid consent and make no valid decision in the two fields under consideration. I express only the view that in law it is presently such age.

I express my gratitude to both counsel for their assistance and for eschewing the sort of arguments which will doubtless follow the judgments given today.

I would allow the appeal and grant the second declaration sought amended so as to add at the end, “save in cases of emergency or with the leave of the court.”

As to the first declaration, it cannot be granted in the terms sought, but it is clear that the result of what I have concluded is that the issue and subsequent maintenance of both the original and revised form of section G were and are contrary to law. I would therefore assume that the department and the local health authority would withdraw the latter whether or not a declaration were granted. Nevertheless, by reason of the far reaching nature of this problem, it is in my view desirable that there should be a formal declaration by this court, and I would propose that it be declared:

> “That the notice issued by the department in December 1980, setting out a revised form of section G of the Memorandum of Guidance issued in May 1974, is contrary to law.”

Fox L.J. In January 1981 Mrs. Gillick wrote to the area health authority demanding an assurance that in no circumstances would any of her daughters be given contraceptive or abortion treatment while they were under 16 in any of the Family Planning Clinics under the control of the authority without her (Mrs. Gillick's) consent. That assurance was not forthcoming. These proceedings are the consequence. They require an investigation of the rights, if any, of parents to be informed of and to control medical treatment to their children. I say "parents" because although Mrs. Gillick is the sole plaintiff, she and her husband are of the same mind in relation to the case, and no point arises as to his absence. Nor, I may say, is any point taken upon the fact that the proceedings take the form which they do and are not by way of judicial review.

Mr. Laws for the Department of Health and Social Security questions the propriety of the use of the word "rights" at all in relation to the position of parents in these matters. He says that if parents can be said to have any rights in relation to their child, it is only a right to carry out the duties which the parents owe to the child. Parents, he says, have no "free-standing" rights at all. For that he relies upon the decision of the House of Lords in J. v. C. [1970] AC 668 . The statutory background to that decision was section 1 of the Guardianship of Infants Act 1925 which is as follows:

> "(1) Where in any proceeding before any court (whether or not a court within the meaning of the Guardianship of Infants Act, 1886) the custody or upbringing of an infant, or the administration of any property belonging to or held on trust for an infant, or the application of the income thereof, is in question, the court, in deciding that question, shall regard the welfare of the infant as the first and paramount consideration, and shall not take into consideration whether from any other point of view the claim of the father, or any right at common law possessed by the father, in respect of such 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."

These provisions are re-enacted in the Guardianship of Minors Act 1971, section 1.

Whether the "welfare" principle enacted by the Act of 1925 did anything more than re-state the existing Chancery doctrine in wardship cases I need not consider, but one would have thought that the language of the section was clear enough and that in any proceedings of the kind mentioned in the section, whether between parents or between a parent and a stranger, the welfare of the child is the first and paramount consideration. However, in In re Carroll (An Infant) [1931] 1 K.B. 317, a dispute arose about an illegitimate child between her mother and an adoption society to whom she had, in the past, handed over the child and who, in that time, had handed the child over to persons who wished to adopt her. The mother now wished to recover the child and place her in an institution of a particular religious denomination. The child was made a ward. The High Court and the Divisional Court both decided that it was in the best interests of the child to leave her where she was. The Court of Appeal, however, by a majority reversed those decisions. Scrutton L.J. said at p. 337 that there had been no material change in the law in the preceding 40 years save that the mother's wishes had been put on an equality with the father; that there was no case in which the court had disregarded the view of an only parent; and that the wishes of the mother as the sole parent should prevail. Slesser L.J. was of the opinion that section 1 of the Act of 1925 was irrelevant. He said, at pp. 355–356:

> "This statute, however, in my view, has confined itself to questions as between the

> rights of father and mother which I have already outlined — problems which cannot arise in the case of an illegitimate child, and ... it is difficult to see ... how it can be said from a consideration of that statute that there has been a development of thought between 1891 and 1926."

In J. v. C. [1970] AC 668 the essence of the matter was the submission of the parents that united parents were prima facie entitled to the custody of their infant child and that the court would only deprive them of care and control if they were unfitted by character, conduct or otherwise to have care and control. And it was asserted that section 1 of the Act of 1925 only applied to disputes between parents and not to disputes between parents and strangers (which was the position in J. v. C.). The House of Lords held that section 1 applied to all disputes, whether between parents themselves or between parents and strangers that the section required that in any such dispute the welfare of the child was the paramount consideration; that In re Carroll was wrong in so far as it decided to the contrary; and that since the judge had not misdirected himself in fact or law there was no ground for interfering with his decision that the welfare of the child in that case required that the child should be committed to the care of the foster parents and not to the parents. I do not think that the case is of assistance. No doubt if a child is a ward of court and a question arises whether it should or should not receive particular medical treatment, the court will determine that question as it thinks best for the welfare of the child even though that determination conflicts with the honestly held views of responsible parents. But that does not really assist in deciding whether, when there is no wardship, the parents have any rights in relation to the giving of medical advice and treatment to their children. Most children are not the subject of litigation and, simply as a matter of convenience and ordered living, some rules have to be established for regulating their affairs even though the court, in the last resort, can in the exercise of its wardship or other jurisdiction impose its own view upon the particular facts of the individual case, as to what is best for the welfare of the child. A statutory example of that is marriage. A child who is over 16 but under 18 cannot, generally, marry without the consent of both parents: see Marriage Act 1949, section 3 and Schedule 2, as amended by the Family Law Reform Act 1969, section 2. The court can however override the refusal of the parents to consent: Marriage Act 1949, section 3(1) (b).

In short, I see no reason why the decision in J. v. C. and the welfare principle to which it gives effect should be regarded as necessarily inconsistent with prima facie working rules which can be applied without prejudice to the ultimate authority of the court. The welfare principle as formulated in the statutes assumes the existence of a dispute before the court and, therefore, that there is an arbiter (the court) which can finally determine in the individual case what is best for the welfare of the child, even though reasonable persons may hold strongly differing views as to what is best. I appreciate that general rules may, in an individual case, work unsatisfactorily. There is, however, in the background, the ultimate control of the court if recourse is had to that.

I come then to the question whether parents have any relevant rights in the present case. Parliament seems clearly to have accepted that parents do have "rights" in relation to their children. Thus, the Children Act 1975, section 85(1), provides that unless a contrary intention appears "the parental rights and duties" means as respects a particular child (whether legitimate or not) "all the rights and duties" which by law the mother and father have in relation to a legitimate child and his property. Further, except under the provisions of certain separation agreements between husband and wife, a person cannot surrender or transfer any parental right or duty which he has as respects a child (section 85(2)).

And section 86 of the Children Act 1975 provides that in the Act unless the contrary appears,

"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) ..."

For the purpose of identifying any relevant rights I think one must start with custody. At common law the father had a right to custody of his legitimate child during minority. That right seems to have been more or less absolute in the absence of evidence that the father would abuse it to the detriment of the child. Thus in Rex v. De Manneville (1804) 5 East 221 the father, upon a habeas corpus, obtained custody of his eight-month-old child from its mother. Lord Ellenborough C.J. said, at p. 223: "Then [the father] having a legal right to the custody of his child, and not having abused that right, is entitled to have it restored to him." This doctrine was mitigated to some extent by two factors. First, the principle that habeas corpus would not go to compel a child who had attained the "age of discretion" to return to the father against the child's wishes. The age of discretion was 16 for girls and 14 for boys: see Thomasset v. Thomasset [1894] P 295 , 298, *per* Lindley L.J. The age of 16 seems to have derived from the Abduction Act 1557 (4 & 5 Ph. & M.c. 8) which related to the abduction of girls: see Reg. v. Howes, 3 E. & E. 332, 334 and 337. The second mitigating factor was the development in Chancery of the principle of the welfare of the child. The fusion of law and equity, with the rules of equity prevailing, which was enacted in 1875 by the Supreme Court of Judicature Act (38 & 39 Vict.c. 77) does not, however, seem to have diminished the inclination of the courts to enforce the wishes of the father. The Agar-Ellis cases (1878) 10 Ch D 49 and (1883) 24 Ch D 317 are extreme examples of this attitude. In the 1883 case, Cotton L.J. said, 24 Ch D. 317. 334:

> "It has been said that we ought to consider the interest of the ward. Undoubtedly. But this court holds this principle — that when, by birth, a child is subject to a father, it is for the general interest of families, and for the general interest of children, and really for the interest of the particular infant, that the court should not, except in very extreme cases, interfere with the discretion of the father, but leave to him the responsibility of exercising that power which nature has given him by the birth of the child."

The father in that case had put restrictions upon contact between his 16-year-old daughter and her mother. The court refused to interfere.

In the 1878 case Sir Richard Malins V.-C. said, 10 Ch D. 49, 56:

> "The father is the head of his house, he must have the control of his family ... and this court never does interfere between a father and his children unless there be an abandonment of the parental duty ..."

It seems that even in their own day the Agar-Ellis cases not surprisingly aroused strong feelings and were probably one of the causes which led to section 5 of the Guardianship of Infants Act 1886 (49 & 50 Vict.c. 27) which provided that the court might

> "upon the application of the mother of any infant ... 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 ...” See *per* Scrutton L.J. in In re Carroll (An Infant) [1931] 1 K.B. 317, 335.

Lord Denning M.R. in Hewer v. Bryant [1970] 1 Q.B. 357, 369 said that we should “get rid of the rule in In re Agar-Ellis.” The principle of the virtual supremacy of the parent's wishes stated by Cotton L.J. and Sir Richard Malins V.-C. in the passages which I have cited represent, I agree, far too extreme a notion of the parent's rights and is unacceptable; it is indeed inconsistent with the provisions of section 1 of the Guardianship of Infants Act 1925 and its successor, the Act of 1971. I do not, however, think that the common law right to custody has been abrogated. We have not been referred to any statute or authority which does that. The right has been subjected to the control of the court and, in effect, no longer belongs to the father alone — it belongs to both parents. But subject to any order of the court in relation to the individual child, it seems to me that the parents have custody. And further the custody continues during minority: see the observations of Bowen L.J. in In re Agar-Ellis 24 Ch D. 317, 335–336. Lord Denning M.R. in Hewer v. Bryant [1970] 1 Q.B. 357, despite his criticism of In re Agar-Ellis, did not doubt that legal custody should continue to 18 though as the child gets older it may, in practice, be a waning right unless the court is prepared to support it for the child's welfare.

The next question is what does custody involve. I think that its central feature is control. No doubt it involves care of the child but, without control, the care may be hindered. It is significant that in defining “legal custody” section 86 of the Children Act 1975 includes, among the rights therein comprised, the rights relating to “the place and manner in which [the child's] time is spent.” These matters depend upon control of the child's person and indeed the section refers to the child's person. If the parents are effectively to determine the place and manner in which the child's time is spent, it seems to me that the law must give them complete control of the child's person. Against that background, we have to consider first of all whether it is permissible, as the department asserts, for a doctor to give contraceptive treatment to a girl under 16 without informing the child's parents. I do not think it is. To provide contraceptive treatment to a girl of such an age must, it seems to me, be regarded as a matter of major importance in the child's life. And to do so without informing the parents is, I think, a serious interference with parental responsibility and the rights involved in custody. It seems to me to be an interference with the control of matters relative to the child and its person which the law (subject to the ultimate discretion of the court in individual cases) gives to the parents. It was accepted by Mr. Laws that if a doctor was aware that a child was a ward of court it would not be proper for him to provide contraceptive treatment without the authority of the court. I think that concession was rightly made. The court's jurisdiction is, however, essentially parental, and it does not set out to do more than a wise and caring parent would: see Reg. v. Gyngall [1893] 2 QB 232 , 241 *per* Lord Esher M.R. Exercising such jurisdiction it would certainly expect that no major decision regarding a girl under 16 should be made without reference to the court. And I think that most parents would certainly expect, in the case of a girl under 16, that they would be informed also. Such expectations in my view are fully supported by the legal rights of parents. Further, if the decision can be made by the doctor without informing the parents, the consequence may be to remove from the parents the right to obtain the courts' ruling upon whether it is for the child's welfare or not. The decision will have been taken and the treatment given. The parents may not learn of it until long afterwards. The position in relation to a girl under 16 is rendered even less acceptable by the fact that the contraceptive treatment is to enable the girl to embark upon or continue sexual relations which, for the man, will normally constitute a criminal offence under section 6 of the Sexual Offences Act 1956 (i.e., unlawful sexual intercourse with a girl under 16).

The circular refers to the “clinical judgment of the doctor.” On the evidence before us I am not clear that “clinical judgment” will normally be a factor of real consequence. The girl generally

is not ill; she is coming for contraceptive treatment to enable her to have sexual intercourse without risk of pregnancy. The problem, it seems to me, is in most cases more moral or social than clinical.

It is said that if a doctor cannot give contraceptive treatment to a girl under 16 without the knowledge of the parents, some girls may be afraid to come to the doctor at all and will risk pregnancy. I see the force of that, but all we can do in this case is to endeavour to state the existing law. If the law as it stands is thought to involve more risks to young girls than it avoids (as to which opinions may differ), Parliament may have to intervene. But to cut out the parents from knowledge of the intended treatment, bearing in mind that one is dealing with girls of 15 and under, would be an important matter of public policy.

I have not so far examined the question whether a girl under 16 could herself give consent to contraceptive treatment and so override any parental rights. Section 8(1) and (3) of the Family Law Reform Act 1969 provide:

> "(1) The consent of a minor who has attained the age of 16 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. (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."

It is said on behalf of Mrs. Gillick that subsection (1) enables a consent to be given by a minor which otherwise could not be given; and that subsection (3) merely removes any doubt that the parents' consent could still be effective. The department, however, contend that a minor of sufficient understanding can give consent, and that subsection (1) merely provides an irrebuttable presumption of sufficient understanding in the case of a person over 16. Subsection (3), it is said, merely allows proof of sufficient understanding in the individual case below 16.

That the common law developed a principle enabling a child to override parental wishes and to consent to the taking of major decisions concerning him provided it could be shown that he was of sufficient understanding seems to be unlikely. It is inconvenient in practice in that it may give rise to subsequent doubts, and difficulties of proof, as to whether the child does have sufficient understanding. The degree of such understanding might vary considerably according to the nature of the matter to be decided. The authorities in the civil law show no tendency to encourage such a rule. Thus in relation to the age of discretion Cockburn C.J. in Reg. v. Howes, 3 E. & E. 332, 336–337 said:

> "We repudiate ... 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 statute referred to is 4 & 5 Ph. & M. c. 8 which I have already mentioned.

Again, in Reg. v. Gyngall [1893] 2 QB 232 , 250 Kay L.J. said:

> "Because the court cannot inquire into every particular case the law has now fixed upon certain ages — as to boys the age of 14 and as to girls the age of 16 — up to which, as a general rule, the court will not inquire upon a habeas corpus ... as to the consent of the child to the place wherever it may be."

These quotations are dealing with habeas corpus but I think they state general objections to investigation of the varying capacities of understanding in individual children. I can see nothing in the authorities which supports, much less establishes, that, at common law, a decision (not in emergency) regarding the provision of medical treatment to a girl under 16 could have been taken without the consent of the father. As I have indicated, the paternal rights at law were very wide, and I see no indication that decisions on major matters regarding the welfare of a girl under 16 could have depended on her consent. The only relevant statutory intervention is that contained in section 8 of the Family Law Reform Act 1969 which relates only to persons over 16.

The result, in my view, is that a girl under 16 cannot give a valid consent to contraceptive treatment and is not entitled to prohibit a doctor from seeking the consent of her parents.

A possible approach to the whole matter is that while the doctor should be bound to inform the parents of his intention to provide contraceptive treatment, if the parents do not consent within a reasonable time he should be at liberty to proceed without their consent even though consent has been refused. This would enable the parents to make an application to the court to determine the matter. I do not think that is in line with the legal position. It reverses the existing legal position which, subject to the ultimate power of the court, gives the final decision to the parents and not to the doctor. That is the consequence of the right of control which, as I have indicated, seems to me to follow from the right to custody. And I do not think that persons not having custody can take upon themselves the right to give consent. I appreciate that this may produce an unsatisfactory position if, for example, the parents cannot be found or the doctor profoundly disagrees, on the particular facts of the individual case, with their refusal to give consent. In such cases the local authority can, if it thinks fit, seek to have the matter determined by the court.

In dealing with this case I would not, in any way, wish to underrate the value of the part which an experienced doctor can play in the practical resolution of the problems with which we are concerned. Nor should one underrate the value of the parents' part. They know the child and they know its history. In most cases, whatever the civil law may be, the best outcome is likely to be that which is the consequence of full co-operation between the parents and the doctor in deciding what is in the child's interest.

In so far as we are concerned, for the purposes of section 1 of the Guardianship of Minors Act 1971, with the welfare of particular children, namely the daughters of Mrs. Gillick now under the age of 16, we are dealing with children of a united family and with parents who are concerned for their well-being. That such children, while under 16, should be given contraceptive treatment without the knowledge of their parents seems to me, on the balance of probability, to be likely to be disruptive of family relationships and inimical to the children's welfare. Nor am I satisfied, on any facts before us, that it would be for their welfare that they should be given such treatment after notice to the parents but against the parents' wishes. The parents in this family are likely to know the child very well. Accepting that they may have strong views on these matters which may not be shared by others, I am not persuaded that, in relation to children of so young an age, their views should necessarily be overridden by those of the doctor (I am not referring to emergencies). It seems to me that if the parents' wishes are

to be overridden, that should be done by the court in relation to the particular circumstances of the time.

Looking at the whole matter, I think that in substance Mrs. Gillick is entitled to the relief which she seeks. I should add that while the writ refers to abortion as well as contraceptive treatment the argument before us was directed to the latter. It is not, however, suggested that there is any difference in principle between the two for the present purposes.

I have not in this judgment examined the criminal law. The judge dealt with it in order to dispose of an argument that a doctor who provided contraceptive treatment to a girl under 16 might be guilty of a criminal offence. I express no view one way or the other on that. As regards any comparison with the criminal law as regards capacity to consent, the criminal law is concerned with different problems (including, in particular, the liberty of the subject) and different considerations apply. Accordingly I do not think that one can safely determine the civil law except on the basis of the civil law authorities, more particularly in view of the use made in the common law of the age of discretion.

I agree with the conclusions (1) to (8) in the judgment of Parker L.J. and with the order which he proposes. I would allow the appeal accordingly.

EVELEIGH L.J. We are concerned with two specific issues. First, is it lawful for the council to issue instructions to the effect that contraceptive aids may be given to children under 16 years of age without involving the parent in the decision to do so, even against the parent's wishes. Secondly, whether contraceptive and/or abortion advice and/or treatment may be given to any child of the plaintiff below the age of 16 without the prior knowledge and/or consent of the child's parent or guardian. Basically these issues involve the responsibility for major decisions in relation to a child's upbringing. As appears from the judgment of Parker L.J. the first and paramount consideration in such matters is the child's welfare. There is no difference in law in relation to contraception or any other major decision, for example education or religious upbringing.

As a matter of common sense and from the authorities to which Parker and Fox L.JJ. have referred, the authority to make such decisions rests with the person having custody of the child. Mrs. Gillick is such a person and I shall use the word “parent” to cover all persons who have custody. It follows that the parent's decision must prevail unless displaced by the child's welfare. Where a court awards custody to a person, it does so upon the basis that that person is capable of making the right decision and, in consequence of the order, that person is the proper person to make the decision. A natural parent must be in the same position in the absence of a court order to the contrary. In some areas the parent's freedom to decide is circumscribed by statute, for example in education. Where this is not so, the parent's decision must be treated prima facie as being in the child's best interests. Anyone who interferes with the parent's decision must be prepared to demonstrate that the decision is not in the child's best interests. In the present case the area health authority have taken the attitude that whatever the parent's wishes or decision any child, and Mrs. Gillick's three children in particular, must be free to obtain contraceptive treatment.

I shall deal with the second declaration first. Mrs. Gillick contends that in relation to abortion or contraception she should be consulted. She wishes to have a say. She also wishes to ensure that as between herself and the doctors employed by the area health authority that she shall have the deciding voice.

Mrs. Gillick's children are not to be free to consult a doctor in confidence and to receive

treatment in confidence. However, she clearly recognises that any decision of hers must be subject to review by the court.

Mrs. Gillick's decision in this regard cannot be supported if in relation to each child the child's welfare demands that it should be otherwise. There are two ways of showing this. One, upon the general proposition that, irrespective of the particular child, such a parental decision must be wrong. Two, that in relation to each of these children considered separately there are personal considerations to make the decision wrong.

As to the first approach to this question, it is tempting to answer it by saying that many reasonable people hold opposing views upon the overall question of the desirability of providing contraceptive aids, and therefore it is impossible, as a generalisation, to say that aids should be available no matter what the personal circumstances of the child. Those who say that aids should be freely available do so on the grounds of public policy, as they see it, that the risk of illegitimate children should be avoided. Some say that those who put the opposite view do so because of out-dated inborn prejudice which fails to accord the welfare of the child the first and paramount consideration. I shall therefore briefly list some points in the argument in order to see if the choice between them points inexorably in one direction.

It is said that public policy demands that unwanted illegitimate births must be avoided. If children think that their parents will be involved they will not come for help. Not only will they not seek contraceptive advice but they will hesitate to seek advice if pregnant or after contracting a disease.

On the other side it is said that there is another way to avoid pregnancy, namely by abstinence; and that is the only 100 per cent. guarantee against pregnancy and disease. The availability of secret medical advice undermines the efforts of the parent to bring the child up with proper moral standards and encourages promiscuity. If an area health authority is permitted to let it be known that it is proper for a child to obtain secret medical advice irrespective of the parent's wishes, the authority of the parent is undermined and the stability of family life threatened.

On the one side it is said that the child must be protected against the stress which pregnancy will cause. On the other side it is pointed out that the girl who indulges in sexual intercourse may suffer from remorse not only for having herself transgressed but for involving a man who may find himself charged with a criminal offence. One would like to think that a great majority of girls would not take part in unlawful sexual intercourse if it were not made easier to do so with impunity and if they did not feel that they would be seen to be standing apart from their less inhibited associates. A parent should be helped not hindered in providing the assurance and the comfort and the advice which such a child might need.

It is accepted that the provision of a contraceptive device is preceded by a careful medical examination. The doctor concerned will have no knowledge of the child's medical history. The decision to provide a device ought not simply to be regarded as a clinical one for it involves the character of the child and her whole wellbeing. This is not a matter to be decided by one who does not know the child.

It is further argued that the courts have always lent their assistance to the parent who seeks to prevent harmful associations between the child and an undesirable man. The provision of a contraceptive device by a doctor who knows nothing of the girl or her companions may be furthering such an association.

The responsibility of a parent for the upbringing of the child is emphasised by the fact that the parent may be made to answer in the criminal courts for a child's misbehaviour. Home background and parental indifference are frequently pleaded as the reason that the child is a delinquent. Parental authority should not be undermined.

I am conscious that I have set out at greater length the case for those who oppose the scheme operated by the area health authority. It is inevitable because the authority's case is simplicity itself, namely that public policy dictates its conduct. The opponents retort that public policy demands the stability of family life.

In some families, even where the members are closely united and where the parents try to maintain high standards, the parents may prefer not to know. They are best able to understand the relationship between themselves and their children and to decide what is best. A mother may wish to protect her child against the wrath of a puritanical father should he learn that a child has sought contraceptive help.

The above observations satisfy me that it is impossible to say that a parent who adopts the attitude of Mrs. Gillick is not acting in the best interests of the child. On the other hand, I cannot say that a parent who does not seek to be involved will always be wrong. The question cannot be answered by a generalisation. I must therefore consider each of Mrs. Gillick's children individually.

It happens that, apart from the age, the evidence before the court in relation to each child is the same. Each is being brought up by capable and responsible parents in a home which seeks to maintain high religious and moral standards and the happiness of the family. We have no other evidence relevant to our inquiry. In those circumstances I find it impossible to say that Mrs. Gillick is wrong in her decision. Indeed on the evidence before us I must assume that she knows best and I think that she is right. I therefore would grant the second declaration with the minor amendment suggested by Parker L.J.

The notice referred to in the first declaration authorises the doctor employed by the area health authority to defy the wishes of a parent like Mrs. Gillick. As I find that Mrs. Gillick is entitled to the second declaration, I hope that I am not being too simplistic when I say that it must follow that to the extent that it authorises such a course, the notice is unlawful. However, the declaration claimed is in somewhat wide and loose terms. I do not think that we should do more than grant the declaration which Parker L.J. has drafted.

On my above approach to this case and the conclusion which I have reached, I do not think it necessary to examine jurisprudentially the nature of a parent's “rights.” I am aware that it is sometimes argued that statutory provisions speak of “rights” but do so only in the sense of powers. In the present case the welfare of children is our first and paramount consideration and, if a declaration of the court will serve to promote that welfare, it is not useful to investigate the distinction between “rights” and powers. I do not see why the parent should be denied relief, even if it is correct to say that a parent has no rights. In truth, however, I do not think it accurate to say that a parent has no rights. The rights may vary in their nature. Some may be only rights of imperfect obligation, but it is too sweeping a statement to say that a parent has no rights, as the judgments just delivered show.

I would emphasise the role of the court as Parker L.J. has done. We have to decide the case according to law. The relevant authorities have been referred to, and in my judgment they lead to the orders which we propose to make. I do not seek to express my own views upon the wider questions which the subject of birth control provokes. I would also emphasise that I do not

intend to lay down a rule that in every case, no matter what the question is, no matter who the child is, the parent must be consulted before any important decision can ever be arrived at in relation to the child. A person who may be involved in such a situation will have three courses open to him. He may do nothing, he may consult the parent, he may make the decision himself and act independently if constrained to do so. Each case must depend upon its own facts, and consequently I cannot say that there will never be a case where it is permissible to act in spite of the parents' wishes. Such cases, however, will be extremely rare and almost impossible to conceive when the parents are thoroughly responsible people.

I would add a word on confidentiality. A doctor's position is not an easy one. The courts recognise this. At the same time in law there is no such right which can justify silence at all times by a doctor, particularly when the welfare of a child is involved. A child may be contemplating doing something, for example something criminal or dangerous, which any sensible person would feel obliged to bring to the parent's attention for the child's protection. There is no law of confidentiality which would command silence when the welfare of the child is concerned. Because of this, I do not think that anything that I have said in relation to contraception should be influenced by arguments which we have heard as to the difficulty which the duty of confidentiality imposes upon a doctor. The alleged duty must be subject to exceptions, and if a doctor feels that he cannot recognise this in relation to contraceptive matters, he can avoid his dilemma by not accepting a child as a patient in the first place.

I have deliberately avoided a discussion of the criminal law. It is enough to say that in my opinion a doctor who prescribes a contraceptive device for a child under the age of 16 years will not necessarily be breaking the law. I think that it would be solving the problem by a sidewind if Mrs. Gillick's case were to succeed only on the basis that such treatment would be a breach of the criminal law. We are concerned with the welfare of children from all aspects.

Appeal allowed with costs, and declarations granted accordingly.

Leave to appeal.

Solicitors: Ollard & Bentley, March; Treasury Solicitor.

[Reported by PAUL MAGRATH, ESQ., Barrister-at-Law.]

APPEAL from the Court of Appeal.

This was an appeal by the Department of Health and Social Security from a decision dated 20 December 1985 of the Court of Appeal, ante, p. 118A, (Eveleigh, Fox and Parker L.JJ.) allowing an appeal by the plaintiff, Victoria Gillick, from a judgment of Woolf J. [1984] Q.B. 581 who on 26 July 1983 dismissed the plaintiff's action against the defendants, the Norfolk Area Health Authority (subsequently amended to the West Norfolk and Wisbech Area Health Authority), and the Department of Health and Social Security, claiming (i) a declaration against both defendants that on its true construction Health Notice (H.N. (80) 46), had no authority in law and gave advice which was unlawful and wrong, and which adversely affected or might adversely affect the welfare of the plaintiff's children, and/or the rights of the plaintiff as parent and custodian of the children, and/or the ability of the plaintiff properly and effectively to discharge her duties as such parent and custodian; and (ii) a declaration against the area health authority that no doctor or other professional person employed by them either in the Family Planning Service or otherwise might give any contraceptive and/or abortion advice and/or treatment to any child of the plaintiff below the age of 16 without the prior knowledge and consent of the child's parent or guardian. The Court of Appeal granted the defendants leave to appeal.

The facts are stated in the opinion of Lord Fraser of Tullybelton.

John Laws and *Ian Kennedy* for the Department of Health and Social Security. This case must be decided on judicial review principles, namely whether the Secretary of State was acting ultra vires any statutory provision. It is said by the plaintiff that in issuing the memorandum of guidance the Secretary of State misunderstood some principle of law material to the guidance, or that the guidance enshrines an erroneous view of the law which is material to the subject matter. Those propositions are put in three ways: (1) that the guidance involves a denial of a legal right which parents possess in relation to their children; (2) that the guidance, if carried into effect by doctors, would sometimes involve the commission by doctors of the criminal offence of aiding and abetting unlawful sexual intercourse; and (3) that the guidance involves the commission of criminal offences and torts by doctors and other professional people, namely assault on the child, because the child cannot in law consent to the touching involved in medical examination which would be necessary in following the guidance.

On the question of parental rights, it is essential to analyse the legal right contended for. The contention is that every parent is in English law entitled to be informed whenever a doctor or other professional person proposes to give any contraceptive advice or treatment to his or her daughter aged under 16 years, in order that the parent might seek to dissuade or prevent the doctor from so acting. That right is said to admit of no exceptions save in the case of an "emergency" and is said to be an absolute right. If that right exists, it is a right which is incapable of being policed by the court and also, paradoxically, of being enforced, because it could not be looked at by the court except in the context of being denied.

The guidance deals only with unusual or exceptional cases and contemplates parents not being informed only in the "most unusual" or "exceptional" cases. If the plaintiff accepted that, she would not object to the guidance. But the plaintiff's contention is that even in exceptional and unusual cases parents have a right to know and a doctor cannot act without the parent's knowledge. That being the position, this case is not primarily about the family circumstances of the plaintiff herself: see Parker L.J., ante, p. 121A–C. On a proper analysis the exercise of the right to know cannot be modified, qualified or prohibited on the grounds that it would be contrary to the interests of the child.

The question whether it would be wise to inform the parents cannot be tested in court without the parents being informed. Any value in keeping the matter from the parents in an individual case would be lost even if the doctor felt that disclosure to the parents would be harmful to the child. To invoke the assistance of the courts would be to throw the baby out with the bath water.

The parental right to be informed does not apparently carry with it any means of its being enforced by the person entitled to the right. If the doctor does not inform the parents, clearly the parents could not get relief in advance because they would not have the knowledge with which to sue. After the event neither the parent nor the child would have a claim for damages. Therefore it is a right which is not enforceable in law and raises the question whether in fact there is such a right in law. It also denies to the doctor any measure of discretion in relation to a child under 16 years.

The Children Act 1975 made sweeping changes to the way in which courts dealt with children. Parker L.J. was incorrect in his analysis of that Act, ante, pp. 123G — 124H, and in particular it cannot be accepted that the Act gave parents the right to determine "the place at which and manner in which [the child's] time is spent." There is a dwindling scale of parental rights from birth to the age of majority. The Act of 1975 suggests that parents' rights march with parents' duties.

In regard to the Education Act 1944, Parker L.J., ante, pp. 124H — 125C, was incorrect. Section 48(4) of the Act of 1944 does not have the effect stated by Parker L.J., ante p. 125C. Not only does section 48(4) manifestly not prohibit treatment to a child whose parent objects, but it also has an analogy to the guidance which is objected to in this appeal.

Parker L.J. was also incorrect in construing section 5(2) of the Mental Health Act 1959 which is now re-enacted in section 131(2) of the Mental Health Act 1983: see ante, p. 123E–G. Parker L.J. at p. 123D–E relied on the National Health Service (General Medical and Pharmaceutical Services) Regulations 1962 (S.I. 1962 No. 2248) which are now replaced by the Regulations of

1974 of the same name (S.I. 1974 No. 160). Those Regulations do not lend support to the contention that at common law a child under 16 years is deemed to be incapable of applying for the services of a doctor.

From section 5(1) (*b*) of the National Health Service Act 1972 it is clear that contraception is now a medical matter and is no longer a social and moral issue only.

Section 1 of the Guardianship of Minors Act 1971 which enshrines the welfare principle makes the proposition that whenever a parental right is being asserted in proceedings in which a minor's right or custody is in question, that right will be denied if the minor's welfare so requires. It is clear that that principle is not confined to litigation between parents. The principle is illuminating on whether a right of the kind asserted by the plaintiff can be upheld. It cannot be a right which the court will never enforce. Therefore any asserted parental right only has existence so far as it has consonance with the child's welfare and one can never have a case where a parent can assert a right which is contrary to the child's welfare.

Parker L.J. departs, ante, p. 130E–F, from the effect of section 1 of the Act of 1971 when he says that the court will assist "to buttress and support the legal right" of the parent. That is what a court will not do, and a parent cannot insist on the enforcement of a right which is contrary to the welfare of the child. Parker L.J. explicitly recognises, ante p. 133C–F, that the enforcement of the right contended for by the plaintiff might lead in individual cases to tragic consequences.

There might be cases where parental rights should not be enforced because of real family breakdown and where there is danger to the child's physical and mental health. The law does not recognise a parental right which is inconsistent with the child's welfare.

The Abduction Act 1557 (4 & 5 Ph. & M.c.8) is an Act which was passed for the protection of the property of heiresses. It is apparent from the preamble to the Act that it was dealing with the position of heiresses who were sought to be taken in marriage by persons who were after their fortunes. That was made a criminal offence and a penalty was imposed. In Reg. v. Howes (1860) 3 E. & E. 332 Cockburn C.J. was dealing with the Act of 1557 when he supported the concept of parental rights and specified 16 as the age until which a child could not leave the parent. Parker L.J. relied on this case although it was an abduction case in which the question was whether or not a child could leave the custody of the parent and begin an independent life. The Act of 1557 was repealed and replaced by the Offences against the Person Act 1828 (9 Geo. 4,c.31) which does not so clearly reflect the protection of property as does the Act of 1557.

There are two possibilities in the present case. First that a doctor with a patient under 16 years has no discretion to act without the parent's consent, and second that the doctor can act in exceptional cases. The second of these possibilities is no more than that the medical profession has a duty and a discretion to act in the patient's best interests.

It is not necessary for the department to submit that a girl under 16 has the wisdom of an adult. It has merely to be shown that a girl of that age has the capacity to consent to medical treatment. There is no reason to suppose that every girl under 16 years is incompetent to decide whether to practise contraception. Capacity to consent is a question of fact in every case: see Reg. v. D. [1984] A.C. 778; Reg. v. Howard [1966] 1 W.L.R. 13 and Reg. v. Harling [1938] 1 All E.R. 307. The concern in the end is about how a doctor is to perform his professional duty.

In re Agar-Ellis [(1883) 24 Ch D 317](#) was a case in which the father prevented the mother from freely communicating with the daughter. The mother and the daughter applied to the court for free access, but the court decided that although it regretted the father's decision it still could not interfere with his rights based on the Victorian view of the father and child relationship. It is an archaic view which is quite out of line with 20th-century reasoning and its importance is confined to legal history. However, the Court of Appeal heavily relied on it: see ante, pp. 128B–C, 142G. The Court of Appeal followed an outdated trend of cases.

Hewer v. Bryant [1970] 1 Q.B. 357 shows that a parent's legal right over a child is a dwindling right until a child reaches majority. Parker L.J. has misinterpreted that case, ante, p. 130D–F.

J. v. C. [1970] AC 668 is an important case in the context of parental rights and is high authority for the proposition that the law has not stood still in that field. It shows the contrast

between the old view and the present one and asserts that the welfare of the infant is the paramount consideration, not only as between parents but also in disputes with strangers and as between strangers. The judgments of the Court of Appeal do not truly reflect the importance of this case: see ante, pp. 127C–D, 140C–E.

The court's purpose can never be to vindicate a parent's rights. If the court thinks that there is inherent harm to the welfare of the child in giving a doctor the discretion to decide on matters relating to the child, that would be relevant. The question is whether a doctor should have a discretion to act in the best interests of the child without having to resort to the court.

A doctor in assessing the consequences of a 15-year-old girl getting pregnant is assessing a clinical matter. If the doctor's clinical judgment could only be carried into effect if he got a court order, that might involve dangers to the child. It is better to have some. rather than no, discretion in the doctor.

The guidance does nothing to encourage the doctor to transgress any principle of law. It is dealing with professional people who have duties recognised by the law and high ethical standards, acting as experts. The need to have regard to the importance of family life is enshrined in the guidance.

In In re N. (Minors) (Parental Rights) [1974] Fam. 40, 46, Ormrod J. does not mention a right to control children when dealing with parental rights, but this case is of limited assistance only.

Three further questions arise. (1) Does the law relating to the duties and powers of doctors demonstrate a scope or discretion for action by doctors such that the guidance is lawful because it merely describes such discretion? That question may perhaps be determinative of the appeal. (2) What separate considerations arise in relation to the second declaration as compared to the first? (3) What view should be taken of the attempt to invoke the law to strike down the guidance, having regard to the fact that it is apparently advice and not an executive act?

The statutes and cases looked at indicate the existence at some time or another of fathers' rights, but that has gone from our law altogether and there is no longer room for the suggestion that as a matter of law the father has more rights than the mother. The rights of parents give rise to the welfare principle, and no rights can prevail against it. All parents' rights are is the power to act for the welfare of the child. Thus where the question is as between the parent's duty and the doctor's duty, there is no conflict in law between those duties since they are duties to act in the best interests of the child.

The question of custody in abduction cases from the Act of 1557 of Philip and Mary onwards is different from the question of what parents might do while the child is in their custody. Therefore those cases are of no help in resolving the present appeal except that the policy remains that as a general rule children should be in the custody of their parents until they are 16 years.

The wider concept of custody, namely the custody that a parent has until a child reaches the age of majority, and the narrower concept of custody, limiting a parent's overall physical control over a child, was explained by Sachs L.J. in Hewer v. Bryant [1970] 1 Q.B. 357.

The question in this appeal has become whether a doctor faced with a girl under the age of 16 asking for, and in his opinion needing, contraceptive advice and treatment without her parents' consent, is required by law to refuse to give such advice and treatment in every case.

The cases on the age of discretion are of no assistance on the issue of the child's capacity to consent to medical examination which would otherwise be an assault. Therefore it would be necessary to look at the common law for guidance on the capacity to consent. Reg. v. D. [1984] A.C. 778 is authority for the proposition that the capacity to consent is a question of fact in every case depending on the child's age and understanding. The view that every child under 16 is incapable of giving consent to medical treatment flies in the face of Reg. v. D. In the Court of Appeal Eveleigh and Fox L.JJ. did not refer to Reg. v. D. and it is unclear what Parker L.J. is saying about it. The criminal law has found that a child under 16 can be capable of consenting and Fox L.J. was incorrect in his conclusions, ante, p. 145A–E Reg. v. Hayes [1977] 1 W.L.R. 234, a case relating to the capacity of a child to give sworn evidence, shows that the law is flexible as to

the age at which a child should give sworn evidence. It is a question of fact depending on the understanding of the child.

On the question whether a doctor in prescribing contraceptives to a girl under 16 years would be committing the crime of aiding and abetting unlawful sexual intercourse, the department adopts the reasoning of Woolf J. in his judgment at first instance in [1984] Q.B. 581, 593–595.

A doctor must decide, in the light of his training and in the light of his knowledge of his patient, what information should be provided to the patient: see Sidaway v. Board of Governors of the Bethlem Royal Hospital and the Maudsley Hospital [1985] AC 871 . That principle applies to the new factors of the present appeal and a doctor must have a discretion to conceal information from a third party, namely the parent, if it is in the interests of his patient. If a doctor has undertaken to give “treatment” that includes contraceptive treatment, and therefore he owes all the duties to his patient that are owed in the giving of treatment.

The guidance starts with the premise that doctors would be true to high professional and ethical standards. It was not intended to police bad doctors but to guide those who were doing their best to perform their duty. Any attempt to lay down a rule for doctors would involve defining “clinical judgment,” which could not be defined save by reference to individual cases. The guidance is dealing with an area in which examples are multifarious, and in attempting to lay down a rule their Lordships' House would not be performing a law making or law developing exercise, but would be categorising medical practice. It would therefore not be a rule of law. The question is how doctors are to carry out their duties, and that is a question which cannot be answered fully by reference to legal rules.

There are constraints recognised by the law on what a doctor might do, given that he must act in the best interests of his patients. None of those constraints amounts to a rule. The criminal law provides specific constraints in specific fields as to what a doctor was not allowed to do. A doctor has a duty to exercise due care and professional skill, and the law will enforce that duty. A doctor must also act in accordance with the ethics of his profession and he is liable to disciplinary proceedings with legal sanctions if he does not, with ultimate appeal to the Privy Council. Patients must have the capacity to consent to any treatment that he proposes, and that capacity must be in the sense defined in Reg. v. D. [1984] A.C. 778. The absence of the capacity to consent would prevent the doctor from acting. There is also the constraint of the exceptional ease. If a doctor ignores family ties as set out in the guidance he would not be acting in accordance with it. A further constraint is the veil of ignorance. A doctor must have enough information to be convinced that he is right.

It is impossible to make rules as to how individually a doctor is to act. However, the existence of the constraints is a powerful factor against the making of rules.

It may be said that there is conflict in the present appeal between the parent and the doctor. But both parent and doctor have duties to a common end, namely the welfare of the child. The parent has a general duty and the doctor a specific one. If the doctor considers that the child should have contraceptives for health reasons, he would be acting within his sphere of competence and would be entitled to prescribe. That would be a rare case but it is a possibility. A doctor's duty is not only to treat people who are ill but also to promote the health of his patients. It could be said therefore that there is no rule of law which absolutely prohibits a doctor from acting to provide contraceptive advice or treatment to any girl under the age of 16 who asks for it and requests that her parents should not be told. A doctor's power to act in such a case is legally constrained by provisions of the criminal law, requirements of the doctor's duty and the requirement of the patient's capacity to consent. In carrying out his duty the doctor will act on the presumption that the patient is the person whose decision as to contraceptive treatment should prevail. That is a rebuttable presumption.

The proposition that responsible parents acting upon their responsibility must always have their wishes prevail is in fact to assert an irrebuttable presumption and is therefore wrong as a matter of application of a legal principle. That is qualified by the proposition that a doctor, if he is to act within the constraints identified, is unlikely to be able to act contrary to the presumption.

If the proposition is that there are some cases in which the doctor has no discretion at all, that must be looked at with care. Such cases are said to be cases where the parents are carrying out their responsibility to the child. How is the doctor to ascertain that a particular case is within the prohibited area? It requires him also to make some sort of value judgment about the parents even if they are parents who on the face of it live as a united family. There could be even within that prohibited area a whole range of cases which have to be looked at. The proposition would make no distinction between a girl who is already having sexual intercourse and another who is not.

Where the court is asked for relief by way of a declaration, if there is no evidence of a present or threatened situation which requires such a declaration, the court should not grant it. In the absence of any special evidence, it is not a right use of the court's power to seek a declaration.

There are two aspects to the reviewability of the guidance. First that it is incapable of being judicially reviewed because it contains advice only and contains no executive decision. Secondly, whether advice only can be reviewed. The subject of every judicial review is a decision which affects some other person: see Council of Civil Service Unions v. Minister for the Civil Service [1985] AC 374 . It is not possible to identify in the guidance any legal solecism. Therefore unless as an absolute rule a doctor has no discretion to act, the guidance is not unlawful.

It is difficult to find any true point of law in the guidance, and the House of Lords is being asked to legislate for the practice of the medical profession. The guidance itself makes clear that the area within which this case lies involves a whole myriad of possible situations. Therefore there are great dangers in attempting to lay down rules unless it is an absolute rule. The department's guidance is true to the legal position of parents and the legal position of doctors. The reconciliation between a doctor's duty and a parent's duty is that both owe a duty to the child.

Gerard Wright Q.C., David Poole Q.C. and *Patrick Field* for the plaintiff. Parents have the legal responsibility for the physical and moral care and upbringing of their children. Within the concept of parenthood is included those who are placed in loco parentis by the courts or by virtue of statutory powers. The law supports that responsibility by granting and enforcing a power or right of control which extends to all major decisions concerning the welfare of the child in question. In the case of the parents, the courts and only the courts or someone endowed with statutory powers may limit or intervene in the exercise of the parental power and responsibility. In the case of the person possessing statutory powers, only the courts, unless expressly excluded by statute, may intervene. Where the court is in loco parentis as in wardship, no one may lawfully intervene. The duration of that responsibility and power is (a) in wardship, the full period of wardship which may extend throughout minority and up to majority; (b) in statutory guardianship, the full period granted by the statute in question; and (c) in parenthood, up to what for 125 years the common law has recognised as the age of discretion, namely, in females the age of 16.

“Major decisions” extend to and include a decision as to contraceptive treatment. A doctor has no right or power or discretion to make his own independent decision as to contraceptive treatment whatever the wishes of the female child in question. His duty is to advise and assist the parent, or person in loco parentis, or the court, in carrying out that party's duty to care for the child in question. Should he discover on full and proper inquiry that the child in question is entirely free from parental control and that there is no one in loco parentis, his duty is to recognise the fact that the child is in moral danger and to report the matter to those best qualified to deal with such a situation, namely, the social services. The correspondence with the area health authority indicates an assertion by them of a right in its doctors and other servants and agents to ignore and invade the parental responsibility and control and is therefore unlawful and in breach of the legal right implied in that responsibility. Consequently the plaintiff is entitled to the second declaration. The area health authority based its attitude on its interpretation of the guidelines. The interpretation which has been contended for is that a doctor in his sole clinical judgment may in any case override and supersede the wishes of a parent and may provide contraceptive treatment irrespective of the parents' wishes. If and in so far as that is a correct or possible interpretation of the guidance, the advice it provides is contrary to law.

Before the National Health Service was set up, the doctor had a contract with the parent to treat the child. That was a fulfilment of the parent's duty to care for the child. The doctor had no free standing right and the parent had the right to decide on what treatment the child should have.

A minor will only be bound by a contract for necessaries. The general rule is that all other contracts entered into by a minor are voidable at his instance. There might be a contract for "necessaries" with a doctor. The minor is not bound contractually on the basis that he was legally capable of a consensual contract, but quasi-contractually because he is liable to pay a reasonable price for beneficial services. Contraceptive services are not "necessaries." A child cannot sue and can only sue through a next friend.

Before the National Health Service medical care was obtained by contract. Section 48A of the Education Act 1944 constituted an erosion of parental power in the general interest of the community. Pupils of educational establishments might have to submit to medical examination. In those circumstances the parent would be required to submit the child for medical examination and penalties would be attached for non-compliance. With the establishment of the National Health Service the provision of general medical services by doctors is no longer contractual and there is no payment for medical advice. The statutory provisions deal only with general medical services and there are no regulations which deal with clinics which are set up by the Area Health Authority. The regulations are therefore not of assistance to the department in this appeal.

The clinics are completely anonymous to protect the woman's privacy. The woman has a right to ask that her general practitioner should not be informed of the fact that she has sought advice from the clinic. Such confidentiality and privacy is entirely appropriate for the adult woman but it is not appropriate for the under-16-year-old.

Parents have certain duties and in order to perform them they must have certain powers which are parents' "rights." The parents must always decide on questions relating to the child's welfare, but their decision can be challenged in the courts. Therefore a parent is always subject to the court. A duty of the parent is a duty to provide medical services if the child needs them. A parent brings in the doctor to fulfil that duty. If the parent and doctor are in conflict, the doctor does not have the right to make a decision on his own.

The department's guidance places no lower age limit at all on girls who might be treated but is merely talking about girls under the age of 16 years. It envisages that the child has a parent, guardian or person in loco parentis.

There are three categories of girls who would not want their parents informed that they are seeking contraceptive treatment: (1) those who are in open rebellion with their parents; (2) those who are in tacit rebellion against their parents and have not informed them of their decision to have contraceptives; and (3) those who are living away from their parents and are de facto independent. In the case of the third category the doctor would not be interfering with parental rights.

A doctor's duty is to give medical advice and treatment. It is accepted that it is unwise for a girl under the age of 16 years to become pregnant. The decision whether to put a girl on contraceptives is a social and moral one, not a medical decision. A doctor should not be a court of appeal from the parent.

The guidance indicates to doctors that they may properly reach a decision to prescribe contraceptives without telling the parents or getting their consent. That is a decision which is entirely within the parental sphere of responsibility. The guidance is so widely drafted that it goes too far and is not in fact confined to "exceptional cases." The exceptions are too wide. The examples given of people who might suffer if confidentiality is not maintained are not the individuals seen by the doctor. The risk contemplated is the harm which might be caused to those who *ought* to come to the clinic and might not. Therefore this is a policy decision which is not related to the patient that the doctor is in fact treating. The individual interests of the child who is before the doctor are sacrificed in the interests of others who might be deterred. The interests of the individual child are sacrificed in the interests of this policy.

All parents have a duty to care for their children. It is a natural duty and every species, including the human species, cares for its young. Parents have a legal duty to care for their children and it is a criminal offence to neglect a child under 16 years. Parents also have a moral duty to care for their children. The duty is to be responsible for the physical and moral upbringing of the child. Those two elements are both important and if either one of them is neglected society may suffer. Therefore the primary duty of the parent is towards the physical and moral welfare of the child. The parent has a right to custody and guardianship of the child which is vital to the performance of the parental duty. At common law a parent has a right to possession of the child.

Although the Act of 1557 of Philip and Mary was rooted in the protection of property, it gave particular protection to the girl herself and it was an offence to “deflower.”

The parental right is not absolute and a parent who fails to perform his duty is subject to the criminal law. Circumstances may be such that a parental decision is questioned, but such questioning should be done through proceedings in the court and not by the independent action of the doctor.

This appeal is not about parents' rights against children's rights. It is about doctors' rights. It is contended on behalf of the department that doctors have a special right to interfere with parents' rights. It is a claim of a right in a doctor to act without parental consent or the consent of the court. The question is whether doctors have a right to act as they think fit.

The consequences of a parent's failure to perform his duty is that the local authority can vest in itself the parent's rights. The local authority has power to walk in where the parental responsibility has failed or is failing. But if there is a chance that parental responsibility can be restored, the local authority has a duty to assist in getting the child back with the parent. That shows the necessity for the continuance of parental rights and duties.

When a local authority passes a resolution vesting the parent's rights in itself, the parent has to be informed and has a right to object and to come to court and oppose the resolution. It cannot be done in secret as the doctors claim the right to do. Therefore under the legislation parental rights are not eroded. Any procedure for interfering with or removing parental rights is carefully controlled by statute and there is the requirement to give notice to the parent and the parent has a right to invoke the court. Over and above the statutory provisions which promote parental duty the court has a supervisory duty as parens patriae. It may be necessary for the parent to seek the assistance of the court not only up to the age of 16 but right up to the age of majority.

In Hewer v. Bryant [1970] 1 Q.B. 357, 369 Lord Denning M.R. while referring to the “dwindling” rights of parents still accepts that there is the need for some control and guidance from the parent over the whole period of minority. Sachs L.J. spelled this out in greater detail. He said that a father had a personal power physically to control an infant until the years of discretion. He accepted totally the common law principle of the age of discretion within which the parent has total control before the rights begin to dwindle.

The doctor's duty in relation to the child is to help the parents to perform their duties. The extent of the parental responsibility is not absolute but is subject to the control of the courts. Subject to that there must be no invasion of the parental duty.

The department's guidance is intended to pre-empt the control of the court. Even when a doctor acts in a genuine emergency without the consent of the parents of a patient aged under 16 years, he must not thereafter conceal from the parents the fact that he has acted. In regard to contraception, it must be accepted that the girl is in a disaster situation and is in moral danger. It is not a situation in which the parents should be excluded.

Even the most primitive systems of law distinguish between majority and minority in order to protect children from their own indiscretions. The question is where the dividing line should be drawn between childhood and adulthood. In European systems calendar age indicates where the line is to be drawn and intellectual capacity is irrelevant. However precocious a child may be, he is still in the eyes of the law an infant or minor until the relevant age of majority.

It is a crime to have unlawful sexual intercourse with a girl under the age of 16 years. A girl under the age of 16 has no capacity to consent, but if she is willing the offence changes from the more serious one of rape to the less serious one of having unlawful sexual intercourse with a girl under the age of 16/13 years. Evidence of the use of force or the overcoming of resistance is not necessary in Scots Law where the girl is a pupil, i.e. below the calendar age of 12: see Reg. v. Sweenie (1858) 8 Cox C.C. 223.

Under the law at present, minority continues up to the age of 18, but 14 has come to be of special significance because that is the age at which a child is deemed to be capable of crime. It is not correct to say that there is no age of discretion and the age of discretion is rooted in the common law. In the specific area of sexual decisions Parliament has intervened through the criminal law to indicate a fixed age below which a girl cannot consent. That was for the protection of young girls and it is in that very area that the department is proposing to interfere. As a matter of public policy, sexual intercourse is the very thing from which the girl is being protected.

The guidance has the effect of taking away from the girl the protection which she most certainly needs and of usurping the parental position. The department in its correspondence with the plaintiff refers to the “final decision” which is not in the guidelines. The plaintiff is a mother with children living at home who is concerned enough to ask that *her* children should not be treated without her consent. It would have been perfectly possible for the area health authority to give her the assurances sought.

All that is derived from Reg. v. D. [1984] A.C. 778 is that the child's capacity to consent is a factor to be considered but is not the overall deciding factor. The welfare principle will always override. That case is distinguishable from the present appeal because it was about kidnapping which is a serious criminal offence and in those circumstances the court would not be in favour of an arbitrary age of discretion.

The provision of contraceptive treatment to girls under the age of 16 either constitutes criminal conduct in itself or is so closely analogous to it as to be contrary to public policy.

Poole Q. C. following. There will always be a problem of enforceability of the decision in this appeal, irrespective of what that decision might be. It would therefore be necessary for their Lordships' House to spell out the law.

A doctor's duty of confidentiality contained in the Hippocratic oath is a qualified one. The duty of confidentiality also has certain exceptions. A patient can give consent to others being informed. A doctor may discuss the patient's case with close relatives of the patient or with colleagues who might also be concerned with the care of the patient. There might be a statutory duty of notification, as for example, in the case of an infectious disease. There might be the sphere of medical research in which details of the patient's case might be divulged. Where a child is living with the parents, a doctor who communicates with a parent who is responsible for the child would not be in breach of confidence. At common law the doctor would in such a case be free to make disclosure to the parents.

When faced with a child patient, the doctor's duty of confidentiality would be adjusted to take in the child's lack of capacity to consent and the parental responsibility.

Laws in reply. There are certain negative submissions on which this appeal does *not* turn because they are not disputed by the department. It is not concerned with the argument, which is accepted, that the law recognises the powers and duties of parents over their minor children. It does not dispute that the law forbids the abduction of a child under the age of 16 from the custody of the parent. It accepts that the notion of the parent's right to custody involves control, although control dwindles as the child grows older. It is not disputed that in some circumstances it might be possible for a doctor to commit the criminal offence of aiding and abetting unlawful sexual intercourse, but it cannot be said that every time a doctor prescribes contraceptives for a girl under 16 years he is acting criminally. Nor is this a case about the circumstances in which it would be wise or foolish for a doctor to prescribe contraceptives for a girl under 16.

The statutes do not cast any light on the content of parents' rights although the statutes deal with the law relating to abduction. However those provisions do not provide the answer to the

questions in the present appeal which is dealing with an uncharted area. A doctor in prescribing for and advising a child without the parents' knowledge is not abducting it.

The plaintiff did not refer to the case of Sidaway v. Board of Governors of the Bethlem Royal Hospital and the Maudsley Hospital [1985] AC 871 and in the area of doctors' duties it would be difficult to ignore that case. It shows that in certain cases doctors have the right to withhold information even from the patient himself.

The plaintiff's case depends upon establishing an absolute rule that parents' rights must not be invaded even in exceptional cases and that a doctor acting without the consent of parents would be acting outside the common law. [Reference was made to the General Medical Council's publication "Professional Conduct and Discipline: Fitness to Practise" (April 1985).]

Wright Q.C. invited to reply on the General Medical Council's publication. The book gives communication with relatives as an exception to confidentiality between doctor and patient: see p. 20. One wonders why there is no such exception when the physical and normal welfare of a child is at risk.

The area health authority did not appear and was not represented.

Their Lordships took time for consideration.

17 October. 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 D.H.S.S.") 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 they were represented by the same counsel as the D.H.S.S.

In December 1980, the D.H.S.S. 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. Secondly, 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.

Thirdly, I must mention a procedural matter. The declaration which is claimed against the D.H.S.S., 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 [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's case which was on 25 November 1982. Accordingly, Mr. Laws, who appeared for the D.H.S.S.,

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 (H.S.C. (I.S.) 32) from the D.H.S.S. 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 whilst 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 A.H.A. 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 D.H.S.S., in which she seeks the following declarations (as amended before the master):

> "(i) A declaration against the [area health authority] and the [D.H.S.S.] that 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 the plaintiff's said children, and/or the rights of the plaintiff as parent and custodian of the said children, and/or the ability of the plaintiff 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 the plaintiff below the age of 16 without the prior knowledge and consent of the said child's parent or guardian."

Woolf J. [1984] Q.B. 581 refused to grant the declarations sought by Mrs. Gillick and dismissed the action. The Court of Appeal (Eveleigh, Fox and Parker L.JJ.), ante, p. 118A, allowed the appeal and granted the declarations. Against that decision the D.H.S.S. 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 L.J. in the Court of Appeal, ante p. 122C, 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 ("N.H.S."), and the appeal therefore only directly

concerns doctors and other persons working in the N.H.S. I shall refer throughout to doctors, to include bevitatis causa other professional persons working in the N.H.S.

The first statutory provision for contraceptive advice and treatment in the N.H.S. was made by section 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 Act of 1967 was repealed by the National Health Service Reorganisation Act 1973 which, by section 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 section 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 section 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.

(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 section 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 16 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. (2) In this section 'surgical, medical or dental treatment' includes ... (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 section 8(1) 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 subsection (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 subsection (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 (S.I. 1974 No. 160) as amended by the National Health Service (General Medical and Pharmaceutical Services) Amendment Regulations 1975 (S.I. 1975 No. 719). These regulations prescribe the mechanism by which the relationship of doctor and patient under the National Health Service 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 regulation 2(1), regulations 6(1) (*a*) and 14(2) (*a*) and Schedule 1 paragraph 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 regulation 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 regulation 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; ..." (Emphasis added).

The words in paragraph (*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 contraceptive 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 section 131 of the Mental Health Act 1983 which provides for informal admission of patients to mental hospitals. It provides by subsection (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 section 48 of the Education Act 1944 which deals with medical inspection and treatment of pupils at state school. Section 48(3) which imposes 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, section 3 and Schedule 5. The Act of 1973 in turn was replaced by the National Health Service Act 1977, section 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 provided under section 48 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 medical treatment provided under this section, 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 Reg. v. Howard [1966] 1 W.L.R. 13, 15 when Lord Parker C.J. said:

> "in the case of a girl under 16, 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 16 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 Mr. Laws for the D.H.S.S. 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 Abduction Act 1557 (4 & 5 Ph. & M.c.8) for punishing:

> "such as shall take away maidens that be inheritors, being within the age of 16 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 Offences against the Person Act 1828 (9 Geo. 4,c.31). We were referred to section 20 of the Act of 1828, 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 a court order or to abandonment of parents' duties).

It was, I think, accepted both by Mrs. Gillick and by the D.H.S.S., 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 Commentaries,* 17th ed. (1830), vol. 1, p. 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 section 1 of the Guardianship of Minors Act 1971 as follows:

> "Where in any proceedings before any court ... (*a*) the 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, or any right at common law possessed by the father, in respect of such 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, ante, p. 118A, Parker L.J. 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. The learned Lord Justice went on ante p. 124F–G:

> "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 L.J. 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 my noble and learned friend, Lord Brandon of Oakbrook, with which the other noble and learned Lords who were present agreed, in Reg. v. D. [1984] A.C. 778. 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, my noble and learned friend said, at p. 806:

> "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 C.J. in Reg. v. Howes (1860) 3 E. & E. 332, 336–337 in these words:

> "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 16 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 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 In re Agar-Ellis (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 daughter 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 [1970] 1 Q.B. 357, 369, Lord Denning M.R. said:

> "I would get rid of the rule in 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 a shilling. 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 of the Committee on the Age of Majority [Cmnd. 3342, 1967], that the legal right of a parent to the custody of a child ends at the 18th birtiday: and even up till then, it is a dwindling right which the courts will hesitate to enforce against the wishes of the child, and the more so 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. [1970] AC 668 Lord Guest and Lord MacDermott referred to the decision in Agar-Ellis, 24 Ch D. 317 as an example of the almost absolute power asserted by the father over his children before the Judicature Act 1873 and plainly thought such an assertion was out of place at the present time: see Lord MacDermott at pp. 703–704. In Reg. v. D. [1984] A.C. 778 Lord Brandon of Oakbrook cited 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 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 L.J. pointed out in the Court of Appeal, ante, p. 141H, the Agar-Ellis cases (1878) 10 Ch D 49 ; 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 (49 & 50 Vict.c.27) which, by section 5, provided that the court may:

> "upon the application of the mother of any infant [whether over 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 ..." (Emphasis added).

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 upon 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 D.H.S.S. 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 upon advice to abstain. We were told that in a significant number of cases such abstinence could not reasonably be expected. An example is In re P. (A Minor) (1981) 80 L.G.R. 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 learned judge is reported to have said, at p. 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 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 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 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 section 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 upon 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 section 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, sections 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] Q.B. 581, 595G. Accordingly, I regard this contention as irrelevant to the question that we have to answer in this appeal. Parker L.J. in the Court of Appeal, ante, p. 118A, 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 L.J. expressed his conclusion on this part of the case as follows, ante, p. 137F–G:

> "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 authority should provide facilities which will 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 National Health Service 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 of Tullybelton. 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 In re P. (A Minor), 80 L.G.R. 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. No 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 upon our attention, do call for a brief consideration.

Procedure

The 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; i.e. the classical "Wednesbury" case for judicial review: Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation [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 R.S.C., 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 United Kingdom v. Department of Health and Social Security [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 [1983] 2 AC 237 , 285D, where Lord Diplock, with whose opinion their other Lordships (Lord Fraser of Tullybelton, Lord Keith of Kinkel, Lord Bridge of Harwich and Lord Brightman) 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 upon 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* 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 order 53 for the protection of such authorities." [Emphasis supplied.]

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 [1983] 2 AC 237 .

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 [1983] 2 AC 237 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 upon 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 [1983] 2 AC 237 . 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, at p. 285F, 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."

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 upon 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 upon the guidance declaration, which upon the evidence they were 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 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."

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 upon 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 upon 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 section 5 of the National Health Service Act 1977 (re-enacting earlier legislation) and section 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 section 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 subsection (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 of Tullybelton, 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 L.J. refers in his judgment in the Court of Appeal, ante P. 118A, any encouragement, let alone any compelling reasons, 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 of Tullybelton, 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 woman. 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), particularly 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 upon. 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 their 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, 10 Ch D. 49; 24 Ch D. 317 of the late 19th 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 [1970] 1 Q.B. 357, an important case to which I shall return later. Yet the decisions of earlier generations may well afford clues to the true principle of the law: e.g. Reg. v. Howes (1860) 3 E. & E. 332, 336, 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 under-rated):

> "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." 1 Bligh 486, quoted by Lord Campbell, *Lives of the Lord Chancellors,* 4th ed. (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 section 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 L.J., ante,

pp. 125G — 126C, quoting Heilbron J. in In re D. (A Minor) (Wardship: Sterilisation) [1976] Fam. 185, 193–194, 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.

Secondly, 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 L.J. has felicitously described as the “bundle of rights” (Hewer v. Bryant [1970] 1 Q.B. 357, 373) which together constitute the rights of custody, care, and control. 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 L.JJ. noted in the Court of Appeal, the modern statute law recognises the existence of parental right: e.g. sections 85 and 86 of the Children Act 1975 and sections 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,* 17th ed. (1830), vol. 1, chs. 16 and 17. He analyses the duty of the parent as the “maintenance ... protection, and ... education” of the child: 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:” op. cit., p. 452. In chapter 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”: 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: pp. 462–463. He then embarks upon 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 17 he could be an executor — all these rights and responsibilities being capable of his acquiring before reaching the age of majority at 21: 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 themselves on a view of the statute law which I do not share and upon their view of the effect of the older case law which for the reasons already given I cannot accept. They 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 upon 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 upon 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 M.R. captured the spirit and principle of the law when he said in Hewer v. Bryant [1970] 1 Q.B. 357, 369:

> "I would get rid of the rule in In re Agar-Ellis, 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 a shilling. 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 of the Committee on the Age of Majority [Cmnd. 3342, 1967], that the legal right of a parent to the custody of a child ends at the 18th birthday: and even up till then, it is a dwindling right which the courts will hesitate to enforce against the wishes of the child, and the more so 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. [1970] AC 668 where their Lordships clearly recognised as out of place the assertion in the Agar-Ellis cases, 10 Ch D. 49; 24 Ch D. 317 of a father's power bordering on "patria potestas." It is consistent with the view of Lord Parker C.J. in Reg. v. Howard [1966] 1 W.L.R. 13, 14 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 Reg. v. D. [1984] A.C. 778, a case to which I shall return.

For the reasons which I have endeavoured to develop much of the case law of the 19th and earlier centuries is no guide to the application of the law in the conditions of today. The Agar-Ellis cases, 10 Ch D. 49; 24 Ch D. 317 (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 C.J. in Reg. v. Howes (1860) 3 E. & E. 332, which Parker L.J. 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 C.J. said, at pp. 336–337:

> "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 21, 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 16 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 of 1557, 4 & 5 Ph. & M. c.8). While it is unrealistic today to treat a 16th 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 C.J. 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 Reg. v. D. [1984] A.C. 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 upon 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 of Oakbrook, with whom their other Lordships agreed, commented that this might well have been the view of the legislature and the courts in the 19th century, but had this to say about parental right and a child's capacity in our time to give or withhold a valid consent, at pp. 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, In re Agar-Ellis (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."

And later, at p. 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 upon 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. [1984] Q.B. 581, 597, I find illuminating and helpful the judgment of Addy J. of the Ontario High Court in Johnston v. Wellesley Hospital (1970) 17 D.L.R. (3d) 139, a passage from which he quotes in his judgment. The key passage, at p. 143, bears repetition:

> "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 that 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 upon criminality or public 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 of Tullybelton, observes, upon 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 upon 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: section 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 bone 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 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 they do 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” (“the memorandum”) on the subject of contraceptive advice and treatment for children under 16 issued to all health authorities by the present appellants, the Department of

Health and Social Security ("D.H.S.S."). The terms of the memorandum are set out in full in the speeches of my noble and learned friends, Lord Fraser of Tullybelton 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 D.H.S.S. 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 D.H.S.S. 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 D.H.S.S. in the exercise of a power conferred upon 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 section 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 (Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation [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 the 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 v. Department of Health and Social Security [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: [1981] 1 All ER 545 . The Royal College of Nursing ("R.C.N.") and the D.H.S.S. had received conflicting legal advice as to 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 R.C.N. had issued a memorandum and a later circular to its members to the effect that it was not lawful. The D.H.S.S. 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 R.C.N. against the D.H.S.S. for a suitable declaration and the D.H.S.S. 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 R.C.N. 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 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 R.C.N. But by a majority of three to two in your Lordships' House the D.H.S.S. carried the day and obtained the declaration they 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 [1981] AC 800 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 proferring 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 D.H.S.S. 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 of Oakbrook, 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. [1984] Q.B. 581, 593B–595G, 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 upon 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 In re P. (A Minor), 80 L.G.R. 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 of Tullybelton 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 D.H.S.S. 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 this 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 to 16.

It is, I think, sufficient to begin with the Criminal Law Amendment Act 1885 (48 & 49 Vict.c.69) 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 Act of 1885, which contained sections 2 to 12, had the cross-heading "Protection of Women and Girls." Sections 4 and 5 provided, so far as material:

> "4. Any person who — unlawfully and carnally knows any girl under the age of 13 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 13 years and under the age of 16 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 Reg. v. Tyrrell [1894] 1 QB 710 it was held by the Court of 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 section 5 of the Criminal Law Amendment Act 1885 set out above. The ground of this decision was that the Act of 1885 had been passed for the purpose of protecting women and girls against themselves: see the judgment of Lord Coleridge C.J. at p. 712.

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 13. 6. (1) It is an offence ... for a man to have unlawful sexual intercourse with a girl not under the age of 13 but under the age of 16."

Further, by section 37 and Schedule 2, the maximum punishment for an offence under section 5 is imprisonment for life, and that for an offence under section 6 imprisonment for two years. Since the passing of the Act of 1956 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 Acts of 1885 and 1956 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 two-fold. So far as the man is concerned there is the inhibition of the criminal law as contained in sections 5 and 6 of the Act of 1956. 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 D.H.S.S. has contended that section 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 expression 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 section 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 In re P. (A Minor), 80 L.G.R. 301. In that case the learned 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” as surplusage.

In the result, I would dismiss the appeal of the D.H.S.S. 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 practise 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 section 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: Sidaway v. Board of Governors of the Bethlem Royal Hospital and the Maudsley Hospital [1985] AC 871 , 904. 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 my noble and learned friend, Lord Fraser of Tullybelton, and the provisions of section 6 of the Sexual Offences Act 1956 indicate that as the law now stands an unmarried girl under 16 is not competent to decide 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 D.H.S.S. 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 the 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 upon by a parent who is not responsible for the custody and upbringing of a 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 D.H.S.S. 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 may practise sex without contraception.

These defects in the memorandum constitute in my opinion a mistake of law on the part of the D.H.S.S. 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 upon a decision which the doctor is in law not entitled to make, then in my opinion, the D.H.S.S. 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. The issue is not whether the D.H.S.S. are exercising a statutory discretion in a reasonable way but whether by mistake of law the D.H.S.S., 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 of Harwich, 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 insofar 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 D.H.S.S.

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; Ollard & Bentley, March.

S. H.