"THE LAW OF THERAPEUTIC ABORTION"

By John V. Barry, Barrister-at-Law

A General Meeting of the Medico-Legal Society of Victoria was held on Saturday, 26th November, 1938, at 8.30 p.m. at the British Medical Society Hall. His Honor Mr. Justice Lowe occupied the chair. Mr. J. V. Barry delivered an address on "The Law of Therapeutic Abortion."

Mr. Barry said: At a meeting of this Society held in February, 1933, Dr. Arthur E. Brown delivered a paper which was entitled "Ethics of Abortion" (*Proceedings of Victorian Medico-Legal Society, vol. 1, p. 106*). As I remember the occasion, he sought guidance and help from discussion by members of this Society upon the thorny problems to which the subject of abortion gives rise, but I am afraid that he was unsuccessful in his quest. Happily, in the subject which it is my privilege to discuss with you to-night, I am not embarrassed by any such search, for it is my intention to avoid the controversial aspects of the problem, and merely to sketch to you the development of English law in relation to abortion, and to define to you the legal position, as I understand it, which has resulted from the action of the London gynaecologist, Mr. Aleck W. Bourne, who, as you all remember, after terminating the pregnancy of a girl of 14 years of age who was impregnated as a result of a rape, surrendered himself to the police authorities so that he might be put upon his trial. I shall examine in some detail the charge which Mr. Justice Macnaghten delivered to the jury which acquitted Mr. Bourne, for while there is nothing particularly startling or unexpected in the directions which his Lordship gave upon the law relating to therapeutic abortion, some observations which fell from him give rise to a problem of great interest to medical practitioners.

Definition

"Abortion" is not strictly a legal term, and in the relevant statute the word "miscarriage" is preferred. In the latest

legal publication known to me, the third edition of the Encyclopedia of the Laws of England (*London, 1938, Sweet & Maxwell, vol. 1, p. 22*) it is said, "Abortion, or miscarriage, as a legal term, means expulsion of the contents of the womb of a pregnant woman at any period of gestation short of full term. To cause abortion is unlawful, unless it is done in good faith for the purpose of saving the life of the mother." It is not irrelevant to say that this passage was written before Bourne's case and, indeed, appeared also in the 2nd edition of that work. In common, though not legal, use of the term, "miscarriage" has reference to accidental termination of a pregnancy, whilst "abortion" has the more sinister meaning of a deliberate and improper procuring by artificial means of the expulsion of the contents of the pregnant uterus. I understand that, medically, abortion may mean an interruption of the pregnancy before the foetus is viable, and miscarriage may be limited to an interruption occurring between the fourth and seventh months of pregnancy.

Historical Review

Under the Roman Law, a woman who procured her own miscarriage was liable as for an *extraordinarium crimen*, but not under the Lex Julia against homicides. In Roman law, an unborn child was not regarded as a human being, but as part of the viscera of the mother. (*Stephen, History of Criminal Law, vol. 1, p. 25; D. Seaborne Davies, "The Law of Abortion and Necessity," 2 Modern Law Review, at p. 131.)*

Under Canon law, artificial abortion directly sought is forbidden as a grave sin under pain of excommunication reserved to the bishop and of the canonical impediment known as irregularity reserved to the Holy See (*Catholic Encyclopedic Dictionary, London, 1931, s.v., "Abortion"*). In 1588, Pope Sextus V. published a Papal Bull, which subjected those guilty of the crime to all the penalties, civil and ecclesiastical, which were inflicted on murderers,

and in May, 1884, and August, 1889, the Tribunal of the Holy Office decreed "it cannot be safely taught in Catholic schools that it is lawful to perform any surgical operation which is directly destructive of the life of the foetus or the mother." One may safely assume that the attitude of the Roman Catholic Church to abortion has always been as it is now defined by the Papal Encyclical, *Casti Connubii*, which was promulgated in 1930. That Encyclical condemns abortion as "the murder of the innocent," and therapeutic abortion is thus prohibited by the Catholic Church. Dr. L. A. Parry, in Ch. 111 of his *Criminal Abortion* (London, 1932) presents the position of the Church, with which, apparently, he is for the most part in accord.

Legal literature relating to abortion is meagre and the first reference in the books of English law I have been able to discover is to be found in Bracton's *De Legibus Angliae*, which was completed about the year 1256. It is there stated: "Si sit aliquis qui mulierem pregnantem percusserit vel ei venenum dederit per quod fecerit abortionem, si puerperium jam formatum vel animatum fuerit, ex maxime si animatum, facit homicidum;" which is in translation, "If there be someone who has struck a pregnant woman or has given her poison whereby he has caused abortion, if the foetus be already formed or animated, and particularly if it be animated, he commits homicide." (*Bracton, Lib. 111 De Corona, Cap. 4, fol. 121.)* About the year 1290 in the law book known as Fleta (which was really Bracton's work brought up to date) there appeared (*Lib. 1, C. 23*) the following:—"10. Qui etiam mulierem pregnantem oppresserit, vel venenum dederit vel percusserit ut faciat abortivum, vel non concipiat, si foetus erat jam formatus et animatus, recte homicida est." (Moreover, whoever shall have overlain a pregnant woman, or shall have given her drugs or blows, in such a sort to procure abortion, or non-conception, after the foetus shall have been already formed, and endowed with life, is by law a homicide.)

"11. Et similiter qui dederit vel acceperit venenum sub hac intentione ne fiat generatio vel conceptio." (And in like manner, whoever shall have given or taken drugs to the intent that no generation or conception may take place.)

"12. Item facit homicidium mulier quae puerum animatum per potationem et hujus modi in ventre devastaverit." (Also the woman commits homicide who by potions and so on shall have destroyed her animate child in her womb.)

Stephen, in his *History of the Criminal Law* (*Vol. 111, p. 32*) considers that Bracton carried the law to a length not adopted in later times. The text in Fleta is probably corrupt, and the words "vel non concipiat" an interpolation, and in any event the passages I have quoted almost certainly owe much more to the Canon law than to the common law.

Animatus or animated meant endowed with a soul, and I understand that it was held by theologians at one time that the male embryo was endowed with a soul at the fortieth day, and the female at the eightieth, but it is now considered that the time of endowment is the same for both sexes, namely, the fortieth day.. (*"The Law of Therapeutic Abortion," Law Times Journal, Vol. 186, p. 153; "Religion and Science," by Bertrand Russell, p. 108.*) The Justinian Code also fixed the period of animation at forty days after conception. *Formatus* or formed meant much the same as animated, for an embryo *formatus* meant an embryo endowed with a soul and its destruction was nothing less than murder, punishable by death, but and embryo *informatus* did not possess a soul. (*186 Law Times Journal, p. 154; 2 Modern Law Review, p. 131.*) This theological position leads the anonymous author of the article in the Law Times Journal to which I have referred to conclude "that there is a strong probability that abortion before the period of forty days had elapsed was not an offence at common law, but it was no doubt an ecclesiastical offence, for all ecclesiastical authorities agreed in making the destruction of an embryo informatus

punishable, although they differed as to the punishment, some, such as St. Augustine, making the offence punishable with a fine only, whereas others, such as the Council of Trullo, making the offence punishable with death."

It should be noticed that in the early history of the law of homicide, all killing was criminal, and it lay on the accused to show some justification or extenuation. The development of the law has been traced by Mr. Justice Dixon in his paper, "The Development of the Law of Homicide," which is printed in *9 Australian Law Journal (Supp.), p. 64,* and is dealt with by Stephen, in *Vol. 111, Chapter XXVI,* of his *History of the Criminal Law of England.* In the early stages, although Lord Bacon had laid the basis of the law in his commentary on the maxim "Necessity carrieth a privilege in itself" (*see R. v. Dudley & Stephens (1884), 14 Q.B.D. 273*), the principle had not developed that an act otherwise criminal may be excused so as to justify an acquittal by showing that it proceeded from an overwhelming necessity. It is this principle of excusability from necessity that I believe lies at the bottom of the law of therapeutic abortion, and I shall have occasion to refer to it later.

The next useful reference to abortion is by Coke in the *3rd Institute, C. 7.* In the course of his definition of murder (a definition which, by the way, led Stephen to remark that Coke showed by it "that utter incapacity for anything like correct language or consecutive thought that was one of his greatest characteristics" (*Dig. Crim. Law, 7th ed., p. 462*)), Coke stated that the victim of homicide must be "any reasonable creature *in rerum natura,*" and continued, "If a woman be quick with child, and by a potion or otherwise killeth it in her womb, or if a man beat her, whereby the child dieth in her body, and she is delivered of a dead child, this is a great misprision, and no murder; but if a child be born alive, and dieth of the potion, battery, or other cause, this is murder, for in law it is accounted a reasonable creature, *in rerum natura,*

when it is born alive." Blackstone, in 1768, followed Coke, and Mr. Justice Willes when giving evidence before the Capital Punishment Commission of 1866 expressed his view of the law to the same effect, for he said, "I take it that an injury inflicted upon a child which has not actually been born into the world, causing death before it has been born into the world, even though it has breathed, does not constitute murder . . . it is right to say that there is authority to the effect that in such cases the mother is guilty of what is called a misprision, but the law of misprision is antiquated . . ." (*British Parliamentary Papers, 1866, 21, p. 274, quoted by D. Seaborne Davies in "Child-Killing in English Law," 1 Modern Law Review, at p. 211*). Upon this requirement that the victim in order to constitute a homicide must have been a person *in rerum natura*, Stephen observed, "The line must obviously be drawn either at the point where the foetus begins to live, or at a point at which it begins to have a life independent of its mother's life, or at a point when it has completely proceeded into the world from its mother's body. It is almost equally obvious that the last of these three periods is the one which it is most convenient to choose. The practical importance of the distinction is that it draws the line between the offence of procuring abortion and the offences of murder or manslaughter, as the case may be. The conduct, the intentions, and the motives which usually lead to the one offence are so different from those which lead to the other, the effects of the crimes are so dissimilar, that it is well to draw a line which makes it practically impossible to confound them. The line has in fact been drawn at this point by the law of England . . ." (*Hist. Crim. Law, Vol. 111, p. 2*). Therefore, in Article 310 of his *Digest of the Criminal Law* (*7th ed., p. 218*), Stephen states, "A child becomes a human being . . . when it has completely proceeded in a living state from the body of its mother, whether or not it has breathed, and whether the navel string has or has not been divided, and the killing

of such a child is homicide, whether it is killed by injuries inflicted before, during, or after birth." "A living child in its mother's womb, or a child in the act of birth, even though such a child may have breathed, is not a human being within the meaning of this definition, and the killing of such a child is not homicide."

It will thus be seen that while there is authority for the view that to procure the abortion of a quick child is a common law misdemeanour (a precedent for a common law indictment appeared in *Chitty's Criminal Law (1816), Vol. 111, pp. 797-8*), the position had never been clearly defined. A woman is quick with child when she for the first time feels the movements of the foetus (*R. v. Goldsmith (3 Camp. 76), R. v. Phillips (3 Camp. 77)*), and I understand that that period may be from the fourteenth to the twentieth week of gestation.

In 1803 was passed the first Act which dealt with "the malicious using of means to procure the miscarriage of women." That Act was known as Lord Ellenborough's Act (43 Geo. 111, C. 58), and it declared that it was a capital felony for any person to administer any deadly poison or other noxious and destructive substance or thing with intent thereby to cause and procure the miscarriage of any woman then being quick with child, and that it was a felony punishable by fine, imprisonment, the pillory, and/or whipping or by transportation for any term not exceeding 14 years for any person to administer a poison or noxious thing or to use an instrument with the like intent upon a woman who was not or not proved to be quick with child. Probably by inadvertence, the Act omitted to make it an offence to use an instrument on a woman quick with child, although it was an offence to do so on a woman not quick with child.

Next came Lord Landsdowne's Act (9 Geo. IV, C. 31) in 1828, which remedies the omission in the first statute, and was in similar terms, but the punishments provided were less severe. It is to be observed that the important

word "unlawfully" that appears in the Act of 1861, and in the Victorian legislation, was not in the 1828 Act (*Russell on Crime, 9th ed., vol. 1, p. 516*). In 1837 came another Act (1 Vic., C. 85), which removed the punishment of death and by abolishing the distinction between women who were and women who were not quick with child, got rid of the theological distinction between the embryo *informatus* and the embryo *formatus*. The Act did not contain the words "whether she be or be not with child," which are in Sec. 58 of the Offences against the Person Act 1861, to which I shall next refer.

Statutory Provisions

In 1861 there was enacted the Act under which Mr. Bourne was prosecuted (24 and 25 Vic., C. 100), which is also the foundation of the Sections in our Crimes Act which deal with the subject. They are Sections 62 and 63 of the Crimes Act 1928, and are as follows:—

"62. Whosoever being a woman with child with intent to procure her own miscarriage unlawfully administers to herself any poison or other noxious thing, or unlawfully uses any instrument or other means, and whosoever with intent to procure the miscarriage of any woman whether she is or is not with child unlawfully administers to her or causes to be taken by her any poison or other noxious thing or unlawfully uses any instrument or other means, and whosoever with intent to procure the miscarriage of any woman whether she is or is not with child unlawfully administers to her or causes to be taken by her any poison or other noxious thing, or unlawfully uses any instrument or other means with the like intent, shall be guilty of felony, and shall be liable to imprisonment for a term of not more than fifteen years.

63. Whosoever unlawfully supplies or procures any poison or other noxious thing or any instrument or thing whatsoever, knowing that the same is intended to be unlawfully used or employed with intent to procure the miscarriage

of any woman whether with child or not, shall be guilty of misdemeanour, and shall be liable to imprisonment for a term of not more than three years."

It thus appears by the Statute that it is an offence for any person to employ artificial means to procure an abortion on a woman whether or not she is pregnant, but that it is an offence for a woman to employ artificial means to procure abortion on herself only if she is in fact with child.

This, then, is the statutory law on the subject, and practically we may take it that in Victoria these two sections comprise the whole of the relevant legal provisions. I am not concerned to discuss whether the law is all that it should be, and there can be no doubt that the accepted attitude is that expressed by Wills, J., in *The Queen v. Tolson* (*(1889), 23 Q.B.D., 168*), when he says, "The foundations of civil society rest upon the principle that obedience to the law, whether it be a law approved of or disapproved of by the individual, is the first duty of the citizen."

Before I conclude this statement of the statutory provisions that deal with the subject, I should mention that there is in England an Act which has not been copied in Victoria. Stephen pointed out (*Hist. Crim. Law, Vol. 111, p. 3*) that there was no provision to meet the specific offence of killing a child in the act of birth. The child is then not a human being, as it has not proceeded completely from the mother, and it cannot be said that to kill it is an abortion, for it may have been completely extruded from the uterus. In 1929, therefore, the Infant Life (Preservation) Act 1929 (19 and 20 Geo. V, c. 34) was passed, and it enacts:—

"Section 1 (1). Subject as hereinafter in this sub-section provided, any person who, with intent to destroy the life of a child capable of being born alive, by any wilful act causes the child to die before it has an existence independent of its mother, shall be guilty of felony, to wit, of child destruction, and shall be liable on conviction thereof on

indictment to penal servitude for life. Provided: that no person shall be found guilty of an offence under this section 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.

(2) For the purpose of this Act, 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."

This enactment (which is not the law in Victoria) is of great importance when considering the direction given to the jury in Bourne's case, for it is plain that the trial judge founded his directions upon that Act, and indeed, the writer of the article in the *Law Times Journal* criticises him for doing so.

Views as to the Law Before Bourne's Case

Writing in 1883, Sir James Fitzjames Stephen observed: "Suppose a ship so situated that the only possible way of avoiding a collision with another ship, which must probably sink one or both of them is by running down a small boat. Or suppose that in delivering a woman it is necessary to sacrifice the child's life to save the mother, I apprehend that in neither of these cases would an offence be committed. It would, however, be necessary to show that the discretion was used fairly" (*Hist. Crim. Law, Vol. 11, p. 110*).

In 1896 the Royal College of Physicians took counsel's opinion on the state of the law, and that opinion ran, "We are of opinion that the law does not forbid the procurement of abortion during pregnancy, or the destruction of the child during labour, where such procurement or destruction is necessary to save the mother's life" (*Taylor, Medical Jurisprudence, 8th ed., Vol 11, p. 144*). In the 1936 edition (9th) of *Russell on Crime* it is said (p. 517), "The word 'unlawfully' excludes from the section acts done in the course of proper treatment in the interests of the life

or health of the mother," but, strangely enough, the only authority given for the proposition is the 7th edition of Taylor's Medical Jurisprudence!

In 1936 a Committee of the British Medical Association published a report on *Medical Aspects of Abortion.* It is of interest to notice that one of the members of the Committee was Mr. Aleck W. Bourne. The Committee complained of the vagueness of the law, and commented that the use of the word "unlawful" in the Section of Act of 1861 created the implication that in some circumstances abortion may be lawful. A similar view had been propounded at a meeting of the British Medico-Legal Society in 1920 by Mr. Justice Salter (*B.M.J., January 29, 1927, Taylor* (*op. cit.*), *Vol. 11, p. 144*). When one recalls how a Court of Appeal can dispose of the effectiveness of the word "unlawfully" in a statute where it is found inconvenient to the conclusion at which the Court desires to arrive (*Cf. The Eclipse of Men's Rea,* by *W. T. S. Stallybrass, 52 L.Q.R. 60*) one can understand the uneasiness and uncertainty that troubled the medical profession. What view a trial judge would take of a defence that an abortion had been performed for therapeutic reasons would depend to a large extent on his own views, and his awareness of whatever might be, to him, the responsible public opinion on the subject, and no one could predict with absolute confidence that therapeutic reasons would be accepted as a sufficient excuse for performing the act which the statute prohibited.

The Principle of Necessity

My own view is that the proper approach to the problem is to be found in the application of the vague principle of law which Stephen sets out in Article 43 of Chapter 111 of his *Digest of the Criminal Law.* Under the heading of *Necessity,* he states:—"An act which would otherwise be a crime may in some cases be excused if the person

accused can show that it was done only in order to avoid consequences which could not otherwise be avoided, and which, if they had followed, would have inflicted upon him or upon others he was bound to protect, inevitable and irreparable evil, that no more was done than was reasonably necessary for that purpose, and that the evil inflicted by it was not disproportionate to the evil avoided. The extent of this principle is unascertained." In a long and entertaining note he speaks of the choice of evils, and giving the two illustrations of the captain of a ship running down the boat, and the surgeon killing the child in the act of birth, as the only way to save the mother, he remarks "such cases are best decided as they arise."

The case in which the principle of necessity has been undisguisedly urged upon an English court of authority is that of *R. v. Dudley & Stephens* (*(1884) 14 Q.B.D. 272*). In that case, which is well worthy of perusal, the facts were, very briefly, that three able-bodied seamen and a cabin boy were adrift after a shipwreck in an open boat. They suffered indescribable hardships, and ultimately when there was little hope left the two accused decided to kill and eat the cabin boy. The prisoner Dudley killed the boy, with the consent of the prisoner Stephens, and although the third sailor had refused to consent to the deed, all three partook of the meal. The three men survived, and were picked up in the lowest state of prostration. Dudley and Stephens were brought home to England and were there indicted for murder. The jury in a special verdict found that if the men had not fed upon the body of the boy, they would probably not have lived to be picked up, and that the boy was likely to have died before them, and that there appeared to the prisoners every probability that unless they then fed or very soon fed upon the boy, or one of themselves, they would die of starvation. The Court (*Lord Coleridge, C.J., Grove & Denman, J.J., Pollock and Huddleston, BB.*) held that upon the facts there was no proof of any such necessity as could justify the prisoners

in killing the boy and that they were guilty of murder. It is obvious from his comments on this decision that Stephen did not think very highly of the exposition of the law which is contained in the judgment of the Court (in which the hand of *Lord Coleridge* is plainly to be seen), for he speaks of some passages in the judgment as basing "a legal conclusion upon a questionable moral and theological foundation," and as being "rhetorically expressed." That it was "rhetorically expressed" was probably enough to disgust so forthright a gentleman as Mr. Justice Stephen, for he writes elsewhere of one of Erskine's most admired addresses that it seemed to him "to consist of that kind of emphatic and well-arranged ornamental commonplace which suits trial by jury, but to show no power of thought and no serious study of the subject" (*Hist. Crim. Law, Vol. 11, p. 151*). However, that decision does not negative necessity as a ground of excuse from criminal responsibility, but is merely that the particular facts of the case did not constitute legal justification for the admitted homicide. In Stephen's opinion, it does not lay down any legal principle (*Dig. Crim. Law, 7th ed., p. 37*).

It is not without interest to observe that in the original Draft Code of the Criminal Law, which in England, in Lord Birkenhead's words (*Fourteen English Judges, p. 309*), "has remained a mere project," Stephen appended to the clause which related to the defence or exception of necessity "Nothing herein contained shall justify any person in any act or omission by which the death of the woman is caused in order that any child of which she is pregnant shall be born alive" (*2 Modern Law Review, p. 137*).

I believe, however, that in recognising therapeutic grounds as legally justifying abortion, the law is really applying the principle which Stephen enunciates, and that it is in reality making a choice between evils. I am comforted to observe that Mr. D. Seaborne Davies, of the London School of Science and Political Economy, has expressed a similar view in his article, *The Law of Abortion and Necessity,*

which came under my notice after the first draft of this paper had been prepared.

The King against Bourne ((1938) 3 All.E.R. 615)

This was the uncertain state of the law when Mr. Bourne, a man of the highest standing in his profession, openly and without reward, and believing he was doing the right thing, operated to terminate the pregnancy of a girl aged 14. He had consulted other practitioners before doing so, and as appeared from the evidence at the trial, it was undesirable that the pregnancy should continue because—

(a) The mental effect produced by a pregnancy brought about by a terrible rape (I quote from the judge's charge to the jury) would be most prejudicial, and

(b) The pelvic bones of the victim not yet having set, it must be undesirable that she should go through the state of pregnancy and finally of labour. *

I am indebted to Mr. Davies' article for some account of the facts leading to the operation. The condition of the girl had been brought to the notice of a lady doctor, Dr. Joan Malleson, who wrote to Mr. Bourne telling him that she, the police surgeon, and two other doctors in semi-official positions considered that curettage should be allowed and requesting him to operate. She reported that the girl's parents were "so respectable that they do not know the address of any abortionist" and that they "could not possibly let her go through" with the pregnancy. Mr. Bourne replied that he would "be delighted" to admit the girl into St. Mary's Hospital and to curette her. He went on "I have done this before and have not the slightest

Compare "The Nature of Man," by Elie Metchnikoff ((London), Watts & Co. 1938) at pp. 57-8: "Observations made on several Europeans who have been brought to bed at an abnormally early age have shown that, contrary to all expectation, parturition was easy and the sequelae normal. The daughters of the colonists in the Antilles were accustomed to marry at very early ages. A young woman of that region had her first child when she was twelve years and a half of age, and the birth lasted no more than a quarter of an hour and was painless.

"On the other hand, certain facts show that too young mothers are subject to a very heavy mortality during childbirth and soon after it. The most salient fact in this connection is furnished by Hassenstein, who has stated that the mortality of labor cases in Abyssinia is thirty per cent., and who has attributed this death rate to the circumstance that marriage takes place before the body of the woman is sufficiently developed."

hesitation in doing it again . . . I have said the next time I have such an opportunity I will write to the Attorney General and invite him to take action." The parents consented on condition the operation was kept secret, but the matter became public. It is stated that it was not through any breach of faith on Mr. Bourne's part that the facts became known.

At the trial the chief medical witnesses were Dr. Joan Malleson, the defendant, Mr. Gilliatt, surgeon at the Samaritan Free Hospital for Women, and Lord Horder. The medical opinion was that the operation is justifiable in any case where there is substantial danger to health if the pregnancy proceeds.

In charging the jury, Mr. Justice MacNaghten said, "The question that you have got to determine is whether the Crown has proved to your satisfaction beyond reasonable doubt that the act which Mr. Bourne admittedly did was not done in good faith for the purpose only of preserving the life of the girl. If the Crown has failed to satisfy you of that, Mr. Bourne is entitled, by the law of this land, to a verdict of acquittal. On the other hand, if you are satisfied beyond all real doubt that Mr. Bourne did not do it in good faith for the purpose only of preserving the life of the girl, your verdict should be a verdict of guilty." He then spoke of the Infant Life (Preservation) Act 1929, and continued, "It provides that no one is to be found guilty of an offence created by the Act—namely, 'child destruction'—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." Those words express, what, in my view, has always been the law with regard to the procuring of an abortion, and although not expressed in Section 58 of the Act of 1861, they are implied by the word "unlawful" in that section. No person ought to be convicted under Section 58 of the Act of 1851 unless the jury are satisfied the act was not

done in good faith for the purpose only of preserving the life of the mother. My view is that it has always been the law that the Crown have got to prove the offence beyond reasonable doubt, and it has always been the law that, on a charge of procuring abortion, the Crown have got to prove that the act was not done in good faith for the purpose of preserving the life of the mother."

He went on, "You have heard a great deal of discussion as to the danger to life and danger to health. It may be you are more fortunate than I am, but I confess that I have felt great difficulty in understanding what the discussion really meant. Life depends upon health, and it may be that health is so gravely impaired that death results . . . Of course there are maladies that are a danger to health without being a danger to life. Rheumatism, I suppose, is not a danger to life, but a danger to health. Cancer is plainly a danger to life. But is there a perfectly clear line of distinction between danger to life and danger to health? I should have thought that impairment of health might reach a stage where it was a danger to life . . . Take a reasonable view of the words, "for the preservation of the life of the mother." I do not think that it is contended that those words mean merely for the preservation of the life of the mother from instant death. There are cases, we are told—and indeed I expect you know cases from your experience—where it is reasonably certain that a woman will not be able to deliver the child with which she is pregnant. In such a case, where the doctor expects, basing his opinion upon the experience and knowledge of the profession, that the child cannot be delivered without the death of the mother, in those circumstances, the doctor is entitled—and, indeed, it is his duty—to perform this operation with a view to saving the life of the mother, and in such a case it is obvious that the sooner the operation is performed the better. The law is not that the doctor has got to wait until the unfortunate woman is in peril of immediate death and

then at the last moment snatch her from the jaws of death. He is not only entitled, but it is his duty, to perform the operation with a view to saving her life . . . The law does not permit of the termination of pregnancy except for the purpose of preserving the life of the mother. As I have said, I think that those words ought to be construed in a reasonable sense, and, if the doctor is of opinion, on reasonable grounds and with adequate knowledge, that the probable consequence of the 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, in those circumstances, and in that honest belief, operates, is operating for the purpose of preserving the life of the woman."

His Lordship further observed, "The difficulty that arises in the case of abortion is that by the operation the potential life of the unborn child is destroyed. The law of this land has always held human life to be sacred, and the protection that the law gives to human life it extends also to the unborn child in the womb. The unborn child in the womb must not be destroyed unless the destruction of that child is for the purpose of preserving the yet more precious life of the mother."

Comments

It must be remembered that the directions in Bourne's case are the *nisi prius* ruling of a single judge, and as such are not of great authority (cf. Stephen's observations in the Introduction to the 1st ed. of his *Digest of the Criminal Law, p. xv*), and in fact are not binding on a Victorian Court. We may summarise the result of the case, however, in the following propositions:—

1. The law recognises that there may be lawful abortions.
2. The burden is on the Crown to prove that any abortion is unlawful.
3. An abortion performed to save the life of the mother is lawful.

4. An abortion performed with the bona fide object of avoiding the reasonably certain physical or mental breakdown of the woman concerned is lawful.

So far as it goes, the direction given in Bourne's case is, I think, in keeping with the opinion of the majority of the community, for, as the British Medical Association's Committee observed (*1936 Report, p. 24, para. 53 (11)*), "While professional opinion appears to differ on the question of the desirability of legalising abortion to prevent the birth of a mentally or physically defective child, it is generally believed that the operation should be permissible when the indications are that continued pregnancy or labour will endanger the life of the mother or seriously injure her health." Elsewhere in the Report the Committee examines at length the "Indications for Therapeutic Abortion." In its conclusions the Committee observed, "Whilst under existing conditions reasons based on eugenic considerations are generally regarded by medical men as falling outside the scope of therapeutic abortion, the Committee believes that there are certain cases of this class which constitute justifiable indications. It is of the opinion that abortion should be considered when, in the light of modern medical knowledge, there is reasonable certainty that serious disease will be transmitted to the child."

It will be seen that while Mr. Justice Macnaghten has carried the law beyond the doubtful common law position, he has not given any ground for believing that abortion for eugenic reasons is legally permissible. Indeed, his directions on the law, limiting as they do the cases of justifiable abortion to those when the operation is necessary for the preservation of the mother's life, may prove an obstacle to any judicial enlargement of the cases wherein abortion is legally justifiable. I confess that I share the view of the anonymous writer in the *Law Times Journal* that it is unfortunate that Mr. Justice Macnaghten should have founded himself so narrowly on a much later Act in

considering the Act of 1861, and that it would have been preferable to have arrived at his directions upon the law by a more direct approach than he in fact employed. That approach, as I have tried to show, could have been found in the exception of necessity. It may thus be that the conclusions of law expressed in the charge are correct, but the reasons given for them are wrong, a state of affairs which examination of the High Court's decisions will show is not so rare as medical members may think.

I feel I should add one observation, and that is that the factors which were present in Bourne's case, namely, that the operation was performed in a public hospital and the surgeon charged no fee, are merely circumstances which bear on the question of the doctor's bona fides, and that it is not essential that they should be present to enable the doctor to avail himself of the defence. Counsel for the defence may like to have them present, but the facts that the doctor has operated in a private hospital and has charged a fee for the service is in no way fatal to the defence.

Practically speaking, the best protection a medical practitioner can have when he comes to deal with this problem is the opinion of at least two colleagues, and the more respectable and eminent in the profession they are, the better. Indeed, the British Medical Association's Committee recommended that an official status should be given to some medical practitioners so that before performing the operation a doctor could obtain official sanction, and thus in practice complete protection, for the course he was following.

Is There a Duty to Perform an Abortion?

I now come to consider very shortly a matter raised by the judge's charge in Bourne's case which I believe to be novel.

The question of therapeutic abortion has always been considered, so far as I know, upon the basis, "When is

it legally a doctor's right to perform a therapeutic abortion?" Bourne's case has cleared up some obscurities, but it poses a further question, "When is it legally a doctor's duty to perform a therapeutic abortion?"

In the course of his charge to the jury, Mr. Justice Macnaghten made the following significant observations: "Here let me diverge for one moment to touch upon a matter that has been mentioned to you—namely, the various views which are held by different people with regard to this operation. Apparently there is a great divergence of view even in the medical profession itself. Some there may be, for all I know, who hold the view that the fact that the woman desires the operation to be performed is a sufficient justification for it. That is not the law. The desire of a woman to be relieved of her pregnancy is no justification for performing the operation. On the other hand, no doubt there are people who, from what are said to be religious reasons, object to the operation being performed at all, in any circumstances. That is not the law either. On the contrary, a person who holds such an opinion ought not to be a doctor practising in that branch of medicine, for, if a case arose where the life of the woman could be saved by performing the operation and the doctor refused to perform it because of some religious opinion, and the woman died, he would be in grave peril of being brought before this court on a charge of manslaughter by negligence. He would have no better defence than would a person who, again for some religious reason, refused to call in a doctor to attend his child, where a doctor could have been called in and the life of the child saved. If the father, for a so-called religious reason, refused to call in a doctor, he would also be answerable to the criminal law for the death of his child. I mention those two extreme cases merely to show that the law—whether or not you think it a reasonable law is immaterial—lies at any rate between those two."

With all respect to the learned judge, I must say that

I find it difficult to believe that this is a correct statement of the law.

Homicide, or the killing of a human being by a human being, is unlawful (*inter alia*) when death is caused by an omission, amounting to culpable negligence, to discharge a duty tending to the preservation of life, whether such omission is or is not accompanied by an intention to cause death or bodily harm (*Stephen Dig. Criminal Law, Articles 310, 314*).

In *The King v. Bateman* (*19 Cr. App. R. 8*), the English Court of Criminal Appeal (consisting of *Lord Hewart, C.J., Salter & Fraser, JJ.*) had to consider the case of a qualified medical practitioner who was confronted in a confinement case with an unusual and difficult presentation and who, after sundry misadventures, mistakenly removed portion of the uterus along with the placenta. The patient died, and the practitioner was convicted of manslaughter. In the course of the judgment allowing his appeal it was said, "If a person holds himself out as possessing skill and knowledge, and he is consulted as possessing such skill and knowledge, by or on behalf of a patient, he owes a duty to the patient to use due caution in undertaking the treatment. If he accepts the responsibility and undertakes the treatment and the patient submits to his direction and treatment accordingly, he owes a duty to the patient to use diligence, care, knowledge, skill and caution in administering the treatment. No contractual relation is necessary, nor is it necessary that the service be rendered for reward . . . There may be recklessness in undertaking the treatment and recklessness in the conduct of it. It is, no doubt, conceivable that a qualified man may be held liable for recklessly undertaking a case which he knew, or should have known, to be beyond his powers . . ."

I do not feel, however, that it can rightly be said that the refusal to destroy human life, even in foetal form, can ever amount to culpable or criminal negligence. The

problem assumes that the doctor can reasonably expect to save the life of the mother by the destruction of the foetus, and that if the operation is not performed, it is reasonably certain both will die. No proper analogy is to be found in the case of the man who is presented with the problem of saving himself and destroying his companion by severing the rope to which the companion is attached so that unless the rope be cut both will be dragged over a precipice, or in the case of the captain confronted by the choice of running down another steamer or a rowing boat. It is apprehended, however, that the abstention from cutting the rope could not amount to suicide, nor could the captain be convicted of manslaughter, merely because he chose to run down the steamer. The judgments of the Victorian Full Court in the interesting case of *The King v. Russell* (*(1933) V.L.R. 59*), in which the question arose of the criminal responsibility of a father standing by watching his wife drown their two children and herself do not touch the matter. The only judicial pronouncement that I have been able to discover is that of Mr. Justice Macnaghten in Bourne's case, and on the short ground that it cannot constitute negligence in law to refrain from destroying human life, whether foetal or existing independently, I submit with respect that his statement of the law on this respect (which is, of course, an *obiter dictum*) goes too far. The difficulty may not be likely to arise in metropolitan practice where there is an opportunity for the medical attendant who finds himself confronted with the necessity of emptying the uterus for therapeutic reasons to retire and hand over the patient to another practitioner whose views on the subject are less rigid; but it is conceivable that in sparsely settled areas, where there is only one doctor available, and he combines the functions of medical man and missionary, the problem may become a real one. Further, should a bill in similar terms to the English legislation, which is (and has been for some time) awaiting the attention of the Victorian Parliament, ever become law, a similar problem may quite

readily arise in ordinary practice where in a difficult confinement it becomes necessary to decide without delay or recourse to other assistance if the child that is in the act of birth should be killed in order to save the life of the mother.

It may be that ordinarily the difficulties of proof are so great that it is in the highest degree unlikely that the law would be set in motion, and therefore it is unnecessary to consider the problem, or it may be that the correct attitude is that of Sir James Fitzjames Stephen, which is in substance that the law should preserve a certain reticence, and that "such cases are best decided as they arise." I feel, however, that the problem is one eminently suitable for discussion by this Society.

It has been suggested to me that I should conclude this paper with an appeal that the legislature should intervene and definitely state the circumstances under which an abortion may be performed. I am inclined to the view, however, that it is better that the judges should make the law on this subject. Close examination of the judge's charge in Bourne's case shows that it is not a very satisfactory exposition of the legal considerations involved. From the practical viewpoint, however, that is not such a disadvantage as it may seem. Once the step has been taken of attributing a meaning to the statute that permits some abortions as justifiable, on therapeutic grounds, it is unlikely that prosecuting authorities or trial judges will seek to interpret it more narrowly. It is the legal conclusion at which Mr. Justice Macnaghten arrived that really matters, and it may well be that sociological considerations will yet result in a widening of the interpretation of the relevant section to include eugenic as well as therapeutic reasons as justifying the termination of pregnancies by medical practitioners.

Discussion

Chairman: Gentlemen, I am sure we are all indebted to Mr. Barry for the very interesting survey he has made,

not only of the present position of the law in regard to therapeutic abortion, but also of the history leading up to the present law. He has been good enough to hand me a copy of his paper, and he has asked me to make some remarks in the opening of the discussion; so that I propose to depart from the traditional silence which has been characteristic of Chairmen, I understand, up to the present, and to say a word or two myself in regard to the subject of the paper.

It is exceedingly interesting, I think, to find how the law has drawn a distinction between human life and the foetus which ultimately becomes human life; and one needs, I think, to pay attention to what Mr. Barry has emphasised, that the law in regard to the aborting of the foetus in the uterus is a statutory law. Indeed, in regard to Victoria the law is summed up in a very few words taken from the Crimes Act—"Whosoever with intent to procure an abortion of any woman unlawfully uses any instrument," and one assumes for the purpose of discussion that an instrument has been used on a woman for the purpose of bringing about an abortion.

The whole gist of the matter, as I understand it, depends on that one word, "unlawfully." It is quite true, as Mr. Barry has emphasised to-night, the charge of the learned judge in Bourne's case is a direction which does not bind as a matter of law any other Court, yet it is the view of the judge who is instructing the jury in that particular case what the meaning of the word "unlawfully" is. His view, which has met with some criticism both from the author of the article from which Mr. Barry has quoted, and from Mr. Barry himself, is that the provision law in England really expressed the common law of the matter, when you are dealing with the word "unlawfully" in all other cases than those in which the abortion which had been brought about was for the purpose of saving the life of the mother—all you can conclude from Bourne's case is that it is one case which comes within the word "unlawfully." Whether "unlawfully" goes beyond that is a matter I think open to a good deal of doubt. If the principle of necessity which Mr. Barry has discussed be the true discriminating line as to what is lawful and what is unlawful, then it may be that the cases in which abortion is justifiable go beyond the mere case of saving the mother's life; but clearly that case is included.

Now, again, I think it is important to bear very clearly in mind the distinction between what is the law and what we think ought to be the law. So far as the law is concerned, it is all wrapped up in that word "unlawfully." As I understand the word "unlawfully" in the Section, it simply means without just cause or excuse. When you come to apply that to the facts of a particular case great difficulty arises. The learned judge who presided at the trial in Bourne's case instructed the jury, that not merely the instant death of the mother, if that were a contingency to be guarded against, was a justification, but that the sufferings of the mother, and the likelihood that the mental and physical wreckage which might follow her undergoing pregnancy, would destroy her health or life, might come within the meaning of the word "unlawfully" as interpreted in the light of a later Act which he thought applicable to the Act with which he was then dealing.

I shall be very interested to hear the expressions of opinion of medical men during the course of the debate to-night as to whether they think the view expressed by the expert witnesses who gave evidence in Bourne's case is one which is really sound.

When I contemplate the child marriages which are common in India and some other parts of the world, and remember what I have read of the numerous cases of mere female children who have gone through pregnancy and borne children, and compare that with the evidence which was given in Bourne's case, I take leave to be sceptical as to whether that evidence should be accepted literally. Perhaps it was only a charitable expression of views by the medical witnesses with the object of bringing about the verdict which the jury ultimately gave. I am saying that to provoke discussion, and I would like to hear what the medical men have to say in regard to it.

I agree with Mr. Barry that not much advantage is to be gained by looking at cases in which, so far, necessity has been held to be an excuse. Stephen has instanced a case where a number of people were roped together in alpine climbing, and all but one have lost their footing and have slipped over the edge of a precipice, with one remaining for the moment on a secure foothold, but with the humanly certain knowledge that unless he severs the rope which holds him to the others he would be dragged down and lose his life. I think in a case of that kind that the man who has the secure foothold would, on the

principle of necessity, be justified in cutting the rope, although it led to the death of those suspended by the rope over the precipice, and saved his own life. It seems to me that this is far removed from any case that is likely to arise in regard to a foetus, and that an analogy of that kind is inapplicable.

It seems to me that Mr. Barry was rather hard upon what was really *obiter dictum* of Mr. Justice Macnaghten in addressing the jury in Bourne's case, in which he spoke of the case of the medical practitioner who, through some religious belief failed and refused to perform an operation of abortion upon a pregnant woman. Mr. Justice Macnaghten expressed the opinion that in the circumstances which he then had in mind and which he put to the jury, the person refusing to operate might actually find himself presented for manslaughter. I think one has always got to bear in mind that in putting a proposition of law you assume the facts to be established, and it seems to me that in the state of facts which Mr. Justice Macnaghten used to the jury, he was assuming that the condition of the woman was such that the currently accepted opinion of the medical profession would be that in order to save that woman's life an abortion ought to be performed. Well, I am far from being convinced that if that actually were the case and the doctor refused to operate and so lost the life of his woman patient, he would not be liable to be presented for manslaughter, and that if the jury accepted those facts in the way the learned judge assumed them to be, the jury might not convict him of manslaughter. At the moment I do not quite see the distinction between the refusal to perform that kind of operation and the operation of amputating a leg or some other part of a man's body which in current medical and surgical opinion would result in saving the life of the patient.

I have not been dogmatic about this question because it is one which I would like to hear argued and have the pros and cons fully explored, but it is a matter on which I certainly do not feel convinced in the way which Mr. Barry appears to be convinced in the expression of opinion he has given. The matter is now open for debate, and I assume that a resolution which was passed at the annual meeting, that the normal time of a speaker during the discussion is five minutes, will operate, but the meeting has power to extend it.

Dr. Ostermeyer: What strikes me about this ques-

tion is the difficulty one has in understanding what is meant by "The Law in regard to Therapeutic Abortion." Take, for instance, the word "unlawfully." It is laid down that "unlawfully" means not in accordance with the law, then it is a question of what is the meaning of "in accordance with the law." What is the law? I do not know what the law is. The position is that the law is not known, and when a case occurs the judge does not know the law and the case goes to the Court of Criminal Appeal, and then it may go to the Privy Council or the House of Lords. Apparently you must keep on going till you get a jury to convict and then you can go to the Court of Criminal Appeal and thence to other higher tribunals in order to ascertain what is the law. But it is a very expensive process, and I am very interested in the question of expense. Apparently we want a paper with much more strength than the B.M. Journal behind us. People have said, "It must have cost Bourne a pretty penny," but Bourne was financed by the London County Medical Protection Society.

I have here the British Medical Journal, which circulates all over the British Empire and the U.S.A., and this is what it says about the law, to which I direct Mr. Barry's attention. There is an article entitled, "Therapeutic Abortion and the Law." The issue to which I refer is that of the 30th July, 1938. It says in one part, "The lawyers were content, in other words, to assume that an abortion was carried out lawfully when a doctor performed it in good conscience, after careful thought and observation and under proper conditions for the substantial benefit of the patient. They felt that, so long as the law refrained from saying what a doctor could do, the question of what he could not do need not arise . . ." You see it gets very subtle. In another passage it states:—

"They (the lawyers) recognised much better than the doctors the essence of the English legal system: a man may do anything which is not expressly prohibited by law; and where authority is lacking the law is written in the hearts of the people, to be interpreted by the Judges."

So you have to read the law out of the hearts of the people!

In the "Lancet," dated October 1st of this year, there is a letter written to the Editor by Letitia Fairfield, Gray's Inn, W.C., September 26th, wherein she states that a girl once consulted her whether she could have therapeutic

abortion done, and she said, "No." Years afterwards, she states, she came across this girl and said to her, "How is the baby?" The girl replied, "I had an abortion." Letitia asked, "How did you get it done?" The girl replied, "I went to a doctor who was an obstetrical specialist and stated that I had been assaulted by a degenerate, and to save my family and my own reputation I got a doctor who was a 'good fellow,' and he fixed me up." Letitia concludes her letter with the following words: "I am all for breaking laws if there is no other way of establishing a great principle."

I contend that there is no such thing as therapeutic abortion at all. It is prophylactic abortion. If a woman is in the family way, there is nothing wrong with her; therefore I say the term "therapeutic abortion" is misapplied. It is really prophylactic abortion, to preserve her mental health and to preserve her reputation.

There is very great difficulty in fixing definitions that are understandable. The definitions as they stand at present are too subtle. It seems to me that the present law leaves everything in doubt, and apparently the only way to try to settle the question of the law in regard to therapeutic abortion is to get doctors convicted and then to appeal to the higher Courts, where the matter may be thrashed out. I suggest that the Attorney-General should take the necessary steps to have the law clearly defined.

Mention has been made by our Chairman of child marriages in the East, and he referred to 14 years of age as being too young for such marriages, but I would remind you, gentlemen, that Juliet was only fourteen years of age and that her mother, Lady Capulet, rebuked her and said that she had borne Juliet when she was the same age. As a matter of fact, girls can bear children at 13 and 14 years of age without any ill effects.

Dr. Maudsley: It has been my fortune, or perhaps misfortune, in my hospital practice, to be consulted by gynaecologists on many occasions as to whether therapeutic abortion should be performed, and the cases have always presented enormous difficulty. Perhaps I may quote one rather curious case of a mentally defective girl of 16 who became pregnant. She was rather an attractive young girl and there was no question about it that she was picked up by some young man and she became pregnant. There was a great question as to

whether this girl should be allowed to go to term with her pregnancy, partly because of her mental deficiency and of her illness when she became pregnant, and the gynaecologist and myself, without any reference to the law at all, suggested that her pregnancy should be terminated. The parents of the girl were extremely anxious that the pregnancy should be terminated, but the girl herself was so proud of the fact that she was going to be a mother that she protested against her pregnancy being terminated, so we were in a dilemma as to whether we should terminate the pregnancy against the girl's wish, or follow the desire of the parents' and our own opinion. Finally, we felt that the situation was such that we could not interfere, and the girl, fortunately gave birth to a stillborn child. I would like to know the position we were in there had we gone on with the abortion. I think in cases where mental disease exists it is extraordinarily difficult, to decide whether a patient, who is perfectly well at the time of conception, and who is perfectly well during early pregnancy and yet has a history of mental disorder, should have that pregnancy terminated. I always take the liberal view, if the gynaecologist concurs, that it should be done, and I adopt that view too, and probably many times I may have contravened the law in that way, and yet I do not think in the least that we have overstepped the ethics of the profession by doing so.

Dr. Farran-Ridge: It seems to me that the mere fact that the pregnancy was from rape is sufficient justification for terminating it, and I myself think that that very largely influenced Dr. Bourne in performing the operation in England. It was sympathy for the girl, because of the special circumstances; but if mental stress alone was to be regarded as a cause for therapeutic abortion it can easily be seen that every case of therapeutic abortion would be justifiable by reference to mental stress, and a large amount of emphasis could be put on that aspect, and abortions performed out of sympathy. One particular case that occurred in my experience, which I regarded as more or less a justifiable case, was that of a woman, who was herself mentally unstable and had a bad mental heredity, who found herself pregnant. The idea of giving birth to a child might easily produce mental stress in her case, and might even bring about a mental breakdown on her part, and perhaps cause her to become insane. Once one gets away from the principle that abortion is justifiable only

to save the life of the patient, one gets into very grave difficulties.

Mr. Ashkanasy: I desire to congratulate the lecturer on the work he has performed in the preparation of this lecture. I would like to express myself to some extent as in agreement with the remarks of Dr. Ostermeyer in his criticism of the existing position, and I would express some disagreement with the final view stressed by the lecturer that the law could probably be best declared without controversy by being left to the judiciary. That, no doubt, is a view which at first sight appears attractive, although it means that there would be a great deal of uncertainty for a number of years. No doubt certain doctors will run grave risks in carrying on what their profession regards as a perfectly proper operation; but that is not at all satisfactory when you consider that this is a problem which does not arise rarely but is arising not only in the practice of gynaecologists, but in those of suburban general practitioners, almost week by week.

The subject is one which involves a very considerable controversy, and it is particularly undesirable that a subject involving a great deal of controversy should be the subject ultimately of judicial controversy. I speak only from very vague memory, but I think Sir John Latham, at our last function and dinner, pointed out to members of the medical profession that they should be chary of regarding the Dr. Bourne's case as necessarily a precedent laying down any general rule, and I think he indicated that it was to be regarded as a case turning upon the particular facts of a particular case; that case is not an authority binding upon the judiciary of Australia, although it would be given very considerable weight. It has to be recognised that the subject of this discussion is precisely the sort of subject upon which judicial minds may differ, and differ very vigorously. The discussion this evening particularly from the medical profession, as far as it has proceeded, has indicated that the accepted and general medical view goes very much further even than the dicta of Mr. Justice Macnaghten in the Bourne case. The problem is one facet of a general problem which the community now has to face, where the legal theory is that because a certain view is the law it must necessarily and unswervingly be obeyed by the general community, but the general community refuses to accept that view because the law is out of

touch with the realities of life. Unless the law is made clear and reasonable it results in curtailing or in corroding respect for the law itself, and that state of affairs in any civilised society should be regarded with the utmost seriousness.

As the law stands at the moment there is only one test laid down by the legislature, that abortion is prohibited if it be unlawful. The word "unlawfully" means contrary to the law, and no further light is thrown upon it by regarding that as meaning without just cause or excuse. Reference to the views of the general members of the profession, members of the highest repute, and to accepted textbooks show a very wide cleft between the view of the medical profession and the principles laid down by lawyers. One recognises that a subject of this kind impinges upon, and very deeply affects, the opinion of the community. Difficult though it may be to grasp the nettle, it is essential at the present time that the nettle be grasped, and that after informative public discussion, the law should be clearly defined by the legislature. The only alternative is the continuous disregard of the law by the medical profession, some of them deliberately and knowingly, and some of them unconsciously but in the best of good faith; and that is inevitably accompanied by breaches of the law under the cover of that general sanction by those who do not act in good faith and those who act from the lowest possible motives. From the point of view of the welfare of the general community, it is desirable that the law should be clarified, and the general basis of the law as declared by the judiciary after the event is particularly unsatisfactory when it is possible that eminent members of the medical profession, eminent and honorable members, may be faced with a crime for which the punishment may be 15 years' imprisonment.

In these circumstances, speaking as a lawyer, I say that it is a case in which the doctor should be certain of his position and that the legislature at present has left distinct uncertainty where it should not exist.

Mr. Fullagar, K.C.: As this subject lies a little outside the ordinary course of my own practice I had not intended to speak to-night, but Mr. Ashkanasy has forced me to my feet because I entirely disagree with him. I think that medical men and lawyers, and the community generally, would live to

regret a legislative attempt to define rigidly the conditions under which the performance of the operation of abortion was lawful. The word "unlawfully" may seem, perhaps, to Dr. Ostermeyer, and to others, to beg the whole question —and of course that is not altogether untrue. The word "unlawfully" where it occurs in the Statute merely throws you back on the common law of England. The Statute says, "Whosoever unlawfully does this shall suffer a penalty"; and then we lawyers go to the common law to find out whether it is lawful or unlawful, and sometimes the common law is kind to us and we find a number of decisions by eminent and clear-headed judges, and we know where we stand. Unhappily sometimes we do not find that, but it is to the common law that we look. The common law has a degree of flexibility which we lose the moment we attempt rigid statutory definitions. And in the administration of the common law before judges and juries effect is given to the conscientious feeling of the community, to the genuine conscientious feeling of the profession in whose ranks the question arises. As matters stand, there is flexibility, and the possibility of taking into account very special circumstances, and those circumstances, as indicated to-night, are almost infinite; there is that possibility of taking them and weighing them all together, which the judge and jury sitting together will do, and of deciding what is right, and what would give a basis for the medical profession; whereas a rigid statutory definition, probably not very clear, after all, would be a thing greatly to be regretted and in its ultimate results a calamity.

Mr. Gregory Gowans: There is one comment I would like to make in regard to Dr. Bourne's case which seems to have been hinted at by some of the speakers to-night, but not actually expressed. It seems to me that it was originally intended by Mr. Bourne and his confreres to challenge the existing law relating to abortion, but that on consulting Taylor's Medical Jurisprudence or one of those books which set out the principles of medicine according to the lawyer or the principles of law according to the doctor, when the matter came to trial they changed their ground, and the evidence that was put before the court seems to have been aimed at showing that the particular abortion which was carried out in this case was necessary to preserve the life as well as the health of the mother; that evidence having been given, the learned judge directed the jury accordingly that

the abortion was justifiable, and justifiable only if it was necessary to preserve the life of the mother, and left it to the jury to decide whether the Crown had satisfied the jury that this particular abortion had not been carried out for that purpose and that purpose only. So I should imagine that if the minds of the people who decided in the first instance on the operation had been looked into one would find that the standard that they first of all applied was quite different from the issue that was presented at the trial, and that it was only subsequent to the operation that they decided that it was necessary to aim their evidence at the higher standard laid down by the trial judge, with the consequent result that whereas they originally set out to alter the law or to put the law right in their view, they ultimately finished up by putting themselves right with the law.

Mr. P. D. Phillips: I rise to support what Mr. Fullagar has said by way of comment on Mr. Ashkanasy's remarks, and for this reason, that if there is one way, paradoxical as it may seem, to put the law out of sympathy with the general feeling of the community it is to invite the attention of the democratically elected Parliament to it. I venture to think that most lawyers would agree that, if there is one way that is more calculated than another to make the law in regard to therapeutic abortion out of sympathy with the best views of both professions, it would be to induce the legislature to express its views about it.

Dr. Crawcour: This paper has been of great interest to anybody who has been practising for a number of years, in that it has clarified the position greatly. I feel disposed to agree with one point very strongly that was mentioned by the Chairman, the fact of the victim being a mother at the age of fourteen. That seems to be a very poor herring drawn across the path. We all know that the age of 14 is a very excellent age at which to have a baby. Our mothers had babies at 16 years of age, and we know of girls of 13 and 14 years who carry babies without any trouble whatever. It is very difficult to know where you are in any particular case because, as has been stated by other speakers to-night, each case has to be treated on its merits. In the Universities of England and Scotland I think it is a practice before a new student is ordained to pronounce the Hippocratic oath, but although we do not do that in Melbourne we certainly subscribe to it, and that is one of our principles.

As to the effect of the mental strain, I am not an authority on that matter and know little about it, but many times one has been approached by young girls, sometimes married and sometimes otherwise, who tell us that unless it is fixed up "she will commit suicide," or will do this, and that. I do not know how the psychologist or the psychiatrist is able to discover who will commit suicide and who will not.

There is one question that has always given me some worry in considering the subject of the paper given by Mr. Barry. Where does the medical man stand when a mother comes to him and says, "I have had so many babies and I do not want any more"? She wants to have some operation to prevent pregnancy. What is the attitude we are to adopt towards such a patient who is a wife? Where do we stand in that matter?

Dr. Cordner: I have something to say which may be of some assistance in the meeting to-night. In all the cases that have been mentioned from the medical point of view they have all been either in regard to rape or in regard to the mental side. I have had three cases which I would like to bring before you, of three married women, and I should like to have some expression of opinion as to what my position was in those cases, and the position of the other medical men involved.

The first case was a young woman in her late twenties. She had already had one child and I had attended her at her confinement. I had not seen her for about six years when she called for me when she was about four months pregnant. I found her seriously ill with pulmonary tuberculosis. I suggested to her that we should have another opinion with reference to the termination of pregnancy. In this instance the religious question cropped up and she refused that further opinion. So I said to her then, "I must step out of this case altogether," and I suggested that she should go to some other medical man of the same religious thought as hers. She did so. The result was that she went the full term but she died about three days after the birth of the baby, and the child at present is suffering from acute pulmonary tuberculosis. I should like to know what our medical position is in both those instances, my own position and that of the man to whom she was referred later.

The second case is somewhat similar, in which a woman of roughly the same age was concerned. She was an Irish

girl who married an Australian soldier, and came out here. She had one baby. I saw her when she was about three months pregnant with the second child—again pulmonary tuberculosis. In this instance I suggested that she should see one of the pulmonary tuberculosis experts, which she did. He suggested that if she went on she would be in the same case as the first patient to which I have referred, and he sent her to a gynaecologist. Three opinions were taken, and after some time this patient was operated on by the gynaecologist, and a therapeutic abortion procured. She became perfectly all right. In this instance also the chest expert and the gynaecologist decided to sterilise the patient also, and this was done. It is now seven years since that was done. She is looking after her first child at the present time quite reasonably comfortably. The pulmonary tuberculosis has died down, and she is to all intents and purposes a reasonably useful member of the community.

The third case is that of a young woman again of about the same age, but in this instance the patient was suffering from severe heart failure. There were two of us on the case, and we called in a gynaecologist for his opinion. The two of us talked the case over for about six weeks when the patient was about four months pregnant, and she was in a very severe stage of heart failure. She could hardly move in the bed without her pulse rate going up somewhere about 160 or 170. She used to breathe with great difficulty, and could hardly turn over in bed owing to her heart condition. It was decided that an abortion should be procured, and that was done privately. That was about two or three years ago, and she is now living a quite reasonably comfortable life. She is still under very large doses of digitalis in order to keep her going, but she is able to look after her home and she is able to look after her first child still. She is extremely keen upon having a third baby—or a second baby it would be; and it is all we can do to convince her that she should not have this other baby because she would get into the same condition as she was before. She was not sterilised. I may say, from the medical point of view, it took us all our time to give her an anaesthetic for the operation.

I should like to know what our positions are, in the event of any further instances of a similar nature.

The Chairman: Is there any further discussion, gentlemen? If there is no further discussion I will call upon Mr.

Barry to reply to the various matters which have been raised in debate.

Mr. Barry: I confess to a feeling of disappointment because I had hoped to cast an apple of discord among the medical profession, and, unfortunately, the only person I have enticed out on the subject has been the Chairman. I had great hopes of hearing how the medical profession regarded the proposition that it may be their duty to perform an abortion, and that unless they do so they might find themselves in the Criminal Court. In my ignorance of the reaction of doctors to such problems, I had thought that it would raise a certain amount of ire in them that they should ever be considered under any legal compulsion to do anything. I must conclude that either the more militant medical elements of this Society are absent or else that the gentlemen who feel resentful find that their resentment is so great that they are unable to express themselves.

I respectfully dissent from the learned Chairman's observation that the considerations applying to the operation of abortion do not differ from those in other operations, such as amputations and the like. I think that where a human life has come into being, and the foetus is capable of going through the period of gestation and of being born as a human being, there is an element which differentiates it altogether from the position which would obtain in the case of a doctor determining, in the light of the knowledge and skill he has, to perform an amputation or other similar operation.

In answer to Dr. Maudsley's question, I think that on the present state of the law an operation in the circumstances that he described would be unlawful.

In regard to the matters raised by Mr. Ashkanasy, I lean towards a definition of the law so far as it is possible, but I feel that on a subject such as this the reaction of the average person to it is not intellectual but emotional, and that in those circumstances, it is not a fit subject for debate in popular assemblies or in the Parliaments that we have, having regard to the extent to which, unfortunately, the quality of Parliamentary representatives has deteriorated. I think it was Sir Richard Bethell, later Lord Westbury, who pushed divorce legislation through the English Parliament despite bitter opposition, but I am afraid that unfortunately we have no public men of his calibre at the moment.

I feel that the only way in which this matter can be approached is on the basis of the principle of necessity. Therapeutic grounds afford only one aspect of the question of the termination of pregnancy. There is the elasticity of the law to which Mr. Fullagar has referred which enables the judges to keep up to date, and I think it is eminently reasonable to suppose that judges are in touch with the more advanced and more intelligent views that obtain in the community upon these matters. If you have such a principle as the principle of necessity you are then enabled to consider the validity of any excuse offered for the termination of pregnancy. It may be in a given case that the economic condition in which the woman finds herself would seem to any humane person to be quite a satisfactory excuse. It may be, on the other hand, that to advance as justification that the pregnancy was due to a rape would not be thought satisfactory, because the woman may have brought the rape upon herself and there may be no reason to fear for her health. Personally, I consider that fully ninety per cent. of the accusations of rape spring out of remorse or fear of consequences, rather than out of the real facts of the situation.

Dealing with the three questions that were raised by Dr. Cordner; as to the first case in which the patient did not want an operation, I would think that in those circumstances the doctor would have no right to perform it.

As to the second and third cases, they are within the principle as laid down by Bourne's case. Though it turned out in the second case that the fears held for the patient were not realised, as there was every reason at the time for the doctors to come reasonably to the opinion that therapeutic abortion should be performed, and as the doctors were acting reasonably, the direction to a jury in such a case would be that the operation had not been done unlawfully.

Dr. Weigall, in moving a vote of thanks, said he thought members ought to thank Mr. Barry very much for the trouble he has gone to in preparing this paper. He felt that it was a subject upon which everybody touched with a great deal of trepidation. Apparently it is much safer to enter it upon the legal side than it is upon the medical side.

Mr. Hamer said that he seconded the vote of thanks with very great pleasure. When he got the notice of the proposed discussion he had felt sure that we would have

a very clear and interesting paper on a very critical subject, and he congratulated Mr. Barry personally on the way he had dealt with it.

The Chairman: I have to convey to Mr. Barry the acclamation of the meeting for his interesting paper.

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