

Lecture Notes. Code: Med 05.01-v1c-01.07

Medical Law

Topic 5 (of 10): **Lecture 1** (of 1)

Abortion

Aim:

To provide a comprehensive account of the law on abortion; and an overview of the range of arguments relating to the morality of abortion.

Objectives:

After careful study of this topic you should be able to:

1. Discuss the law relating to lawful abortions as provided for by s.1(1) Abortion Act 1967 as amended by the Human Fertilisation and Embryology Act 1990;
2. Discuss the law and ethics relating to abortions at various stages of foetal development;
3. Discuss the lawfulness and/or the potential criminal action in relation to menstrual extraction, selective reduction of multiple pregnancy; and the abortion pill' under the provisions of the current law on abortion.

Abortion: legally permissive – but moral?

The Abortion Act 1967 introduced permissive abortion into England and Wales. In a non-emergency case, 'permissive' means that no-one will be guilty of an offence under the law relating to abortion if a woman's pregnancy is terminated by a registered medical practitioner ('doctor') after two registered medical practitioners are of the opinion, formed in good faith, that the woman's physical or mental health will be affected in such a way specified by *s.1(1)* or any other condition specified in *s.1(1)* is satisfied. In emergency situations, the requirement for *two* doctors to form an opinion in good faith is dispensed with: if one doctor deems a termination to be immediately necessary, then the woman may lawfully be aborted: *s.1(4)*. No abortion carried out in accordance with the provisions of the Abortion Act 1967 (as amended) will constitute a criminal offence of 'procuring a miscarriage' under the *Offences Against the Person Act 1861* (see *infra*).

Nevertheless, many people with strong religious convictions, e.g., Roman Catholics, are anti-abortion. They adopt the general stance that life begins at conception and no one but God has the authority to end it. Some of them agree that there are grounds on which abortion may be carried out – though the grounds are very limited and relate, for example, to rape and incest. Even then, in February 1992, the High Court in the Republic of Ireland refused a 14-year-old girl permission to come to Britain for an abortion, despite an allegation of rape. As a result of a referendum held in 1983, a ban on abortion had been written into the Irish Constitution and it left no scope for 'exceptional circumstances'. Consequently, at first instance, the alleged victim of a serious crime was denied the opportunity to seek an abortion on the ground that it would be unconstitutional! The parents of the girl appealed and hoped that the decision would be reversed – perhaps on the

basis that European Community law would prevail and that the girl would be free to travel to another Community country (UK) and have the abortion. In fact, the Irish Court of Appeal, which gave permission for the girl to have an abortion in England, based its decision on the need to preserve her health. It was accepted (without argument) that the girl had felt suicidal as a result of her ordeal. [The case was *A-G v X* [1992] 1 IR 1, and in June 1994 a 44 year old businessman was jailed for 14 years after being convicted of rape: (1994) *The Times*, June 3rd. The girl miscarried].

The Morality of Abortion

1. The Insignificance of the ‘When-Does-Life-Begin’ Arguments

Maclean & Maher (*Medicine, Morals & the Law*) note that many arguments relating to the morality of abortion focus on the time when human life begins. In essence, the theory is that once human life has begun the taking of it (by abortion) is impermissible whereas an abortion may be permissible if it can be carried out *before* life begins. However, they say there is very ‘little of practical value to be gained from this way of tackling the abortion issue ...’. For example, they cite the old, long-held belief that “there was a ‘separate’ human life at the moment of *quicken*ing, i.e., when the mother first feels the foetus move”. They contend that: “it is impossible to understand what moral significance this stage has, [since] the arrival of the stage at which the foetus moves is not significant in terms of physical development.” This contention is supported by noting that there is no connection between quickening and viability (i.e. the stage at which the foetus is a ‘child capable of being born alive’).

Furthermore, the stage of *viability* is, itself, rejected as being of *moral* significance. A viable foetus would still be dependent on others for its continued existence even though it might no longer be dependent on its mother. Now, if it is permissible to abort the non-viable foetus because of its dependence on the mother, why should it be considered abhorrent to abort a viable foetus ‘which also must be dependent upon other people’? On the other hand, if it is morally impermissible to abort a viable foetus or, for example, to kill a new born child, why should it be morally permissible to abort a non-viable foetus when the only significant difference between the two cases relates to the identity of the party(ies) upon whom the foetus is dependent? If there was any justification in the dependency argument then it could be extended to the killing of (say) old people who were dependent on others – yet, clearly, that would be murder and very much against public policy.

Birth is also disregarded as being of moral significance in determining when life begins. If there is no moral significance in the viability stage of a foetus whilst it is still inside the womb, what *moral* significance, if any, can attach to it once it is outside the womb? (*Similarly, if there is moral significance attached to a new-born child and deliberately killing it is morally impermissible, why shouldn’t this impermissibility be extrapolated to any stage of the development of the foetus?*).

Maclean & Maher assert that if any moral significance is to be accorded to the ‘when-does-human-life-begin’ argument, it is to be found at the conception stage. Here, the pro-life perspective focuses on the observation that conception is the start of a *continuous process* of development from the single-cell stage containing an equal number of chromosomes from both parents, through the multi-cellular stage, ... then the embryo stage,

to a foetus and, finally, a new-born baby. Of particular note is the view that a unique being of specific genetic composition is created at conception. However, the counter argument is that the single-cell, or even multi-cellular pre-embryo stage, is totally unlike anything which could be recognised as a human being: just as an acorn is a *potential* tree, but nothing more, so a zygote (the single or multi-cell stage of the pre-embryo) is no more than a *potential* human being [hence, no argument can be based on the alleged *autonomy* of the foetus]. To base an argument on the destruction of potential is also to raise an argument against contraception – the prevention of potential development of human life.

[Q. To what extent, if at all, do you believe that English law is immoral in so far as it makes express provisions for ‘the supply of contraceptive substances and appliances’ (s.5(1)(b) *NHS Act 1977*) and it permits abortion in certain specified circumstances, (s.1(1) *Abortion Act 1967 as amended*)?]

2. To continue the moral debate on abortion by adopting considerations of the ill defined but so-called ‘right to life’ of the developing, “innocent” foetus and of the opposing moral and legal rights of an *autonomous* woman would lead to a sterile debate in which no consensus would be achieved. Probably the most that can be expected is tolerance and respect for the right to express an opposing view – something absent in the crusade of *ACLA (American Coalition of Life Activists)* – a group that has launched a “*Nuremberg Files Project*” the purpose of which is “to gather all available information on abortionists and their accomplices for the day when they may be formally charged and tried at Nuremberg-type trials for their crimes” (per *David Crane*, national director, *ACLA*, January 1996). Moreover, their interpretation of ‘free speech’ included the naming on the WWW in February 1999 of doctors who performed abortions in America.

Law and Abortion

As noted, the legality of abortion in prescribed circumstances is not in doubt: the lawful performance of abortion being provided for in the *Abortion Act 1967* (as amended). Prior to the enactment of the original 1967 Act, the principal Act with provisions relating to abortion was the *Offences Against the Person Act 1861*. This Act made no distinction between criminal abortion and therapeutic abortion. Its provisions remain ‘good law’ despite the recommendations of the *Law Commission* in September 1997 that the Act should be repealed.

The provisions of the 1861 Act and the amending provisions of the 1967 Act in the *Human Fertilisation and Embryology Act 1990 (HFEA 1990)* result in a total of four Acts of Parliament that contain provisions relating to abortion, viz; *Offences Against the Person Act 1861*; the *Infant Life (Preservation) Act 1929*; *Abortion Act 1967*; and the *HFEA 1990* – though, in essence, and with reference to nothing other than abortion, this last Act merely contains the provisions *amending* the 1967 Act. Pre-the amended 1967 Act, *Jane Fortin* described the abortion legislation as “an astonishing hotchpotch of overlapping legislative provisions”. As will be noted, the current legislation does not escape academic criticism.

(I) Criminal Abortion

The law relating to *criminal abortion* is to be found in **ss.58 & 59 Offences Against the Person Act 1861**. In particular, **s.58** provides for criminal offences, punishable by a maximum of life imprisonment, in particular circumstances. In essence (not verbatim):

- (1) for any woman, *being with child*, unlawfully to do any act with intent to procure a miscarriage; and
- (2) for any other person unlawfully to do an act with intent to procure the miscarriage of any woman ‘whether she be or be not with child’.

Thus, self-induced abortion by the woman herself is only criminal if the woman is, in fact, pregnant. Any Act by a third party is criminal ***regardless of whether or not the woman can be proved to be pregnant***.

Brazier (*Medicine, Patients and the Law*, 3/e, 2003, p318) has noted that: “The law embodied in the 1861 Act was applied rigorously up to 1967”. Also, **Mason & McCall Smith** (*Law and Medical Ethics*, 6/e, 2002) made the point that:

“The proscription prior to 1967 was so strong that, in addition to being punished by the courts, a doctor involved in an abortion was extremely likely to have his name erased from the Medical Register”.

Although a defence to a charge of criminal abortion was not introduced until the enactment of the **Infant Life (Preservation) Act 1929**, **Keown** (*Abortion, Doctors and the Law*) has traced judicial pronouncements as to the potential lawfulness of therapeutic abortion to *R v Wilhelm* (1858) and to *R v Collins* (1898) where it was said that:

It could well be understood that there were cases where it was necessary, in order to save the life of a woman, that there should be forcible miscarriage, and a properly qualified doctor had to say when that time had arrived. That was not unlawful. (*per Grantham J*).

s.1 Infant Life (Preservation) Act 1929 contained the qualified defence that:

... no person shall be found guilty of an offence ... unless it is proved that the act which caused the death of the child was not done in good faith for the purpose only of preserving the life of the mother.

The first case to raise the defence of therapeutic abortion was:

R v Bourne [1939] 1 KB 687

A 14-year-old girl became pregnant after being raped. Dr Bourne agreed to perform an abortion on her. He had previously carried out other abortions and had written: ‘I have done that before and shall not have the slightest hesitation in doing it again. I have said that the next time I have the opportunity, I will write to the Attorney-General and invite him to take action.’ Following the operation, Dr Bourne was indicted under the Offences Against the Person Act 1861.

Held: *Macnaghten J*; Where an abortion was performed for the purpose of saving the life of a woman, *or for preserving her health* – physical or mental – then it would not have been performed unlawfully. There was no clear distinction between danger to life and

danger to health ‘ ... since life depends on health, and it may be that health is so gravely impaired that death results.’ Furthermore, “ ... the word ‘unlawfully’ [in s.58 OAP Act 1861] is not ... a meaningless word ... it imports the meaning expressed by the proviso in s.1(1) [of the 1929 Act], and that s.58 of the Offences Against the Person Act 1861, must be read as if the words making it an offence to use an instrument with intent to procure a miscarriage were qualified by a similar proviso.” So *Macnaghten J* was able to conclude that:

“ ... if the doctor is of the opinion, on reasonable grounds and with adequate knowledge, that the probable consequence of continuance of the pregnancy will be to make the woman a physical or mental wreck, the jury are quite entitled to take the view that the doctor who, under those circumstances and in that honest belief, operates, is operating for the purpose of preserving the life of the mother.” Dr Bourne was acquitted.

As noted by *Morgan & Lee (Blackstone’s Guide to the Human Fertilisation and Embryology Act 1990)*: “Until the late 1960s, ... the *Bourne* interpretation remained the only source of defence for a person charged with the unlawful procurement of a miscarriage”.

The Meaning of ‘Capable of being born alive’

The Infant Life (Preservation) Act 1929 had introduced the offence of *child destruction* or causing death of a child presumed *capable of being born alive* before it has an existence independent of its mother: i.e. at a time after the expiry of the limitation on an abortion – which was put at 28 weeks. [N.B.: This time limit was found only in the *Infant Life (Preservation) Act 1929*: no time limit was specified in the *Abortion Act 1967* when originally enacted].

Modern case law illustrating the meaning of ‘capable of being born alive’ includes:

C v S [1987] 1 All ER 1230

While this case confirmed that a father has no legal right to be consulted prior to the legal termination of a pregnancy, the principal issue to be decided was whether or not an abortion carried out on an 18 to 21 week-old foetus constituted an offence under the *Infant Life (Preservation) Act 1929*.

Held: The foetus was not capable of being born alive because it would not be able to breathe ‘either naturally or with the aid of a ventilator’ *per Lord Donaldson MR*. No offence was committed under the 1929 Act.

Rance v Mid-Downs Health Authority [1991] 1 QB 587

Held: A foetus which had reached that stage in its development where it was capable, if born, of living and breathing through its own lungs without any connection to its mother was a child “capable of being born alive” within the meaning of *s.1 of the Infant Life (Preservation) Act 1929* and accordingly an abortion of a foetus at that stage in its development was unlawful *even if carried out within the period of 28 weeks referred to in s.2 of the 1929 Act*. Accordingly, it was not possible to found a course of action against a hospital if its medical staff negligently failed to discover an abnormality in a foetus which was “capable of being born alive”, thereby depriving the parents of the possibility of having the pregnancy terminated.

The significant feature about a child being ‘capable of being born alive’ is that breathing must take place other than by or through connection with its mother. “It is not necessary that the child be able to sustain its lung function without mechanical ventilation. To require otherwise would mean that all the varied circumstances in which neonates might require ventilation would be cases of children who were not capable of being born alive, and failure to attend or render medical assistance would not be culpable”, per *Morgan & Lee, op cit.* [N.B.: The decision in *Rance* must now be read in the light of *s.1 Abortion Act 1967* as amended by *s.37 Human Fertilisation and Embryology Act 1990.*]

(II) Permissive Abortion: The Abortion Act 1967 (as amended)

The Abortion Act 1967 is *permissive only*: i.e. abortion is allowed only on certain clearly defined grounds. *s.1*, as amended by the *Human Fertilisation and Embryology Act 1990* now reads;

- (1) ... a person shall not be guilty of an offence under the law relating to abortion when a pregnancy is terminated by a registered medical practitioner if two registered medical practitioners are of the opinion, formed in good faith –
 - (a) that the pregnancy *has not exceeded its twenty-fourth week* and that the continuance of the pregnancy would involve risk, greater than if the pregnancy were terminated, of injury to the physical or mental health of the pregnant woman *or* any existing children of her family; or
 - (b) that the termination is necessary to prevent grave permanent injury to the physical or mental health of the pregnant woman; or
 - (c) that the continuance of the pregnancy would involve risk to the life of the pregnant woman, greater than if the pregnancy were terminated; or
 - (d) that there is a substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped.

With respect to grounds (b), (c) and (d), no time limit is specified. Accordingly, *abortion is lawful, if performed on the aforementioned grounds, up to term.*

Furthermore, *s.37(4) HuFEA 1990* has substituted a new *s.5(1)* in the *Abortion Act 1967* (i.e., in respect of the effect it has on the *Infant Life (Preservation) Act 1929*). The new sub-section provides that:

No offence under the *Infant Life (Preservation) Act 1929* shall be committed by a registered medical practitioner who terminates a pregnancy in accordance with the provisions of this Act.

This, to quote *Morgan & Lee* (op cit) “ ... ‘uncouples’ the *Abortion Act* from the *Infant Life (Preservation) Act* altogether. An abortion specified on any of the specified grounds in *s.1* and having met the procedure requirements is now lawful, whether carried out on a child incapable of being born alive or of one capable of being born alive. It also means that there is a fifth separate ground for lawful abortion within the terms of the 1967 Act.”

As noted, whereas the general rule is that for an abortion to be legal, *two* registered medical practitioners must be of the opinion, in good faith, (**s.1(1)**), that the grounds specified in the Act are met, this changes in the event of an emergency, where **s.1(4)** provides that an abortion may be performed following a determination by *one* registered medical practitioner, again in good faith, that termination of the pregnancy is ***immediately necessary*** to save the life, or to prevent grave permanent injury to the physical or mental health of the pregnant woman.

What follows from the above is that *a woman has no right to an abortion*: the general rule is that the decision as to whether an abortion is performed will be made by two registered medical practitioners acting in good faith. Whether or not the doctors acted in good faith or ‘abused the Act’ by deferring unduly to the woman’s opinion that she needs an abortion would be a question for a jury to determine: *R v Smith* (1973).

The general rule that an abortion must be carried out in an NHS hospital or other place approved for the purpose by the Secretary of State for Health does not apply to emergencies: **s.1(3)**.

Case law on abortion may be sub-divided into a number of categories, which include: (1) the position of the parents; (2) whether the foetus has any rights; (3) the rights, if any, of third parties, viz; (i) doctors; (ii) nurses; and (iii) medical receptionists.

1(a) The Mother

Emeh v Kensington and Chelsea and Westminster A.H.A. [1985] QB 1012

P, a mother of three healthy children, underwent an abortion and sterilisation operation in May, 1976. In January 1977, when she discovered she was 18-20 weeks pregnant, she decided not to have another abortion. She later sued K in negligence and for breach of contract.

Held: She was successful on both counts, and her refusal to undergo a second abortion was not so unreasonable as to eclipse the surgeon’s negligence: *it was not a novus actus interveniens*. She was awarded damages amounting to more than £20,000 which included the cost of a second sterilisation operation.

N.B. Where the pregnant female is a *Gillick*-competent minor, her right to confidentiality means that she does not have to inform her parents of her wish to seek an abortion. The approach adopted in *Gillick* to seeking advice and treatment on contraceptive matters applied equally in relation to abortion: *R (on the application of Axon) v SS for Health* (2006)

Abortion and Incompetent Females

Irrespective of whether the female is of adult years, i.e. she has reached the age of majority, or she is a minor, the ***Abortion Act 1967*** as amended provides the necessary safeguards and, thus, any abortion which complies with one of the provisions in **s.1(1)** will be lawful. Consequently, a declaration of the lawfulness of the procedure will not be a prerequisite for such an abortion. This was decided in: *In re G (mental patient: termination of pregnancy)*:

In re G (Mental Patient: termination of pregnancy) (1991)

Held: There was no requirement to seek a Court declaration for performing an abortion on a pregnant mentally handicapped woman: the *Abortion Act 1967* provided fully adequate safeguards for the doctors involved.

1(b) The Father

Paton v British Pregnancy Advisory Service [1979] QB 276

Held: A father has no rights in respect of an unborn child and the Abortion Act 1967 gave him no right even to be consulted prior to an abortion. In this case it was said that the father had ‘no legal right enforceable at law or in equity to stop his wife having this abortion or to stop the doctors from carrying out the abortion’. Although the abortion was performed, the father took his case to the European Commission on Human Rights ((1980) 3 EHRR 408), arguing that this decision infringed the European Convention on Human Rights. Whereas he argued that his right to family life and the unborn child’s right to life had been infringed, the Commission dismissed his claim. It was said that where an abortion was carried out on medical grounds, his (the father’s) right to family life must necessarily be subordinated to the need to protect the rights and health of the mother’.

It would seem that the pursuit of a claim by a father for *locus standi* in challenging a decision to abort his wife would be confined to challenging the decisions of two doctors purportedly made in good faith that a proposed abortion would be lawful within the scope of the 1967 Act. Thus, in May 1997, *James Kelly* succeeded in having his wish to prevent his estranged wife from having an abortion, being referred to the House of Lords. However, he instructed his lawyers not to proceed with the case when, it was said, that he realised not only the consequences of the financial hardship he had endured in pursuing the case but that it was “no longer about me and her, it was about changing the law”. ((1997) *The Times*, May 28th).

2. Foetal ‘rights’?

The 1929 Act apparently protected only a ‘viable’ foetus, one ‘capable of being born alive’. The 1990 Act has amended the *Congenital Disabilities (Civil Liability) Act 1976, s.4(4)*, so as to provide a child born alive and surviving for at least 48 hours with a cause of action for damage which resulted during the course of an assisted conception. In other words, as noted by *Mason & McCall Smith*, 3/e, 1991:

“ ... fetal rights may be established while in utero – or even before conception – [but] they cannot be realised until the fetus is born alive. [The authors go on to say that:] “There is no existing basis in law which justifies a conclusion that foetuses are legal persons. [Accordingly], a stillbirth cannot benefit; no suit for wrongful death is recognisable in the United Kingdom and we are left with an apparent paradox – as *Pace* has put it: ‘Liability is incurred for negligent injury to the foetus but not – or, at least, not necessarily – for its deliberate destruction’.”

Confirmation of a foetus having no legal personality and, consequently, no *locus standi* in a claim to a right to life was made in *Kelly's case* (*supra*) in 1997 and supported in *St George's Healthcare NHS Trust v S* (1998) *The Times*, May 8th.

{See also: *Vo v France* (2005) 40 EHRR 12 – no consensus in Europe as to the moral status of the embryo}

Should a foetus be aborted if it is thought to have genetic characteristics associated with homosexuality?

(See articles in the Sunday Telegraph, 16th and 23rd February 1997; and the letter from James Watson in the edition of the 23rd Feb alleging that he was misquoted in the edition of the 16th February).

Third Parties' Rights

(i) Doctors

A doctor claiming conscientious objection must prove it. Yet a conscientious objection does *not* absolve a doctor from treating a woman when the continuation of her pregnancy threatens her life.

In respect of career 'advancement', *Mason & McCall Smith* have said: '... that the profession of gynaecologist is now virtually closed to those who feel unable to accept [the Abortion Act 1967] whether this be on religious or on Hippocratic grounds'. A more notable feature, however, relates to a doctor who *does* accept the 1967 Act as amended. Whereas in 1968 the *Declaration of Geneva* (as amended in Sydney) proclaimed: 'I will maintain the utmost respect for human life from the time of conception', by 1970 the *Declaration of Oslo* had been modified to read that: 'Diversity of response to [abortion] results from the diversity of attitudes towards the life of the unborn child. This is a matter of individual conviction and conscience'(!) It is, in fact, a matter that continues to cause controversy and in June 1997 the *BMA's Ethical Committee* were criticised by many doctors for the "politicisation" in trying to amend the *Hippocratic Oath's* declaration of: "I will not give a woman a pessary to produce abortion" to:

I recognise the special value of human life but I also know that the prolongation of human life is not the only aim of health care. Where abortion is permitted, I agree that it should take place only within an ethical and legal framework. ...

It is of paramount importance that a doctor ensures he acts in good faith in expressing an opinion that a proposed abortion comes with a permissive category if he is to remain within the law as failing to do so provides for criminal liability under the *OAP Act 1861: R v Smith* [1973] 1 WLR 1510.

(ii) Nursing Staff

s.4 Abortion Act 1967 provides that no person is under a legal duty to assist in an abortion to which (s)he has a conscientious objection, *except* where immediate treatment is necessary *to save the life of the woman or to prevent grave permanent damage to her health*. The question which then arose was: if a midwife or a nurse was prepared to help a registered medical practitioner would (s)he be guilty of any offence since *s.1 Abortion Act 1967* only provided that no offence would be committed when a pregnancy is terminated by that registered practitioner in prescribed circumstances. The answer was given in:

Royal College of Nursing v DHSS [1981] AC 800

Here, *Lord Diplock* said:

“The doctor need not do everything with his own hands; the requirements of the sub-section are satisfied when the treatment for termination of a pregnancy is one prescribed by the registered medical practitioner carried out in accordance with his directions and of which a registered medical practitioner remains in charge throughout.”

(iii) Medical Receptionists

The first case to provide guidance on *s.4(1) Abortion Act 1967* was *Janaway v Salford A.H.A.* *s.4(1)* provides that: ‘... no person shall be under any duty ... *to participate* in any treatment authorised by this Act to which he has a conscientious objection’.

Janaway v Salford A.H.A. [1988] AC 537

In June 1984 Mrs Janaway, the applicant, became employed by the respondent health authority as a medical receptionist at a health centre. Her duties included the typing of correspondence for doctors at the centre. In September, she discovered that her employers expected her to type letters referring patients to specialists with a view to the termination of pregnancy. Being a practising Roman Catholic and regarding all abortions as immoral, she refused, and sought to rely on *s.4(1)*. Her employers, taking the view, on legal advice, that the section only applied to those with direct, clinical responsibility for the patients, dismissed her. Mrs Janaway applied for judicial review, seeking an order of *certiorari* to quash her employers’ decision and a declaration that she was not under any duty to type the abortion referral letters.

Held: A secretary who typed a letter could not be said to be counselling or procuring an abortion: she would have been intending merely to carry out the obligations of her employment. She could not invoke the protection of *s.4(1)*.

(III) Abortion procedures that have raised doubts as to their legality

Whether the techniques of menstrual extraction and selective reduction of multiple pregnancies constitute abortion and comply with the Abortion Act 1967 as amended has been the source of much academic comment and judicial dicta. In contrast, provisions of the *Human Fertilisation and Embryology Act 1990* appear comprehensively to deal with the ‘abortion pill’.

Menstrual Extraction

As noted by *Brazier* (2/e, 1992): ‘... if more than 72 hours elapse after unprotected intercourse before the woman seeks help, menstrual extraction can be used at or just after the due date of her next period. By this technique, an instrument attached to a vacuum is used to remove the whole of a woman’s monthly period within a few minutes, including, if it exists, the product of any unwanted conception’¹.

¹ This quote does not appear in the 3/e of her book (2003). Indeed, Margaret Brazier has placed less emphasis on this technique as: ‘Menstrual extraction has fallen out of fashion’. [In essence, this is because] ‘... the abortion pill may render menstrual extraction obsolete’. (p321).

The legality of such a procedure appeared to have been confirmed, though it was not free from doubt. In 1978 the then DPP had reasoned that it was illegal since ‘anything done with intent to procure the miscarriage of a woman in unlawfully done unless authorised by s.1 of [the Abortion] Act’. Furthermore, he stated that no doctor could hold the opinion in good faith, as required by the Act, that there was a risk to the woman or the child in the continuance of the pregnancy if he did not know that in fact she was pregnant. In 1979, and without giving any reasons, the DPP’s superiors, the Attorney-General and the Solicitor-General, decided that a gynaecologist employing the technique would be protected by the Abortion Act. There was merely an expression of opinion that the Act’s references to termination of pregnancy should be understood as including steps taken to terminate a pregnancy which two practitioners in good faith believe to exist.

This highly unsatisfactory situation was only partially addressed by **Tunkel** who aimed to deflect criticism and the associated criminal liability away from doctors by noting that:

‘ ... it would be well to keep in mind what we are pondering: the prospect of prosecuting highly respected medical men. Their crime (maximum penalty, life imprisonment) is their open and ethical performance, with skill and success, of routine procedures at just the time when these are medically most desirable. Should there even be a shadow of criminality over this situation?’

The central issue, the meaning in the Abortion Act 1967 of the words ‘when a pregnancy is terminated’ fell to be determined by the House of Lords in the *Royal College of Nursing* case, (1981). There was no unanimous opinion: indeed, substantially different opinions were delivered. **Lord Edmund-Davies**, for example, adopted a passage from **Smith & Hogan’s Criminal law** (4th edn., 1978). They had asserted that:

... the legalisation of abortion must include the steps which are taken towards it. Are we really to say that these are criminal until the operation is complete, when they are retrospectively authorised, or alternatively that they are lawful until the operation is discontinued or the woman is discovered not to be pregnant when, retrospectively, they become unlawful? When the conditions of the Act are otherwise satisfied, it is submitted that [the doctor] is not unlawfully administering, etc., and that this is so whether the pregnancy be actually terminated or not.

Brazier noted (2/e, 1992) that while ‘menstrual extraction can be carried out by a woman alone [c]riminal liability may ... be avoided, because it will be impossible to prove whether she was ever in fact pregnant’.

[It may have been that the most meritorious proposal was that given by the **Lane Committee (1974)** which suggested that the Abortion Act should have been amended by adding a new subsection to state that: ‘In this Act references to termination of pregnancy include acts done with intent to terminate a pregnancy if such exists’.

Whilst the legality of menstrual extraction cannot be free from doubt, Margaret Brazier now notes (3/e, 2003) that:

‘No successful prosecution has ever been brought in respect of post-coital birth control, nor is criminalization likely now. In 1983, the Attorney-General expressed his opinion that prior to implantation there is no pregnancy and so means used to prevent implantation do not constitute procuring a miscarriage. In 1991 a judge dismissed a prosecution for criminal abortion based on the insertion of an IUD agreeing with the Attorney-General that until implantation there is no pregnancy’].

Selective Reduction of Multiple Pregnancy: 'Selective Feticide'

'Selective reduction' is the term used to describe the procedure 'whereby one or more embryos in a multiple pregnancy are selectively killed to allow others to develop'. *Margaret Brazier* (3/e, p331) states that:

'The dead foetuses are not expelled from the uterus, but may become 'foetus papyraceous', flattened and mummified, and emerge on delivery of their healthy brothers and sisters'.

As to the legality of the procedure, it would appear that two questions have to be answered, viz: (i) does the procedure fall within the offence under *s.58 OAP Act 1861* of acting 'with intent to procure a miscarriage'?; and, if it does, (ii) would compliance with the terms of the *Abortion Act 1967*, as amended, render it lawful?

A persuasive article on this issue is *John Keown's 'Selective Reduction of Multiple Pregnancy'* (1987) NLJ 1165. Keown argues that a miscarriage does not necessitate the expulsion of the foetus from the uterus or to the emptying of the uterus; that 'miscarriage' pertains not to the destination of the foetal remains but to the failure of gestation. He says that *s.58* prohibits the termination of pregnancy even if the foetus is not thereafter expelled. Furthermore, '[s.58] is infringed whether the woman miscarries all of the foetuses or only of one'. Keown's argument is supported by *David Price* who concluded that: 'it is the causing of foetal death which is the essence of the crime of abortion and not simply the expulsion of the foetus from the mother'.

With regard to whether compliance with the 1967 Act, as amended, would render selective reduction lawful, the situation, initially, was not clear. However, given that *s.37(5)* of the 1990 Act amended *s.5(2)* of the 1967 Act to refer to 'a woman's miscarriage (or, in the case of a woman carrying more than one foetus, her miscarriage of any foetus) is unlawfully done unless authorised by section 1 of this Act ...', it was soon recognised that if a selective reduction was performed on one of the grounds for which a termination for the whole pregnancy was lawful, then the procedure would be *not unlawful*. Accordingly, *Mason & Laurie* note that selective reduction procedures comply with the law (7/e, Ch.5.118, p167), as does *Brazier*, who is of the opinion that *s.37(5) HFEA 1990* 'provides a relatively clear regime for selective reduction', (3/e, p331), and she adds that killing some foetuses to save others invokes the ground of 'permitting abortion to safeguard the health of any "existing children" of the pregnant woman'[which is provided for in *s.1(1)(a)* of the 1967 Act]. The problem this generates, however, is: [how] 'Can foetuses be regarded as "existing children"?''. As she notes: 'The whole philosophy of English law relating to the status of the foetus is that a foetus is not for legal purposes a child!'. Moreover, *Morgan & Lee* note that:

"Almost all reductions will be justifiable on the grounds that there is a substantial risk that each foetus will be born with such physical or mental abnormalities as to be seriously handicapped within *s.1(1)(d)*, because multiple pregnancy carries with it a significant risk of prematurity with the associated birth risks. If *Keown* and *Price* are correct in their interpretation of the notion of miscarriage, then any difficulties of interpretation are lessened. But if the better view is that expulsion of the products of conception from the womb is an essential ingredient of miscarriage then *prima facie* there remain difficulties."

[The most famous – and perhaps most tragic – case involving the refusal of a pregnant woman to undergo selective reduction, was that involving Mandy Allwood in 1996. The sympathy extended to her for the deaths in utero of all eight fetuses was, however, diluted by what appeared to be her attempt to “cash in” on her multiple-pregnancy when she hired the services of a well-known publicist and signed a contract with a ‘tabloid’ newspaper. It was strenuously denied by the newspaper that the amount of money she would be paid was directly linked with the number of babies she managed to carry to term].

RU486: The ‘abortion pill’

To the original s.1(3) Abortion Act 1967, which provided that ‘any treatment for the termination of pregnancy must be carried out in a hospital vested in the Minister of Health or the Secretary of State under the National Health Service Acts, or in a place for the time being approved for the purposes of this section ...’, has been added a new **s.(3A)** which provides that:

The power ... to approve a place includes the power, in relation to treatment consisting primarily in the use of such medicines as may be specified in the approval and carried out in such a manner as may be specified, to approve a class of places.

The purpose of the amendment was to anticipate the marketing of the French ‘abortion pill’, **RU486**, the administration of which requires no surgery or anaesthetic, and to acknowledge that there is no need for its administration to be confined to a woman within a hospital or approved clinic. However, a registered medical practitioner who administers this ‘abortion pill’ knowing that a woman is pregnant and with intent to end the pregnancy, obviously intends to procure a miscarriage within the provisions of the 1861 Act. Accordingly, this can be done lawfully only in compliance with the provisions of the **Abortion Act 1967**. Yet, if the same drug was administered before implantation took place (and could one be certain of this?), there would be no requirement for this since ‘any anti-pregnancy technique that prevents implantation does not terminate pregnancy, because there is no pregnancy, and therefore cannot be abortion’, per *Norrie*. Perhaps the point is best concluded by *Norrie* who asserts that: ‘The real difficulties for the law come about when we try to define [just what is meant by] termination of pregnancy’.

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Jackson, E, *Medical Law Text, Cases, and Materials*. Oxford: OUP, 2006, Ch.10
Maclean & Maher, *Medicine, Morals & the Law*, Gower Publishing, 1983, Ch.2.
Mason & McCall Smith, *Law and Medical Ethics*, 7/e, Oxford: OUP, 2005, Ch.5.
Pattinson, D, *Medical Law and Ethics*. London: Sweet & Maxwell, Ch.7
Stauch, Wheat & Tingle, *Text, Cases & Materials on Medical Law*, 3/e. London: Routledge-Cavendish, 2006, Ch.8.
- Abortion Act 1967** (See either: *Jones & Morris*, *Blackstone’s Statutes on Medical Law*, 3/e London: Blackstone Press, 2003; or *Tovey, Gwyn* (ed), *Cracknell’s Statutes on Medical Law*. London: Old Bailey Press, 1998).
- Mackay*, *Late abortions – a new dilemma?* [1991] PN 124.

World Wide Web

- Abortion Information Page: <http://www.euthanasia.com/abortion.html>
- Abortion Law Homepage: <http://hometown.aol.com/abtrbng/index.htm>
- Abortion Law Development:
http://www.policyalmanac.org/culture/archive/crs_abortion_overview.shtml
- American Constitutional Law and Abortion:
<http://members.aol.com/abtrbng/conlaw.htm>
- California Abortion & Reproductive Rights Action League (CARAL):
<http://www.caral.org/abortion.html>
- Abortion Law in Canada: <http://www.duhaime.org/ca-abor.htm>
- Abortion Law in Australia:
<http://www.aph.gov.au/library/pubs/rp/1998-99/99rp01.htm>
- Pro-choice forum: (English law – good):
http://www.prochoiceforum.org.uk/irl_abort_law.asp
- Pro-choice forum - again – (but more up-to-date articles): (English law – good):
http://www.prochoiceforum.org.uk/ocr_abort_law.asp
- ALRA – Abortion Law in the UK: <http://www.alra.org.uk/abortion.html>

Further Areas of Continuing Debate to Note:

“New evidence on foetal pain raises abortion doubts”, (1996) *The Times* July 18th

“Abortion doctors may give foetuses painkiller”, (1998) *The Sunday Telegraph*, August 1st

“Tissue from aborted foetuses used to save unborn babies” (1996) *The Sunday Times*, Sept. 1st

“Abortion ‘increases chances of breast cancer by a third’”, (1996) *The Times*, October 12th

“Why abortions are not immoral”, Lord Winston talking to Francis Wilson, (1996) *The Sunday Telegraph*, August 18th; and letters to the editor taking issue with Lord Winston, (1996) *The Sunday Telegraph*, August 25th

“Trust calls for abortions at GP surgeries”, (1998) *The Times*, April 9th

“Cross-party group demands easier access to abortion”, (1998) *The Times*, April 28th

“Abortion too easy, say most women”, (1997) *The Sunday Telegraph*, October 26th

“NHS abortions rise as managers take control”, (1995) *The Times*, January 3rd

“Young doctors refuse abortions”, (1998) *Sunday Times*, November 15th

“Doctors aid sex-choice abortions”, (1999) *Sunday Times*, June 13th

Typical Examination Questions

1. In addition to the legal uncertainty associated with early and late abortions there can be little doubt that such practises are unethical.

To what extent, if at all, does this statement reflect the current law and the morality of performing abortions in the early and in the late stages of pregnancy?

2. “The medical profession is about to have laid before it a new dilemma created by s.37 of the Human Fertilisation and Embryology Act 1990, which amends s.1 of the Abortion Act 1967. Put at its most dramatic, it gives doctors power to kill an unborn child capable of an independent existence up to the moment of birth. This is a dilemma with profound legal as well as ethical dimensions”.

[*Irene Mackay*, Late abortions – a new dilemma? Professional Negligence (1991)]

Explain how this ‘new dilemma’ is merely one of several recognised ‘dilemmas’ which contribute to a lack of clarity in the law and ethics of abortion.

3. To what extent would you agree with the assertion that: ‘Abortion’ is a synonym for murder?
4. A woman should be given more control over ‘rights’ to an abortion. Consider the facts that neither a developing foetus nor the putative father has any *locus standi* to prevent the mother being aborted. Moreover, no one has the right to prevent a competent, pregnant woman refusing medical treatment that might be required to save her life and that of her unborn child. Yet, in non-emergency situations, the general rule in English law is that a pregnant woman can be aborted only if two doctors are of the opinion, formed in good faith, that the circumstances provided for in *s.1(1) of the Abortion Act 1967* (as amended) apply. This restriction is an anomaly that the law should address.

Critically evaluate this assertion.