to the Minister for Aboriginal Affairs. In Justice Maurice's terms:

> . . . it is fundamental to the nature of our society that the determination of disputed questions of fact are by and large committed to juries made up of ordinary people or judges and magistrates whose only specialist training is the law . . . We do not commit the decision-making function to experts in that field . . . In this way our society and others with whose liberal traditions it identifies have so far managed to avoid the tyranny of boffins.
>
> Warumungu Land Claim,
> Reasons for Decision, 1October1985,

parents, children and the pill

> Children begin by loving their parents. After a time they judge them. Rarely, if ever, do they forgive them.
>
> Oscar Wilde, 'A Woman of no Importance'

The English House of Lords has overturned the Court of Appeal in the Gillick Case ([1985] *Reform* 53). Mrs Victoria Gillick had sought a declaration that a circular issued by the Department of Health and Social Security for England and Wales which advised doctors that they can give contraceptive advice and treatment to girls under the age of 16 years without their parents' knowledge or consent was unlawful. Although losing both at first instance and in the House of Lords, Mrs Gillick had a total of five judges coming down in her favour while only four were against (The House of Lords was split 3:2 against her, but she got a unanimous decision in the Court of Appeal (0:3). She had lost at first instance (1:0).). In the House of Lords the majority was composed of Lord Fraser of Tullybelton, Lord Scarman and Lord Bridge of Harwich. Lord Brandon of Oakbrook and Lord Templeman dissented.

Lord Fraser said that the main question in the appeal was whether a doctor could lawfully prescribe contraception for a girl under 16 without the consent of parents: can a doctor ever, in any circumstances, lawfully give contraceptive advice or a treatment to a girl under 16 without her parents' consent? He said that three strands of argument were raised in the appeal:

- whether a girl under the age of 16 had the legal capacity to give valid consent to contraceptive advice and treatment including medical examination;
- whether giving such advice and treatment to a girl under 16 without her parents' consent infringed the parents' rights; and
- whether a doctor who gave such advice or treatment to a girl under 16 without her parents' consent incurred criminal liability.

Lord Fraser said that after a careful consideration of the relevant statutes he came to the conclusion that there was no provision which compelled a holding that a girl under 16 lacked the legal capacity to consent to contraceptive advice, examination and treatment, provided that she had sufficient understanding and intelligence to know what they involved.

Lord Fraser said that since the circular which was the subject of the declaration claim expressely stated that it would be 'most unusual' to provide contraceptive advice without parental consent, the contention of Mrs Gillick involved the assertion of an absolute right to be informed of and to veto such advice or treatment being given even in the 'most unusual' cases. Lord Fraser said that parent's rights to control the child existed not for the benefit of the parent but for the child.

It was contrary to the ordinary experience of mankind, at least in Western Europe in the present century, to say that a child remained in fact under the complete control of his parents until attaining the definite age of majority, and that on obtaining that age he or she suddenly acquired independence. In practice most wise parents relaxed their control gradually as children developed, and encouraged them to become increasingly independent. Moreover the degree of parental control actually exercised over a particular child did in practice vary considerably according to his or her understanding and intelligence. It would be unrealistic for the courts

not to recognise those facts, Lord Fraser said. He said social customs had changed and the law ought to and did in fact have regard to such changes when they were of such major importance. Lord Fraser agreed with Lord Denning who had said in 1970 that parents had '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 the right of control and ends with little more than advice.'

Lord Fraser said that in the overwhelming majority of cases the best judges of the child's welfare were the parents. There was no doubt that any important medical treatment of the child under 16 would normally be carried out only with parents' approval. That was why it would be 'most unusual' for a doctor to advise a child on contraceptive matters without the knowledge and consent of the parents.

Lord Fraser said that it was notorious that children of both sexes were often reluctant to confide in their parents about sexual matters, and the guidance showed that to abandon the principle of confidentiality for contraceptive advice to girls under 16 might cause some not to seek professional advice at all, thus exposing them to the immediate risks of pregnancy and sexually transmitted diseases.

Lord Fraser acknowledged that the risks could be avoided if the patient were to abstain from sexual intercourse. One of the doctor's responsibilities would be to decide whether a particular patient could reasonably be expected to act upon advice to abstain. But there might well be cases where it was impossible to monitor the sexual activities of the girl under 16 who had been pregnant; or where the doctor felt that because the girl was under the influence of her sexual partner or for some other reason there was no realistic prospect of her abstaining from intercourse.

If that was right, in Lord Fraser's view, it pointed 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 without the consent or even the knowledge of her parents: the only practical course was to entrust the doctor with the discretion to act in accordance with his view of what was best in the interests of the girl who was his patient. Lord Fraser said that the doctor should of course always seek to persuade the patient to tell her parents that she was seeking contraceptive advice, and the nature of the advice she received. At least the doctor should seek to persuade the patient to agree to the doctor informing the parents. But he said that there might well be cases where the girl refused either to tell the parents herself or to permit the doctor to do so. In such cases the doctor would be justified in proceeding without the parents' consent or even knowledge, providing the doctor was satisfied that:

- The girl would, although under 16 years, understand the doctor's advice.
- She could not be persuaded to inform her parents or to allow the doctor to inform the parents that she was seeking contraceptive advice.
- She was very likely to have sexual intercourse with or without contraceptive treatment.
- Unless she received contraceptive advice or treatment her physical or mental health or both were likely to suffer.
- Her best interests required the doctor to give her contraceptive advice, treatment or both, without parental consent.

Lord Fraser said that the appeal was concerned with doctors who honestly intended to act in the best interests of the girl and that it was most unlikely that a doctor who gave contraceptive advice or treatment with that intention would commit an offence under the Sexual Offences Act (eg of being an accessory to carnal knowledge).

Lord Scarman concurred with Lord Fraser and remarked that the present case was the beginning, not the conclusion of the legal development in a field not yet fully explored.

Like Lord Fraser, he emphasised that contraceptive advice and treatment should be given to underaged girls without their parents consent only in the most exceptional cases. Lord Scarman said that parental rights clearly existed and did not wholly disappear until the age of majority. They related to both the person and the property of the child i.e. custody, care and control of the person of the child and guardianship of its property. But the common law had never treated such rights as sovereign or beyond review and control. Nor had the law ever treated the child as other than a person with capacities and rights recognised by law. Parental rights were derived from parental duty and existed only so long as they were needed for the protection of the person and property of the child.

Lord Scarman said that if the law were to impose on the process of growing up fixed limits where nature knew only a continuous process, the price would be artificiality and lack of realism in an area where the law must be sensitive to human development and social change. Unless and until Parliament thought fit to intervene, the courts should establish a principle, flexible enough to enable justice to be achieved by its application to the particular circumstances placed before them. Lord Scarman noted changed features in today's society:

- the existence of contraception as a subject for medical advice and treatment;
- the increasing independence of young people; and
- the change in status of women.

He said that the law ignored these developments at its peril.

Lord Brandon in dissent said that intercourse with a girl under the age of 16 was unlawful and the man was guilty of a crime. It followed that for any person to promote, encourage or facilitate the commission of such an act might itself be a criminal offence, and must in any event be contrary to public policy. It might be said that that applied equally to a parent or doctor or social worker. (Lord Fraser, in the majority, had argued that if a doctor were to commit an offence under the Sexual Offences Act by giving contraceptive advice or treatment to a girl under 16, the doctor would be committing that offence whether or not he acted with the parents' consent. That consent could not exculpate him.)

To give the girl contraceptive treatment was to remove largely the inhibition against the having of unlawful sexual intercourse arising from the risk of an unwanted pregnancy, Lord Brandon said. He noted the argument that some girls under 16 would have sexual intercourse whether contraceptive treatment was made available to them or not and that therefore giving such treatment did not promote, encourage or facilitate the having of such intercourse. Lord Brandon rejected that argument however, first because the mere fact that a girl under 16 sought contraceptive advice itself indicated that she was conscious of the inhibition arising from the risk of an unwanted pregnancy and was more likely to indulge her desires if it could be removed. He said that second if all the girl under 16 needed to do in order to obtain contraceptives was to threaten that she would go ahead with or continue having unlawful sexual intercourse unless she was given contraceptives, a situation tantaamount to blackmail would arise which no legal system ought to tolerate. He said that the only answer the law should give to such a threat was 'wait till you are 16'.

Lord Templeman also dissenting said that an unmarried girl under 16 did not possess the power in law to decide for herself to practise contraception. Where parent and doctor agreed that contraceptive treatment was in the best interests of the girl, there was no legal bar to that treatment. Difficulties arose where parent and doctor differed. A doctor might 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, depending

on the nature of the treatment and the age and understanding of the infant. But a decision on the part of the girl to practise sex and contraception required 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 partner and herself. It was doubtful whether a girl under 16 was capable of a balanced judgment to embark on frequent, regular or casual sexual intercourse fortified by the illusion that medical science could protect her in mind and body, and ignoring the danger of leaping from childhood to adulthood without the difficult formative transitional experiences of adolescence. He said that there were many things which a girl under 16 needed to practise, but sex was not one of them. Lord Templeman said that Parliament could declare that view to be out-of-date, but as the law now stood an unmarried girl under 16 was not competent to decide whether to practise sex and contraception.

Lord Templeman said that a doctor, acting without the views of the parent, could not form a 'clinical' or any other reliable judgment that the best interests of the girl required the provision of contraceptive facilities. The doctor who provided contraceptive facilities without the parents' knowledge deprived the parents of the opportunity to protect the girl from sexual intercourse by persuading and helping her or by the exercise of parental power. Lord Templeman said that a parent would sooner or later find out the truth in any event and might do so in circumstances which brought about a complete rupture of good relations between members of the family and between the family and the doctor. He said that the secret provision of contraceptive facilities to a girl under 16 would encourage participation by the girl in sexual intercourse and that that offended basic principles of morality and religion which ought not to be sabotaged in stealth. Contraception should only be considered if and when the combined efforts of parent and doctor failed to prevent her from participating in sexual intercourse and there remained only the possibility of protecting the girl against pregnancy. A doctor might 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 an emergency, or in exceptional cases where the parent had abandoned or forfeited by abuse the right to be consulted. A doctor was not entitled to decide whether a girl under 16 should be provided with contraceptives if a parent who was in charge of the girl was ready and willing to make that decision in exercise of parental rights. (*The Times,* 18 October 1985)

standing in public interest litigation

> United States President Dwight Eisenhower, confronted by a team of economic advisers warning of impending economic doom, reportedly replied, 'Don't just do something, stand there.'

A report by the Australian Law Reform Commission, tabled on 29 November 1985 in Federal Parliament, contains recommendations designed to assist citizens, pressure-groups and associations who wish to enforce the rule of law in areas such as economic regulations, environmental protection, welfare rights, constitutionality of laws and review of the legality of the conduct of government departments and agencies. The report is entitled *Standing in Public Interest Litigation.* It deals chiefly with complex and technical legal rules as to who are appropriate plaintiffs to take civil proceedings in public interest matters. It suggests that existing restrictions on the right to sue should not be eliminated wholly, but should be defined more simply and in narrower terms.

A public-spirited citizen who sees another person, or perhaps a government department, acting unlawfully, may want to ask a court to rule on the question whether the law is being complied with. He or she may even want to ask the court to stop the other person from breaking the law or to ensure that when the person or government department acts in