ABORTION: A LEGAL PERSPECTIVE

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Introduction

Since 1998, in Western Australia an abortion is unlawful unless performed by a medical practitioner in good faith and with reasonable care and skill, and the abortion is justified. A person who unlawfully performs an abortion is guilty of an offence, punishable by a fine of $50,000.

An abortion is justified up to 20 weeks gestation if:

(a) the woman has given informed consent; or

(b) she has given informed consent and will suffer serious personal, family or social consequences if the abortion is not performed; or

(c) she will suffer serious danger to her physical or mental health if the abortion is not performed, and she has given informed consent or it is impracticable to do so; or

(d) the pregnancy is causing serious danger to her mental or physical health, and she has given informed consent or it is impracticable to do so.

Informed consent can only be given after appropriate counselling from a medical practitioner not involved in the abortion.

If, however, the woman is at least 20 weeks pregnant, an abortion is not justified unless:

(a) two medical practitioners have agreed that she or the unborn child has a severe medical condition that justifies the abortion; and

(b) the abortion is performed in an approved facility.

Further, a person who is not a medical practitioner who performs an abortion is guilty of a crime and liable to 5 years' imprisonment, subject to the exception that a person is not criminally responsible for surgical or medical treatment administered to another person for that other person's benefit or to an unborn child to preserve the life of the mother, provided the treatment is performed in good faith and with reasonable care and skill and is reasonable having regard to the state of the woman at the time and all the circumstances.

The following general features might be seen to emerge from the current law. First, there is, in general terms, an acceptance that an abortion will be lawful if it is carried out by a medical practitioner. To that extent, abortion is, in effect, treated as a medical issue. Secondly, under the first of the four criteria referred to above, an abortion up to 20 weeks is effectively available 'on request'. The other three criteria do not appear to add anything to that, except in cases where consent is impracticable to obtain. Thirdly, the woman does not herself commit an offence in procuring a miscarriage. Fourthly, the aim of the legislature appears to be to reduce the scope for 'backyard' abortions outside of a medical context. In that regard, non-medical practitioners who perform an abortion are liable for up to 5 years' imprisonment. Fifthly, even non-medical practitioners may be excused if they act, amongst other things, to preserve the life of the mother. Perhaps, in practical terms, this exception may ordinarily apply to midwives or other 'lay' persons involved in childbirth. Sixthly, the law draws a distinction between different stages of pregnancy - up to 20 weeks and after 20 weeks. Seventhly, the destruction of a foetus remains the subject of the criminal law.

An understanding of how the law concerned itself with abortion involves some appreciation of the development of the criminal law in general, and the particular principles which have historically shaped legal thinking about what constitutes being human in the context of the law's concern for the protection of human life.

These matters reach back nearly one thousand years into a period of English legal history when the distinction between the criminal law and the civil law as we understand those concepts, was only beginning to emerge, and when jurisprudence was principally the province of ecclesiastical scholars.

This paper seeks to outline (necessarily in general terms) these developments. It covers the emergence of the common law in relation to abortion and its rather chequered history up to around 1800. It then deals with the first statutory criminalisation of abortion in 1803 in the context of what was (at least by modern standards) a particularly ruthless and bloodthirsty penal code.

It then traces the statutory revisions which reduced, to some extent, the severity of the 1803 statute until the law became, in effect, settled in a form which lasted, in England, for over 100 years from 1861. That statutory form, which was adopted into the WA *Criminal Code*, applied in Western Australia until 1998. It, in effect, made it an offence to 'unlawfully' cause an abortion. It was then left to the common law to work out what 'unlawful' meant in this context. The common law's initial response was, in the eyes of some at least, less than satisfactory.

In Western Australia, after a period of nearly 100 years in which no superior court in this State had itself determined what 'unlawful' meant in this context, the legislature intervened and produced the 1998 amendments referred to above.

The paper concludes with a brief discussion on the civil law concerning the legal rights of the unborn child.

The development of the criminal law

The distinction between criminal law and civil law took some time to evolve[i]. Each serves a fundamentally different purpose. Civil law is designed to provide redress to individuals for wrongs they have suffered. Criminal law is concerned with public order and the punishment, or removal from society, of offenders who have transgressed against public order.

The distinction between the two, however, requires a fairly developed idea of public order and society. According to Weber, 'a state is a human community that (successfully) claims the monopoly of the legitimate use of physical force within a given territory'[ii].

In early societies, where the idea of public order was weak, both compensation for wrongs done (the object of civil law) and retribution for the wrongdoing (the object of criminal law) were exacted at the insistence of the individual who had been wronged, or their kin or family.

In order to avoid feuding between the family of the victim and the family of the wrongdoer, over time there developed a system whereby the victim would procure payment by way of 'emendation' for the wrong, through some customary process. An emendation payment would, in modern parlance, serve both as a fine and damages.

As society developed, the retributive process shifted from the victim and his family to the broader community, and thence (in theory) to the King. Thus it may be said that 'the history of the criminal law is a history of the King's

peace'[iii]. This shift from the individual to the King might be seen as essentially procedural in nature.

A substantive notion which contributed to the development of the criminal law was the idea that there existed a species of wrong which both deserved, and required, punishment. This substantive notion was drawn from ecclesiastical ideas concerning the nature of sin and the necessity of atonement by penance.

However, it was some time before any clear distinction between crime and tort emerged, because the legal process for dealing with crime still required initiation by the victim or his kin. Nor did the language always keep up with the developing distinction between tort and crime. As late as 1505, a Chief Justice would speak of a tortfeasor, in an action for damages, as being 'punished' for his 'misdemeanour': ***Orwell v Mortoft*** (1505) B & M 408.

When crime and tort eventually became separate, it was left to the common law to work out what degree of wickedness was necessary as a constituent element of a criminal offence. The common law drew on Canon law, traceable back to St Augustine, for the proposition that mental guilt was a necessary prerequisite for criminal punishment - '*reum non facit nisi mens rea*' (an act does not make guilt without a guilty mind).

If a wrong was particularly serious, it was 'unemendable' and the wrongdoer suffered judgment to lose everything he or she had, including his or her life, land and property. Wrongs of this kind were 'felonies' from the old French word meaning 'wicked' or 'treacherous'. Lesser wrongs - wrongs for which the word felony was inappropriate - merited lesser penalties, such as imprisonment, corporal punishment or pecuniary fine. These lesser wrongs were generically described as 'trespass', but after the 1500s the broad term 'misdemeanour' (corresponding to the Latin *malefactum*) was used.

Canon Law: early Middle Ages

By the start of the 12th Century there had accumulated within the Western Church numerous rules and ecclesiastical pronouncements in various collections called 'Canons'. Many of the Canons concerned matters of purely theological content, such as creeds and doctrinal statements. Others regulated specific conduct and behaviour. Gratian, the famous teacher of law at Bologna University, set out to systemise the Canons and their scope for enforcement through a hierarchical system of authority under the Bishop of Rome, ie, the Pope. Gratian published his work, commonly called the *Decretum,* around 1140.

The study of Canon law was taken up enthusiastically in European countries, and a system of courts, with the Pope at their apex, developed to handle the litigation which emerged in consequence of the new jurisprudence[iv].

Amongst the curial hierarchy were Bishop's courts known as 'Consistory Courts', presided over by the Bishop's 'Official Principal'. The Bishop's 'Principals' were men learned in Canon law who, over time, became known by their more common name as 'Chancellors'. Canon law also indirectly shaped the development of the common law because during the early Middle Ages, most of the King's judges were ecclesiastics familiar with the chief tenets of Canon law[v].

The Western Church was a transnational organisation and Canon law was taken to apply to all Christians everywhere. The territorial reach of Canon law was extensive.

Ultimately, however, enforcement of Canon law depended upon the cooperation of the temporal courts, and the degree of cooperation varied from country to country. A dividing line between matters temporal and matters spiritual was not

always easy to draw, and conflicts in jurisdiction between the royal courts in England, and the ecclesiastical courts, were essentially conflicts of laws, caused by the co-existence of two systems of law operating with equal validity within the one geographical territory. Frequently, litigants (not least the Clergy themselves) would apply for a writ of prohibition, preventing the ecclesiastical court from dealing with a dispute. Ultimately, in the case of conflict, the King's law prevailed[vi].

In a world accustomed to viewing immoral conduct as sin, the King's courts had jurisdiction over the more serious sins, such as murder and theft. The ecclesiastical courts had jurisdiction over mortal sins, such as adultery, and, in consequence, matters such as marriage, testacy and intestacy. Bearing false witness or lying were also sins accommodated within the jurisdiction of the ecclesiastical courts through proceedings for defamation. Defamation proceedings were, however, criminal proceedings in form in the Middle Ages, which could result in the guilty party being 'sentenced' to do penance[vii].

In this regard it is useful to note that the Latin etymological ancestor of the word 'crime', '*crimen*', could be understood in early Canonical jurisprudence in four senses[viii]:

(a) in its common usage today as meaning a wrongdoing punishable by the authorities;

(b) a variety of misconduct ('*irregularitas*') leading to ineligibility for sacramental office or rank within the ecclesiastical hierarchy;

(c) sin (*pecatum*) in the modern Catholic understanding of that word as a wrong redeemable by confession and (where appropriate) private penance; and

(d) another form of sin, perpetuated more generally against God's justice, and perpetuated publicly and so worthy of public atonement.

Canon law - foetal homicide: early Middle Ages

Gratian's *Decretum* first raised the prospect that the killing of a human foetus could constitute homicide and warrant punitive measures ordinarily applicable to homicide[ix]. Gratian stated the negative proposition that:

> He who procures an abortion before the soul is infused into the body is not a homicide.

Three sources were quoted for this proposition, two from St Augustine and one from St Jerome. An important passage attributed to St Augustine was itself said to be supported by Exodus 21:22-23 in the Septuagint, an expanded Greek version of the Old Testament dating back to the 3rd Century BC. The Septuagint version of Exodus 21:22-23 was said to have stated:

> Should someone strike a pregnant woman who later miscarries he must give soul for soul if the foetus had been formed; had the foetus not been formed, however, he must offer monetary compensation.

The Septuagint's interpretation of Exodus 21:22-23 is now regarded (at least in the reformed Western Church) as erroneous. The King James version of Exodus 21:22-24 is as follows:

> If men strive, and hurt a woman with child, so that her fruit depart from her, and yet no mischief followed: he shall be surely punished, according as the woman's husband will lay upon him; and he shall pay as the judges determine.
>
> And if any mischief follow, then thou shalt give life for life.
>
> Eye for eye, tooth for tooth, hand for hand, foot for foot.

In other words, there is no distinction drawn between whether the foetus has a 'soul' or not, and the object of the provision is one of monetary compensation, unless the mother herself suffers further injury ('mischief'), in which case the penalty is 'life for life, eye for eye' etc.

The Septuagint translation is thought to have been inspired by the Aristotelian concept that life in the maternal womb did not possess human quality without corresponding bodily features. Aristotle had considered that human life began at some stage in foetal development when 'ensoulment' or 'animation' occurred. Aristotle had identified this time of animation with observable movement. He believed that it occurred, in the case of male children, 'on the right-hand side of the womb and about the fortieth day, but if the child be a female then on the left-hand side and about the ninetieth day'[x].

Over the next century, Gratian's successors in Canon law developed a consensus to the effect that physical human formation marked the entry of an immortal soul into the conceived body, and that killing of the formed foetus was thereby homicide. Subsequent papal decrees in the early 1200s confirmed that the bodily formation of the foetus separated homicidal abortion from non-homicidal abortion. The focus of these papal pronouncements was, however, not '*crimen*' in the first sense referred to earlier, but '*irregularitas*', that is, whether the misdeed precluded eligibility for sacred office.

Canon law at this stage did not accept the 'traducianist' view, which gained early acceptance in the Eastern Church. The 'traducianist' view was that human life was formed at conception. The early Christian writer Tertullian (around 198 AD) was a traducianist who famously said:

> Man is he who will be one, just as the whole fruit is already in the seed.

(It may be mentioned here for completeness that subsequent papal statements did not preserve the dichotomy between the animated foetus and the unformed foetus. In 1588, Pope Sixtus V promulgated a bull known as *Effraenatam* in which he declared obsolete Gratian's distinction between the formed and unformed foetal life, and extended the maximum ecclesiastical punishment to all forms of abortion. In reaction to what one author[xi] has described as 'widespread disapproval', his immediate successor, Gregory XIV, revoked *Effraenatam* just six months into his pontificate, and the Gregorian statute, *Sedes Apostolica*, published in 1591, restored the Aristotelian/Gratian distinction. However, in 1869 Pope Pius IX reversed the earlier stance once more and removed the distinction between the animated and unanimated foetus.)

Continental Civil Law

Following the emergence from the Dark Ages, civil jurisprudence also became the subject of serious study in Bologna University[xii]. The civil lawyers examined Justinian's *Corpus Iuris Civilis* which essentially proceeded, relevantly, on the premise that there was no humanity prior to birth. The *Corpus* appears to have been influenced by Stoic philosophy rather than the Aristotelian view of humanity. Stoic philosophy taught that humanness presupposed delivery from the womb and the newborn baby taking his or her first breath. The Stoic point of view was, in general terms, adopted in Roman jurisprudence. Thus, under Roman law the foetus was not regarded as a human being, but as part of the viscera of the mother[xiii], save for the limited, legal fiction that a child in utero could acquire contingent rights, enforceable after birth, for the purposes of hereditary succession.

Nevertheless, under Roman law the mother, or a third party, who caused the death of the child in utero did commit a type of '*crimen*' for which punishment

was temporary exile. But this was not homicide. The rationale for the '*crimen*' was not the protection of the unborn child, but the law's concern for the father who had been deprived of descendants. It appears that no offence was committed if the life of the unborn was terminated with the parents' consent[xiv].

Despite this, in what appears to have been a very doubtful exegesis of the *Corpus*, the civil lawyers in Bologna, remarkably, arrived at effectively the opposite conclusion. Their view was that the law of homicide applied to the foetus after the fortieth day from conception[xv]. In this regard, Continental civil law was not materially different from the Canon law.

Foetal homicide in England - 12th to the 16th Century

Records of the King's courts in England, in the period 1194 to 1350, regularly attested to the pursuit, by women, of felony charges against persons who had violently caused a termination of their pregnancy[xvi].

Bracton's treatise '*On the Laws and Customs of England*', completed in 1256, contained a reference to the law of abortion. Bracton, cognisant of Canon law, in effect, equated the wrongful killing of a foetus with homicide, if the foetus was formed, or 'animated' with a human soul[xvii].

After about 1350, however, proceedings of this kind effectively disappeared in England.

Moreover, nothing in this period suggests any criminal proceedings in relation to abortion in its modern commonly accepted sense of termination of the pregnancy by or with the consent of the mother.

There were no recorded proceedings in England for foetal homicide between 1350 and 1557 when Staunford published his treatise '*The Pleas of the Crown*' in 1557. In Staunford's view, causing prenatal death was not a punishable

offence. That view, however, was not accepted as correct by the 'father of the common law', Sir Edward Coke, in the early part of the next century.

The common law - 17th to early 19th Century

The Western Church in Europe was split by the events of the Reformation. After the Reformation, the significance of ecclesiastical courts in the life of the law of England was greatly reduced. The common law courts came to assume jurisdiction over matters traditionally dealt with in the ecclesiastical courts.

In post-Reformation England, Sir Edward Coke, in the *Third Institute*, C.7 stated that the victim of homicide must be 'any reasonable creature *in rerum natura* [of the nature of things]' and continued:

> If a woman be quick with child, and by a potion or otherwise kills it in her womb, or if a man beat her, whereby the child dies 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 die for the potion, battery or other cause, this is murder, for in law it is accounted a reasonable creature, *in rerum natura* [of the nature of things], when it is born alive.

Subsequently, in 1866 when Willes J gave evidence on the question of child killing before the Capital Punishment Commission, his Lordship observed that the law of misprision, referred to by Coke, was 'antiquated' and 'in truth you [would] never find an indictment in practice … I think it must be taken that there is no law applicable to that case by reason of the obsolete character of the law of misprision'[xviii].

There was, however, some authority for the view that to procure the abortion of a 'quick' child (although not before then) was a common law misdemeanour, although the position had never been clearly defined[xix]. A woman was 'quick' with child when she felt for the first time the movements of the foetus:

R v Goldsmith 3 Camp 76; ***R v Phillips*** 3 Camp 77. It was thought that this could be around 20 weeks.

According to McGuire DCJ in ***R v Bayliss & Cullen***[xx], it was 'doubtful that abortion was ever firmly established as a common law crime, even with respect to the destruction of a quick foetus'.

This common law misdemeanour, if and to the extent that it existed, appears to give effect to the Canonical distinction between an 'animated' foetus (who had a soul) and the 'unformed' child in utero.

The 18th Century: criminal law

The 18th Century was a time of rioting[xxi]. In 1769, Benjamin Franklin, visiting from America, recorded that within a year, he had seen riots in the country about corn, riots about elections, riots about workhouses, riots of colliers, riots of weavers, riots of coal heavers, riots of sawyers, riots of smugglers and excise men who had been murdered, and the King's armed vessels and troops fired at.

Franklin's list was relatively short.

In the 18th Century, English men and women also rioted against turnpikes, enclosures, high food prices, religious groups, press gangs, theatre prices, foreign actors, pimps, bawdy houses, surgeons, French footmen, ale keepers, and industrial employers. They also rioted against the rumoured destruction of cathedral spires, and even against a change in the calendar.

The laws in response were harsh. The country's rulers continually denounced the English populace as the 'giddy multitude', 'the inferior herd of mankind', the 'dregs of the people', 'the scum of the earth', and a 'lawless and furious rabble'. They enacted a particularly savage criminal code, which was designed by the ruling class to maintain law and order, and property.

The criminal law was so 'littered with Acts imposing the death penalty for any offence which had caught a legislator's fancy'[xxii] that between the Restoration and 1820 the number of capital offence statutes increased by more than one a year, and one statute alone contained 200 capital offences. Thus, the criminal law made the death penalty applicable to an extraordinary variety of offences, including being disguised within the mint; maliciously cutting hop vines growing on poles; being a soldier or a seaman and wandering about without a pass; pickpocketing to an amount over one shilling; consorting with Gypsies; cutting down growing trees; stealing fish out of a pond; and impersonating the out-pensioners of Greenwich Hospital.

It has been said[xxiii]:

> This uniquely bloody code was fettered, fortunately, by a uniquely liberal criminal procedure, which mitigated the violence of the law. Prisoners were not tortured; for most of the time habeas corpus was a safeguard; the judges, though cornerstones of the State and often highly political, were no longer just another arm of the executive and were not usually subject to political interference in criminal cases; trials were public; nearly all prosecutions were private, which with the government not being directly involved, fostered judicial fairness and considerations to the prisoner; above all there was the jury. Acquittals were common.

The same author observed that by any comparison other than in comparison with Continental European law at the time, English criminal law and procedure was seriously deficient.

Lord Ellenborough's bill

In this context, the Westminster Parliament enacted the first statute in effect prohibiting abortion. The bill was introduced by Lord Ellenborough, then Chief

Justice of England, in 1803[xxiv]. It was accompanied by two other bills, the overall effect of which was to clarify aspects of the criminal law.

It appears that Parliament was influenced by, broadly speaking, three factors. The first was the desire of Ellenborough CJ to clarify the existing law. The second was to redress a perception, albeit perhaps not widely held, that abortion was a social problem at the time. The third was to accommodate the emerging view of medical science that, scientifically, there was no basis for the Canonical/Aristotelian distinction between foetal life prior to 'animation' and foetal life after 'animation'.

Certainly, extending capital punishment to abortion accorded both with the moral philosophy of Lord Ellenborough and his philosophy of punishment. He subscribed to the view that the extreme penalty should be provided for many offences, if only carried out in a few. With Lord Eldon, he led the House of Lords in its opposition to Sir Samuel Romilly's campaign to reduce capital punishment. He urged that leniency would only encourage crime.

As an interesting aside perhaps[xxv], it is to be noted that rioters invaded Lord Eldon's house in 1814. His Lordship managed, with the help of four soldiers, to arrest two of them. One of these, the Lord Chancellor wrote, 'bid me to look to myself, and told me the People were much likely to hang me, than I was to procure any of them to be hanged'. In the end, nobody was hanged. Lord Eldon continued on the Woolsack and died in his bed. When the rioters were sent before a magistrate, the soldiers said 'they would do their duty as soldiers but would not be witness. And that was the end of that'[xxvi].

In 1803, Lord Auckland drew the debate in the House of Lords to a close by remarking that capital offences were already so numerous that they ought not to be increased without great deliberation. Nevertheless, even he was ready to

admit that 'the crime[s] enumerated by the noble and learned Lord [Ellenborough] call for severe and exemplary punishment'[xxvii].

It is also thought that a contributing factor to the rise in capital offences was the (undoubtedly correct) recognition by the ruling class that the church's concept of eternal punishment was no longer an effective deterrent to crime. As the fear of spiritual punishment disintegrated, the gallows 'arose from its ashes'[xxviii]

English statutory law: 19th and 20th Centuries

1803

On 1 July 1803, *Lord Ellenborough's Act 1803* 43 Geo 3 c 58 came into force. This was the first statutory instrument relating to abortion. It covered the entire gestation period, but, in effect, recognised the ecclesiastical/Aristotelean distinction between the 'animated' foetus and the foetus prior to animation. Killing of the former was a capital offence. Killing of the latter was not murder, but was still a lesser offence. The statute did not make specific reference to the mother herself.

The long title of the Act was:

> An Act for the further prevention of malicious shooting and attempting to discharge loaded firearms, stabbing, cutting, wounding, poisoning and the malicious using of means to procure the miscarriage of women …

In its preamble it referred to:

> [D]ivers cruel and barbarous outrages have been of late wickedly and wantonly committed in divers parts of England and Ireland, upon the persons of divers of his Majesty's subjects, either with intent to murder, or to rob, or to maim, disfigure or disable, or to do other grievous bodily harm to such subjects: and whereas the provisions now by law made for the

> prevention of such offences, have been found ineffectual for that purpose: and whereas certain other heinous offences, committed with intent to destroy the lives of his Majesty's subjects by poison or with intent to procure the miscarriage of women … but no adequate means have hitherto provided for the prevention and punishment of such offences …

The Act provided that:

> [I]f any person … shall wilfully, maliciously and *unlawfully* administer to, or cause to be administered to or taken by any of his Majesty's subject, any deadly poison, or other noxious and destructive substance or thing, with intent such his Majesty's subject or subjects thereby to murder, or thereby to cause or procure the miscarriage of any woman, *then being quick with child* … [those persons] shall be and are hereby declared to be felons, and *shall suffer death as in felony* without benefit of clergy. (emphasis added)

The Act also made provision for a non-capital offence where the woman was not 'quick with child'. It provided that:

> And whereas it may sometimes happen that poison or some other destructive or noxious and destructive substance or thing may be given, or other means used, within intent to procure miscarriage or abortion *where the woman may not be quick with child at the time, or it may not be proved that she was quick with child*; … [t]hat if any person … shall wilfully and maliciously administer to, or cause to be administered to, or taken by any woman, any medicines, drug, or other substance or thing whatsoever, or shall use or employ or cause or procure to be used or employed any instrument or other means whatsoever, with intent thereby to cause the miscarriage of any woman not being, or not being proved to be, quick with child at the time of administering such things or using such means, ... then … the person or persons so offending … shall be and are hereby *declared to be guilty of felony, and shall be liable to be fined*, imprisoned, set in and upon the pillory, publicly or privately whipped, or to suffer one or more of the said punishments, or to be transported beyond the seas for any term not exceeding

> 14 years, at the discretion of the court before which such offender shall be tried and convicted. (emphasis added)

1828

The 1803 Act was superseded by *Lord Landsdowne's Act 1828* 9 Geo 4 c 31. The 1828 Act maintained, for the purposes of a capital offence, the distinction between a foetus after and before animation, but slightly mitigated the punishments provided by the earlier law[xxix].

1837

The 1828 Act was superseded by a statute which both consolidated and amended the statute law concerning offences against a person: *Offences Against the Person Act 1837* 7 Will 4 & 1 Vict C 85. The 1837 Act gave the offence of abortion its modern form until the 1998 Western Australian amendments. It abolished capital punishment for the offence, and removed the ecclesiastical distinction between the two stages of development of the foetus in utero.

The 1828 and 1837 statutes both still failed to make any reference specifically to the mother.

In 1846, the Criminal Law Commissioners, after referring to the relevant provisions concerning abortion, suggested adding a proviso to the effect that no offence is committed when the act is done in good faith with the intention of saving the life of the mother[xxx].

The suggested proviso was, however, never enacted in connection with the provisions creating the offence of abortion, although a proviso to that effect did emerge in a 1929 statute involving treatment of a similar subject matter: the *Infant Life (Preservation) Act 1929*.

1861

The 1837 Act was itself superseded by the *Offences Against the Person Act 1861* 24 & 25 Vict C 100, which came into force on 1 November 1861. It referred specifically to the mother.

It is the 1861 Act which remains current in England. The wording of all the original Australian statutory provisions making abortion a crime was directly based on s 58 and s 59 of the *Offences Against the Person Act 1861*. Sections 58 and 59 provided, relevantly:

> 58 Every woman, being with Child, who, with Intent to procure her own Miscarriage, shall *unlawfully* administer to herself any Poison or other noxious Thing, or shall *unlawfully* use any Instrument or other Means whatsoever with the like Intent, and whosoever, with Intent to procure the Miscarriage of any Woman, whether she be or be not with Child, shall *unlawfully* administer to her or cause to be taken by her any Poison or other noxious Thing, or shall unlawfully use any Instrument or other Means whatsoever with the like Intent, shall be guilty of Felony, and being convicted thereof shall be liable …
>
> 59. Whosoever shall *unlawfully* supply or procure 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 she be or be not with Child, shall be guilty of a Misdemeanour …

1929

In England, a statute relating to a similar subject matter was enacted in 1929: the *Infant Life (Preservation) Act 1929* (19 and 20 Geo V, C34) (1929 Act). That Act made it an offence, in effect, to kill a child not yet delivered but which was 'capable of being born alive'. It provided that 28 weeks was the age at which, prima facie, a foetus would be 'capable of being born alive'. However,

the Act provided, relevantly, that no such offence would be committed unless it was found 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 English common law's interpretation of the meaning of 'unlawful'

Ultimately, in England, the legislature, by the *Abortion Act 1967*, effectively prescribed the circumstances in which an abortion would not be regarded as 'unlawful'[xxxi]. Prior to 1967, it was left to the common law to determine when an abortion would not be '*unlawful*'. The most celebrated case was ***R v Bourne*** [1938] 3 All ER 615[xxxii].

In ***Bourne*** a young woman was gang raped by a group of soldiers and became pregnant. The condition of the girl was brought to the notice of a female doctor, who wrote to Mr Aleck Bourne, a member of the Committee of the British Medical Association. The treating doctor told Mr Bourne that she, the police surgeon and two other doctors considered that curettage should be allowed and requested him to operate. She reported that the girl's parents were 'so respectable that they do not know the address of any abortionists' 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 added that he had done this before and had not the slightest hesitation in doing it again. He performed the abortion and made the fact known to the police, thereby effectively inviting prosecution.

Mr Bourne was prosecuted. The indictment originally did not include the word 'unlawful'. The point was taken by the defence and the indictment was amended to include it. The matter came before Mr Justice Macnaghten and a jury. The medical opinion was to the effect that the operation was justifiable in the circumstances of the case. Mr Bourne was acquitted.

The effect of the summing by Macnaghten J was as follows[xxxiii]:

(a) the law recognised that there may be lawful abortions;

(b) the burden was on the Crown to prove that any abortion was unlawful;

(c) an abortion performed to save the life of the mother was lawful; and

(d) an abortion performed with the bona fide object of avoiding the reasonably certain physical or mental 'breakdown' of the woman concerned was lawful.

In reaching these conclusions, Macnaghten J held that the word 'unlawfully' when used in s 58 of the *Offences Against a Person Act 1861* should be read in the same manner as if the words making it an offence were qualified by a similar proviso to that contained in s 1 of the 1929 Act.

Two points may be noted about Macnaghten J's reasoning. First, although he purported to read in the proviso to the 1929 Act, he arguably went beyond that, in that the 1929 Act proviso referred to 'preserving the life of the mother', whereas his Lordship appears to have expanded upon that idea by referring to the 'breakdown', including the mental 'breakdown' of the mother. Secondly, insofar as Macnaghten J read into s 58 the words of a different enactment, his reasoning was, arguably at least, unconventional.

It was subsequently suggested that Macnaghten J relied upon, and to the extent that he did not, should have relied upon, the principle of 'necessity'[xxxiv].

Over 40 years later, Lord Diplock was less than complimentary about Macnaghten J's ruling. Lord Diplock said[xxxv]:

> The summing-up by Macnaghten J … resulted in an acquittal. So the correctness of his statement of the law did not undergo

> examination by any higher authority. It still remained in 1967 [when the *Abortion Act* was enacted] the only judicial pronouncement on the subject. No disrespect is intended to that eminent judge and the former head of my old chambers, if I say that his reputation is founded more on his sturdy common sense than upon his lucidity of legal exposition. Certainly his summing up, directed as it was to the highly exceptional facts of the particular case, left plenty of loose ends and ample scope for clarification. For instance, his primary ruling was that the onus lay on the Crown to satisfy the jury that the defendant did not procure the miscarriage of the woman in good faith for the purpose only of 'preserving her life', but this requirement he suggested to the jury they were entitled to regard as satisfied if the probable consequence of the continuance of the pregnancy would be to 'make the woman a physical or mental wreck' - a vivid phrase borrowed from one of the witnesses, but unfortunately lacking in precision. The learned judge would appear to have regarded the defence as confined to registered medical practitioners, and there is a passage in his summing up which suggests that it is available only where the doctor's opinion as to the probable dire consequence of the continuance of the pregnancy was not only held bona fide but was also based on reasonable grounds and an adequate knowledge - an objective test which it would be for the jury to determine whether, upon the evidence adduced before them, it was satisfied or not.
>
> Such was the unsatisfactory and uncertain state of the law that the *Abortion Act 1967* was intended to amend and clarify.

The principle of necessity

It is convenient to mention briefly the principle upon which it is suggested Macnaghten J relied, or should have relied. The principle of 'necessity' as stated by Stephen in his *Digests* of the criminal law was[xxxvi]:

> 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 whom 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.

The WA *Criminal Code*

On 1 May 1902 the *Criminal Code Act, 1902* (WA) came into force and contained what became s 199 - s 201 and s 259 of the first *Criminal Code Act 1913* (WA), which came into force on 1 January 1914. Those provisions read as follows:

> 199. Any person who with intent to procure the miscarriage of a woman, whether she is or is not with child, *unlawfully* administers to her or causes her to take any poison or other noxious thing, or uses any force of any kind, or uses any other means whatever, is guilty of a crime, and is liable to imprisonment with hard labour for fourteen years.
>
> 200. Any woman who, with intent to procure her own miscarriage, whether she is or is not with child, *unlawfully* administers to herself any poison or other noxious thing, or uses any force of any kind, or uses any other means whatever, or permits any such thing or means to be administered or used to her, is guilty of a crime, and is liable to imprisonment with hard labour for seven years.
>
> 201. Any person who *unlawfully* supplies to or procures for any person anything whatever, knowing that it is intended to be *unlawfully* used to procure the miscarriage of a woman, whether she is or is not with child, is guilty of a misdemeanour, and is liable to imprisonment with hard labour for three years.
>
> …
>
> 259. A person is not criminally responsible for performing, in good faith and with reasonable care and skill, a surgical operation upon any person for his benefit, or upon an

> unborn child for the preservation of the mother's life, if the performance of the operation is reasonable, having regard to the patient's state at the time and to all the circumstances of the case.

They remained unchanged, other than the removal of the words 'with hard labour', up until the major amendments effected by the *Acts Amendment (Abortion) Act 1998* (WA) (the 1998 amendments), which came into force on 26 May 1998.

It is to be noted that s 259 was, in effect, a proviso not dissimilar to that contained in s 1 of the 1929 Act (UK).

Australian case law on the meaning of 'unlawful'

Up until the late 1960s and early 1970s there was no Australian case law or statutory clarification as to the meaning of 'unlawful' in the statutes prohibiting abortion.

The first important Australian case was the Victorian decision in ***R v Davidson***[xxxvii], where Menhennitt J considered that acting with intent to procure a miscarriage would only be lawful if the accused held an honest belief on reasonable grounds that the abortion was both 'necessary' and 'proportionate'. His Honour arrived at that conclusion by applying the principle of necessity. Necessary in this context meant the abortion was necessary to preserve the pregnant woman from a serious danger to her life or to her physical and mental health, and proportionate meant the abortion was, in the circumstances, not out of proportion to the danger to be averted. It is apparent that the ***Davidson*** ruling was less restrictive than the ***Bourne*** ruling in that it permitted abortion to avert a 'serious danger' to the pregnant woman's health, thereby reducing the level of danger to health required before an abortion could lawfully be performed. The ruling did not explicitly state whether an abortion could be performed lawfully

by someone other than a qualified medical practitioner. On one view, it implicitly imposed this requirement.

In ***R v Wald***[xxxviii], Levine DCJ in New South Wales considered that a doctor could take into account the effects of economic and social factors upon the health of a pregnant woman when assessing whether an abortion was 'necessary' and 'proportionate'. Thus, if there was any 'economic, social or medical ground or reason' upon which the doctor could honestly and reasonably believe that an abortion was required to avoid a 'serious danger to the woman's mind or to her physical and mental health', the abortion would be lawful. The accused need not have believed that the woman's health was in 'serious danger' at the time of consultation, but merely that her health 'could reasonably be expected to be seriously endangered at some time during the currency of the pregnancy if uninterrupted'.

The next important decision, from a West Australian perspective, was handed down by the District Court of Queensland in 1986: ***R v Bayliss and Cullen***[xxxix]. Like the then WA *Criminal Code*, the Queensland *Criminal Code* did not contain a definition of 'unlawful' for the purposes of the unlawful abortion provisions, but did contain a provision similar to s 259 of the WA *Criminal Code*, to the effect that a person is not criminally responsible for performing a surgical operation for the 'benefit' of the patient, or 'upon an unborn child for the preservation of its mother's life' if the performance of the operation was 'reasonable, having regard to the patient's state at the time and to all the circumstances of the case' and providing that the procedure is carried out in good faith and with reasonable care and skill. That provision was contained in s 282 of the Queensland *Criminal Code*. In ***Bayliss***, McGuire DCJ, in effect, held that this exculpatory provision imported the same test as that stated by

Menhennitt J in ***Davidson***. His Honour did not adopt the extended position taken by the NSW District Court in ***R v Wald***.

In 1994, ***Bayliss and Cullen*** was affirmed by the Supreme Court of Queensland in ***Veivers v Connolly***[xl]. In ***Veivers***, de Jersey J considered that the proviso in s 282 of the *Criminal Code* (Qld) authorised 'an operation necessary to preserve the woman from a serious danger to her mental health which would otherwise be involved should the pregnancy continue'. He also rejected the defendant's claim that the only 'serious danger to mental health' could be one that arose during the period of the pregnancy itself. Instead, the relevant danger to mental health could be one which would not 'fully afflict' the woman in a practical sense until after the birth.

1998 amendments: Western Australia

Although there was no ruling in Western Australia on the meaning of 'unlawful' for the purposes of the abortion provisions in the *Criminal Code*, nor on the meaning of the exculpatory provision in s 259 of the *Criminal Code*, the assumption appears to have been made that the Queensland decisions, dealing with comparable legislation, would represent the law in Western Australia. It was in that context that the legislature enacted the 1998 amendments to the *Criminal Code*.

On 10 February 1998, two doctors were charged by police for breaching s 199 of the *Criminal Code Act 1913* (WA). On 10 March 1998, Cheryl Davenport introduced the Criminal Code Amendment (Abortion) Bill 1998 (as it was originally named) to Parliament. The *Acts Amendment (Abortion) Act 1998* (WA) (amending Act) received assent on 26 May 1998 and came into operation that same day.

The amending Act repealed sections 199, 200 and 201 of the *Criminal Code Act 1913* (WA), and substituted the following:

199. Abortion

(1) It is unlawful to perform an abortion unless -

(a) the abortion is performed by a medical practitioner in good faith and with reasonable care and skill; and

(b) the performance of the abortion is justified under section 334 of the *Health Act 1911*.

(2) A person who unlawfully performs an abortion is guilty of an offence.

Penalty: $50 000.

(3) Subject to section 259, if a person who is not a medical practitioner performs an abortion that person is guilty of a crime and is liable to imprisonment for 5 years.

(4) In this section -

'***medical practitioner***' has the same meaning as it has in the *Health Act 1911*.

(5) A reference in this section to performing an abortion includes a reference to -

(a) attempting to perform an abortion; and

(b) doing any act with intent to procure an abortion, whether or not the woman concerned is pregnant.

The amending Act repealed s 259 and substituted the following:

259. Surgical and medical treatment, liability for

A person is not criminally responsible for administering, in good faith and with reasonable care and skill, surgical or medical treatment -

(a) to another person for that other person's benefit; or

(b) to an unborn child for the preservation of the mother's life,

if the administration of the treatment is reasonable, having regard to the patient's state at the time and to all the circumstances of the case.

The amending Act also inserted s 334 into the *Health Act 1911* (WA), which includes the following subsections:

334. Performance of abortions

…

(3) Subject to subsections (4) and (7), the performance of an abortion is justified for the purposes of section 199(1) of *The Criminal Code* if, and only if -

(a) the woman concerned has given informed consent; or

(b) the woman concerned will suffer serious personal, family or social consequences if the abortion is not performed; or

(c) serious danger to the physical or mental health of the woman concerned will result if the abortion is not performed; or

(d) the pregnancy of the woman concerned is causing serious danger to her physical or mental health.

(4) Subsection (3)(b), (c) or (d) do not apply unless the woman has given informed consent or in the case of paragraphs (c) or (d) it is impracticable for her to do so.

(5) In this section -

'***informed consent***' means consent freely given by the woman where -

(a) a medical practitioner has properly, appropriately and adequately provided her with counselling about the medical risk of termination of pregnancy and of carrying a pregnancy to term; and

(b) a medical practitioner has offered her the opportunity of referral to appropriate and adequate counselling about matters relating to termination of pregnancy and carrying a pregnancy to term; and

(c) a medical practitioner has informed her that appropriate and adequate counselling will be available to her should she wish it upon termination of pregnancy or after carrying the pregnancy to term.

(6) A reference in subsection (5) to a medical practitioner does not include a reference to -

(a) the medical practitioner who performs the abortion; nor

(b) any medical practitioner who assists in the performance of the abortion.

(7) If at least 20 weeks of the woman's pregnancy have been completed when the abortion is performed, the performance of the abortion is not justified unless -

(a) 2 medical practitioners who are members of a panel of at least 6 medical practitioners appointed by the Minister for the purposes of this section have agreed that the mother, or the unborn child, has a severe medical condition that, in the clinical judgment of those 2 medical practitioners, justifies the procedure; and

(b) the abortion is performed in a facility approved by the Minister for the purposes of this section.

…

These provisions remain unchanged today, apart from s 259 of the *Criminal Code Act 1913* (WA) which was amended by the *Acts Amendment (Consent to Medical Treatment) Act 2008* (WA), which came into operation on 27 June 2009. The amendment inserted '(including palliative care)' after the word treatment in subsection (1) and also inserted a subsection (2) as follows:

> **259. Surgical and medical treatment, liability for**
>
> …
>
> (2) A person is not criminally responsible for not administering or ceasing to administer, in good faith and with reasonable care and skill, surgical or medical treatment (including palliative care) if not administering or ceasing to administer the treatment is reasonable, having regard to the patient's state at the time and to all the circumstances of the case.

Sections 290 and 291 of the WA *Criminal Code*

Sections 290 and 291 of the *Criminal Code* (WA) provide as follows:

> **290** Preventing birth of live child
>
> Any person who, when a woman is about to be delivered of a child, prevents the child from being born alive by any act or omission of such a nature that, if the child had been born alive and had then died, he would be deemed to have unlawfully killed the child, is guilty of a crime, and is liable to imprisonment for life.
> Alternative offence: s. 291.
>
> **291 Concealing birth of dead child**
>
> Any person who, when a woman is delivered of a child endeavours, by any secret disposition of the dead body of the child, to conceal its birth, whether the child died before, at, or after its birth, is guilty of a crime, and is liable to imprisonment for 2 years.

These provisions are virtually in the same terms as they appeared at the introduction of *Criminal Code* in 1914.

It was observed by the Hon M Murray QC (Crown counsel at the time) in '*The Criminal Code: A general Review*' 1983, that the phrase in s 290 'when a woman is about to be delivered of a child' is of 'uncertain meaning'. The Hon M Murray recommended that this phrase be amended so that the provision applies 'whenever a woman is pregnant with a child capable of being born alive'. After consultation with the WA Committee of the Royal College of Obstetricians and Gynaecologists, he also recommended that an evidentiary provision be inserted to the effect that, prima facie, a child was capable of being born alive if the woman concerned had been pregnant for a period of 24 weeks or more. Those recommendations were never enacted. Section 290 was mentioned in obiter in ***Martin v The Queen*** (No 2) (1996) 86 A Crim R 133, 138.

Other States and Territories

The position in the other States and Territories of Australia can be divided into two groups: those that have undergone statutory reform and those that have not.

The position in the jurisdictions that have been reformed is as follows.

Tasmania

The law on abortion in Tasmania is covered by the *Reproductive Health (Access to Terminations) Act 2013* (Tas), which came into operation on 12 February 2014. The Act states that the pregnancy of a woman who is not more than 16 weeks pregnant may be terminated by a medical practitioner (not defined in the Act) with the woman's consent. Also, termination is permitted after 16 weeks if the medical practitioner reasonably believes that the continuation of the pregnancy would involve greater risk of injury to the physical or mental health of the pregnant woman than if the pregnancy were terminated and has consulted with another medical practitioner who concurs.

Section 178D of the *Criminal Code Act 1924* (Tas) makes it a crime for a person other than a medical practitioner (not defined) or the pregnant woman to terminate a pregnancy.

Victoria

The law on abortion in Victoria is now governed by the *Abortion Law Reform Act 2008* (Vic), which came into operation on 23 October 2008. Among the purposes of the Act was to repeal provisions relating to abortion in the *Crimes Act 1958* (Vic); to abolish common law offences relating to abortion; and to make it an offence for an unqualified person to perform an abortion. In essence, the Act provides that a registered medical practitioner (defined in the Act) may perform an abortion on a woman who is no more than 24 weeks pregnant. If a woman is more than 24 weeks pregnant, abortion may be permitted only if the medical practitioner reasonably believes it is appropriate in all the circumstances and has consulted at least one other registered medical practitioner who concurs. Section 65 of the *Crimes Act 1958* (Vic) makes it a crime for any person who is not a 'qualified person' (defined) to perform an abortion on another person, and the maximum penalty is 10 years' imprisonment. A pregnant woman who consents to or assists in an abortion on herself is not guilty of a crime in Victoria. Section 66 abolishes all common law offences relating to abortion in Victoria.

ACT

The current laws in the ACT were introduced by the *Medical Practitioners (Maternal Health) Amendment Act 2002* (ACT), which amended the *Medical Practitioners Act 1930* (ACT) (repealed). These provisions came into effect on 10 September 2002. They are now contained in Part 6 of the *Health Act 1993* (ACT). These provisions simply provide that a person who is not a doctor

(defined) must not carry out an abortion and that a person must not carry out an abortion unless it is in a medical facility approved under s 83(1) of the Act. The maximum penalty for breaching these requirements is 5 years' imprisonment and 6 months' imprisonment respectively.

The position in the jurisdictions which have not been reformed is as follows.

New South Wales

The law on abortion in New South Wales is still contained in s 82 - s 84 of the *Crimes Act 1900* (NSW). In ***CES v Superclinics (Australia) Pty Ltd*** (1995) 38 NSWLR 47, Kirby ACJ provided a detailed discussion and analysis of the test in ***Wald***. His Honour, in effect, reinterpreted the test on the basis that the question of whether an abortion is 'unlawful' is, in effect, determined by a doctor's subjective beliefs about when an abortion is appropriate, based on that doctor's assessment of the impact of social and economic factors on the health of the woman seeking abortion. This was applied in ***R v Sood*** [2006] NSWSC 1141. The maximum punishment for a third party unlawfully procuring an abortion or a pregnant woman unlawfully procuring her own abortion is 10 years' imprisonment.

Queensland

The law on abortion in Queensland is contained in s 224 - s 226 and s 282 of the *Criminal Code Act 1899* (Qld). These provisions are very similar to the Western Australian provisions before the 1998 amendments. The position in Queensland is still that set out in ***Davidson***; ***Bayliss and Cullen***; and ***Veivers***. The maximum penalty for a third party unlawfully procuring an abortion is 14 years' imprisonment, and for a pregnant woman procuring her own abortion unlawfully is 7 years' imprisonment.

South Australia

The *Criminal Law Consolidation Act 1935* (SA) contains similar provisions to NSW and Queensland: s 81 - s 82. However, it also contains s 82A, which sets out circumstances where an abortion will be lawful. Section 82A is not a new provision, and can be found in the oldest online reprint of the Act from 1985. Section 82A allows an abortion where two medical practitioners are of the opinion, formed in good faith, that the continuance of the pregnancy would involve greater risk to the life of the pregnant woman or greater risk of injury to the physical or mental health of the pregnant woman, than if the pregnancy were terminated (provided the abortion is carried out in a hospital); or that there is a substantial risk that the child would be seriously handicapped (provided the abortion is carried out in a hospital); or that the abortion is 'immediately necessary' to save the life, or prevent grave injury to the physical or mental health of the pregnant woman. Notably, the maximum punishment for breaching s 81 or s 82 is life imprisonment.

Northern Territory

The crime of abortion is contained in part VI division 8 of the *Criminal Code Act* (NT). The provisions are similar to those in NSW and Queensland, however, there is no provision which would make the pregnant woman liable. There is also a defence available where the conduct was for the purpose of benefiting the pregnant woman or pursuant to a socially acceptable function or activity and the conduct was reasonable. The maximum penalty for breaching these provisions is 7 years' imprisonment.

The circumstances in which an abortion in the NT will be lawful are set out in s 11 of the *Medical Services Act 1982* (NT). Essentially, this provision provides that a termination will be lawful where the woman is no more than 14 weeks

pregnant and two medical practitioners (not defined) form the opinion, in good faith, that continuance of the pregnancy would involve greater risk to the woman's life or greater risk of harm to her physical or mental health than if the pregnancy were terminated; or there is substantial risk that the child would be seriously handicapped.

The civil law

No enforceable civil right to life

The law does not recognise the right to life outside the protection of the criminal law: ***Yunghanns v Candoora No 19 Pty Ltd*** [1999] VSC 524 [104].

Accordingly, it has been held that the father of an unborn child, and the foetus acting through the father as its next friend, lack the standing to prevent a woman from having an abortion (either an allegedly unlawful abortion or a lawful abortion): ***Attorney-General (QLD); Ex rel Kerr v T*** (1983) 46 ALR 275, 277; 57 ALJR 285 (Gibbs CJ); ***Paton v British Pregnancy Advisory Service Trustees*** [1979] QB 276; ***Wall v Livingston*** [1982] 1 NZLR 734; ***Carruthers v Langley*** (1984) 13 DLR (4th) 528; ***In the Marriage of F and F*** (1989) 13 Fam LR 189; ***Talbot v Norman*** (2012) 46 Fam LR 530.

In ***Attorney-General; Kerr v T***, Sir Harry Gibbs observed:

> There are limits to the extent to which the law should intrude upon personal liberty and personal privacy in the pursuit of moral and religious aims (277 - 278).

The rationale for the rule in relation to illegal abortions is that as a general principle, injunctive relief is not available to a private citizen to restrain or prevent breaches of the criminal law (***Commonwealth v John Fairfax & Sons Ltd*** (1980) 147 CLR 39, 49 - 50).

In addition, there is no right to compensation for the fact of being born. Thus, a child who has suffered injury in utero not caused by a third party, for example, injury caused by a rubella infection, cannot recover damages for being born with disabilities on the basis that it would have been better off had it been aborted. In ***Harriton v Stephens*** (2006) 226 CLR 52, a doctor failed to diagnose rubella in a pregnant patient. He thereby deprived the patient, the mother, of the option of having the pregnancy terminated. The mother gave birth to a child with serious congenital disabilities. Proceedings were brought on behalf of the child against the doctor for negligence. Gleeson CJ and Gummow, Callinan, Heydon and Crennan JJ held that the doctor did not owe the child a duty of care. Further, damage was an essential ingredient of the tort of negligence, and the calculation of damage in this situation would require the impossible comparison between the child's life with disabilities and the state of non-existence. Therefore, the damage claimed was not amenable to being determined by a court.

Claims against tortfeasors

The common law recognises that a foetus has a right not to be caused physical injury by a third party whilst in utero. Thus, a negligent driver who causes injury to a pregnant mother may be liable for the injury suffered by the foetus in the accident. The right, however, is inchoate in the sense that the foetus has no remedy for the injury done to it unless and until it is born: ***Watt v Rama*** [1972] VR 353; ***Lee v Hutton*** [2013] FamCA 745 [146].

I am unaware of any cases where a child has sued its mother for injury done to it in utero, for example, where the mother has caused the child to be born with foetal alcohol syndrome.

Property rights

Also, like Roman law, the common law of succession recognises that a foetus may have legal rights, exercisable consequent upon its birth. The rights even apply to a frozen embryo: ***Re the Estate of the late K*** (1996) 131 FLR 374. In that case a couple who wished to have children entered into an in-vitro fertilisation program. One child was born. It was the intention of the couple to have another child. Two other embryos that were produced were frozen. The father died intestate. It was held that 'a child, being the product of his father's semen and mother's ovum, implanted in the mother's womb subsequent to the death of his father is, upon birth, entitled to a right of inheritance afforded by law' (381).

Similarly, in trust law, the interests of an unborn child can be protected. In ***Yunghanns v Candoora No 19 Pty Ltd*** [1999] VSC 524, a trust deed conferred rights on a class of infant beneficiaries. The plaintiff was allowed to commence proceedings on behalf of his unborn child who, after birth, would fall into the relevant class. The court granted an interlocutory injunction to restrain the trustee from amending the trust deed in order to preserve the contingent rights of the unborn child who, if born, would have rights under the family trust.

More generally, Jordan CJ in ***Connare v Pistola*** (1943) 60 WN (NSW) 95 referred to the 'rule of construction that words referring to children in existence at a particular time may be read as large enough to include a child *en ventre sa mere* but not born at that time if so to read them will secure to the child a benefit to which it would have been entitled if then born, if it appears that such a child is within the reason and motive of the gift' (96).

Economic loss for the 'unwanted' child

The *parents* of a child may recover damages for the reasonable upkeep of a child to the age of 18 years, on the basis that they would never have incurred such expenditure had the child never been born. In ***Cattanach v Melchior*** [2003] HCA 38; (2003) 215 CLR 1, a couple became the parents of an unintended child as a result of negligent advice and failure to warn by the doctor who had performed a sterilisation procedure upon the mother. By a majority of four (McHugh, Gummow, Kirby and Callinan JJ) to three (Gleeson CJ, Hayne and Heydon JJ), the High Court held that the couple were entitled to the damages claimed for the cost of raising and maintaining the child up to the age of 18 years in consequence of the doctor's negligence. The majority held that the human benefits and joy received from the birth of a child was legally irrelevant to the head of damage claimed by the parents. The majority in this regard declined to follow the opposite conclusion reached unanimously by the House of Lords in ***McFarlane v Tayside Health Board*** [1999] 3 WLR 1301.

[i] This section is derived principally from JH Baker, An Introduction to Legal History, 4th edition, 2002 ('Baker'), p 500 - 502, 522 - 523

[ii] H Garth and C. Wright-Mills (eds): From Max Weber 1970, p 78

[iii] Windeyer, Lectures on Legal History, 2nd edition, 1957, p 19

[iv] The following is derived principally from Baker p 126 - 128

[v] Windeyer, p 37

[vi] Baker, p 128

[vii] Baker, p 436

[viii] Muller, The Criminalisation of Abortion in the West, Cornell University Press 2012 ('Muller'), p 4 - 5

[ix] This part is derived principally from Muller, p 1, 24 - 30, 83 - 84, 101 - 103, 136 - 141

[x] The Works of Aristotle, vol 11 bk 7, ch 3 583b, p 109

[xi] Muller, ibid

[xii] This section is derived principally from Muller p 26 - 30, 103

[xiii] Barry, 'The Law of Therapeutic Abortion', recorded in The Proceedings of the Medico - Legal Society of Victoria, vol 3, 211 ('Barry') at p 212

[xiv] D. Seaborne Davies, 'The Law of Abortion and Necessity' (1938) 2 MLR 126 ('Davies (2)') p 131

[xv] Muller, p 29

[xvi] This section is largely derived from Muller, p 66 - 75

[xvii] Barry, p 213

[xviii] D. Seaborne Davies, 'Child-Killing in English Law' (1937) 1 MLR 203 (Davies (1)), p 211 - 212

[xix] Barry, p 217

[xx] ***R v Bayliss & Cullen*** (1985) 9 Qld Lawyer Reps 8 ('Bayliss')

[xxi] This section is largely derived from Gilmour, Riot, Risings and Revolution, Governance and Violence in 18th-Century England, 1992 ('Gilmour'), p 9, 15 - 16, 147

[xxii] Gilmour, p 145

[xxiii] Gilmour, p 148 - 149

[xxiv] This background to the introduction of Lord Ellenborough's bill is derived principally from Keown, Abortion, Doctors and the Law, 1988, Cambridge University Press, p 12 - 32

[xxv] Gilmour, p 5 - 6

[xxvi] Ibid

[xxvii] Keown, p 17

[xxviii] P Johnson, A History of the English People, 1985, p 251

[xxix] Davies (2), p 134

[xxx] Davies (2), p 136

[xxxi] The *Abortion Act 1967* effectively made abortion lawful if two registered medical practitioners formed the opinion in good faith that the pregnancy would involve risk to the life of the mother or injury to the physical or mental health of the mother or any existing children of her family greater than if the pregnancy were terminated, or if there was a substantial risk that the child would be seriously handicapped if born

[xxxii] The discussion of ***Bourne*** is derived principally from Barry, p 224 - 227 and Davies (2), p 126 - 130

[xxxiii] Barry, p 227 - 228

[xxxiv] Barry, p 228 - 229

[xxxv] ***Royal College of Nursing of the United Kingdom v Department of Health and Social Security*** [1981] 2 WLR 279, p 297 - 298, 1 All ER 545, p 567 - 568

[xxxvi] Stephen, A Digest of Criminal Law, 4th ed, Art. 32, p 24

[xxxvii] ***R v Davidson*** [1969] VR 667 ('Davidson')

[xxxviii] ***R v Wald*** (1971) 3 NSWDCR 25 ('Wald')

[xxxix] See note xix

[xl] ***Veivers v Connolly*** [1995] 2 Qd R 326 ('Veivers')