

DOCTORS AND THE GILLICK CASE

A Legal Comment

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O.R. Johnston's article canvasses many of the varied issues, ethical, medical and legal arising from the decision in *Gillick v. West Norfolk and Wisbech Area Health Authority*. This comment will focus more specifically on some of the legal issues involved.

At the outset, it is significant to note that Lord Devlin, one of the most distinguished judges of the immediate past has categorised the case as possibly being "socially the most important to come before the courts in this decade". As he goes on to point out that is due not so much to what the trial judge, Mr. Justice Woolf, actually decided as to the broader implications of legal and indeed social and moral policy which are involved. As is so often the case with legal judgements in the U.K., these were somewhat side-stepped. It is important to grasp that the actual decision in the case was reached on fairly narrow and relatively technical grounds. One gets the definite impression that the judge clearly felt that these were determinative of the issue and that these having been decided, he could ignore broader aspects.

There were three issues at stake in the legal arguments in the *Gillick* case. Two are fairly technical, though not unimportant. These were (a) *The Criminal liability point* and (b) *The Consent point*. The third issue which is in a sense the nub of the case for the social and moral points of view is (c) *The Parental Responsibilities point*. The judge largely subsumed the third issue in the second. It is highly arguable whether he was right to do so. The decision he took on the consent issue is, it is submitted, not necessarily conclusive of the third point and thus not of the whole case even if it was correct of itself. In general, I think it deserves to be stressed that the judgement emphasises the technical rather than the policy issues of the whole question. It does not properly ventilate what attitude the law should take to parental care and control of the moral and sexual development of children and young people.

The Criminal Liability Issue

It was submitted on Mrs. Gillick's behalf that a doctor who prescribed contraceptive measures to a girl under 16 was an accessory to the criminal offence of unlawful intercourse, (of which the male partner alone can be guilty). The first point to be made here is that this argument really goes too far for Mrs. Gillick's purposes in that if it is correct the doctor would thus be liable even if parental consent was given or the parents notified. The judge pointed this out and went on to rule, rightly, it is submitted that parental consent is an irrelevance to the question of the doctor's potential criminal liability (if any). He did however discuss the circumstances in which a doctor might be criminally liable and although he rejected the wider submission that a doctor is always liable, he did instance a situation in which he might be.

The reasons for rejecting the wider submission seem fairly sound in that

the contraceptives are not so much a direct instrument of the crime as a means to prevent a possible consequence and in general the link between the crime and the prescription was usually too remote. However it was stressed that if the doctor knew of the circumstances in detail and not merely that there was a risk of intercourse with someone at some place and at some time and prescribed contraceptives to encourage intercourse he would be guilty of an offence.

The Consent Issue

As a matter of general law, medical treatment if it involves any physical interference with a patient is unlawful in the absence of consent. The age by which consent can validly be given is fixed by Act of Parliament for England at 16 but the relevant section preserves the validity of consent at common law. What the judge decided was that consent could validly be given at common law by someone under 16 to medical treatment depending on maturity and understanding and the nature and effect of the treatment. As a general statement of law, this is probably correct. It would also be consistent with Scots law which has for centuries recognised a considerable discretion in so-called minors (i.e. boys over 14 and girls over 12). Although the question of consent to medical treatment does not seem to have been decided in the case of a minor in Scotland and the statutory rule recognising consent at 16 does not apply there general principles e.g. in the law of contract recognise a power of choice and judgement for them.

Although the decision on the point of consent is probably correct as a matter of law, it does not necessarily dispose of the case, although Mr Justice Woolf considered that it did. Firstly, the judge completely subsumed the consent issue and the question of parental rights and responsibilities. He stated that parental consent becomes irrelevant if the young person's consent is given. This is logically correct if the issue is approached only *via* the question of the technical law of assault or trespass to the person. It is not necessarily the case if a wider concept of parental responsibility be invoked. Secondly, the contraceptive pill, presumably the most common form of prevention used for young girls is not covered by the consent point at all as its prescription does not amount to an interference with bodily integrity and is therefore not an assault. (The judge conceded this). Thirdly, is it entirely fair to equate contraception with medical treatment as the judge does? This ignores the obvious point that the girl is in no sense sick or in need of medical aid to relieve illness. Further there are social, moral, psychological factors involved in intercourse and contraception especially in the case of an underage girl. All of this seems to support another view being taken. Fourthly, application of the judge's test by valid consent will not be easy in practice for doctors especially in the case of contraception largely for the reasons outlined above. Unless it is assumed as seems to be strongly hinted in the judgement that girls of 15 at least are to be deemed mature enough to give consent as a matter of course. These points taken together lead one to submit that the judge should have had recourse to a wider ground of decision.

Perhaps all of these issues are involved in the question. Is it not illogical that what is popularly called "the age of consent" be fixed at 16 for the purpose of sexual intercourse while consent to contraception can be given at some variable but earlier age of so-called maturity? The "age of consent" is fixed in the best interests of the young people involved but such a concept did not seem to weigh in the judge's decision. (Fairness demands that it be pointed out that it is assumed that parental consent will be the normal situation, but how realistic is this?)

The Parental Responsibilities Issue

This is really the nub of the matter. What the DHSS circular, held to be lawful, does is to remove parental direction and control in the vitally important matter of sex from parents, and transfer responsibility to the young person and her doctor. Legally this was accomplished by the subsuming of the consent issue with this broader one. For the reasons given above this is questionable especially as the consent issue in the context in which the judge discussed it can, by his own admission, have no relevance to the contraceptive pill. The judge should also have had regard to two other arguments related to parental responsibilities.

Firstly greater emphasis should have been placed on the relevance of the underlying criminal law which seeks to secure the protection of young girls against exploitation and abuse and even their own immaturity. This surely fits ill with the decision and points at least to parental involvement. Secondly, it is surely a fundamental principle of law that, in general, the responsibility for the care and protection of children and young persons lies fundamentally with their parents. If these responsibilities are abused or not properly discharged the state, no doubt legitimately, may step in and remove them. But by definition that is an exception. The rule is surely that the law will recognise, protect and foster the vital protective and caring role of parents. The grounds on which parental rights and responsibilities can be abridged or indeed removed themselves support the general proposition. It is submitted in a sentence that the judge should have had regard to this wider principle in deciding the case and that its application would have led to a different result.

An American Perspective

It may be of interest to note briefly some relevant and parallel developments in the U.S.A. In 1973, the US Supreme Court decided that restrictions on abortions in state law infringed a so-called right to privacy. The principle was later applied to a requirement of parental consent for minors' abortions which was also invalidated.

In 1977, the same so-called right was used to hold unlawful under the US constitution a New York statute restricting the issue of contraceptives to young people under 16. American courts use broader methods of reasoning and in general articulate their assumptions and pre-suppositions more openly than British ones. This is true especially of the US Supreme Court. However in preferring the privacy of the young teenager over the state's right to regulate morals the American judiciary went further along the same line of reasoning as used in the *Gillick* case in emphasising the autonomy of the young person.

However, in somewhat of a reaction, the US Supreme Court has now distinguished in the case of abortion between parental consent and notification to parents and have upheld the constitutional validity of the latter being required.

This represents a recognition of parental interests which is to be welcomed.

Obviously the legal context is very different but these examples are interesting as demonstrating a more open discussion of the underlying social issues. It is to be hoped that the Court of Appeal will focus more closely on some of these.

Conclusion

It appears that in view of the grave risks involved in under-age sexual relations physically and psychologically as well as morally, what is really at stake is parental guidance and responsibility. Christians and all citizens have a right to insist that these be continued to be supported by the law. Sadly the *Gillick* case, however correct its reasoning may be on some questions, fails to grasp this pivotal issue of parental care being legally respected and upheld.

The Warnock Report: A Christian Response

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Medical Ethics Group of Rutherford House
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David Hume Tower, Lecture Hall B

Saturday January 19th, 1985,
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The recent publication of the Report of the Committee in Inquiry into Human Fertilisation and Embryology, chaired by Dame Mary Warnock, D.B.E., marks a milestone in the development of medical and social ethics.

The Medical Ethics Group of Rutherford House is seeking to stimulate an authentic Christian response to the Report and its recommendations. We are particularly pleased to welcome as a guest speaker to this Conference Professor John Marshall, a member of the Warnock Committee who signed the second dissent to the Report, opposing the use of human embryos under any circumstances for the purposes of experimentation.

Speakers:

Professor John Marshall F.R.C.P. Ed., F.R.C.P., D.Sc., M.D.
Professor of Clinical Neurology in the University of London
Member of the Warnock Committee

Professor Ian Donald C.B.E., M.D., F.R.C.O.G., F.R.C.S. Glas.
Professor Emeritus of Obstetrics in the University of Glasgow

Dr George Chalmers F.R.C.P.
Consultant in Geriatric Medicine, Glasgow

The Very Revd Professor Thomas F. Torrance M.B.E., F.B.A., F.R.S.E.,
Dr. Theol., D. Litt, D.Sc.
Professor Emeritus of Christian Dogmatics
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