THE *GILLICK* CASE : ABETMENT, DETERRENCE AND PUBLIC POLICY

1. Introduction

The danger of too great an extension of the concept of abetment is usefully illustrated by *Gillick*'s case.[1] The issue was whether doctors employed by an area health authority could lawfully give contraceptive advice or treatment to the plaintiff's daughters, who were under sixteen years of age, without her knowledge and consent. The area authority had received from the Department of Health and Social Security a memorandum of guidance on family planning which stated, *inter alia*, that to abandon the principle of confidentiality between doctor and patient in respect of children under sixteen years might cause some not to seek professional advice at all, thus exposing them to risks such as pregnancy and sexually transmitted diseases, and that in exceptional cases it is for the doctor exercising his clinical judgment to decide whether to prescribe contraception.

The contention on the plaintiff's behalf was that the Department, in issuing the memorandum, was exercising its discretion unlawfully. The deep cleavage of opinion with regard to the moral and ethical issues underlying the case is evident from the narrowness of the majority in the House of Lords upholding the legality of the Department's action. Lord Fraser,[2] Lord Scarman[3] and Lord Bridge[4] recognised the entitlement of a doctor to give contraceptive advice and treatment to a girl under sixteen without her parents' knowledge and consent, in circumstances where she is very likely to begin or continue having sexual intercourse with or without contraceptive treatment, if the doctor is satisfied that her mental or physical health is likely to suffer unless she receives contraception. On the other hand, Lord Brandon was convinced that to give such a child contraceptive treatment is to remove a powerful inhibition and,

[1] *Gillick* v. *West Norfolk and Wisbech Area Health Authority* [1985] 3 W.L.R. 830 (H.L.)
[2] At p. 844.
[3] At p. 858.
[4] At p. 863.
[5] At p. 866.

therefore, to facilitate an illicit sexual relationship. Lord Templeman[4] concurred in the dissent on somewhat different grounds.

The object of this article is to consider the views expressed in the three courts — the Queen's Bench Division,[7] the Court of Appeal[8] and the House of Lords[9] — in regard to the question of the propriety of imputing criminal liability to the doctor offering contraceptive treatment on the basis of the law of abetment.

II. Arguments in Support of Criminal Liability

Parker L.J., in the Court of Appeal, entertained no doubt that a doctor who provided contraceptive treatment and advice to a girl under sixteen without her parents' consent could be found liable for an offence under section 28 of the Sexual Offences Act 1956 by aiding and abetting unlawful sexual intercourse in contravention of section 6 of that Act.[10]

It was common ground between the contestants that the imposition of criminal liability was appropriate in some circumstances but not in others. It is clear that where a doctor provides a girl who is under sixteen, or a man, with advice and assistance with regard to contraceptive measures with the intention of encouraging them to have sexual intercourse, he becomes[11] an accessory before the fact to an offence contrary to section 6. In the majority of cases, however, the doctor would agree to provide contraceptive treatment only because he is convinced that sexual relations, from the commencement or continuation of which the minor cannot be dissuaded, are likely to cause her serious physical or mental damage in the event of a suprevening pregnancy or would expose her to the risk of sexually transmitted disease. However, Parker L.J. embarked upon an exhaustive discussion of the statute law in order to demonstrate that, even in the typical case, the application of principles relating to abetment is warranted by public policy reflected in the legislative provisions applicable.

[4] At p. 868.
[7] [1984] 1 Q.B. 581.
[8] [1985] 2 W.L.R. 413.
[9] [1985] 3 W.L.R. 830.
[10] [1985] 2 W.L.R. 413 at p. 432-435.
[11] [1984] 1 Q.B. 581 at p. 593, *per* Woolf J.

(a) *The Statute Law*

The scope of the offence of having unlawful carnal intercourse has been widened progressively, with regard to the age of the girl against whom the offence may be committed. The Offences against the Person Act 1861[12] recognised two offences involving, as the victim, respectively, a girl under the age of ten years[13] and a girl between the ages of ten and twelve years.[14] These offences were reintroduced by the Offences against the Person Act 1875[15] in regard to girls under the age of ten years and girls between the ages of twelve and thirteen, respectively; and the latter offence was further extended by the Criminal Law Amendment Act 1885[16] to apply to girls between the ages of thirteen and sixteen.[17]

While consent by the victim is a defence to common assault, the special feature of the statutory offence relating to unlawful carnal knowledge is that sexual intercourse with girls under certain ages entails criminal responsibility irrespective of consent. Indeed, when the minimum age of the girl was raised gradually by statute, it was found necessary to declare that the offence was committed "whether with or without her consent", probablay because, by raising the age, there were being brought within the criminal law cases in which hitherto consent would have operated to preclude the commission of any offence at all.[18]

Moreover, during the period from 1861 to 1960 the penalty for these offences has been increased steadily. According to the provisions of the Act of 1861 the graver offence was a felony carrying a minimum sentence of three years' penal servitude and a maximum of penal servitude for life,[19] and the lesser offence was characterised as a misdemeanour carrying a sentence of three years' penal servitude or imprisonment with or without hard labour for a term not exceeding two years.[20] The Act of 1875 raised the minimum term

[12]24 & 25 Vict., c. 100.
[13]s. 50.
[14]s. 51.
[15]38 & 39 Vict. c. 94.
[16]48 & 49 Vict. c. 69.
[17]ss. 4 and 5.
[18][1985] 2 W.L.R. 413 at p. 432. *per* Parker L.J.
[19]s. 50.
[20]s. 51.

of penal servitude for the graver offence from three to five years. Under the Criminal Law Amendment Act of 1885 the graver offence remained a felony carrying a maximum sentence of imprisonment for life and the lesser offence remained a misdemeanour punishable with a maximum sentence of two years' imprisonment.[21] Finally, the Indecency with Children Act 1960 increased from two years to seven years the maximum penalty for an attempt to commit the graver offence.[22]

Two other features of the development of the statute law were regarded by Parker L.J. as significant. The first was the imposition of a duty, until 1967, on any person who was aware of the commission of the grave offence to report it to the police or other public authority.[23] The second was the provision contained in the Act of 1956 that, in the case of girls under thirteen and those between the ages of thirteen and sixteen, respectively, it was 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 with a particular man.[24]

Parker L.J. was satisfied that the cumulative effect of these considerations is to provide a firm basis for application of the law governing abetment: "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 thirteen, 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 sixteen the more readily to commit such acts. It seems to me equally incongruous to assert that doctors have the right to accept the young and to provide them with contraceptive advice and treatment without reference to their parents and even against their known wishes."[25] Parker L.J. concluded that the provision of these facilities amounts to encouragement which justifies imposition of liability on the doctor as an abettor.

[21]Cf. Sexual Offences Act 1956, ss 5 and 6.
[22]s. 2.
[23][1985] 2 W.L.R. 413 at p. 433.
[24]Sexual Offences Act 1956, ss. 25 and 26.
[25][1985] 2 W.L.R. 413 at p. 435.

(b) *Deterrent Required by Public Policy*

An even more thoroughgoing approach was adopted by Lord Brandon of Oakbrook in the House of Lords. His Lordship was convinced that to prescribe contraceptive treatment for the girl necessarily involves promoting, encouraging or facilitating the having of sexual intercourse, contrary to public policy, by that girl with a man.[26] Lord Brandon declared: "The inhibitions against the having of sexual intercourse between a man and a girl under sixteen are primarily twofold. So far as the man is concerned, there is the inhibition of the criminal law as contained in section 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."[27]

III. The Countervailing Factors

It is submitted that neither of the grounds suggested by Parker L.J. and by Lord Brandon for invoking the law of abetment carries conviction.

The history of the relevant legislative provisions certainly indicates a strong awareness of the vulnerability of girls below certain ages and a commitment to securing their protection in a manner not catered for by the law of rape, since the principle is now settled that a minor having sufficient intelligence and understanding is capable of consenting to sexual intercourse so as to bring about the result that the man involved is not guilty of rape.[28] But application of principles relating to abetment is inappropriate in the context under discussion, because of the state of mind of the doctor and the objective which he intends to accomplish. In modern law the abettor must certainly intend to facilitate achievement of the criminal purpose aimed at by the principal offender: "The purpose (of

[26][1985] 3 W.L.R. 830 at p. 865.
[27]At p. 865-866.
[28]*R* v. *Howard* [1966] 1 W.L.R. 13 at p. 14.

the alleged abettor) must be the purpose of the one sought to be made a party to the offence."[29] There is no basis for the doctor to be held liable as the accessory of the man who had intercourse with a girl below the age specified by the law, unless the doctor had the intention to "encourage, countenance, uphold or support"[30] the principal. Where the doctor, far from aiming at promoting intercourse prohibited by the law, realises that the girl is determined to indulge in intercourse in any event and intervenes only to insulate her from the gravest consequences which could arise from a course of conduct which she had independently decided to pursue, mere knowledge on the doctor's part that the treatment he provides has the incidental result of removing a powerful disincentive in regard to the illicit intercourse taking place, is clearly insufficient to warrant imputation of criminal responsibility to the doctor on the footing of principles of abetment. A Canadian court has aptly observed that "If what is done incidentally and innocently assists in the commission of an offence, that is not enough to involve the alleged party whose purpose was not that of furthering the perpetration of the offence."[31]

The contentions advanced on Mrs. Gillick's behalf in the Queen's Bench Division took for granted that the contraceptives supplied by the doctor were identifiable as instruments for the commission of the crime of unlawful sexual intercourse.[32] Counsel for Mrs. Gillick used as analogies situations in which a person supplies poison to a potential murderer knowing that the poison is intended for the commission of murder, and where a person supplies a car knowing that it is intended to be used in making a rapid escape from a burglary. Woolf J., rightly rejecting these analogies, said: "I would regard the pill prescribed to the woman as not so much the instrument for a crime or anything essential to its commission but a palliative against the consequences of the crime."[33]

It is significant that, even in contexts involving the provision by X of some necessary instrument or thing for the commission of an offence by Y, with knowledge that the offence is likely to

[29] *R* v. *F.W. Woolworth Co. Ltd.* (1974) 46 D.L.R. (3d) 345 at p. 353 Kelly J. (Ont.C.A.).
[30] *R* v. *Rhyne* 1945 1 D.L.R. 592 (N.S.C.A.).
[31] See the case cited at n. 29 *supra*, at p. 353-356.
[32] Cf. *R* v. *Cox and Railton* (1884) 14 Q.B.D. 153; *Thambiah* v. *R* [1966] A.C. 37.
[33] [1984] 1 Q.B. 581 at p. 595.

be committed with the thing X supplies, there is a strand of authority in American law which enjoins caution in the use of the law of abetment. The spirit of detachment and individualism characteristic of the common law accounts for the lingering reluctance to extend the net of criminal liability so wide as to require a person who has merely a commercial interest in selling an object to concern himself with the purposes for which it would probably be used by the buyer. "The seller of an ordinary marketable commodity is not his buyer's keeper in criminal law unless he is specifically made so by statute."[34] An American court, disapproving vigorously of the practice adopted by many prosecutors of seeking to sweep within the purview of conspiracy and abetment all those who have been associated in any degree with the main offenders, has underlined "the opportunities of great oppression"[35] which the practice entails. The court invoked, as a necessary limiting feature, the requirement that "The abettor must in some sense promote the venture himself, make it his own, have a stake in its outcome."[36] The unsuitability of concepts of abetment in the setting of the *Gillick* case is underscored by the total lack of any interest on the doctor's part approaching this quality.

The sole basis on which the doctor's intervention can be said to make illicit intercourse easier is that it eliminates a factor which, had it existed, would have operated as a deterrent against carnal connection. However, there is clear authority in the common law that this represents far too tenuous a link to call for the imposition of liability within the framework of the law of abetment. That mere knowledge relating to the intention of another to commit an offence is inadequate, is apparent from the decision of an English court in *R* v. *Hawkesley*.[37] The accused was a partner with Z in a small taxi business. A and B, two young men with a previous criminal record, who were quite well known to Z but less well known to the accused, M, persuaded H to drive them on credit from the taxi office in the centre of the city to a suburb. H was unaware that either A or B had criminal records. On the journey A and B informed H that the purpose of the trip was to break into a golf

[34]G.L. Williams, Criminal Law: The General Part (2nd ed., 1961), p. 373.
[35]*U.S.* v. *Falcone* (1940) 109 F. (2d) 579.
[36]*Ibid.*
[37][1959] Crim. L.R. 211.

club. H dropped A and B near the golf club, and a police officer overheard one of them say: "We will want you back in about an hour." H did not return. The court held that H could not be regarded as an accessory, since the evidence indicated only that H knew of the intention of A and B to commit the crime but not that he agreed to participate in its commission in any way. In *R* v. *Coney*[38] Hawkins J. commented: "To constitute an aider and abettor some active steps must be taken by word, or action, with the intent to instigate the principal or principals. Encouragement does not of necessity amount to aiding and abetting: it may be intentional or unintentional."[39] To the extent that the doctor's actions can be looked upon as encouragement by virtue of the removal of an inhibition, it is clearly of an unwitting character, since his only object is to avert, in relation to the girl he is treating, some of the most harmful effects of an illegel act the commission of which he is unable to prevent.

Lord Brandon's sweeping approach, which entails the result that the doctor's liability for abetment of unlawful sexual intercourse is not confined to situations in which contraceptive treatment was resorted to without the knowledge of the girl's parents but remains intact despite consent to such treatment given by the parents, would seem to be based on a singular misconstruction of public policy. Lord Brandon and Parker L.J. both adopt, as an inarticulate premise of their reasoning, that the objectives of public policy directed towards prevention of sexual intercourse with very young girls, are best given expression by the inflexible withholding of contraceptive treatment in all circumstances from the girl. However, a compassionate interpretation of the elements of public policy demands that some weight be attached to protective considerations *vis-a-vis* the girl, and that there should not be preoccupation with the factor of deterrence as the exclusive object of policy. This receives explicit recognition in the speech of Lord Bridge of Harwich: "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 sixteen is the protection of young girls from the untoward consequences of intercourse. Foremost

[38](1882) 8 Q.B.D. 534.
[39]At p. 557, *per* Hawkins J.

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."[40] The better view, then, is that the doctor, far from engaging in a course of conduct which involves conflict with the underlying purposes of the law, acts in a manner which enables attainment of as much of these purposes as is practicable in an unusually difficult situation.

IV. *Central Concepts of the Law of Abetment*

The core concepts in the modern law of abetment are encouragement and assistance, neither of which, it is clear, has any realistic bearing on the doctor's role in the *Gillick* case.

(a) *Assistance*

The usual form of assistance is the provision of materials or other things which are required for the commission of an offence.[41] The fact that the thing supplied is not indispensable to achieve the criminal purpose, or that it could have been obtained by an alternative method which did not involve participation by the alleged abettor, does not necessarily make for exoneration of the latter if the thing supplied is in fact useful.[42]

The predominant trend in English law is consistent with the result that a person who supplies a thing, knowing that the party to whom it is given intends to use it for a criminal purpose, can be held guilty as abettor, even though he himself had no interest in the commission of the offence and preferred, indeed, that the crime be not perpetrated. Thus, the sale of oxygen-cutting equipment[43] and of coal[44] was held to entail this result in circumstances

[40][1985] 3 W.L.R. 830 at p. 863.
[41]H.L.A. Hart and A.M. Honore, *Causation in the Law* (2nd ed., 1985), p. 385.
[42]*Ibid.*
[43]*R* v. *Bainbridge* [1959] 3 W.L.R. 656.
[44]*National Coal Board* v. *Gamble* [1959] 1 Q.B. 11.

where, respectively, the seller was aware that the buyer intended to break into a bank and that it was the buyer's purpose to commit a statutory offence connected with the driving of a vehicle carrying goods of excessive weight on the highway. Where the vendor knows that the liquor he sells will be re-sold by the buyer in breach of a statutory prohibition, he is a party to the offence when it is committed.[45] Similarly, if X lends Y his car to drive, knowing that Y is disqualified from driving, X is an accessory before the fact to Y's offence.[46]

This line of authority is exposed to the criticism that it opens the door too wide to criminal liability, in that a person who completes an ordinary commercial transaction ought not to be compelled to probe the intentions of his customers as a requirement of escape from penal consequences. This difficulty is compounded by varying degrees of probability in regard to commission of the criminal act. For instance, the owner of a vehicle may be certain or virtually certain that the borrower intends to use the vehicle for housebreaking;[47] or he may simply be aware that there is the likelihood or the possibility that his property would be used as an instrument to commit a crime.

However, where the level of probability envisaged suffices for purposes of the law of abetment, the fact that the alleged abettor disapproves of the criminal design does not militate against liability. Where X drove Y to the spot where he knew Y intended to murder a policeman, X's act of driving the car was construed as aiding and abetting "even though he regretted the plan or indeed was horrified by it."[48] It is in this type of case that the law distinguishes sharply between motive and intention, and holds that only the latter concept is relevant to liability on the ground of abetment. Devlin J., dealing with this distinction, has commented: "If one man deliberately sells to another a gun to be used for murdering a third, he may be indifferent about whether the third man lives or dies and is interested only in the cash profit to be made out of the sale, but he can still be an aider and abettor. To hold otherwise

[45] *Cook* v. *Stockwell* (1915) 15 Cox 49.
[46] *Pope* v. *Minton* [1954] Crim. L.R. 711; see also, for a situation involving the sale of an imitation firearm, *Cafferata* v. *Wilson* [1936] 3 All E.R 149.
[47] *R* v. *Bullock* [1955] 1 W.L.R. 1.
[48] *Lynch* v. *D.P.P. for Northern-Ireland* [1975] A.C. 653 at p. .678.

would be to negative the rule that *mens rea* is a matter of intent only and does not depend on desire or motive."[49]

The dichotomy between motive and intention was sought to be exploited by counsel for Mrs. Gillick as the basis of a contention that the doctor's remoteness from the act of illicit intercourse, from the point of view of motive or desire, was not a ground of exculpation, provided that the contraceptive treatment was intentionally given. Lord Simon of Glaisdale has observed in a different context: "One may lend assistance without any motive, or even with the motive of bringing about a result directly contrary to that in fact assisted by one's effort."[50] But the facts of *Gillick*'s case provide no occasion for the application of this principle, since what is involved is not the intentional provision of an instrument for the crime, but the intentional adoption of a technique designed to extenuate the consequences of a criminal act which is contemplated in the circumstances as inevitable.

This point makes possible the distinguishing of a statement of principle by an American court: "The assistance given need not contribute to the criminal result in the sense that, but for it, the result would not have ensued. It is quite sufficient if it facilitated a result that would have transpired without it. It is quite enough if the aid merely rendered it easier for the principal actor to accomplish the end intended by him and the aider and abettor, though in all human probability the end would have been attained without it."[51] The crucial point of distinction is that the doctor's act makes easier not the commission of the crime itself but the control of repercussions stemming from the act.

(b) *Encouragement*

It is a feature of encouragement, in the setting of the law of abetment, that the principal offender's resolve to commit the criminal act need not be shown to be directly attributable to encouragement by the alleged abettor.[52] Consequently, the fact that the parties to the illicit intercourse had already resolved to have sexual connec-

[49] *National Coal Board* v. *Gamble* [1959] 1 Q.B. 11 at p. 23.
[50] *D.P.P. for Northern Ireland* v. *Lynch* [1975] A.C. 653 at p. 699.
[51] *State* v. *Tully* (1894) 15 So. 722. (S.C. of Alabama).
[52] H.L.A. Hart and A.M. Honore, *Causation in the Law* (end ed., 1985), p. 386.

tion does not absolve the doctor from responsibility *qua* abettor, if encouragement, in the relevant sense, is imputable to him.

Here, again, however, it would be palpably artificial to impute to the doctor encouragement of the illicit intercourse itself. The typical case of encouragement is that illustrated by a leading English case[53] which involved an order under the Aliens Act prohibiting an American saxophone player from performing. The accused, fully aware that this order had been made, attended a performance by the saxophonist and gave it extensive publicity in his journal. It was held, on the facts, that the accused's behaviour amounted to aiding and abetting contravention of the prohibition which had been made under the Aliens Act. However, the manifest ground of distinction is that the accused in this case, unlike the doctor employed by the area health authority in *Gillick,* was determined to do all he could to enable the principle offender to accomplish his purpose.

(c) *Communication*

A peculiarity of section 6 of the Sexual Offences Act 1956 is that no offence is committed by the girl herself whose protection from her own lack of mature judgment is the primary object of the statutory offence.[54] The sole offender is the man who has intercourse with her. An obvious difficulty in regard to reaching the conclusion that the doctor aids and abets the man in having sexual intercourse with the girl is the fact that, in the great majority of cases, the doctor would have had no contact whatever with the man. Nevertheless, counsel for Mrs. Gillick argued that a doctor giving contraceptive advice or treatment to a girl under sixteen who has attended a family planning clinic alone, becomes an accessory to the subsequent unlawful sexual intercourse by abetting the criminally liable male through the innocent agency of the girl.[55]

In principle, assistance of a kind which falls within the ambit of the law of abetment can take place in the total absence of any communication between principal and accessory. Thus, in an American case the accused, who was aware of the principal's intention

[53] *Wilcox* v. *Jeffrey* [1951] 1 All E.R 464.
[54] Cf. *R* v. *Tyrrell* [1894] 1 Q.B. 710.
[55] Cf. *R.* v. *Cooper* (1833) S.C. & P. 535.

to kill the victim, took steps independently to ensure the success of the principal's plan by making certain that no warning would reach the victim.[56] Despite the lack of any communication between the accused and the principal, the former was convicted of abetment of murder.

This is a tenable view in circumstances where the intention of the alleged accessory to assist the criminal enterprise of the principal offender admits of no doubt. But, given that the doctor is in no way concerned with helping the male party who may not even be identifiable at the time contraceptive treatment is prescribed, and also that the doctor has no other interest than that of safeguarding the interest of the young girl, there is a wholly unreal quality about resorting to the principle of innocent agency in order to demonstrate a nexus between the doctor and the male partner in illicit intercourse. Although communication between principal and accessory is not indispensable and, therefore, the lack of it between the doctor and the male party in the *Gillick* case is not decisive, the doctor cannot be treated as an accessory because no link of the required kind exists between him and the male party.

(d) *Specific Act Envisaged*

In cases where contraceptive treatment is thought by the doctor, in the exercise of his clinical judgment, to be desirable, it may well happen that no specific act of intercourse by the girl is envisaged by the doctor, whose apprehension is that she is likely to be embroiled in a promiscuous relationship and that, if this happens at some indefinite point of time in the future, measures to prevent pregnancy are essential in the girl's interest.[57]

In the *Gillick* case Woolf J., in the Queen's Bench Division, queried whether a vague anticipation of this nature is sufficient for purposes of the law of abetment: "In order to be an accessory, you normally have to know the material circumstances. In such situation the doctor would know no more than that there was a risk of sexual intercourse taking place at an unidentified place with an unidentified man on an unidentified date — hardly the state

[56] *State* v. *Tully* (1894) 15 So. 722.
[57] Cf. the approach adopted by Butler-Sloss J. in *In re P. (A Minor)* (1981) 80 L.G.R. 301.

of knowledge which is normally associated with an accessory before the fact."[58]

This, however, is not a satisfactory basis for excluding principles of abetment. In a New Zealand case[59] the accused wrote a letter giving detailed instructions as to the manner in which safes could be broken open. At the time he wrote the letter the accused had no knowledge that the recipient of the letter would use this information on any particular occasion. The accused, nevertheless, was held liable for aiding and abetting the commission of the offence at a time which was unclear when the advice was given.

V. Conclusion

Woolf J., in the Queen's Bench Division, was emphatic in his assertion that the doctor could not be regarded as an abettor unless he intended to encourage and facilitate intercourse.[60] On the other hand, Parker L.J., in the Court of Appeal, was equally convinced that the imposition of criminal responsibility on the doctor who provides a girl below the age of sixteen years with contraceptive treatment without the consent of her parents, is justified by the principles governing abetment.[61] The other two judges in the Court of Appeal expressed no conclusive opinions on the point. Fox L.J., explicitly leaving the matter open, commented: "As regards any comparison with the criminal law as regards capacity to consent, the criminal law is concerned with different problems 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."[62] In similar vein Eveleigh L.J. observed: "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 (contraceptive) treatment would be a breach of the criminal law."[63]

Eveleigh L.J., in the Court of Appeal, was of opinion that a doctor who prescribes a contraceptive device for a child under the

[58][1984] 1 Q.B. 581 at p. 595.
[59]*R.* v. *Baker* (1909) 28 N.Z.L.R. 536.
[60][1984] 1 Q.B. 581 at p. 596-597.
[61][1985] 2 W.L.R. 413 at p. 432-435.
[62]At p. 443.
[63]At p. 446.

age of sixteen years "will not necessarily be breaking the law."[64] A note of equivocality also marks the opinion of Lord Fraser in the House of Lords: "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."[65]

But it is proper to go further and to take a more definite view of the law: because of the doctor's intention and the objective which he endeavours to achieve in consequence of his intervention, there are compelling objections to invocation of the law of abetment as a vehicle for the imputation of criminal responsibility to the doctor offering contraceptive treatment.

Lord Fraser expressed the view that the doctor would be justified in proceeding without the parents' consent or even knowledge, provided he is satisfied in regard to a variety of matters: (1) that the girl (although under sixteen years of age) would 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 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 parental consent.[66]

As a matter of legal principle, these criteria circumscribe too narrowly the range of the doctor's clinical judgment. The first consideration spelt out by Lord Fraser is of crucial importance, since the child's understanding determines the legal validity of the consent she purports to give. However, once the child is shown to have this degree of understanding in regard to the matter to which the doctor's advice relates, the remainder of the factors stipulated by Lord Fraser affect merely the moral quality of the doctor's intervention. These are elements which have a clear bearing on the desirability of contraceptive treatment for the child without parental agreement and support; and they are no doubt matters which the doctor

[64] *Ibid.*
[65] [1985] 3 W.L.R. 830 at p. 845.
[66] At p. 844.

will anxiously ponder before making his decision. But they do not restrict the area of clinical discretion as a matter of necessity, at any rate in the sense that criminal sanctions become apposite if these considerations are shown to have been transgressed.

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