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Abortion — The Female, the Foetus and the Father

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The recent case of *Paton* v. *Trustees of B.P.A.S.*[1] raised an issue never previously canvassed before an English court, namely: does a husband have any rights in English law to prevent his wife having a lawful abortion within the terms of the Abortion Act 1967? Apart from its interest as a case of first impression in an area of the law which has never been devoid of controversy, the case raised directly or by implication fundamental questions about the control of family life and the rights and duties of those in any way connected with it. Should the final decision as to the termination of a pregnancy rest with the mother (in consultation with her physicians), the father, or the State? What rights, if any, does the unborn child possess? What remedies, if any, are available to control the actions of those involved in the abortion process?

The facts of the case are clear and unremarkable enough. When her general practitioner confirmed that she was pregnant, Mrs. Paton applied for and obtained the necessary medical certificates entitling her to an abortion within the terms of section 1(1) of the Abortion Act 1967. Mr. Paton had not been consulted either by his wife or the medical practitioners before the certificates were issued, and was strongly opposed to such an abortion. He alleged that his wife was being "spiteful, vindictive and utterly unreasonable" and sought an injunction restraining her from undergoing an abortion without his consent. Sir George Baker P. held that the husband had no right enforceable at law or in equity to prevent the abortion stating that: "(t)he two doctors have given a certificate. It is not and cannot be suggested that that certificate was given in other than good faith and it seems to me that there is the end of the matter in English law. The 1967 Act gives no right to a father to be consulted in respect of the termination of a pregnancy ... The husband, therefore, in my view has no legal right enforceable at law or in equity to stop the doctors carrying out the abortion."[2] Any suggestion that the unborn child might have any rights was similarly rejected in the court's statement that "(t)he foetus cannot, in English Law, in my view, have any rights of its own, at least until it is born and has a separate existence from the mother. That permeates the whole of

the civil law of this country (I except the criminal law, ...), and is indeed, the basis of the decisions in those countries where law is founded on the common law, that is to say, in America, Canada, Australia and, I have no doubt in others."[3]

In the following paragraphs it is proposed to examine some of the main implications of the decision.

The female: A woman's right to choose[4]

It is noteworthy that at the committee stage of the Medical Termination of Pregnancy Bill which emerged as the 1967 Act, an amendment was moved which would have provided that, save in emergency, spousal consent to an abortion would be required where the husband was the father of the child. This clause was in the event defeated.[5] The decision in *Paton* effectively supports the view that the 1967 Act gives the woman "the right to choose" whether or not to proceed with the abortion, provided always that she has satisfied the medical requirements and obtained the appropriate certificates. An attendant problem which was discussed in open court was the extent to which the woman can influence the doctors in reaching their decision and issuing those certificates. Counsel for the husband referred to the way in which a woman could "hoodwink" the doctors by feigning the effects which the continuance of a pregnancy might have on her mental stability. This possibility is rendered more likely by the somewhat subjective manner in which section 1 is worded. In the last analysis it may be that the medical decision is not one reached impartially by the doctors but one come to under the threat of emotional blackmail. To a very large extent therefore doctors are forced to rely on what the woman tells them. Although Lord Scarman has stated that this places a very great social responsibility on doctors surely it is one which the law can supervise? Yet the President's decision in *Paton* hints that in practice it may be almost impossible to challenge or in any way to control the working of the Act. Sir George Baker P. stated that his own view was that "it would be quite impossible for the courts in any event to supervise the operation of the 1967 Act ... The certificate is clear, and not only would it be a bold and brave judge ... who would seek to interfere with the discretion of doctors acting under the 1967 Act, but I think he would really be a foolish judge who would try to do any such thing, unless possibly, there is clear bad faith and an obvious attempt to perpetrate a criminal offence."[6] Such an approach to the workings of the Act would apparently mean that the woman's choice was circumscribed only to the extent of an almost unchallengeable medical discretion.

The foetus

The decision in *Paton* is interesting as an illustration of the English approach to the problem of foetal rights, at a time when there is a perceptible trend towards enlarging and extending those rights. The emphatic statement of the court that the foetus cannot in English civil law have any rights of its own until it is born, arguably gives a misleading and over-simplified picture of a developing area of the law. As a general proposition it can hardly be supported.

Section 1(1) of the Variation of Trusts Act 1958 permits the interests of a child not yet conceived to be taken into account, which at least suggests that there can exist a "right" in an unborn child to the consideration of a civil court. The trend in recent years has also been in favour of giving greater recognition to the interests of the unborn rather than less. Section 2 of the Congenital Disabilities (Civil Liability) Act 1976 imposes on a woman driving whilst pregnant the same duty to take care for the safety of her unborn child as for other road users, albeit that such a right is dependent on the child's survival for 48 hours after birth. Indeed, it can be argued[7] that this type of legislation has brought about something of a legal contradiction in that giving such individuals a right to sue for injuries sustained at some stage before birth, postulates that they must be deemed by the law to have been persons at that point in their development. Such a contradiction within the law at least illustrates the considerable complexity in this area and makes it all the more surprising that the Court could express itself in such "black and white" terms. Moreover, the trend towards increased legal recognition of the foetus has if anything gone further in other common law jurisdictions such as America.[8] It therefore seems unlikely that the decision in *Paton* represents anything like the authoritative last word on foetal rights.

The father

Whilst it must be acknowledged that certain arguments in support of the father's position were not put before the court, the decision in *Paton* effectively holds that a husband and father has no control over his wife's decision to proceed with an abortion.

The court seems to have taken the view that an injunction was simply not an appropriate or even practical remedy to enforce whatever right, if any, a husband might possess. Sir George Baker P. put the view succinctly when he stated: "(n)o court would ever grant an injunction to stop sterilisation or vasectomy. Personal

relationships in marriage cannot be enforced by the order of a court.''[9] Doubtless because of the decision that there was no suitable remedy for Mr. Paton's claim, the decision is silent upon the possibility of basing the husband's right to obtain an injunction on any other grounds.[10] These would include the situation where a husband was seeking a divorce on the grounds of his wife's unreasonable behaviour as evidenced by her decision to have an abortion, and could therefore justify the issuing of an injunction in order to restrain that unreasonable behaviour. Other grounds such as the existence of a contractual relationship between the parties, or an application for custody of the unborn child by the father, were discussed in the course of argument although they were not mentioned in the decision. Another possible argument might have been based on an invocation of the wardship jurisdiction of the High Court, an approach not even adverted to in argument or in the judgment. The somewhat narrow grounds of the present decision leave open many issues which could be canvassed on a subsequent application. The possibility of the ''illegitimate father''[11] enforcing any rights appears even more remote in view of Sir George Baker P.'s statement that: ''in this country the illegitimate father can have no rights whatsoever except those given to him by statute.''[12] Although the putative father has thus only his basic statutory rights the case leaves open the issue as to whether he would be a person having sufficient interest in an unborn child to invoke the wardship jurisdiction of the High Court.

Paton and Gouriet[13]

The most substantial argument advanced by counsel for the husband in *Paton* to support the father's claim for an injunction was the individual's interest in restraining the commission of a criminal offence, on the assumption that the proposed operation was tainted with illegality. In the event no evidence was adduced to indicate that the certificates had been issued in anything other than the good faith required by the Act. Thus the difficult issues involved were avoided by the simple declaration that: ''(i)t is unnecessary for me to decide that academic question because it does not arise in this case.''[14] Following on after *Gouriet* the decision does however provide some insight into the formidable obstacles which a plaintiff has to surmount before he can obtain an injunction restraining the commission of a criminal offence. The private citizen cannot act unless he can demonstrate that the threatened breach of the law would constitute an infringement of his private rights or would inflict special damage on him. To

overcome any problem related to his *locus standi*, the private citizen must seek the consent of the Attorney-General to institute relator proceedings. Were the Attorney-General to refuse his consent, it seems that his refusal cannot, after *Gouriet*, be effectively challenged in the courts. Even if the father can satisfy the requirement as to standing, there still exists the difficulty for him of establishing whether such a legal right exists at all in such circumstances as pertained in the case of *Paton*. Obviously, in a case of first impression a plaintiff cannot point to any clear authority to justify the claim that he has a legal right, and unless he can show a legal right, the court will not issue an injunction. The result appears to be an almost "Catch-22" dilemma.

The influence of the American decisions

The court quoted with approval the statement of Blackman J. delivering the opinion of the American Supreme Court in *Planned Parenthood of Central Missouri* v. *Danforth, Att.-Gen. of Missouri,*[15] (a case decided on facts similar to *Paton*) that "clearly since the State cannot regulate or prescribe abortion during the first stage when the physician and his patient make that decision, the State cannot delegate authority to any particular person, even the spouse, to prevent abortion during the same period." This case followed what is undoubtedly the most influential decision in this area of American Law, that of *Roe* v. *Wade*[16] in 1973. The rather bland reference to the *Danforth* case makes it difficult to ascertain what weight the court gave to the authority, although one suspects from the fact of its citation, that the high standing of the court and the similarity of the factual situation influenced the English court to some degree. It is unfortunate perhaps that the court did not subject the American cases to much closer scrutiny, since they have generated a considerable body of criticism in American legal circles. The reasoning of Blackman J. cited by the Court in *Paton* is certainly open to the criticism that it confuses two quite separate types of interest: those of the State and those of the individual.[17]

Despite the fact that the President said that he had found these decisions "helpful,"[18] it is difficult to see how the type of reasoning indulged in by Blackman J. could have any useful application to the English system. The American decisions are firmly based on the right to privacy protected by the U.S. constitution, a right which it was held, encompassed a woman's decision whether or not to terminate her pregnancy. As the President acknowledged,[19] no such argument could possibly be advanced in an English court

where there is no appeal to a written constitution as the ultimate safeguard of a citizens rights, and where legislative authority is vested in an omnicompetent Parliament. The assistance which he therefore derived from the cases must simply have been supportive, for the only thread linking them all together is the flat denial of the father's right to have a say in the destiny of his unborn child.

That this area of the law will continue to invite speculation is beyond doubt for the case leaves open so many important issues. The decision in *Paton* v. *Trustees of B.P.A.S.* has not served to soothe but rather to exacerbate the fears already expressed on behalf of the female, the foetus and the father as to the rights and wrongs of abortion.[20]

Notes

1 [1978] 2 All E.R. 987.
2 *Ibid.* p. 991.
3 *Ibid.* p. 989.
4 See D.C. Bradley "A Woman's Right to Choose" (1978) 41 M.L.R. 365, which considers the matter in detail, though without incorporating the decision in *Paton*.
5 *Ibid.* n. 18.
6 [1978] 2 All E.R. 987 at pp. 991 and 992.
7 E.H.W. Kluge, "Right to Life of Potential Persons," Dalhousie Law Journal (1977), vol. 3, pp. 837-848.
8 See Veitch and Tracy "Abortion in the Common Law World," 22 Am. Jo. Comp. L., (1974), p. 652 esp. at pp. 681-685; and also Veitch "*Delicta in Familiam Americanam*," vol. 3, Ang. Am. L.R. (1974), p. 436 esp. at p. 468.
9 [1978] 2 All E.R. 987 at p. 990.
10 See Bradley *op. cit.* n. 4.
11 [1978] 2 All E.R. 987 at p. 990.
12 *Ibid.*
13 [1977] 3 All E.R. 70.
14 [1978] 2 All E.R. 987 at p. 991.
15 [1976] 96 S Ct. 2831 at 2841.
16 U.S. Sup Ct. Reps. 35 L. Ed. 2n 147 (1973).
17 See Reardon J. *dissentiente* in *Doe* v. *Doe* 62 A.L.R. 3d 1082 at p. 1092.
18 [1978] 2 All E.R. 987 at p. 992.
19 *Ibid.*
20 Although Sir George Baker P. expressly denied that he was concerned with the moral issues involved in abortion, it is difficult to see how they can be completely ignored in an area of the law such as this.