

ETHICS AND LAW

TERMINATION OF PREGNANCY AND ASSISTED REPRODUCTION

Handout 3

Outline of legal position in England and Wales

(From Hope, T. and Savulsecu, J. Medical Ethics and Law: the Core Curriculum. In preparation.)

Abortion Law

The current law on abortion is best understood in its historical context.

Before 1861 the law was governed mainly by common law. The principal points were:

1. Abortion, whether carried out by the mother, a doctor, or another, was generally a (serious) criminal act.
2. Carrying out an abortion for the purpose of saving the mother's life, may have been lawful, particularly if the mother's life were in immediate danger. It remained unclear, until 1967, the extent to which a doctor could carry out an abortion lawfully for the sake of the health of the mother.
3. The status of the fetus changed at the "quickening". The quickening was the point at which the mother first noticed fetal movements. It generally occurs in the second trimester, around 16-20 weeks in the first pregnancy and often earlier in subsequent pregnancies. The significance of the quickening derives from Aristotle as the point at which the human life began - when the fetus became animated. The word "quick" means roughly "alive" as in the phrase: "the quick and the dead."
4. An abortion carried out after the "quickening" generally carried the death penalty. An abortion carried out before quickening was a criminal act but carried a lesser sentence.

1861: The Offences Against the Person Act

The Offences Against the Person Act 1861 remains the definitive law in England. It gives statutory grounds to the effect that abortion is a crime (except where subsequent legislation provides protection against criminal prosecution). The Act replaced the death penalty for abortion by penal servitude for life. It also abolished any distinction between different fetal ages: the crime, and punishment, were the same whatever the fetal age.

Appendix 1 provides the wording for the two key sections of the Act.

Plugging a legal hole: the Infant Life (Preservation) Act 1929

The 1861 Act gave protection to the fetus up to the point of labour. A person does not have protection of the criminal law against homicide until he is born. Until 1929 there was a legal hole in the protection of the fetus between the start of labour and birth. In other words, until 1929 it may not have been a criminal offence to kill the fetus during labour. The primary aim of the 1929 Act was to give the fetus protection from being killed during the process of its birth. However its provisions went beyond this. The key points of this Act were as follows.

1. "...any person who, with intent to destroy the life of a child capable of being born alive, by any wilful act causes a child to die before it has an existence independent of its mother, shall be guilty of child destruction..." [section 1(1)]

2. It clarified that it was not a crime if the act that caused the death of the child (fetus) was done in good faith "for the purpose only of preserving the life of the mother".

3. It stated that: "...evidence that a woman had at any material time been pregnant for a period of 28 weeks or more shall be prima facie proof that she was at that time pregnant of a child capable of being born alive." [section 1 (2)]

It remained uncertain whether an abortion ("procuring a miscarriage") carried out to save the mother's life before the time at which the child was capable of being born alive was lawful, since the 1929 Act does not cover that period.

The Abortion Act (1967)

The Abortion Act was designed to tackle two main issues. The first was increasing concern at the number of "back street abortions" that were being carried out, despite the fact that they were illegal. These were often medically quite unsafe and an increasing number of women were being admitted to hospital with complications resulting from such abortions. The second was the lack of clarity over the question of when a doctor could carry out an abortion for the sake of the mother's health. Doctors, acting in good faith in the interests of their patients, faced the possibility of criminal charges.

The Act provides a doctor ("medical practitioner") who carries out an abortion within the terms of the Act, immunity from prosecution. It does not decriminalise abortion in general. Neither does it provide protection for anyone other than the doctor (and, following the House of Lords ruling in Royal College of Nursing of UK v DHSS [1981] for nurses as well).

The original Act was amended in 1990 (the amendments were part of the Human Fertilisation and Embryology Act. Appendix 2 gives some of the important sections of the amended Act. Five points need emphasis.

1. Prior to 24 weeks a doctor may carry out an abortion, with the woman's consent, on very wide grounds (section 1 (1a)). By far the majority of abortions in England are carried out under this section.

2. After 24 weeks, abortion is only lawful either to prevent considerable risk of considerable harm to the mother, or for the sake of the fetus/child (see Appendix 2 for exact wording). In practice most abortions after 24 weeks are done for the sake of the fetus/child (i.e. under section 1 (1d)).

3. Except in an emergency two doctors are required to be of the opinion that abortion is justified on one of the grounds stated in the Act.

4. Doctors normally date pregnancy from the first day of the woman's last menstrual period. This is not necessarily the day of conception (indeed it is unlikely to be so), and certainly not the day of implantation of the embryo in the uterus. It is generally assumed that when the Act states that "pregnancy has not exceeded its 24th week" it means 24 weeks since the first day of the woman's last period. But this is not clear - particularly if there is evidence that conception had

taken place on a day after this.

5. It is not clear what the approach should be to deciding whether an abortion is legal under section 1(1d). The courts have had to decide when it is lawful for doctors to withhold or withdraw life sustaining treatment for neonates on the grounds that the baby is severely handicapped. The courts' approach has been that doctors should act in the baby's best interests and that there are situations when it is better for the baby to be dead than to continue living in the state it is in. However, the report of the Select Committee of the House of Lords (1988) makes it clear that parents' interests and views are of importance in coming to a decision. It is of course also the case that it would not be lawful to kill a neonate even on the grounds of best interests.

Appendix 3 summarises some further points concerning legal aspects of abortion, and of fetal damage.

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