Abortion Retried

Catherine Henry, APLA Member, NSW

The case of *CES v Superclinics* (CES), which is the subject of an Application for Special Leave to Appeal to the High Court due to be heard on 15 April, is the first time that an Australian appellate court has had to deal with the vexed issue of the lawfulness of abortion.

The abortion issue

The *CES* case is the most significant abortion case since the 'Levine ruling' in *R v Wald* (1971) 3 DCR (NSW) 25 over twenty years ago. Given the dearth of Australian abortion cases, it is somewhat ironic that the *CES* case did not, as the other abortion cases did, arise from a prosecution. Instead, it was a civil damages claim arising from the allegedly negligent failure on the part of certain medical practitioners to diagnose a woman's pregnancy. The case was one in contract and negligence brought by the parents of a child against a number of general practitioners and a clinic (Superclinics) located in the CBD of Sydney which, it was claimed, employed the doctors.

The plaintiff, CES, had consulted the doctors at the Clinic. The plaintiff mother is called CES, as a suppression order was granted to protect the anonymity of the child. It was CES' evidence at the trial that she had told each of the defendants she was concerned to investigate whether her absence of periods meant she was pregnant. It was also her evidence that she had told each doctor at each consultation that if she was in fact pregnant she wished to have an abortion. At the time, CES was 21 years old, a part-time student, earning a meagre income in her mother's handcraft business, living in shared accommodation and in a relationship that was not a happy one. Over a two-month period, there were five visits to the defendant doctors at the Superclinic. CES was pregnant but each of the defendant doctors had failed to diagnose the pregnancy. Finally, some two months after the last visit to the Superclinic, the pregnancy was confirmed by a doctor from the suburbs who had treated CES' family over the years. At the time of diagnosis, the gestational age of the pregnancy was 19 & 1/2 weeks and the medical opinion available to CES at the time was that the pregnancy was too advanced to terminate.

CES and the father of the child sued the doctors and Superclinics, claiming damages for the pain and suffering involved in childbirth, for the depression which the pregnancy had caused CES and, most significantly from the perspective of the quantum of damages claimed, the costs of raising the child to age 18.

Justice Newman found that there had been breaches of the duty of care owed to the plaintiff CES (with the exception of one of the doctors). He also found, more importantly, that the abortion which CES had wanted but had been denied would not have been recognised by the law. He then went on to apply the common law principle that a plaintiff cannot recover compensation for having been denied the opportunity of having performed an illegal act.

The law of abortion has been seen as secure since the decision in *Wald*. As a decision of a state District Court, however, *Wald* is tenuous legal authority. In *CES*, a superior court has been asked to rule on the difficult issue of the legality of abortion for the first time in Australian legal history.

The Menhennit and Levine Rulings

It is over 20 years since the landmark decision of NSW District Court Judge Levine in the case of *R v Wald*. This was a criminal prosecution against the proprietors, Drs Wald and Hall, and several of the doctors who had been performing abortions at the Heatherbrae Abortion Clinic in Bondi. The prosecution occurred in a more turbulent political climate than that which now prevails. Under the Liberal Askin administration, a full-time abortion squad made up of 27 permanently attached police officers had been directed to 'crack down' on 'illegal' abortionists.[1] There were regular and well attended public meetings to discuss abortion reform and it was not uncommon for aspiring politicians to seek election on a platform where commitment to legal abortion was prominent.

The charges relating to the Heatherbrae Clinic were the result of a police raid. The accused, it was alleged, were guilty of crimes within the ambit of s.83 of the Crimes Act 1900 (NSW). Counsel for the Clinic proprietors, Jim Staples, has recently claimed that the charges were laid in response to public accusations in the media that certain senior police officers were taking bribes from medical practitioners. It was said to have been a defensive gesture on the part of the then NSW Police Commissioner.

At the trial, Jim Staples (formerly Judge of the NSW Industrial Commission) submitted to Judge Levine that he should direct an acquittal and take the case away from the jury. Staples has since described his address as 'put(ting) the whole law of abortion as conventionally received into issue'.[2] During the course of the address, he had recited the legal and

social history of the rules of law relating to the inducing of miscarriages from as early as the 16th century and reviewed all the statutory provisions of the 19th century and the modern rulings of the courts. It was his basic tenet that as long as reasonable care was taken during the abortion procedure, the woman concerned properly consented and no harm or injury occurred, abortion had never constituted a criminal offence. Abortion, he submitted, should only be unlawful if it constituted an assault.

In the event, Levine J did not accept the submission of Staples and left the case with the jury. However, in his address to the jury, Levine J introduced a new component to the lawfulness test. In determining whether the continuation of the pregnancy represented a serious danger to the woman's physical or mental health, 'economic, social or medical ground(s) or reason(s)' could, the judge said, be considered as relevant (*Wald* at 27).

The situation in New South Wales mirrored what had been happening in other States. During the late 1960s in Victoria, for example, the State police homicide squad, which had become responsible for investigating allegedly unlawful abortions, was responsible for the investigation and prosecution of offences by doctors under the provisions of the criminal code. In 1969,129 charges were laid. Dr Bertram Wainer, a Melbourne GP, attracted a high profile during this time due to his attempts to expose Victorian police officers in so-called abortion rackets.

One of the doctors prosecuted was Charles Davidson, a colleague of Bertram Wainer. He was charged with four counts of unlawfully using an instrument to procure the miscarriage of a woman and one count of conspiring to unlawfully procure a miscarriage. The case was finally heard by a Supreme Court Justice, Menhennit J, who adopted a liberal test for lawfulness. He said that for a termination to be lawful, the accused must honestly believe on reasonable grounds that the procedure is:

- necessary to preserve the woman from a serious danger to life or her physical or mental health (not being merely the normal dangers associated with pregnancy and childbirth); or

  in the circumstances is not out of proportion to the danger to be averted.

Dr Davidson was acquitted by the jury of all charges.

A period of 'truce' [2]

A mood of great optimism followed the Levine and Menhennit rulings. In New South Wales and Victoria the impetus had been provided for concerned medical practitioners to establish freestanding abortion clinics in the major centres. In 1972 the first clinic in Melbourne was opened. In post- Levine Sydney, while a small number of abortions were being performed as a routine part of the health service provided at the Leichhardt Women's Health Centre, a specialist abortion service—the Preterm Foundation—opened in June 1974. Also of significance in 1974, abortions became included as a service attracting the payment of medical benefits through the Medicare system.

These developments did not, however, result in the immediate removal of the abortion issue from the political agenda. In the months immediately following the Menhennit and Levine rulings, there was a period of what has been described as 'prosecutorial aggression'[3] at the direction of the governments of the day. This was able to be resolved finally by a deal struck between the police and abortion activists, who had responded to the hard-line police tactics by high profile protests both in Parliament and in the wider public arena. As long as abortions were the subject of proper consent, performed in an environment 'fit for the purpose' and by registered medical practitioners, the deal provided that there would be no police interference.[4]

Not a crime punished by our place in our time [5]

There has followed since a period of relative but uneasy stability. There are endeavours, from time to time, by the 'Right to Life' movement and politicians, via the mechanisms of private members bills, to attempt to confine the availability of abortion services. Notwithstanding this, the law in this area has been regarded as settled for the past two decades in accordance with the principles laid down in the two formative cases. In this period, there has been almost no prosecutorial activity. While the police are certainly obliged to investigate complaints of so-called 'abortion offences', law enforcers today do not perceive the contravention of abortion laws as a serious law enforcement problem.[6] For instance, neither the NSW nor the Victorian State DPP have formulated prosecutorial guidelines governing the prosecution of unlawful abortions. The laws are regarded as 'unenforceable'[7] as borne out by the local track record. Of direct relevance is the widespread view that the requisite standard of proof is impossible to sustain. Only in the case of a 'backyard' procedure, would it be likely that the Crown would be successful in establishing that the medical practitioner did not hold the required honest and reasonable belief as

to the danger to the woman's physical or mental health.

How many abortions?

In the period spanning the past 20 or so years, many thousands of women around the country have sought and obtained abortions. The most up-to-date statistics available from the Commonwealth Health Insurance Commission reveal that, nationally, almost 76,000 claims were submitted for abortion services (item number 35643) in the 1993-94 financial year.[8] The figures increase significantly each year and represent one abortion for every three live births. Especially in the major metropolitan centres of Sydney and Melbourne, abortion is, in practice, available on demand.

The growing availability is largely reflective of public attitudes to abortion services. Historically, a distinction has been drawn between, on the one hand, those abortions sought on grounds of foetal abnormality, where the pregnancy is the result of rape or where the mother's health is at risk and, on the other, those abortions sought on what might loosely be termed 'socio-economic grounds'. There has always been widespread support for abortions falling within the first category but not for those in the latter category.

The last decade or so has witnessed increased support for greater access to abortions generally, including those sought for socio-economic reasons. There are indications that six out of every ten Australians currently support abortion for economic reasons.[9] This is a significant increase on figures collected in the 1960s when only approximately two in every ten were in favour of greater access.

Most women currently seeking an abortion do so for socio-economic reasons such as age, financial situation or the state of their relationships.[10] Newspaper headlines are reinforcing:

'Abortion rise blamed on recession' [11]

'Grim choice: mortgage or baby' [12]

CES v Superclinics

In wanting her own pregnancy terminated, CES was motivated by lifestyle and financial reasons and was therefore no different to the many women who have presented to free-standing abortion clinics in the 1980s and 1990s seeking (and obtaining) abortions. At the trial, evidence was led in relation to the state of CES' mental health. Evidence of her significant distress at the news of the diagnosis of pregnancy and in the period leading up to the child's birth was given by a number of witnesses. CES did not receive any professional counselling at the time the pregnancy was diagnosed, although, the doctor who finally diagnosed the pregnancy gave evidence at trial that 'there was a serious danger to CES' mental health in allowing the pregnancy to proceed to term'.

Despite this evidence, Newman J considered the failure to refer for psychiatric counselling by the GP to be fatal to the case on the criteria of 'danger to mental health', saying:

> Dr K did not refer the plaintiff to a psychiatrist at the time, however, after the birth of the child the first plaintiff exhibited symptoms of depression and anxiety which caused Dr K to make such a reference. What I glean from Dr K's evidence is that ... [CES'] reaction to her pregnancy was not such as to require treatment by a psychiatrist ... I find that had Dr K considered that the pregnancy did constitute a danger—indeed a danger falling short of a serious danger—to [CES'] mental health, she would have ... referred her to an appropriate specialist for treatment [*CES* at 8]

Consequences of Newman J's Judgement

Shortly after Levine delivered his judgement in the R v Wald case in 1972, a Melbourne academic wrote the following about the law of abortion then in force:

> Consider the sham of a woman obliged to present herself to a doctor as being under a 'serious danger to her physical or mental health'. An adult woman, fully aware of her personal life situation, is not allowed to make a private decision that she is unwilling or unable to continue with an unwanted pregnancy. Instead, she must at least be able to convince the doctor that she is somehow mentally unstable."[13]

In order to have an abortion performed, women have not, it would seem, had to satisfy a doctor of symptoms consistent with a recognisable psychiatric illness in order to have an abortion.

Is the law, therefore, out of step with practical reality?

The Decision of the Court of Appeal

The bench was comprised of President Kirby and Justice Priestley and Meagher. By 2:1 (Meagher J dissenting), the Court found that CES' abortion

would have been one recognised by the law.

Dealing first with the minority judgement of Meagher J, he found that "...the plaintiff's claim (for damages) was repelled by statutory illegality..." and that Newman J's approach to the issue of legality was correct. His judgement was peppered by statements such as:

> "It seems to me that our law has always proceeded on the premise that human life is sacred."

and, quoting Blackstone's Laws of England:

> "Life is...a right inherent by nature in every individual and it begins in contemplation of law as soon as an infant is able to stir in the mother's womb."

On the legality point, Kirby P and Priestley were at one. Kirby P made the following points in his judgement:

1. Newman J got the law wrong.

   It is not the woman seeking the abortion whose conduct is capable of infringing the criminal law. Rather, it is the doctor who performs the abortion who must have (using Levine language) "the honest and reasonable belief that the woman's mental or physical health was gravely affected by her pregnancy warranting termination."

2. The whole enquiry involving a consideration of the facts in a purely hypothetical context (ie would a doctor presented with a woman in CES' situation have referred her for an abortion) was inherently unsatisfactory.

3. Newman J's remark that the doctor who confimred CES' pregnancy had not referred CES off to a psychiatrist and that there was accordingly no evidence of serious danger to CES' mental health (again Levine language) was too dismissive and a misinterpretation of the evidence. In any event, as Kirby pointed out, many have suffered in the past with mental disturbance and still do without the intervention of a psychiatrist.

4. Newman J had failed to take into account how CES may have reacted emotionally after the birth of the child when considering the danger to her mental health. This was a very relevant factor in his opinion.

5. The bank robber analogy (derived from the facts in the decision of the High Court in *Gala v Preston* was unsatisfactory".

6. He found the continued prescence of abortion offences in the Crimes Act in light of the position at common law to be anomalous. He felt bound to remind the Court of the reality of the NSW practice of freely available abortions.

Priestley J was of the same view on the legality point. However, from the plaintiff's perspective, there was, in his judgement, a real sting in the tail, on the question of damages. He found that the costs of raising the child should not be recoverable as they derived from the parents' decision to keep the child and not adopt it out! This was expressed to be an application of the priciple of mitigation of loss.

Editors' note:

In our next issue of *Update*, we discuss the public policy of awarding compensation for an unwanted pregnancy.

References

1. A useful history of events in the late 1960s and early 1970s is described in Siedlecky, Stephania and Wyndham, Diana, Populate and Perish: Australian Womens' Fight for Birth Control, Allen and Unwin, Sydney, 1990, Chapter 6.

2. Jim Staples, former NSW Industrial Commission Judge and who earlier in his career defended the two doctors in *R v Wald* describes the 'deal' struck by police and abortion activists in NSW in the period post-*Wald* as a truce in a paper presented at the Preterm Foundation (20th anniversary) dinner on 30 May 1994.

3. Staples, Jim, above, p.3.

4. Staples, Jim, above, p.3.

5. Waller, Louis, 'Any Reasonable Creature in Being', (1987)13 Monash University Law Review, March, p.47.

6. Cica, Natasha, 'The Inadequacies of Australian Abortion Law', (1991 5(1) Australian Journal of Family Law 47.

7. McMichael, Tony (ed), Abortion: The Unforceable Law,. Law Book Company, Sydney, 1972.

8. Statistics provided by the Functions Statistics Branch of the Health Insurance Commission for the 1993-94 financial year.

9. Findings of the National Science Survey as reported in Kelley, Jonathan and Evans, MDR, 'Should Abortion be Legal? Australians' Opinions and their Sources in Ideology and Social Structure' in Jonathan Kelley and Clive Bean (eds) Australian Attitudes, Allen and Unwin, Sydney, 1988.

10. Abortion providers confirm this to be the case from their experience in the conduct of counselling sessions prior to the abortion procedure: statements made by the Medical Director of Australian Birth Control Services in the press after the *CES Case*— see Voumard, Sonya, 'No Regrets for Abortion Doctor', Sydney Morning Herald, 20. 4. 94, p.6.
11. Age 29.3.92
12. Sydney Morning Herald, 3.3.91
13. These are the views of Tony McMichael in 'Introduction: The Case for Reform in Abortion: The Unenforceable Law, above.
14. Coleman, Karen, 'Politics of Abortion in Australia: Freedom, Church and State', (1988) 29 Feminist Review 75-97.

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I want your cases

Have you been involved in a case recently which other APLA members may find useful or interesting?

If the answer is

YES

please write it down and send it to the *Update*.

We want short case notes as well as articles on current issues affecting plaintiff lawyers.

Please call Therese Bateman on

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Technology for Plaintiff Lawyers

Bill Madden, APLA Member, NSW

Enclosed with this edition of the APLA Newsletter is a short survey designed to give some indication of the level of technology usage by APLA members.

During 1995 there has been an enormous growth of interest in, and usage of, communications technology both for electronic mail and access to information.

The NSW Law Foundation has greatly assisted, firstly through establishment of a bulletin board/ electronic mail service known as "First Class Law". The First Class Law service is still in operation and has about 700 active users.

The service provides electronic mail, public and private discussion groups and access to resources such as the NSW Supreme and District Court lists and High Court judgments.

Late last year the Law Foundation in co-operation with the Australasian Legal Information Institute established an internet home page known as "Foundation Law".

The Foundation Law site provide links to other sites and most importantly access to a very substantial volume of legal information such as the Commonwealth Statutes, Rules and Regulations, Federal Court cases and the like.

The site is already very popular with use during October 1995 averaging 600 enquiries per day.

No doubt practitioners and firms who obtain internet accounts in order to access the Foundation Law and other materials will also pursue more frequent use of electronic mail.

Some firms have already registered their firm names for Email purposes and indeed established their own home pages.

It is often said that the adoption of technology by firms practising on behalf of defendants/insurers is well in advance of plaintiff firms and practitioners.

I would be most interested to hear from members regarding their own experiences, good or bad, in this area.

Members responding to the survey or to me directly will assist in further articles or seminars on this topic.

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