2006

Emergency Contraception, Abortion and Evidence-Based Law

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ETHICAL AND LEGAL ISSUES IN REPRODUCTIVE HEALTH

Emergency contraception, abortion and evidence-based law

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KEYWORDS

Evidence-based law;
Emergency
contraception;
Abortion;
Expert witnesses;
Levonorgestrel;
Miscarriage;
Legal interpretation

Abstract Courts and legal tribunals increasingly decline to serve as religious or moral guardians, and require social evidence to support litigants' claims. Recent cases on emergency contraception and abortion are examined to show how judicial interpretations can take account of evidence of the impact that different understandings of the law will have for how ordinary people can plan their lives and reproductive choices. In an emergency contraception case, an interpretation was rejected that would have criminalized choices that millions of decent, law-abiding physicians, pharmacists and women routinely make. In an abortion case, three judges unanimously rejected a government ministry's defence of compliance with the law because the ministry had failed to investigate the needs within its jurisdiction for legal clarity, lawful services, and its responsibility to women returning from having lawful procedures elsewhere. In both cases, litigants prevailed who showed factual evidence that their claims better promoted reproductive health and choice.

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1. Introduction

Reproductive health law has emerged from centuries of belief that human reproduction, occurring within the secretive and inaccessible recesses of

women's bodies, was a realm of supernatural or divine ministry and intention. Often a focus of human hopes and fears, the chance of reproduction was not a domain that allowed human intervention or control. Indeed, human restraint of women's reproduction was legally condemned, although castration of vanquished men was an historically accepted military practice. Until 1969 in Canada, for instance, providing knowledge or means of contraception appeared in the Criminal

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Code as a Crime Against Morality. Governments were not challenged to justify such laws before the courts in which they enforced them. Their leaders rested upon moralistic value systems, often influenced by conservative religious institutions, shared among governing elites but at variance with the preferences of most affected residents in the community.

2. Development of evidence-based law

It was not until the closing decades of the twentieth century that courts considered it necessary to take responsive account of the actual values according to which members of the general community attempted to regulate their reproductive lives. Courts could no longer ignore, for instance, that the births of healthy children of unplanned pregnancies were not necessarily received as blessings. A case that “bust the blessing balloon” [1] occurred in 1971, when a pharmacist misread a prescription for a contraceptive drug (Norinyl) and provided a woman with a tranquilizer (Nardil) instead, resulting in birth of her eighth child. Her claim for negligence required proof of damage, but the trial judge followed precedent to rule that a child’s birth could not legally be regarded as a species of damage. Reversing this ruling, the appeal court held that:

To say that for reasons of public policy contraceptive failure can result in no damage as a matter of law ignores the fact that tens of millions of persons use contraceptives daily to avoid the very result which the defendant would have us say is always a benefit, never a detriment. Those tens of millions of persons, by their conduct, express the sense of the community [2].

In more recent years, courts in several countries have become more prepared to find the principles by reference to which they assess litigants’ arguments on interpretation of the law in the realities of how ordinary, mainstream members of their societies plan and live their lives. Courts can adopt fact-based reality checks to measure preferences of legal interpretation advanced by politically inspired governmental agencies, by leaders of religious institutions, and even by judges of courts from whose judgment appeals have been brought. Judges, accustomed to the legal duty to give reasons for their own decisions, require litigants to give reasons for their arguments of how the law should be interpreted, and increasingly expect reasons to

be factually realistic. That is, judges take account not only of the claims of policy preference or spiritual values advanced to support arguments of how the law should be applied, but also of social utility and effect. An argument of policy or professed values not supported by evidenced realities of the social setting in which the court’s decision will be received and effective may be rejected as unreasonable or unrealistic.

Recent decisions will illustrate this democratic development in cases concerning emergency contraception and abortion, but an earlier English case concerned adolescent access to contraceptive care. In the *Gillick* case [3], arising in the early 1980s, a litigant requested a ruling that no contraceptive care be delivered to her daughters aged under 16 years without her consent, because a circular to physicians issued by the Department of Health and Social Security that claimed that physicians could deliver such care to a minor of sufficient understanding without her parent’s consent or knowledge was unlawful. The Sexual Offences Act, 1956 declared it criminal to have intercourse with girls aged under 16 years, and the mother claimed that equipping her daughters for intercourse condoned a crime and their victimization.

The mother requested a ruling not only that her daughters not be given contraceptive care without her consent, which she made it clear she had no intention of giving, but also that they not receive abortion. The trial judge upheld the legality of the Department’s circular, finding that it embodied the long-recognized “mature minor” doctrine [4]. However, the Court of Appeal reversed this decision, and held the mother entitled to the ruling she requested [5]. On further appeal, the final appeal court, the House of Lords, reversed the Court of Appeal and reinstated the decision of the trial judge [3].

The Court of Appeal’s decision was based on narrow factual presumptions of parental control and adolescent compliance, perhaps reflecting the judges’ refined cultural milieu in which early teenage daughters did not become sexually active. It discounted the wider reality in England that early teenage girls were having pregnancies, babies and abortions at rates the Department found alarming. Further, the judges mainly addressed contraception, paying little regard to the ruling requested on abortion. Parents are obliged as a matter of law to provide their children with medically indicated care, including therapeutic abortion, and cannot be granted legal power to veto such treatment. The Court of Appeal’s judgment on contraception was not

related to the realities of general social experience, and failed seriously to relate its reasoning to abortion, and was therefore reversed.

3. Introduction of fact evidence

Normally, parties to a case will present evidence to support their factual claims, but when cases raise issues of wider concern that transcend the immediate dispute between the parties, judges may allow “friends of the court” (*amicus curiae*) to present evidence and argument. This practice recognizes that judicial decisions, perhaps based on narrow legalistic arguments of construction of language or precedent, may have social implications that extend far beyond the interests or perception of the original parties. To reduce unintended consequences of judgments, judges may open cases to participation, perhaps on limited grounds, by representatives of potentially affected interests, including governmental agencies and non-governmental advocacy groups.

Fact witnesses are people presented as having direct knowledge of facts in dispute but evidence may also be presented by “expert witnesses”. Matters of everyday knowledge, such as the normal period of human gestation, do not require expert evidence. Judges will rule on whether expert witnesses are appropriate, but commonly find that medical and sociological claims justify or require supporting expert testimony. The role of expert witnesses is not to serve as advocates for parties that call (and pay) them, but objectively to assist judges to determine facts that fall outside everyday knowledge. Parties request testimony from experts whose evidence the parties believe will advance their case, but expert witnesses bear them no duty to satisfy their expectations. Judges cannot rely on any non-legal special or expert knowledge of their own that they may possess, since facts in dispute must be presented in court for examination and dispute by all parties.

Judges rule on whether individuals qualify as experts, addressing whether their qualifications and prominence in their alleged field of expertise are adequate, and whether the expertise they are found to possess is relevant to the facts in dispute. Experience in professional practice does not in itself constitute expertise, since it may be based on repeated application of commonplace skills or perceptions. The final question for the court is how the evidence of expert witnesses for the different parties coincides or conflicts, and whose conflicting evidence is more persuasive.

4. The challenge to emergency contraception

4.1. Legal facts

The *Smeaton* case, commenced in England by the Society for the Protection of Unborn Children (SPUC), and decided in 2002, was a narrowly focused technical claim that the Secretary of State for Health was not legally entitled under the Medicines Act 1968 to make the Prescription Only Medicines (Human Use) Amendment (No. 3) Order 2000 [6]. This allowed registered pharmacists to supply the emergency (“post coital” or “morning-after”) contraceptive drug Levonorgestrel to women aged 16 years and over without a doctor’s prescription.

The SPUC claimed the drug was abortifacient, and so governed by the UK Abortion Act 1967. This Act, drafted by reference to the Offences against the Person Act 1861, requires the opinion of two doctors, acting in good faith, that conditions of the 1967 Act are satisfied, otherwise a criminal offence is committed against Section 59 of the 1861 Act. This provides that any person who supplies a “noxious thing... knowing that the same is intended to be... used... with intent to procure the miscarriage of any woman” commits a criminal offence. Section 58 of the 1861 Act establishes that the woman need not be shown to be pregnant for the crime of acting “with intent to procure the miscarriage” to occur.

Narrow though the SPUC claim might appear, the judge found it to implicate all interventions intended to prevent fertilization of an ovum or its implantation in utero, such as many regular contraceptive products and intra-uterine devices. It was therefore necessary to clarify the law since, as the judge observed in the first paragraph of his 398 paragraph judgment, “the outcome of this case may potentially affect the everyday lives of hundreds of thousands, indeed millions, of ordinary men and women in this country” [7].

The key legal issues in the case were the meaning in the 1861 Act of the intention to procure “miscarriage,” which all parties accepted as synonymous with “abortion,” and whether criminal abortion may result when implantation of a fertilized ovum is deliberately intended to be prevented. Voluminous conflicting historical texts were cited regarding how miscarriage was construed in 1861, but the judge found this inquiry not relevant since, as a matter of law, the 1861 legislation is “always speaking”. This means that it “should be interpreted in the light of the current scientific evidence... The proper approach is to

make use of the best current medical and scientific knowledge that is available” [8]. On the fact of what “miscarriage” or “abortion” means in medical science at the opening of the 21st century, the judge was persuaded by the uncontroverted evidence of Dr. Connie Smith, of the Faculty of Family Planning and Reproductive Health Care of the Royal College of Obstetricians and Gynaecologists, Professor Steven Smith, Professor of Obstetrics and Gynaecology at Cambridge University, and, among others, Professor Chris Barratt, Head of the Reproductive Biology and Genetic Research Unit at the University of Birmingham. The judge accepted their evidence that an intention to prevent implantation of a fertilized ovum is regarded not as abortifacient, but as contraceptive. The judge also accepted scientific evidence that emergency contraceptive drugs have no effect on post-implantation gestational development.

4.2. Social evidence

The Family Planning Association (fpa) was allowed to intervene in the proceedings as a party, and evidence was given on its behalf by its Chief Executive Officer. She made the case on social facts for availability of emergency contraception, in accordance with the 2000 Order, through pharmacies only. The judge considered the fpa argument to warrant detailed attention, “because it sets out what for most people, other than lawyers, this case is really about” [9]. The judge accepted the claim that “fpa is uniquely well placed to inform the court as to the wider implications of this case and the current reality of the arguments being put forward by SPUC” [10].

The information was that emergency contraception is a safe and effective method to prevent unintended pregnancy, and the only method to prevent pregnancy after contraceptive failure and unprotected sex, including by rape. It was estimated that about half of UK pregnancies are unplanned, that about 22% of all pregnancies end in induced abortion, and that about three-quarters of women having abortion were using some form of contraception when they conceived. Research showed that most women either requesting abortion or continuing an unplanned pregnancy would have used emergency contraception if they had known about it, where to get it, and the 72-h post-coital limit on its most effective use. The claim for off-prescription access was supported by evidence from countries with off prescription access that demand increases at weekends and public holidays, when primary care physicians and family planning clinics are less available. The conclusions were

submitted that ease of access to emergency contraception reduces the demand for abortion, and that obstructed access would significantly affect abortion rates.

The judge reached his decision on the meaning of the 1861 Act and legality of the 2000 Order on the basis of legal precedents and principles of legal interpretation. He expressed comfort in his conclusion, however, by referring to evidence of the social utility of his decision. He observed that:

There would in my judgment be something very seriously wrong, indeed grievously wrong with our system – by which I mean not just our legal system but the entire system by which our polity is governed – if a judge in 2002 were to be compelled by a statute 141 years old to hold that what thousands, hundreds of thousands, indeed millions, of ordinary honest, decent, law-aiding citizens have been doing day in day out for so many years is and always has been criminal. The social case put by fpa ... remains wholly unanswered by SPUC [11].

5. Access to abortion

5.1. Legal facts

The Abortion Act 1967 enacted by the UK Parliament has not been extended to Northern Ireland, where abortion remains governed by the more restrictive and less clearly expressed Offences against the Person Act 1861. A result is that each year, about two thousand women travel from Northern Ireland, a separate jurisdiction within the UK, to England, Wales and Scotland (i.e., Britain) where they have abortions. These are lawful under the 1967 Act, and the law of Northern Ireland is not violated by Northern Irish resident women having lawful abortions in Britain. A challenge to social justice arises, however, in that procedures conducted in Britain are not legally funded under the National Health Service (NHS) provisions of Northern Ireland, so that those personally unable to meet expenses, estimated at between £500 and £1200 for service and travel costs, cannot avail themselves of services. Further, many who travel, or cannot afford to travel, are legally eligible to have lawful abortion services in Northern Ireland under the 1861 Act, but physicians refuse to undertake them. Some refuse on religious grounds, but others with no conscientious objection in principle are fearful that, because of uncertainty in the law, they may face prosecution were they to proceed. Punishment for committing unlawful abortion is up to life imprisonment.

Against this legal background, the Family Planning Association of Northern Ireland (FPANI) sued the Minister of Health, Social Services and Public Safety in Northern Ireland, applying for a judicial declaration that the Ministry acted unlawfully in failing to issue advice and/or guidance to women of reproductive age, and to physicians within the jurisdiction, on availability and provision of lawful abortion services. The FPANI also applied for a judicial declaration that the defendant Ministry has unlawfully failed both to investigate whether women are receiving satisfactory abortion services in Northern Ireland, and to make, or secure the making of, necessary arrangements to ensure satisfactory abortion services [12].

The trial judge, who subsequently became the Lord Chief Justice of Northern Ireland, denied the declarations and dismissed the applications, but helpfully clarified the law, and paved the way for the Court of Appeal's decision. The 1861 Act contains the abortion law of Northern Ireland and the background law in England, as the *Smeaton* case [7] shows. Section 58 of the Act provides that:

Every woman...who, with intent to procure her own miscarriage, shall unlawfully administer to herself any poison...or shall unlawfully use any instrument...with the like intent, and whosoever...shall unlawfully administer to her...any poison...or shall unlawfully use any instrument...with the like intent, shall be guilty of a felony.

Repetition that it is a felony to administer substances or use instruments "unlawfully" raises the question whether substances or instruments may be applied "lawfully".

That question remained unanswered until 1938, when an English court ruled in the *Bourne* case [13] that abortion is lawful when a person undertakes it with intent to preserve a woman's life, or her continuing physical or mental health, endangered by continuation of pregnancy. Further, a procedure need not be delayed in anticipation of such danger until death or prolonged incapacity is imminent. The *Bourne* ruling has been widely followed in the Commonwealth and beyond [14], and never judicially contradicted, but its application in Northern Ireland had not been judicially endorsed with certainty. In several cases, trial judges had presumed its applicability, but in generally unreported and unpublicized judgments. However, in the FPANI case, the trial judge authoritatively ruled that the *Bourne* judgment represents the law in Northern Ireland. The trial judge dismissed the FPANI application for declarations on the ground that his ruling now provided the community with adequate clarity.

5.2. Social evidence

Reviewing evidence of women's access to abortion services in Northern Ireland, the three Court of Appeal judges unanimously disagreed with the trial judge that his ruling, rejecting the FPANI claim, sufficiently provided physicians in the jurisdiction with the confidence to undertake abortions they considered in their patients' health interests. Physicians remained exposed to the risk of prosecution, instigated perhaps with the encouragement of activist associations such as SPUC. Further, since providers of abortion services were liable to severe punishment, the law required clarification on the burden of proof; that is, whether the prosecution must show that the service provider did not believe the woman to be in serious danger of death or prolonged impairment, or whether the defence must show the provider acted honestly in that belief. An additional issue was uncertainty about termination of pregnancy of non-viable fetuses, and of grossly abnormal viable fetuses.

Legal provisions in Northern Ireland of 1972 [15] require the Ministry to ensure integrated health services to promote physical and mental health, and personal social services to promote social welfare, so as to secure effective co-ordination of health and personal social services. The duty applies to aftercare, health information and, for instance, service advice, guidance and assistance. The Ministry must discharge these duties, however, only "to such extent as it considers necessary". The Ministry's reply to the FPANI complaints was that it had lawfully exercised its discretion in deciding that no action was required on its part regarding abortion services.

FPANI introduced extensive social evidence and medical expert witnesses, to show widespread medical professional uncertainty about, and fear of, the law, and consequent hardship suffered by women denied abortion services in Northern Ireland, and abortion aftercare services following procedures in Britain, who were legally eligible to receive services in Northern Ireland. The Ministry's defence that it provided adequate services was compromised by evidence that it had acquired no reliable information of the extent of services required. It had failed to investigate evidence, including through a judge's complaint that no physician in Northern Ireland would undertake an abortion he had judicially approved [16], of the unmet need for services, of why women in Northern Ireland did not consult their local physicians before obtaining procedures in Britain, on the extent of procedures in Britain for which women returning to Northern Ireland required aftercare, or on the

extent of self-induced and unskilled procedures within its jurisdiction. The Ministry had similarly failed to consider the legal position regarding abortion of non-viable and grossly abnormal viable fetuses.

In concluding his judgment, Lord Justice Nicholson observed that:

on the available evidence I am of the opinion that the [Ministerial] department has not merely been guilty of non-feasance [i.e. omission to act] but has decided not to carry out duties required of it...It might be more appropriate to describe the department's conduct as seeking to avoid its responsibilities [17].

He had previously found that:

An inference [of presented evidence] is that the department does not regard itself under an obligation to provide aftercare for those who return to Northern Ireland after an abortion in England. If so, the department is in breach...of the 1972 Order [18].

Lord Justice Campbell similarly concluded that:

The cumulative effect of the evidence is to demonstrate a failure to provide the breadth of service that is appropriate...the Department has created the impression that it has distanced itself from this [abortion] service...The very considerable degree of latitude given to the Department does not mean that it can decline even to inform itself if there is a need for services that is not being met [19].

Lord Justice Nicholson summarized how he considered the Ministry's guidance on the law should be expressed [20], but the three appeal judges refrained from directing Ministerial action other than to conduct comprehensive investigations. These would be into such matters as abortions available under the 1861 Act that physicians decline to undertake, physicians' experience of women resorting to unskilled abortion-related interventions, numbers of women returning to Northern Ireland following abortions in Britain and the aftercare they require, including counselling and assisting women with unplanned pregnancies to obtain medical advice, information on all of their options, and non-directive counselling. The judges accepted that, once informed with relevant evidence from its own investigations and from medical colleges and associations, the Ministry would undertake appropriate action to discharge its legal responsibilities

for women's access to abortion-related services. The Court also established, however, that judges could review subsequent ministerial decision-making and conduct alleged still to violate legal responsibilities.

6. Human rights

Neither the *Smeaton* case nor the Northern Ireland abortion case was significantly argued on human rights principles, and accordingly, the judges who addressed human rights aspects of the claims made no decisions on the grounds of such principles. However, human rights were central to the first abortion case decided, in October 2005, by the UN Human Rights Committee [21]. A 17-year old minor in Lima, Peru, was 14 weeks pregnant when ultrasound diagnosed an anencephalic fetus. A gynecologist–obstetrician found danger to the minor's life and, with support of her mother, recommended abortion. A psychiatrist also found danger to the minor's mental health from continuation of pregnancy. The law in Peru, like the 1861 Act in Northern Ireland, permits abortion on evidence of danger to a woman's life or continuing mental health. Nevertheless, the Director of the hospital, with support of the national Ministry of Health, refused approval. The minor was compelled to deliver the child, and to breast feed it for 4 days before it predictably died, leaving the minor with severe depression.

The Human Rights Committee, in proceedings the government of Peru did not defend, found Peru responsible for multiple violations of the UN International Covenant on Civil and Political Rights. Violation was found of Article 7, which provides that “No one shall be subjected to torture or to cruel, inhuman or degrading treatment”, and of Article 17, which states that “No one shall be subjected to arbitrary or unlawful interference with his privacy [or] family”, from denial of access to a lawful therapeutic abortion. Article 24 was violated in denial of health protection required for minors. The state violated its duty, under Article 2, to respect and ensure an individual's rights under the Covenant, and provide remedies to correct breaches. The Human Rights Committee required Peru to provide the minor with a remedy including compensation, and to adopt measures to prevent future violations, including publishing clear regulations specifying women's rights to lawful abortion and ensuring means of effective access to medical services [22].

7. Conclusion

National courts of law and international tribunals are increasingly requiring governmental conduct to be reasonable and rational in light of demonstrated evidence. Where evidence shows that individuals' rights are violated, governments are legally required to provide effective remedies, including for prevention of future violations. Where evidence shows violations of rights due to uncertainty in the meaning of laws, governments are required to provide clarification, particularly to those most affected by the laws. In the context of reproductive health, medical and related health care providers, and actual and prospective patients, are legally entitled to guidance by health ministries on rights respectively to deliver indicated services, and to access such services.

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