Case No: CO/928/2001

Neutral Citation Number: [2002] EWHC 610 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEENS BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand,
London, WC2A 2LL

Thursday 18 April 2002

Before :

THE HONOURABLE MR JUSTICE MUNBY

- - - - - - - - - - - - - - - - - - - -

Between :

R (JOHN SMEATON on behalf of SOCIETY FOR THE PROTECTION OF UNBORN CHILDREN)	**Claimant**
- and -	
THE SECRETARY OF STATE FOR HEALTH	**Defendant**
- and -	
(1) SCHERING HEALTH CARE LIMITED (2) FAMILY PLANNING ASSOCIATION	**Interested Parties**

- - - - - - - - - - - - - - - - - - - -

(Transcript of the Handed Down Judgment of
Smith Bernal Reporting Limited, 190 Fleet Street
London EC4A 2AG
Tel No: 020 7421 4040, Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

- - - - - - - - - - - - - - - - - - - -

Mr Richard Gordon QC, Mr James Bogle and Mr Martin Chamberlain (instructed by **Coningsbys**) for the Claimant
Mr Kenneth Parker QC, Mr James Eadie and Mr Simon Hattan (instructed by **the Office of the Solicitor to the Department**) for the Secretary of State
Mr David Anderson QC and Miss Jemima Stratford (instructed by **CMS Cameron McKenna**) for Schering Health Care Limited
Ms Nathalie Lieven (instructed by **Leigh Day & Co**) for Family Planning Association

- - - - - - - - - - - - - - - - - - - -

Judgment
As Approved by the Court

Crown Copyright ©

Mr Justice Munby:

1. This case raises medical and legal questions of great complexity, difficulty and interest. It raises also moral and ethical questions of great importance. But it is no exaggeration to say that 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.

2. This judgment is necessarily very long. I have had to summarise and analyse a large mass of medical and legal material, much of it of consuming interest. But it is, I believe, vitally important that the law should be accessible to all and that those who wish to understand my decision should be able to do so without having to read the full judgment. Accordingly I begin this judgment with an overview which summarises the issues and my decision. I have used what I hope is plain and straightforward language, avoiding as much as possible in this part of my judgment all technical medical and legal language.

OVERVIEW

3. This case concerns the legality of the prescription, supply and use of the morning-after pill.

4. The claimant, John Smeaton, who acts on behalf of the Society for the Protection of Unborn Children ("SPUC"), says that such prescription or supply amounts in principle to a criminal offence under sections 58 and/or 59 of the Offences against the Person Act 1861 ("the 1861 Act").

5. In reality the allegations which SPUC makes extend to this: that a woman who takes the morning-after pill is herself potentially committing a criminal offence under the 1861 Act.

6. Furthermore, and whatever SPUC may say, these allegations of serious criminality which it makes extend to cover *any* form of birth control which may have the effect of discouraging a fertilised egg from implanting in the lining of the womb – that is to say, not merely the morning-after pill but also IUDs, the mini-pill, and even the pill itself.

7. Put shortly, the effect of sections 58 and 59 of the 1861 Act, taken together with the relevant parts of the Abortion Act 1967, is that abortifacient substances – substances which cause miscarriage or abortion – may be administered only if two doctors certify that the conditions set out in the 1967 Act are satisfied. Otherwise, the use of such substances is in principle criminal.

8. SPUC's case is that, whatever it may be called, the morning-after pill is not in fact a contraceptive. It is, says SPUC, an abortifacient, in other words it causes miscarriages. Accordingly, says SPUC, unless the procedures laid down by the 1967 Act are complied with the supply and use the morning-after pill may involve the commission of criminal offences.

9. Compliance with the procedures laid down by the 1967 Act requires, as I have said, the involvement of *two* doctors. So if SPUC is right the use of the morning-after pill will in effect be lawful only if it has been prescribed by two doctors.

10. In order to understand SPUC's argument I need to explain the relevant medical facts. Put very simply, there are two key stages in the biological process following sexual intercourse:

    i) The first is fertilisation. This takes place after the man's sperm and the woman's egg have met in the fallopian tube. It is a process which commences hours, or even days, after sexual intercourse. The process itself takes many hours.

    ii) The other key stage is implantation. This takes place after the fertilised egg has moved into the womb. It involves a process by which the fertilised egg physically attaches itself to the wall of the womb. The process does not start until, at the earliest, some four days after the commencement of fertilisation. The process of implantation itself takes some days.

11. Put in its simplest terms, SPUC's case is that *any* interference with a fertilised egg, if it leads to the loss of the egg, involves the procuring of a "miscarriage" within the meaning of the 1861 Act, even – and this is the important point – if the interference takes place *before* the egg has implanted in the wall of the womb. So, says SPUC, any so-called contraceptive which can in fact operate to prevent a fertilised egg implanting itself in the wall of the womb is not in fact a contraceptive. It is, says SPUC, an abortifacient.

12. The precise ways in which the pill, the mini-pill and the morning-after pill operate are still not fully understood. It is known, however, that the pill, the mini-pill and the morning-after pill are all capable of operating either to prevent fertilisation and/or to prevent implantation. So, according to SPUC, the morning-after pill is an abortifacient. And that is why, if SPUC's case is correct in relation to the morning-after pill, then the same legal consequences must follow also in the case of the pill and the mini-pill.

13. What is also clear, however, is that:

i) The morning-after pill (like the pill and the mini-pill) cannot cause a fertilised egg which is implanted to de-implant – that is, it cannot work after the process of implantation is complete.

ii) The morning after-pill, if it is to be effective, has in any event to be taken at a time – no later than 72 hours after intercourse – when implantation will not have begun.

14. So much for the biology.

15. Reduced to essentials SPUC's legal argument comes down to this:

i) The word "miscarriage" was generally understood by medical opinion in 1861 as including the failure or prevention of implantation.

ii) Parliament's intention in 1861 was to give effect to that contemporary medical understanding. In other words, Parliament's intention in 1861 was to prohibit all attempts to procure abortion from the stage of fertilisation onwards.

16. In my judgment SPUC's legal argument is erroneous. SPUC's application must be dismissed.

17. In essence this is because:

i) As a matter of law my decision must ultimately turn *not* on what the word "miscarriage" was understood to mean in 1861 but rather on what it means today.

ii) Whatever it may or may not have meant in 1861 the word "miscarriage" today means the termination of an established pregnancy, and there is no established pregnancy prior to implantation. There is no miscarriage if a fertilised egg is lost prior to implantation. Current medical understanding of what is meant by "miscarriage" excludes results brought about by the pill, the mini-pill or the morning-after pill. That is also, I should add, the current understanding of the word "miscarriage" when used by lay people in its popular sense.

18. It follows that since the morning-after pill is used before the process of implantation has even begun, and because it cannot make an implanted egg de-implant, the morning-after pill cannot as a matter of law bring about a "miscarriage".

19. I should add that I do not in any event accept SPUC's case as to the meaning of the word "miscarriage" in 1861. Some of the leading and most authoritative medical

works of the time strongly supported the idea that miscarriage becomes possible only after implantation.

THE PROCEEDINGS

20. These are judicial review proceedings commenced on 8 March 2001 by John Smeaton on behalf of SPUC seeking to challenge the making by the Secretary of State for Health on 8 December 2000 of *The Prescription Only Medicines (Human Use) Amendment (No 3) Order 2000*, SI 2000/3231 ("the 2000 Order"). The 2000 Order was laid before Parliament on 12 December 2000 and came into force on 1 January 2001. There were debates on the 2000 Order in the House of Commons Standing Committee on Delegated Legislation on 24 January 2001 and in the House of Lords on 29 January 2001.

21. The 2000 Order is part of the statutory regime regulating the sale and supply of medicinal products which is governed by the Medicines Act 1968 ("the 1968 Act") and associated subordinate legislation. The ability to place a medicinal product on the market is regulated by the *Medicines for Human Use (Marketing Authorisations etc) Regulations 1994*, SI 1994/3144. Nothing turns on the precise provisions of those Regulations so I say no more about them.

22. The 1968 Act distinguishes between three different classes of medicinal products: (i) those which are on the so called 'general sale list' and may therefore be supplied by persons other than registered pharmacists (section 51), (ii) those which are not on the 'general sale list' and which (subject to exception in the case of supply direct by medical practitioners) may only be supplied by or under the supervision of a registered pharmacist (section 52) and (iii) those available only on prescription from a medical practitioner (section 58) – so called prescription only medicines. The *Prescription Only Medicines (Human Use) Order 1997*, SI 1997/1830 ("the 1997 Order") specifies those medicines which, for the purposes of section 58 of the 1968 Act, are to be prescription only medicines.

23. There are two bodies, established under the 1968 Act, which I should mention: the Medicines Commission, which is the United Kingdom's highest scientific advisory body in this field, established under section 2, and the Committee on the Safety of Medicines, established under section 4 to give advice to Ministers in relation to the safety, quality and efficacy of medicines for human use. Section 58(6) of the 1968 Act requires the appropriate Ministers to consult the Committee on the Safety of Medicines before exempting a medicinal product from prescription only medicines status.

24. In considering whether a medicinal product can safely be supplied under the supervision of a registered pharmacist, but without prescription by a medical practitioner, the Committee on the Safety of Medicines takes account of the criteria for classifying medicinal products as prescription only which are set out in section

58(A) of the 1968 Act. Section 58(A)(2) provides that prescription control shall be applied to any product which:

> "(a) is likely to present a direct or indirect danger to human health, even when used correctly, if used without the supervision of a doctor or dentist; or
>
> (b) is frequently and to a very wide extent used incorrectly, and as a result is likely to present a direct or indirect danger to human health; or
>
> (c) contains substances or preparations of substances of which the activity requires, or the side effects require, further investigation; or
>
> (d) is normally prescribed by a doctor or dentist for parental administration."

25. The effect of the 2000 Order was to amend the 1997 Order so as to exempt from the restrictions imposed by section 58(2) of the 1968 Act products containing up to 0.75mg of a substance – a progesterone – known as Levonorgestrel. The exemption was confined to the supply of such products "for use as an emergency contraceptive in women aged 16 years and over".

26. The particular product with which I am concerned is called Levonelle. Its only purpose is for use as what the 2000 Order calls "an emergency contraceptive", in common parlance as a morning-after pill. It is distributed in the United Kingdom by the first interested party, Schering Health Care Limited ("Schering").

27. The morning-after pill has been authorised in the United Kingdom as a prescription only medicine since the first one, PC4, a combined pill containing oestrogens and progestogens, was licensed in 1984. PC4 was available from that time on the prescription of a single medical practitioner until it was withdrawn from the market in October 2001. On the coming into force of the 1997 Order, Levonorgestrel was included in such a way as to denote that products containing Levonorgestrel would likewise be available only on prescription. Levonelle-2, a pill containing only Levonorgestrel, was launched in February 2000 as a prescription only medicine.

28. During 2000, there was extensive consultation, involving amongst others SPUC, as to whether the morning-after pill should be reclassified from a prescription only medicine so as to be available from pharmacies for women of 16 years and over. There was an intensive review by expert bodies, the Committee on the Safety of Medicines and the Medicines Commission, of the safety of the morning-after pill. Those bodies both considered that it would be safe to permit its sale to the public by pharmacies. The Secretary of State for Health considered that it would be desirable to do so. The 2000 Order effected that reclassification.

29. Levonelle was launched as a pharmacy only medicine in February 2001. Levonelle-2 continues to be available as a prescription only medicine.

30. Thus, putting the point very shortly, prior to the 2000 Order both the substance Levonorgestrel and the commercial product Levonelle (in the form of Levonelle-2) were available only on prescription from a medical practitioner. The practical effect of the 2000 Order was to reclassify Levonorgestrel so as to permit pharmacists to dispense Levonelle (as opposed to Levonelle-2) without the need for a prescription.

31. Permission to apply for judicial review was refused on the papers by Collins J on 21 March 2001. That refusal was on three main grounds: first, that there had been significant delay for which there was no acceptable excuse; second, that there would be detriment to good administration in permitting the claim to proceed; and, third, that the claim was not arguable on the merits. On a renewed oral application for permission on 2 May 2001 Scott Baker J granted permission: [2001] EWHC Admin 372. By a consent order made by Master Foster on 8 June 2001 Schering was granted permission to intervene. By a consent order made by Silber J on 17 July 2001 the second interested party, the Family Planning Association ("fpa") was granted permission to intervene. For convenience I shall, where appropriate, refer to the Secretary of State and the interested parties collectively as "the defendants", for they all make common cause against SPUC.

32. The substantive hearing came on before me on 12 February 2002. It lasted three days. SPUC was represented by Mr Richard Gordon QC, Mr James Bogle and Mr Martin Chamberlain. The Secretary of State was represented by Mr Kenneth Parker QC, Mr James Eadie and Mr Simon Hattan, Schering by Mr David Anderson QC and Miss Jemima Stratford and fpa by Ms Nathalie Lieven. I am very grateful to all of them for their assistance. Their submissions, both written and oral, were uniformly of the very highest quality. I reserved judgment on 14 February 2002. I now (18 April 2002) hand down my judgment.

THE ISSUE

33. Put very shortly the issue is whether the supply of Levonelle in accordance with the 2000 Order may involve or facilitate the commission of criminal offences under sections 58 and 59 of the 1861 Act in those cases – which is, in truth, in every case – where its subsequent administration is otherwise than in accordance with the requirements of the Abortion Act 1967 ("the 1967 Act").

34. Put shortly, and at the risk of over-simplification, the effect of the 1967 Act and sections 58 and 59 of the 1861 Act, taken together, is that abortifacient substances (ie, those which cause miscarriage or abortion) may be administered only if two medical practitioners acting in good faith certify that the conditions set out in the 1967 Act are satisfied. Otherwise, the use of such substances is in principle criminal.

35. Specifically, unless the conditions set out in the 1967 Act are satisfied it is a criminal offence under section 59 of the 1861 Act to

> "supply or procure any poison or other noxious thing … knowing that the same is intended to be … used … with intent to procure the miscarriage of any woman".

36. Likewise, unless the conditions set out in the 1967 Act are satisfied it is an offence under section 58 of the 1861 Act to "administer" any "poison or other noxious thing" "with intent to procure" a "miscarriage".

37. SPUC's case is that, whatever it may be called, Levonelle is not in fact a contraceptive but an abortifacient, in other words that it causes miscarriages. Accordingly, says SPUC, unless the procedures laid down by the 1967 Act are complied with – that is, absent the involvement of *two* doctors – the supply and use of Levonelle involves or may involve the commission of criminal offences under sections 58 and 59 of the 1861 Act.

38. Correctly analysed SPUC's case appears to rest on the propositions that, once fertilisation of the ovum has commenced (alternatively, has been completed – it is not altogether clear whether SPUC contends that a miscarriage is capable of being induced from the start or only after the end of the fertilisation process), and whether that fact is reliably detectable or not,

    i) the woman can properly be said to be "with child";

    ii) the use of any chemical or device which may adversely affect the subsequent natural process is properly to be characterised as inducing "miscarriage"; and

    iii) a person (the woman or a third party) has the requisite intent if one of the possible methods of operation of the chemical or device might involve discouragement of implantation of the fertilised ovum – even though it is likely to be impossible to prove whether that was the cause of the fact that the fertilisation of the ovum did not lead to established pregnancy.

39. There may of course be room for argument in any criminal case as to whether there is the necessary intention for the purposes of sections 58 or 59. However all parties have sensibly accepted the relevance of the question identified by SPUC and the importance of the court resolving the matter. It is plainly undesirable that there should be any risk whatever of a prosecution being brought against a person supplying or administering Levonelle if in fact SPUC's contentions are, as all the other parties contend, groundless.

40. I shall in due course have to elaborate the way in which SPUC puts its case. Here I merely observe that it is based in significant measure upon an analysis by the eminent

academic lawyer, Dr John Keown, in an article, *'"Miscarriage": A Medico-Legal Analysis'*, published in [1984] Crim LR 604. Dr Keown's conclusion was that the "post-coital" pill causes miscarriage within the statutory meaning of the word and that accordingly (see p 614) its use, procurement and supply are prohibited by sections 58 and 59 of the 1861 Act. Similar views had previously been expressed by Victor Tunkel, Senior Lecturer in Law at Queen Mary College, London, in an article, *'Modern Anti-Pregnancy Techniques and the Criminal Law'*, in [1974] Crim LR 461.

41. Dr Keown's article appeared shortly after a written answer given in the House of Commons on 10 May 1983 by the Attorney-General, Sir Michael Havers QC, who expressed the view that the use of the morning-after pill does not constitute a criminal offence within either sections 58 or 59. This view, that the morning-after pill is *not* an abortifacient, has subsequently been repeated in the House of Commons by government ministers on various occasions: by the Parliamentary Under Secretary of State for Public Health at the Department of Health (the Minister for Public Health), Ms Tessa Jowell MP, on 2 July 1998 and by her successor, the Minister for Public Health, Ms Yvette Cooper MP, on 19 July 2000 and again on 24 January 2001.

42. Put in the starkest terms the legal issue is whether the views expressed by Dr Keown and Mr Tunkel or those expressed by the Attorney-General and successive Ministers for Public Health are correct.

43. SPUC seeks relief under two heads. First, it seeks an order quashing the 2000 Order. Secondly, it seeks a declaration that:

    i) the 2000 Order is ultra vires the Secretary of State;

    ii) a person who administers Levonelle to a woman with the intention of causing any embryo which exists to be expelled commits an offence under section 58 of the 1861 Act;

    iii) a person who supplies Levonelle intending that the patient use it for a like purpose commits an offence under section 59 of the 1861 Act.

44. Now that relief is framed in such a way as to accord with the language of the 1861 Act. But the practical effect of the grant of such relief would be to make it impossible for anyone to sell or use Levonelle without risk of breaking the criminal law. The practical effect of granting such relief would, in other words, be to criminalise the sale and use of Levonelle. In fact the implications go even wider than that as I will shortly mention.

SOME PRELIMINARY MATTERS

45. Before moving to the heart of the case I should first make absolutely clear what this case is *not* about.

Law and morals

46. I have said that this case raises moral and ethical questions of great importance. It would be idle to suggest otherwise. For those who view such matters in religious terms it raises religious and theological questions of great – and, to some, transcending – importance. But I must emphasise that, so far as the court is concerned, this case has nothing to do with either morality or religious belief. The issue which I have to decide is not whether the sale and use of the morning-after pill is morally or religiously right or wrong, nor whether it is socially desirable or undesirable. What I have to determine is whether it may constitute an offence under the 1861 Act.

47. Cases such as this, and others in the field of medicine (one thinks of cases such as *Airedale NHS Trust v Bland* [1993] AC 789 and *Re A (Conjoined Twins: Medical Treatment)* [2001] Fam 147), raise moral, religious and ethical issues on which, as Lord Browne-Wilkinson pointed out in *Bland* at pp 879E, 880A, "society is not all of one mind" and on which indeed "society as a whole is substantially divided". Our society, including the most thoughtful and concerned sections of our society, are deeply troubled by, and indeed deeply divided over, such issues. These are topics on which men and woman of different faiths, or indeed of no faith at all, may and do hold, passionately and with the utmost sincerity, starkly differing views. All of those views are entitled to the greatest respect but it is not for a judge to choose between them.

48. The days are past when the business of the judges was the enforcement of morals or religious belief. That was a battle fought out in the nineteenth century between John Stuart Mill and Sir James Fitzjames Stephen (Stephen J) and in the middle of the last century between Professor Herbert Hart and Sir Patrick Devlin (Devlin J). The philosophers had the better of the argument, and rightly so. The Court of King's Bench, or its modern incarnation the Administrative Court, is no longer custos morum of the people. *Bland* and the earlier decision of the House of Lords in *In re F (Mental Patient: Sterilisation)* [1990] 2 AC 1 recognise what in the latter case Lord Goff of Chieveley referred to (at p 73C) as "the libertarian principle of self-determination". And as I said in *Harris v Harris, Attorney-General v Harris* [2001] 2 FLR 895 at p 944 (para [387]):

> "a judge, although it may be that on occasions he can legitimately exercise the functions of an aedile, is no censor".

49. As Professor Hart pointed out (see *The Morality of the Criminal Law* (1964) pp 39-41), both Sir James Stephen and Sir Patrick Devlin assumed a society marked by a very high degree of homogeneity in moral outlook and where the content of this

homogeneous social morality could be easily known. He suggested that neither of them had envisaged the possibility that society is, and on one view had already by the 1960s become, morally a plural structure.

50. Be that as it may, it can hardly be disputed that the last few years have marked the disappearance in an increasingly secular and pluralistic society of what until comparatively recently was in large measure a commonly accepted package of moral, ethical and religious values. This means that on many of the medical, religious and ethical issues which the courts increasingly have to grapple with there is simply no longer any generally accepted common view. One of the paradoxes of our lives is that we live in a society which is at one and the same time becoming both increasingly secular but also increasingly diverse in religious affiliation. As I said in *Sulaiman v Juffali* [2002] 1 FLR 479 at p 490 (para [47]):

> "Although historically this country is part of the Christian west, and although it has an established church which is Christian, I sit as a secular judge serving a multi-cultural community of many faiths in which all of us can now take pride, sworn to do justice 'to all manner of people'. Religion – whatever the particular believer's faith – is no doubt something to be encouraged but it is not the business of government or of the secular courts. So the starting point of the law is an essentially agnostic view of religious beliefs and a tolerant indulgence to religious and cultural diversity. A secular judge must be wary of straying across the well-recognised divide between church and state. It is not for a judge to weigh one religion against another. All are entitled to equal respect, whether in times of peace or, as at present, amidst the clash of arms."

51. The truth is that these are decisions which, as Lord Browne-Wilkinson (at p 878B) and Lord Mustill (at p 890H) recognised in *Bland*, ultimately involve matters of principle which ought properly to be decided by citizens through their democratically elected representatives in Parliament.

52. In this case I am spared embarrassment because Parliament has spoken. My duty is simply to construe sections 58 and 59 of the 1861 Act. Moreover, and precisely because Parliament has spoken, Mr Gordon was entirely right to press me with what Lord Diplock said in *Duport Steels Ltd v Sirs* [1980] 1 WLR 142 at p 157B:

> "My Lords, at a time when more and more cases involve the application of legislation which gives effect to policies that are the subject of bitter public and parliamentary controversy, it cannot be too strongly emphasised that the British constitution, though largely unwritten, is firmly based upon the separation of powers; Parliament makes the laws, the judiciary interpret them. When Parliament legislates to remedy what the majority of its members at the time perceive to be a defect or a lacuna in the existing law (whether it be the written law enacted by existing statutes or the unwritten common law as it has been

> expounded by the judges in decided cases), the role of the judiciary is confined to ascertaining from the words that Parliament has approved as expressing its intention what that intention was, and to giving effect to it. Where the meaning of the statutory words is plain and unambiguous it is not for the judges to invent fancied ambiguities as an excuse for failing to give effect to its plain meaning because they themselves consider that the consequences of doing so would be inexpedient, or even unjust or immoral. In controversial matters such as are involved in industrial relations there is room for differences of opinion as to what is expedient, what is just and what is morally justifiable. Under our constitution it is Parliament's opinion on these matters that is paramount.
>
> A statute passed to remedy what is perceived by Parliament to be a defect in the existing law may in actual operation turn out to have injurious consequences that Parliament did not anticipate at the time the statute was passed; if it had, it would have made some provision in the Act in order to prevent them. … But if this be the case it is for Parliament, not for the judiciary, to decide whether any changes should be made to the law as stated in the Acts …
>
> It endangers continued public confidence in the political impartiality of the judiciary, which is essential to the continuance of the rule of law, if judges, under the guise of interpretation, provide their own preferred amendments to statutes which experience of their operation has shown to have had consequences that members of the court before whom the matter comes consider to be injurious to the public interest."

53. This is a topic to which I shall have to return when I consider the principles that determine how I should construe the 1861 Act.

Life

54. There is another important matter that I should make clear at this stage. It is no part of my function as I conceive it to determine the point at which life begins. In the view I have taken of the 1861 Act there is no need for me to do so. It is, as it seems to me, undesirable that I should do so. Even were I to attempt to do so, the effect of my decision would be limited. In the nature of things all I could do would be to determine as a matter of law an issue which has much wider ramifications and which in other contexts may well have to be determined by reference to quite different criteria.

55. At times Mr Gordon's argument came close to suggesting that since, as is common ground, *one* of the purposes of the 1861 Act is to protect the life of the unborn, and since, as SPUC would have it, life for this purpose begins at conception, therefore the sale and use of Levonelle involves the commission of offences under the 1861 Act. As

I shall demonstrate in due course the argument in my judgment involves a mis-reading of the 1861 Act and it is in any event fallacious.

56. As in the case of death so in the case of life (and indeed so also in the case of motherhood) the concept may mean one thing to a medical man or biologist, another thing to a theologian or ethicist, another thing to a philosopher and yet another thing to a lawyer. I am competent only to rule on matters of law. But what, to make a rather obvious point, is meant in law by death? The answer is that it all depends – on time and context. In the final analysis, life, death and parenthood are, for legal purposes, merely legal constructs which may or may not correspond with biological facts and which, indeed, will not necessarily be applied consistently for all legal purposes.

57. Once upon a time the law, following medical science, treated death as marked by the cessation of breathing or of heartbeat. At present the law treats death as meaning brain stem death: *Re A* [1992] 3 Med LR 303, *Airedale NHS Trust v Bland* [1993] AC 789. But there may be contexts in which the law treats death as occurring at some other time. In certain circumstances the court may presume death if someone has not been heard of for at least seven years: *Chard v Chard* [1956] P 259. Section 184 of the Law of Property Act 1925 creates for certain purposes a statutory presumption as to when death occurs when two or more persons have died in circumstances rendering it uncertain which of them survived the other or others. No doubt there are other examples of the point.

58. In the same way the law may treat parenthood as attaching at different times. Thus in the case of adoption parenthood ends and begins with the making of an adoption order: see section 12 of the Adoption Act 1976. And, as we shall see, sections 2(3) and 27 of the Human Fertilisation and Embryology Act 1990 ("the 1990 Act") contain special rules for the attribution of motherhood in the case of those embryos to which that Act applies.

59. So also, in my judgment, in the case of life.

60. In the case of life – or, to be more precise, the beginning of life, whatever that may mean – there is this further difficulty. As I explain below, current medical and biological understanding is that the beginning of life is not an event but a process which itself lasts an appreciable time. Even biology and medicine therefore cannot tell us precisely when it is that "life" in fact "starts".

Human Rights

61. No one has addressed me on any aspect of either the Human Rights Act 1998 or the European Convention for the Protection of Human Rights and Fundamental Freedoms. Thus Mr Gordon has not sought to argue that the fertilised ovum has a right to life under Article 2: cf *Paton v United Kingdom* (1981) 3 EHRR 408, *H v Norway* (1992) 73 DR 155, *Open Door Counselling and Dublin Well Woman v Ireland* (1992) 15 EHRR 244. Nor, on the other hand did Mr Parker or any of the

others seek to argue that the right to respect for private and family life protected by Article 8 extends to confer the kind of privacy interest protected right to distribute and use contraceptives which has been recognised by the Supreme Court of the United States of America in cases such as *Griswold v Connecticut* (1965) 381 US 479, *Eisenstadt v Baird* (1972) 405 US 438 and *Carey v Population Services International* (1977) 431 US 678. No one has suggested that the 1861 Act is incompatible with the Convention or that its proper construction requires reference either to the Convention or to Strasbourg jurisprudence.

Safety

62. I wish to emphasise that, despite what is hinted at in some of SPUC's evidence, this case has nothing whatever to do with the safety of Levonelle as a medicinal product. The evidence before me shows that Levonorgestrel has an excellent safety profile with unusually few side effects. It has been authorised by the Medicines Control Agency on the basis of its safety, quality and efficacy. And, as I have already mentioned, prior to its re-classification to permit pharmacy dispensing in certain conditions, there was detailed consideration of the safety of this type of supply not only by the Committee on the Safety of Medicines but also by the Medicines Commission. All advised that Levonelle can be supplied safely under the supervision of a pharmacist for emergency contraception. The Committee on Safety of Medicines considered with care the safety implications of the move from prescription only medicine to pharmacy only classification and concluded that "all the steps required safely to supply emergency contraception could be successfully completed in a pharmacy." The Royal Pharmaceutical Society has issued guidance on the supply of Levonelle.

63. The evidence shows that, although in a small number of cases there may be some minor side effects (eg nausea), the morning-after pill is safe whether as a prescription only or as a pharmacy only medicine. Medical evidence tendered by Schering's Medical Director, Dr Longthorne, is to the effect that the morning-after pill in each of its forms (PC4, Levonelle-2 and Levonelle) is "much safer than any form of medical termination." The evidence put forward by fpa is to similar effect. According to its Chief Executive, Anne Weyman: "Emergency contraception is safe, simple and effective. Abortion is both medically and psychologically invasive."

Common ground

64. I should also indicate certain matters that are common ground between the parties.

Delay

65. As I have mentioned one of the reasons why Collins J refused SPUC permission to proceed with this application was because there had been significant delay. On one view of the matter the delay has been very great indeed, because, as we shall see, the essential legal issue which underlies this litigation had certainly been identified as long ago as 1962. That said, Scott Baker J was persuaded that permission should be

granted. Before me no one has sought to rely upon delay as a reason why I should not decide the real underlying issue. I say no more about the point. It follows that I do not need to consider the various authorities on this aspect of the matter which Mr Gordon would otherwise have wished to deploy: *R v Secretary of State for the Home Department ex p Ruddock* [1987] 1 WLR 1482, *R v Commissioner for Local Administration ex p Croydon LBC* [1989] 1 All ER 1033, *R v Secretary of State for Foreign and Commonwealth Affairs ex p World Development Movement Ltd* [1995] 1 WLR 386 and *R v Criminal Injuries Compensation Board* [1999] 2 AC 330.

Vires and the 2000 Order

66. It is not disputed by SPUC that, the 1861 Act apart, there is no possible basis for challenging the vires of the 2000 Order. I do not therefore need to consider further the provisions of either the 1968 Act or the 1997 Order.

67. It is not disputed, either by the Secretary of State or by Schering and fpa, that if Levonelle is indeed, as SPUC asserts, an abortifacient (so that its supply and administration with the appropriate intention constitute offences) the 2000 Order will be ultra vires. The 2000 Order purports to permit Levonelle to be supplied by pharmacists and will thus, if SPUC is correct, tend to facilitate the commission of those offences. Parliament is assumed not to have intended that statutory powers should be used to facilitate the commission of criminal offences: see de Smith, Woolf and Jowell, *Judicial Review of Administrative Action*, ed 5, para 5-071, *R v Registrar General ex p Smith* [1991] 2 QB 393.

68. Nor is it disputed, either by the Secretary of State or by Schering and fpa, that I have jurisdiction to declare whether the 2000 Order is ultra vires and, if it is, to quash it: *R v Her Majesty's Treasury ex p Smedley* [1985] QB 657, *R v Secretary of State for Foreign and Commonwealth Affairs ex p Rees-Mogg* [1994] QB 552. See also *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112.

69. It is thus common ground that the central issue, and the question upon which SPUC's claim turns, is whether Levonelle operates in such a way as to cause a "miscarriage" within the meaning of sections 58 and 59 of the 1861 Act.

70. It will be appreciated that in these circumstances the 2000 Order is completely irrelevant. It is merely a convenient peg upon which SPUC seeks to hangs its claim, a claim that could have been brought at any time after the first introduction of the morning-after pill as long ago as 1984. SPUC's claim in truth has absolutely nothing to do with whether Levonelle is available without prescription or only on prescription. If SPUC is correct the supply and use of Levonelle is equally criminal whether it is supplied on prescription or not. For if SPUC is correct its use is and always has been permissible only if certified by *two* doctors in accordance with the requirements of the 1967 Act.

SOCIAL REALITIES

71. I have made it clear that the court cannot concern itself with moral or religious issues. But that does not mean that I can blind myself to the social realities, which underlie this case, nor to the social implications were I to find in favour of SPUC. I shall have to consider in due course the extent to which, if at all, I am permitted to have regard to such matters in construing the 1861 Act. I shall also in due course have to consider in more detail what I might call the 'social' case presented by fpa in answer to SPUC. Here I merely outline two of the salient features of this aspect of the case.

72. The first is this. Although SPUC is somewhat reluctant to go this far, it is apparent that if its arguments are correct in relation to Levonelle the consequences extend far beyond the morning-after pill. The stark fact is that, although presented as a challenge to the 2000 Order, this case calls into question the lawfulness not only of the morning-after pill but also of all hormonal contraception. Indeed the case calls into question the lawfulness of all those forms of so-called contraception which are capable of inhibiting the implantation of a fertilised egg, notably intra-uterine devices ("IUDs"), progestogen only pills (the mini-pill) and even the ordinary combined pill (the pill). Indeed there are only two methods of contraception – barrier methods and periodic abstinence – which never act in the way in which Levonelle acts, that is by preventing implantation.

73. On the logic of its own case SPUC's challenge, and the allegations of serious criminality *inter alia* by the woman concerned, are not simply to the morning-after pill. They extend to *any* chemical or device which operates, or may operate, by impeding, discouraging or preventing the natural process at any time after fertilisation has started, alternatively has completed. They extend to *any* drug or device which may operate in that way, even if it may also operate in a way which impedes, discourages or prevents the process of fertilisation. The medical profession and female members of the public have for years been operating on the basis that the use, prescription and supply of such chemicals and devices is legal and involves no potential criminality. The pill has been available since the 1960s and the morning-after pill since the early 1980s. That position has remained unchallenged until sought to be reopened in these proceedings.

74. The other is this. Making Levonelle available from pharmacists without a prescription means that it can be obtained more quickly following intercourse when a woman knows or suspects that her regular method of contraception has failed, particularly during weekends and public holidays. If SPUC were to succeed in this challenge, the result would be, as I have said, that Levonelle could be prescribed only by doctors who had complied with the requirements of the Abortion Act 1967. This in turn would mean that:

    i) Levonelle would tend to be administered either not at all or at a later stage, when the expert evidence is that it is less effective and more likely to operate post-fertilisation.

ii) There would inevitably be an increase in the number of abortions as conventionally understood, a result which, Schering suggests, SPUC would presumably not welcome.

75. In this context I repeat a point I have already made. The evidence put forward by fpa is that "Emergency contraception is safe, simple and effective. Abortion is both medically and psychologically invasive."

76. The Secretary of State stresses that there is what he calls a powerful social case for the morning-after pill both being available and being available as a pharmacy only medicine. He asserts that fpa with their extensive experience on the ground are uniquely well placed to speak to this aspect. He points to fpa's evidence which, he says, clearly sets out the benefits, concluding as Ms Weyman does, that "there are overwhelmingly strong reasons why it is better to provide emergency contraception than to put more women in the position where they may need to seek an abortion."

THE EVIDENCE

77. I was taken through a large mass of written evidence and other written materials. I shall have to analyse much of it in due course. Most of this material was of consuming interest. At this stage it is convenient to indicate that apart from the purely legal it fell into six broad categories:

i) First, there was evidence from a number of eminent doctors explaining in very considerable detail the processes of conception and pregnancy as those processes are currently understood by medical science.

ii) Secondly, there was evidence as to current medical terminology, including extracts from a number of current medical dictionaries.

iii) Thirdly, there was evidence exhibiting and explaining a large mass of early nineteenth century medical texts.

iv) Fourthly, there was evidence as to the history and development of contraception in this country.

v) Fifthly, there was evidence from a number of eminent doctors describing what might be called modern contraceptive technology and explaining the methods of operation of the various forms of contraception so far as currently understood by medical science.

vi) Finally, there was evidence as to various current social issues relevant to modern contraceptive usage.

THE LAW RELATING TO ABORTION

78. Until 1803 the only law relating to abortion was the common law. Since 1803 the law has been entirely statutory.

Abortion – the common law

79. I start in the thirteenth century with Bracton's *De Legibus et Consuetudinibus Angliae* (On the Laws and Customs of England). In the course of discussing the pleas of the Crown, he said at f 121 (Woodbine & Thorne edition, 1968, Vol II at p 341):

> "If one strikes a pregnant woman (mulierem praegnantem) or gives her poison in order to procure an abortion (abortivum), if the foetus is already formed or quickened, especially if it is quickened (iam formatum vel animatum fuerit, et maxime si animatum), he commits homicide."

80. In the seventeenth century Coke in the Third Part of his Institutes of the Laws of England said at p 50 that:

> "If a woman be quick with childe, and by a potion or otherwise killeth it in her wombe; or if a man beat here, whereby the child dieth in her body, and she is delivered of a dead child, this is a great misprision, and no murder."

81. Having then cited Bracton and Fleta, Coke continues: "And herein the law is grounded upon the law of God." There follows a reference to the book of Genesis.

82. Blackstone said much the same thing in the eighteenth century in his *Commentaries on the Laws of England*, Vol 1 at p 125:

> "Life is the immediate gift of God, 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. For if a woman is quick with child, and by a potion, or otherwise, killeth it in her womb; or if any one beat her, whereby the child dieth in her body, and she is delivered of a dead child; this, though not murder, was by the antient law homicide or manslaughter. But at present it is not looked upon in quite so atrocious a light, though it remains a very heinous misdemesnor."

83. Thus the law at the beginning of the nineteenth century. Four features of the common law may be noted: first, that the common law envisaged the commission of offences by both the woman carrying the "child" and others who took action resulting in its death; secondly, that those offences (constituting only "misprision" or "misdemesnor"

and not felony) were not capital; thirdly, that no offence could be committed unless and until there was a "child"; and, fourthly, that for this purpose there had to be "quickening".

84. One other feature of the common law is to be noted. Chitty's *Criminal Law* of 1816 provided (Vol 3 at p 800) a precedent for an indictment at common law. Based on a case in Michaelmas 42 Geo 3 (1802) it charged that the defendant:

> "did … unlawfully … give and administer … to [the woman], ... being big and pregnant with child … divers other … dangerous … pills … with a wicked intent to cause and procure [the woman] to miscarry …"

85. So the concept of "miscarriage" was part of the common law offence.

<u>Abortion – the statute law before 1861</u>

86. Lord Ellenborough's Act of 1803, 43 Geo 3, c 58, created two statutory criminal offences. Section I made it a felony punishable by death:

> "if any person … shall wilfully, maliciously and unlawfully administer to, or cause to be administered to or taken by any of his Majesty's Subjects, any deadly Poison, or other noxious and destructive Substance or Thing, with Intent … thereby to cause and procure the Miscarriage of any Woman then being quick with Child".

87. Section II made abortion before quickening a crime for the first time. It provided for a felony punishable by fine, imprisonment, the Pillory, whipping or transportation for up to fourteen years:

> "And whereas it may sometimes happen that Poison or some other noxious and destructive Substance or Thing may be given, or other Means used, with 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 … if any Person or Persons … 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 or procure 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 [a felony is committed]".

88. As Mr Parker points out there were conflicting authorities as to whether proof that a woman had not conceived could afford a defence to the offence under section II. In *R v Phillips* (1811) 3 Camp 73 it was held to be no defence; in *R v Scudder* (1828) 1 Mood CC 216 it was held to be a defence.

89. Lord Lansdowne's Act of 1828, the Offences against the Person Act 1828, repealed the 1803 Act. Section XIII created two offences. The first, a felony punishable by death, was committed:

> "if any Person, with Intent to procure the Miscarriage of any Woman then being quick with Child, unlawfully and maliciously shall administer to her, or cause to be taken by her, any Poison or other noxious Thing, or shall use any Instrument or other Means whatever with the like Intent".

90. The second, a felony punishable by transportation for not more than fourteen years, imprisonment or whipping, was committed:

> "if any Person, with Intent to procure the Miscarriage of any Woman not being, or not being proved to be, then quick with Child, unlawfully and maliciously shall administer to her, or cause to be taken by her, any Medicine or other Thing, or shall use any Instrument or other Means whatever with the like Intent".

91. The 1828 Act was replaced in relevant part by the Offences against the Person Act 1837. The 1837 Act provided in section VI for a single offence punishable by transportation for life or imprisonment for:

> "whosoever, with Intent to procure the Miscarriage of any Woman, 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".

92. The death penalty in cases in which the woman was quick with child was abolished in accordance with the recommendations in their Report dated 19 January 1837 of the Commissioners Appointed to Inquire Into the State of the Criminal Law. The Commissioners added this observation:

> "By the present Law, this offence is divided into two classes: the capital offence being where the woman shall be *quick with child*. Having taken away the capital punishment, we have omitted this distinction, which we consider will be advantageous as removing a difficulty in evidence, and as obviating the necessity of discussing a question respecting which considerable doubt must always exist."

93. Two features of this statutory development may be noted, in addition to the fact that the Acts of 1803 and 1828 made capital certain offences which at common law had not been capital. The first is that the Act of 1803 (the Act of 1828 made no material change to the position) introduced for the first time an offence which did not depend upon proof that the woman was "quick with child". The second is that the Act of 1837 created a single offence which did not depend on proof that the woman was "quick with child" or, indeed, even that she was (to use the terminology of the 1861 Act) "with child".

94. As Dr Keown points out in his book, *Abortion, doctors and the law: Some aspects of the legal regulation of abortion in England from 1803 to 1982* (1988), at pp 30-31, the 1837 Act as enacted omitted the word "pregnant" with which the Commissioners in their draft Bill (no doubt with *R v Scudder* in mind) had qualified the word "woman" in the phrase "Miscarriage of any woman". Not surprisingly, therefore, in *R v Goodhall* (1846) 1 Den CC 187 it was held that proof of pregnancy was unnecessary.

95. The reform of 1837 may have removed anomaly from the law of abortion but, as was pointed out soon after, only at the price of creating greater anomaly in the law generally. W Tyler Smith in *Parturition and the Principles and Practice of Obstetrics* (1849) at p 105 did not mince his words:

> "This term quickening, which it would be impossible to abolish too soon, is a relic of theo-physiology, absurd and groundless in itself, but upon which laws have been based that remain to the present day, to the disgrace of our jurisprudence. The imaginary quickening, marks the period when our ancestors believed the foetus to become endued with life and soul. Women, therefore, who were quick with child, and convicted of capital crimes, were respited until after delivery. We now know that such a special commencement of human and immortal life has no foundation, and modern laws make it a punishable crime to procure abortion, and destroy the ovum at any time; but the ancient laws which sanction the execution of a pregnant woman, and her child with her, before the period of quickening, with their attendant absurdity of a jury of matrons, still survive." – So, indeed, they did, at least in theory, until 1965 – "The law is therefore in this anomalous position: in one case, it punishes as a crime the destruction of the ovum in the early months; in the other, the Law itself ruthlessly commits this crime."

<u>Abortion – the 1861 Act</u>

96. Section 58 of the 1861 Act provides as follows:

> "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 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".

97. Section 59 is in the following terms:

> "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 not be with child, shall be guilty of a misdemeanor".

98. It will be noticed that in place of the phrase "quick with child", which had been used at common law and in the Acts of 1803 and 1828, the 1861 Act uses the phrase "with child".

99. It will be appreciated that between them sections 58 and 59 create three offences. The first, created by the first limb of section 58, can be committed only by the woman concerned and only if she is "with child":

> "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, … shall be guilty of felony".

100. The second, created by the second limb of section 58, can be committed by anyone and whether or not the woman is "with child" – thus carrying forward explicitly the principle in *R v Goodhall* that pregnancy is not a necessary element of the offence:

> "[W]hosoever, with intent to procure the miscarriage of any woman, whether she be or 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"

101. The third, created by section 59, can again be committed by anyone and whether or not the woman is "with child":

> "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 not be with child, shall be guilty of a misdemeanor".

102. It will be noticed that the 1861 Act does not make abortion as such a criminal offence. Each of the three offences consists, in essence, of two ingredients:

i) the doing of certain acts (either "administering" or "using" or "supplying or procuring" certain things)

ii) with a certain knowledge or intent.

103. In the case of the first offence there is, of course, a further ingredient: it must be proved that the woman is "with child".

104. Common to all three offences is the need to prove either an "intent to procure … miscarriage" or, in the case of the offence under section 59, knowledge of another's "intent to procure … miscarriage". That was in terms the nature of the intent required under the common law prior to 1803 (according to the precedent cited in paragraph [84] above) and under every version of the offences created in each of the Acts of 1803, 1828, and 1837.

105. Given the issue in the present case the last point requires emphasis. The essence of the offence, both at common law and in every version of the statutory regime since 1803, has always been the procuring of "miscarriage". Putting the same point rather differently, "miscarriage" is not a term of art introduced into the law in 1861. It is the word which Parliament and the lawyers have been using in this context for some two hundred years.

106. Common also to all three offences is the need to prove that the relevant act is "unlawful". The requirement of unlawfulness was considered in *R v Bourne* [1939] 1 KB 687. Nothing turns for present purposes on Macnaghten J's celebrated direction to the jury in that case and I need say no more about it. Unlawfulness is now determined by reference to section 1 of the 1967 Act, for section 5(2) of that Act, as amended by the 1990 Act, provides that:

> "For the purposes of the law relating to abortion, anything done with intent to procure a woman's miscarriage (or, in the case of a woman carrying more than one foetus, her miscarriage of any foetus) is unlawfully done unless authorised by section 1 of this Act…"

Section 5(2) as originally enacted provided that:

> "For the purposes of the law relating to abortion, anything done with intent to procure the miscarriage of a woman is unlawfully done unless authorised by section 1 of this Act."

It can thus be seen that the concept of the "foetus" was first introduced into this area of the law by the 1990 Act.

107. Section 6 of the 1967 Act defines "the law relating to abortion" as meaning for this purpose:

> "sections 58 and 59 of the Offences against the Person Act 1861, and any rule of law relating to the procurement of abortion."

Abortion – the 1967 Act

108. Section 1(1) of the 1967 Act as originally enacted provided that:

> "Subject to the provisions of this section, a person shall not be guilty of an offence under the law relating to abortion when a pregnancy is terminated by a registered medical practitioner if two registered medical practitioners are of the opinion, formed in good faith –
>
> (a) that the continuance of the pregnancy would involve risk to the life of the pregnant woman, or of injury to the physical or mental health of the pregnant woman or any existing children of her family, greater than if the pregnancy were terminated; or
>
> (b) that there is a substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped."

109. As amended by the 1990 Act section 1(1) of the 1967 Act now provides that:

> "Subject to the provisions of this section, a person shall not be guilty of an offence under the law relating to abortion when a pregnancy is terminated by a registered medical practitioner if two registered medical practitioners are of the opinion, formed in good faith –
>
> (a) that the pregnancy has not exceeded its twenty-fourth week and that the continuance of the pregnancy would involve risk, greater than if the pregnancy were terminated, of injury to the physical or mental health of the pregnant woman or any existing children of her family; or

> (b) that the termination is necessary to prevent grave permanent injury to the physical or mental health of the pregnant woman; or
>
> (c) that the continuance of the pregnancy would involve risk to the life of the pregnant woman, greater than if the pregnancy were terminated; or
>
> (d) that there is a substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped."

Other legislation

110. I was referred to three other statutes. The first is the Infant Life (Preservation) Act 1929, section 1(1) of which makes it a criminal offence for:

> "any person who, with intent to destroy the life of a child capable of being born alive, by any wilful act causes a child to die before it has an existence independent of its mother … Provided that no person shall be found guilty of an offence under this section unless it is proved that the act which caused the death of the child was not done in good faith for the purpose only of preserving the life of the mother."

Section 5(1) of the 1967 Act, as amended by the 1990 Act, provides that no offence under the 1929 Act is committed by a registered medical practitioner who terminates a pregnancy in accordance with the provisions of the 1967 Act. Nothing turns on the 1929 Act and I say nothing more about it.

111. I was also referred to the Surrogacy Arrangements Act 1985. As amended by the Children Act 1989 and the 1990 Act this makes all surrogacy arrangements unenforceable (section 1A) and criminalises certain commercial surrogacy arrangements and certain advertisements about surrogacy (sections 2 and 3). For present purposes what are important are the definitions to be found in section 1 of the Act. Section 1(2) defines a "surrogate mother" as meaning:

> "a woman who carries a child in pursuance of an arrangement –
>
> (a) made before she began to carry the child, and
>
> (b) made with a view to any child carried in pursuance of it being handed over to, and parental responsibility being met (so far as practicable) by, another person or other persons."

112. Section 1(3) provides that:

> "An arrangement is a surrogacy arrangement if, were a woman to whom the arrangement relates to carry a child in pursuance of it, she would be a surrogate mother."

Section 1(6) provides that:

> "A woman who carries a child is to be treated for the purposes of subsection (2)(a) above as beginning to carry it at the time of the insemination or of the placing in her of an embryo, of an egg in the process of fertilisation or of sperm and eggs, as the case may be, that results in her carrying the child."

113. Finally I was referred to certain other provisions of the 1990 Act. This sets up a regime under which, subject to stringent licensing arrangements (sections 3, 4 and 11), embryos may be created, kept and used, including in particular in treatment for infertility and in research. The Act requires embryos to be destroyed, if outside the body, 14 days after the mixing of the gametes (the sperm and the egg) *in vitro*: sections 3(3)(a) and 3(4).

114. The basic prohibitions on the use of human embryos are contained in section 3(1) which provides that:

> "No person shall –
>
> (a) bring about the creation of an embryo, or
>
> (b) keep or use an embryo,
> except in pursuance of a license."

115. Section 3(3)(a) provides that:

> "A license cannot authorise … keeping or using an embryo after the appearance of the primitive streak".

116. That is defined in section 3(4):

> "For the purposes of subsection (3)(a) above, the primitive streak is to be taken to have appeared in an embryo not later then the end of the period of 14 days beginning with the day when the gametes are mixed, not counting any time during which the embryo is stored."

117. Section 1(1) of the 1990 Act provides as follows:

> "In this Act, except where otherwise stated –
>
> (a) embryo means a live human embryo where fertilisation is complete, and

> (b) references to an embryo include an egg in the process of fertilisation,
>
> and, for this purpose, fertilisation is not complete until the appearance of a two cell zygote."

118. Section 1(2) provides that:

> "This Act, so far as it governs bringing about the creation of an embryo, applies only to bringing about the creation of an embryo outside the human body; and in this Act –
>
> (a) references to embryos the creation of which was brought about *in vitro* (in their application to those where fertilisation is complete) are to those where fertilisation began outside the human body whether or not it was completed there, and
>
> (b) references to embryos taken from a woman do not include embryos whose creation was brought about *in vitro*."

119. Section 2(3) provides that:

> "For the purposes of this Act, a woman is not to be treated as carrying a child until the embryo has become implanted."

120. Section 27(1) provides that:

> "The woman who is carrying or has carried a child as a result of the placing in her of an embryo or of sperm and eggs, and no other woman, is to be treated as the mother of the child."

Section 27(2) provides that:

> "Subsection (1) above does not apply to any child to the extent that the child is treated by virtue of adoption as not being the child of any person other than the adopter or adopters."

121. Section 11 sets out the classes of activity for which licenses may be granted. These include the use of embryos in the course of providing treatment services and for the purposes of research. The specific activities themselves are set out in Schedule 2 and include bringing about the creation of embryos *in vitro* and keeping or using embryos in the course of providing treatment services (Schedule 2, paragraph 1) and in the course of a project of research (Schedule 2, paragraph 3). Provision is also made for the storage of embryos (Schedule 2, paragraph 2).

122. Section 14(1)(a) contemplates that a licence may be granted authorising the storage of "an embryo taken from a woman". This needs to be read in conjunction with Schedule

3, paragraph 7, headed “Embryos obtained by lavage, etc.” Paragraph 7(1) provides that:

> “An embryo taken from a woman must not be used for any purpose unless there is an effective consent by her to the use of the embryo for that purpose and it is used in accordance with the consent.”

Paragraph 7(2) provides that:

> “An embryo taken from a woman must not be received by any person for use for any purpose unless there is an effective consent by her to the use of the embryo for that purpose.”

123. I must return in due course to consider some of the less obvious implications of the legislation.

THE SCIENCE

124. As we have seen the legislation which I have just mentioned refers to a number of different expressions: in the 1861 Act, “being with child” and “miscarriage”; in the 1967 Act, “pregnancy”; in the 1985 Act, “to carry a child”, “the time of … insemination” and “egg in the process of fertilisation”; in the 1990 Act, “the primitive streak”, “fertilisation is complete”, “egg in the process of fertilisation”, “two cell zygote”, “embryo has become implanted” and “carrying … a child”. With a view to understanding such expressions I have been taken to a large mass of material bearing on the relevant medical science (a) as understood today and (b) as understood in the nineteenth century.

Medical science – the processes of pregnancy as understood today

125. On this topic I had evidence from a number of very eminent medical experts: Professor Peter Braude, Professor of Obstetrics and Gynaecology and Head of the Division of Women’s and Children’s Health at Guy’s, King’s and St Thomas’ School of Medicine (statement dated 10 July 2001); Professor Nigel Andrew Brown, Professor of Developmental Biology, and Chairman of the Department of Anatomy and Developmental Biology, at St George’s Hospital Medical School, University of London (statement dated 3 August 2001); Dr John McLean, Associate Specialist in Genitourinary Medicine in the Manchester Centre for Sexual Health in the Manchester Royal Infirmary (statements dated 22 October 2001 and 4 February 2002); and Professor Chris Barratt, Professor and Head of the Reproductive Biology and Genetics Research Unit at the University of Birmingham and Scientific Director of the Assisted Conception Unit at the Birmingham Women’s Hospital (statement dated 22 October 2001).

126. In essence they were all agreed as to the basic physiology. So far as is necessary for present purposes, and presented in very simplified terms (for which I trust these distinguished experts will forgive me), the position can be summarised as follows:

i) Ovulation involves the release of a mature egg (an ovum) from the ovary, usually, but not invariably, into the fallopian tube. Release of the ovum occurs at a variable time towards the mid point of the menstrual cycle.

ii) Following coitus, the sperm penetrates the cervical mucus and, after varying periods of time (anything from a few hours to as much as six days), reaches the fallopian tube. During this time the sperm is undergoing a process of maturation called capacitation without which it is incapable of fertilising an ovum.

iii) The ovum and capacitated sperm meet in the fallopian tube. This can be described as Time 0. The ovum is fertilised by a capacitated sperm in the fallopian tube. Fertilisation is a process, not an event that occurs at a single point in time.

iv) It can take between a few minutes and several hours for the sperm to enter the ovum. The first evidence that fertilisation has been successful is the presence of two pronuclei, one containing the maternal and the other the paternal chromosomal material. This usually occurs about 14 hours after Time 0. The paternal and maternal genetic material comes together – in effect fusing – during a process of syngamy which takes place between 24 and 30 hours after Time 0.

v) Syngamy immediately precedes the division of the ovum into two cells, called the two cell zygote. This is the start of the cleavage stage. The next divisions are into four cells, approximately 48 hours after Time 0, and into a ball of eight cells, the morula, which resembles a mulberry, approximately 60 hours after Time 0. The sixteen cell stage is reached about 72 hours after Time 0 – some four or more days after coitus.

vi) Cleavage continues at regular intervals until the blastocyst stage is reached between five and six days after Time 0. At this point the fertilised egg resembles a hollow football with cells plastered around the outside. Throughout this time it is contained within the eggshell, the zona pellucida.

vii) Up until the attachment stage the embryo is not attached in any way to the woman herself. All the stages thus far described happen in a free-floating environment, initially within the fallopian tube and then within the uterus, which the cleaving embryo is believed to enter, during the transition from morula to blastocyst, somewhere between four and six days after Time 0 – a week or more after coitus.

viii) In the uterus the zona pellucida splits and the blastocyst is released from the shell. The blastocyst then begins to attach to the uterine epithelium, the surface layer of the uterine endometrium (wall). The very earliest that this can happen is some four to five days after Time 0, though it is usually about six days after Time 0. The outer trophoblast cells of the released blastocyst begin to invade the epithelium, burrowing into the underlying endometrial stroma. About eight days after Time 0, by which time the blastocyst is partially embedded in the endometrial stroma, the trophoblast layer differentiates into two layers. It continues to implant. By ten to eleven days after Time 0 the blastocyst has sunk right into the stroma and the epithelium is growing over the surface defect. The embryo only begins to form the early tissue layers by about 14 days after Time 0, in a process called gastrulation which takes place through a structure called the primitive streak which is the first sign of the head to toe axis of the embryo.

ix) The hormone human chorionic gonadotrophin (hCG) begins to be produced and to circulate in the mother's bloodstream from the commencement or close to the commencement of the implantation process, that is about six or so days after Time 0. This is the chemical detected in a pregnancy test. It is uniquely associated with pregnancy. It can now be detected in smaller quantities than before. A predictor test is sensitive to quantities of the chemical which enable identification of the implantation process at the earliest from about seven days after Time 0. The test for hCG represents the first reliable opportunity to identify the existence of an embryo.

127. Reduced to essentials there are thus three relevant stages in the process: coitus, fertilisation and implantation. Fertilisation, a process which itself takes many hours, commences hours or even days after coitus. Implantation, a process which itself take some days, starts at the earliest some four to five, though usually some six or seven, days after the commencement of fertilisation. The earliest method of detecting pregnancy, by testing for hCG, enables the existence of an embryo to be identified from about seven days after the commencement of fertilisation, that is only *after* commencement of the implantation process.

128. It will be appreciated from this that at the time of ingestion of the morning-after pill – within 72 hours of coitus – (a) implantation will not have begun and (b) there is no method by which it can even be determined whether fertilisation has occurred.

129. There is one other aspect of this medical evidence which perhaps requires emphasis. This is summarised by Professor Braude in the proposition that "Fertilisation does not usually result in the development of an embryo" and by Professor Brown in the statement "It is striking that the usual fate of the fertilized human egg is to die." According to Professor Braude not much more than 25% of successfully fertilised eggs reach the blastocyst stage of development and "Even once implanted the failure rate is prodigious", for fewer than 15% of fertilised eggs will result in a birth.

Medical science – current terminology

130. In relation to modern medical terminology I had evidence from Professor James Owen Drife, Professor of Obstetrics and Gynaecology at the University of Leeds, Honorary Consultant Obstetrician and Gynaecologist to the General Infirmary at Leeds, a Vice-President of the Royal College of Obstetricians and Gynaecologists, and an elected member of the General Medical Council (statement dated 3 August 2001). He qualified in 1971.

131. I think it best if I set out some of his evidence verbatim. He says that he was:

> "asked by Schering Health Care Limited to provide an account of the meanings I ascribe to terms in everyday use in gynaecological practice today. The meaning of some terms has altered slightly during the thirty years that I have been practising medicine. There are two reasons for this. One is that knowledge has increased among both doctors and the public as a result of medical advances – in particular the introduction of IVF, the development of highly sensitive pregnancy tests and the refinement of ultrasound imaging, all of which occurred during the 1980s. The other reason is a growing sensitivity among doctors to the implications that medical language has for patients."

132. So far as concerned the meaning of the word "pregnancy" his evidence was as follows:

> "The meaning of the word **"pregnancy"** has not changed in relation to the later stages of gestation, but I consider that its meaning has changed in relation to the earliest stages. In the past, pregnancy was suspected when a woman missed her period and was confirmed by uterine enlargement, found on abdominal or pelvic examination. Nowadays, pregnancy is confirmed by a positive pregnancy test, which can be carried out on either urine or blood. It tests for HCG (human chorionic gonadotrophin), a hormone produced by the placenta or the cells destined to form the placenta. A pregnancy does not necessarily require the presence of an embryo or fetus. For example, a common complication of early pregnancy is an "anembryonic pregnancy", in which the pregnancy test is positive, the woman feels pregnant and the placental tissue is developing, but embryonic development has failed at a very early stage. Such a pregnancy can continue for two or three months before ending in miscarriage. Nor does a pregnancy have to be in the uterus: an "ectopic pregnancy" develops outside the uterus, commonly in the fallopian tube. Initially it may include a live embryo but the pregnancy almost always fails, usually around the second month. Bearing all these factors in mind, in my experience neither doctors nor women normally

> consider that a pregnancy has begun until the pregnancy test is positive, even when (as in IVF) an embryo has been placed inside the uterus. The pregnancy test does not become positive until HCG can be detected, usually around the time of the missed menstrual period."

133. He adds:

> "In my view **pregnancy begins** when the pregnancy test is positive, some ten to fourteen days after conception. My reasons relate to the large numbers of fertilised oocytes which are believed to be lost during the normal menstrual cycle. I do not believe these can be described as "pregnancies". When teaching students, I describe the processes of spermatogenesis, ovulation and fertilisation as a continuum with implantation and early pregnancy development. I reserve the term "pregnancy" for the phase after implantation. When talking to patients, I would not use the term "pregnancy" until a pregnancy test was positive or a menstrual period had been missed."

134. Miscarriage he defines as follows:

> "**"Miscarriage"** means the loss of a clinically recognised pregnancy. Since a pregnancy cannot be recognised until HCG can be detected, and HCG is not produced until implantation has been initiated, a miscarriage will not occur prior to implantation. As I have explained above, a clinically recognised pregnancy generally means that at least one menstrual period has been missed. Rarely nowadays a pregnancy test may be positive before a period is missed and if the period occurs a few days late it may be considered to be a very early miscarriage, but this applies to only a small number of cases. From various strands of evidence it has been calculated that in a normally cycling woman who is sexually active and not using contraception, conception will occur in about 85% of cycles. Of those fertilised eggs, around 15% will be lost before implantation begins. Of those which begin to implant, only about half will implant successfully. Of the half which do implant successfully (as shown by detectable HCG in the woman's urine), between one third and one half will be lost at the time of the menses. Overall, therefore, around 75% of all conceptions are followed by an apparently normal period. These losses of fertilised eggs, whether before or after implantation in a cycle ending with normal menstruation, do not involve a clinically recognised pregnancy and are not covered by the term "miscarriage"."

135. He adds this illuminating observation:

> "I have been involved in providing contraceptive services and termination of pregnancy services for almost thirty years. I have thought a great deal about the implications of my actions. I have discussed them with students, written about them in medical and lay publications (including the correspondence column of The Times) and debated them in the context of ethics courses and religious discussions. I have been fully aware of my duty to comply with the 1967 Abortion Act: almost every week for 29 years I have filled in the Abortion Act forms as part of my work in the termination service. I take these duties very seriously because I am conscious of my moral duty as a doctor and a teacher, and because I am aware that any lapse from the requirements of the Act could render me liable to prosecution. I have never at any time felt that the provisions of the Act referred to the prescribing of Levonelle, or the insertion of an intrauterine contraceptive device, or the prescribing of a progesterone-only pill. Although I carry out abortions, I have never felt that prescribing PC4 or Levonelle, or fitting a coil or prescribing a progesterone-only pill is procuring an abortion. Some of my colleagues do not carry out abortions because of their deeply-held views, but they are happy to prescribe PC4 or fit an IUCD or prescribe progestogen-only contraception. I do not know of any gynaecologist who feels that these contraceptive methods are procuring abortions. Indeed, colleagues who oppose abortion are – like me – keen to prescribe these contraceptives in order to reduce the need for abortion. Even though abortion is now safe in this country, it is distressing for all concerned – women and doctors. Levonelle is highly regarded because it reduces the number of cases in which a woman needs to consider abortion."

136. I should add that no gynaecologist, obstetrician or family planning practitioner whose views are in evidence before this court expresses disagreement with Professor Drife's proposition (that is, that "I do not know of any gynaecologist who feels that these contraceptive methods are procuring abortions. Indeed, colleagues who oppose abortion are – like me – keen to prescribe these contraceptives in order to reduce the need for abortion.") Those who express a view agree. And as we shall see in due course (see paragraph [245] below), both the consultant gynaecologists who gave evidence to the court in *R v Dhingra* agreed (Transcript p 2G) that:

> "so far as the current thinking of the medical profession is concerned the use of the word "miscarriage" relates to the spontaneous loss of an established pregnancy and not the result of anything done to interfere with the processes of fertilization or implantation."

137. Finally Professor Drife said this:

> "I consider that dating **"the start of life"** from a particular point in time is not helpful in a clinical sense or indeed possible in a scientific sense. I agree with those who have pointed out that DNA (the self-replicating molecule within the chromosomes) is immortal. It perpetuates itself endlessly, sometimes in the cells of the human body and sometimes in the sperm or the eggs. This continuum is uninterrupted, except if an individual dies childless."

Medical science – current medical dictionaries

138. A number of medical dictionaries and other reference works were produced by various witnesses: by Mr Smeaton, the National Director of SPUC (statement dated 19 October 2001); by Dr Jacqueline Claire Bore, who is not merely the solicitor having the conduct of this case on behalf of Schering, but who is also a registered medical practitioner and a member of the Royal College of General Practitioners and who holds the Diploma of the Royal College of Obstetricians and Gynaecologists and the Certificate in Family Planning issued by the Faculty of Family Planning of that Royal College (statement dated 21 January 2002); and by Paul Conrathe, who is the solicitor having the conduct of this case on behalf of SPUC (statement dated 4 February 2002).

139. I shall take these works in turn, referring in each case to the most recent edition to which my attention was directed.

140. *Taylor's Principles and Practice of Medical Jurisprudence* (ed 13, 1984): At p 322 it is said that:

> "Miscarriage is synonymous, in a legal sense, with the word abortion, the fetus being regarded as a human life to be protected by the criminal law from the moment of fertilisation."

141. *The International Dictionary of Medicine & Biology* (1986): This contains the following relevant definitions:

> Miscarriage:
>
> > A popular term for spontaneous abortion.
>
> Miscarry:
>
> > To abort the products of conception spontaneously. A popular usage.
>
> Abort:
>
> > To expel the products of conception prematurely before viability of the fetus is reached.

Abortion:

> The termination of pregnancy or premature expulsion of the products of conception by any means before fetal viability …

Conception:

> The act or condition of becoming pregnant; the initiation of pregnancy.

Pregnancy:

> The state of a female from the time of conception until delivery of the products of conception.

142. *Churchill's Medical Dictionary* (1989): This contains definitions of miscarriage, abort, abortion, conception and pregnancy which are virtually identical to those in the *International Dictionary*.

143. *Butterworth's Medical Dictionary* (ed 2, 1978, repr 1990): This contains the following relevant definitions:

Miscarriage:

> Abortion; expulsion of the fetus before it is viable.

Abortion:

> Premature or untimely expulsion of the fetus …

Fetus:

> The later stage in the development of the embryo … In man the term is applied to the embryo from the end of the eighth week up to birth.

Conception:

> The act of becoming pregnant. The fertilisation of the ovum by a spermatozoon and the beginning of the growth of the embryo.

Pregnancy:

> The state of being with child; the condition from conception to delivery of the conceptus.

Embryo:

> In man, the term is usually restricted to the first 8 weeks of intrauterine life, the term fetus being employed after that.

144. *Reiss's Reproductive Medicine: From A to Z* (1998): This contains the following relevant definitions:

> Miscarriage:
>
> > the spontaneous loss of a pregnancy before the 24th week of pregnancy.
>
> Pregnancy:
>
> > the state of being gravid, which in humans lasts about 38 weeks during which a woman is carrying within her an unborn but implanted embryo or fetus with its placenta and membranes.
>
> Abortion:
>
> > spontaneous miscarriage.
>
> Implantation:
>
> > the process by which the blastocyst becomes embedded in the decidual lining of the uterus at the beginning of pregnancy. In humans, implantation comprises apposition, when the blastocyst becomes closely apposed to the decidua, adhesion, when it first attaches to the decidua, and penetration, when it reaches the basement membrane and stroma of the uterus and establishes contact with the maternal circulation.
>
> Embryo:
>
> > the product of fertilization of an oocyte … the conceptus from fertilization until about the tenth week of gestation.
>
> Fertilization:
>
> > the process by which the male and female gametes unite to form a zygote.
>
> Conception:
>
> > the process from fusion of the gametes through the early development of the conceptus, to implantation of the blastocyst.

145. *Stedman's Medical Dictionary* (ed 27, 1999): This contains the following definitions:

Miscarriage:

> Spontaneous expulsion of the products of pregnancy before the middle of the second trimester; spontaneous abortion.

Pregnancy:

> The state of a female after conception and until the termination of the gestation.

Conception:

> Act of conceiving: the implantation of the blastocyte in the endometrium.

Implantation:

> Attachment of the fertilized ovum (blastocyte) to the endometrium, and its subsequent embedding in the compact layer, occurring 6 or 7 days after fertilization of the ovum in humans.

Fertilization:

> The process beginning with penetration of the secondary oocyte by the spermatozoon and completed by fusion of the male and female pronuclei.

Abortion:

> Expulsion from the uterus of an embryo or fetus prior to the stage of viability.

Embryo:

> In humans, the developing organism from conception until approximately the end of the second month.

Fetus:

> In humans, the product of conception from the end of the eighth week to the moment of birth.

146. *Melloni's Illustrated Dictionary of Obstetrics and Gynaecology* (2000): This contains the following relevant definitions:

Miscarriage:

> Popular term for spontaneous abortion.

Miscarry:

> To deliver a nonviable fetus.

Abortion:

> Expulsion or extraction of all or any part of the products of conception (placenta, membranes, and embryo or fetus) …

Embryo:

> An organism in its earliest stage of development: in humans from conception to the end of the eighth week.

Conception:

> The fertilisation of an ovum by a spermatozoon.

Fertilisation:

> The union of a spermatozoon with an ovum.

Pregnancy:

> Condition of the female from the time of conception to delivery of the embryo or fetus.

147. *Dorlands's Illustrated Medical Dictionary* (ed 29, 2000): Said by Dr Bore to be "regarded by many as the world's finest medical dictionary", this contains the following relevant definitions:

Miscarriage:

> loss of the products of conception from the uterus before the fetus is viable; spontaneous abortion.

Abortion:

> the premature expulsion from the uterus of the products of conception – of the embryo, or of a nonviable fetus.

Conception:

> the onset of pregnancy, marked by fertilisation of an oocyte by a sperm or spermatozoon; formation of a visible zygote.

Embryo:

> in humans, the developing organism from the fourth day after fertilization to the end of the eighth week.

Fertilization:

> rendering gametes fertile or capable of further development; a sequence of events that begins with contact between a spermatozoon and oocyte, leading to their fusion …

Pregnancy:

> the condition of having a developing embryo or fetus in the body after union of an ovum and spermatozoon.

Fetus:

> the unborn offspring in the postembryonic period, after major structures have been outlined, in humans from nine weeks after fertilization until birth.

148. Now some of these definitions (see *The International Dictionary* and *Churchill*) are really too general to be of any very great assistance. But, putting the matter generally, it can be seen that current medical definitions given in medical dictionaries support the view that pregnancy begins once the blastocyst has implanted in the endometrium and, more particularly, that miscarriage is the termination of such a post-implantation pregnancy. See in particular the definitions in *Reiss*, *Stedman* and *Dorland* which seem to me to be unambiguously supportive of the defendants' case. *Butterworth's* and *Melloni*, although not quite so clear, also seem to me to support the defendants' rather than SPUC's case. With the sole exception of *Taylor* none of the dictionaries is unambiguously helpful to SPUC's case.

<u>Medical science – nineteenth century science and terminology</u>

149. Evidence in relation to nineteenth century medicine was given by Joan Lynn Walsh, a Researcher at the Clinical Effectiveness Unit at the Faculty of Family Planning and Reproductive Health Care of the Royal College of Obstetricians and Gynaecologists (statements dated 11 July 2001 and 26 January 2002) and by Dr Keown, who is Senior Lecturer in the Law and Ethics of Medicine in the University of Cambridge and Senior Research Fellow of Churchill College Cambridge (statements dated 19 October 2001 and 14 December 2001).

150. Dr Keown in his article and his book (see esp at pp 23, 38-39) and both Dr Keown and Ms Walsh in their evidence referred to a number of eighteenth and nineteenth century medical texts. The following were produced in evidence (I list them in chronological order of publication):

- Thomas Denman *An Introduction to the Practice of Midwifery* (1794) Vol 1 pp 222-224.

- William Cruikshank *Experiments to discover the Ova of Rabbits* (1797), Philosophical Transactions of the Royal Society of London, Vol 87 (1797) pp 197-214.

- John Burns *The Anatomy of the Gravid Uterus with Practical Inferences relative to Pregnancy and Labour* (1799) p 150.

- John Burns *The Principles of Midwifery including the Diseases of Women and Children* (ed 3 1814) pp 192-195.

- John Mason Good *The Study of Medicine* (ed 1 1822) Vol IV p 177, (ed 2 1825) Vol IV pp 23-27, 177-178, (ed 3 1829) Vol XX pp 21, 174-175.

- W Montgomery *An Exposition of the Signs and Symptoms of Pregnancy* (1837) pp 230-231.

- Michael Ryan *A Manual of Midwifery and Diseases of Women and Children* (ed 4 1841) pp 110-111, 146-147, 162-163.

- John Ramsbotham *Practical Observations in Midwifery with Cases in Illustration* (ed 2 1842) pp 15-16, 376.

- John Burns *The Principles of Midwifery including the Diseases of Women and Children* (ed 10 1843) pp 200-201, 304-305

- Alfred S Taylor *A Manual of Medical Jurisprudence* (1844) pp 596-597.

- James Whitehead *On the Causes and Treatment of Abortion and Sterility* (1847) pp viii, 181-182, 197, 355.

- W Tyler Smith *Parturition and the Principles and Practice of Obstetrics* (1849) pp 52-53, 104-105, 136-141.

- Francis H Ramsbotham *The Principles and Practice of Obstetric Medicine & Surgery in reference to The Process of Parturition* (ed 4 1856) pp 52-53, 683-684.

- R Philp *The Dictionary of Medical and Surgical Knowledge* (1864) pp 458-459.

- William Leishman *A System of Midwifery including the Diseases of Pregnancy and the Puerperal State* (ed 2 1876) pp 412-415.

- Robert and Fancourt Barnes *A System of Obstetric Medicine and Surgery* (1884) Vol 1 pp 488-489.

- William Thompson Lusk *The Science and Art of Midwifery* (ed 3 1885) pp 114-115, 305.

- Arthur P Luff *Text-book of Forensic Medicine and Toxicology* (1895) Vol 2 pp 178-179.

151. The thesis underlying Dr Keown's analysis is most clearly summarised in his first witness statement. Referring to the research he undertook for his book he says:

> "Part of that research involved a specific study of the question whether section 58 of the Offences against the Person Act 1861 prohibits, by its use of the word 'miscarriage', attempts to prevent the implantation of any fertilised egg which may be present. To ascertain the meaning of the word 'miscarriage' in the nineteenth century I carried out a survey believed to include all major obstetrical texts published in England between 1788 and 1910. The study concluded that 'miscarriage' was understood in 1861 by medical and medico-legal authorities to include a failure to implant and that, applying the ordinary meaning of the word at the time the statute was enacted, section 58 was intended to prohibit attempts to procure abortion from conception (fertilisation). The above texts were unanimous in either supporting or not contradicting this conclusion. The study was published as "Miscarriage": A Medico-Legal Analysis in [1984] *Crim LR* 604. Nothing I have read since then inclines me to retract anything in the article."

152. Now this material, much of which has been subjected to a minute and, if I may say so, very illuminating textual analysis by Dr Keown and Ms Walsh, is, I do not doubt, of very great interest. I do not, however, have to examine it in exhaustive detail. In the first place, and as will become apparent in due course, my decision must as a matter of law ultimately turn *not* on what the word "miscarriage" was understood to mean in 1861 but rather on what it means today. Secondly, the whole of Dr Keown's argument – at least in the form in which he puts it forward – depends, as it seems to me, on the factual assertion that, as he himself puts it, the relevant texts are "unanimous" in either supporting or not contradicting his conclusion. With very great respect to Dr Keown, and fully acknowledging that the scholar has more time than the busy judge to analyse matters of this sort, I nonetheless have to say that the texts, as it seems to me, are very far from unanimous. Some, as I read them, on their face contradict Dr Keown's reading. I can, accordingly, deal with them comparatively briefly.

153. The most important of the texts are those of Good, John Ramsbotham, Burns, Whitehead, Tyler Smith, Francis Ramsbotham and Leishman. I shall take them in turn.

154. As a preliminary comment I observe that nineteenth century medicine appears to have recognised – correctly in the light of modern understanding – that:

i) What we would call fertilisation (then often referred to as impregnation) takes place in the fallopian tube and before the fertilised ovum passes into the uterus – thus Burns as early as 1799 refers (at p 150) to the state of the uterus "Before the embryo passes down through the Fallopian tube into the uterus" and Ryan in 1841 recognises the fact when (at p 111) he asks "But how can we explain the fact, that but one tube only is concerned in conception?"

ii) After its arrival in the uterus the fertilised ovum becomes attached to the uterine wall – thus in 1829 Good can refer (at p 175) to "the separation of the ovum from the fundus of the womb" and in 1842 John Ramsbotham describes (at p 16) how "when the impregnated Ovum is received into the uterine cavity, it becomes attached to some one point".

155. Good in 1829 says this (at pp 174-175):

> "a miscarriage occurs not infrequently within three weeks after impregnation, or before the ovum has descended into the uterus … In later stages of pregnancy, abortion consists of two parts or stages; the separation of the ovum from the fundus of the womb, and its expulsion from the mouth."

156. John Ramsbotham in 1842 (at p 376) describes abortion as follows:

> "Abortion, or miscarriage, implies the premature expulsion of the contents of the impregnated Uterus. This misfortune may take place at any intermediate time between the act of impregnation, and the completion of the common term of pregnancy: but either of the preceding words is more generally applied to that occurrence in the early stages of gestation. The expulsion of the uterine contents after the seventh month of pregnancy, may be more properly termed "premature labour."

157. Writing in 1843, Burns – who, as we have seen, was well aware that fertilisation takes place in the fallopian tube – says this (at pp 304-305):

> "The usual period of utero-gestation is nine months, but the foetus may be expelled much earlier. If the expulsion take place within three months of the natural term, the woman is said to have a premature labour; if before that time, she is said to miscarry, or have an abortion. The process of abortion, consists of two parts, detachment and expulsion; but these do not always bear an uniform relation to each other, in their duration or severity. The first, is productive of haemorrhage, the second of pain; for the one is attended with rupture of vessels, the other

> with contraction of the muscular fibres … The symptoms then of abortion, must be those produced by separation of the ovum, and contraction of the uterus."

158. Whitehead in 1847 writes (at p 182) that:

> "Miscarriage, is the term usually employed to signify the expulsion of the foetus from the womb at any period before the completion of its growth … I shall … use the word *abortion* in its widest signification, to denote the untimely arrest of the process of utero-gestation at any period of pregnancy".

159. Earlier (at p 181) he had referred to the period of utero-gestation as running "from the moment of impregnation, when the ovum … receives the fertilising stimulus".

160. Tyler Smith writing in 1849 saw abortion as being (p 105) the destruction of the ovum "at any time" or (p 136) "between conception and natural parturition".

161. Francis Ramsbotham in 1856 defined abortion as follows (pp 683-684):

> "By abortion or miscarriage, is meant the premature expulsion of the contents of the gravid womb, before the term of gestation is completed. … The process of abortion consists of two parts – the separation of the ovum from its uterine attachment, and its expulsion from the uterine cavity."

162. He was, of course, well aware (see at p 52) that conception took place in the fallopian tube and before the impregnated ovum reaches the uterus.

163. Leishman in 1876, treating abortion as synonymous with miscarriage, says (pp 413-414) that:

> "Strictly speaking, Abortion may take place at any moment subsequent to conception."

164. I need go no further: we are by now well past 1861.

165. Now I can entirely accept, even if Ms Walsh does not, that Good, Tyler Smith and Leishman support Dr Keown's position. On a benevolent reading Whitehead might perhaps be thought to be ambiguous. But John Ramsbotham, Burns and Francis Ramsbotham provide Dr Keown with no such support. Indeed, on the face of it they contradict him. Both Ramsbothams define abortion and miscarriage – terms which they explicitly use interchangeably – by reference to the expulsion of the contents of the *uterus*; both Burns and Francis Ramsbotham by reference to the "detachment" or

"separation" of the ovum – in other words by reference to the state of the ovum *after* implantation.

166. The simple fact is that the texts are *not* unanimous. Analysis of the medical sources cited by Dr Keown in his article and witness statements reveals a much more complex and contradictory picture than the one which he seeks to present, and one which, in my judgment, wholly undermines the conclusion at p 613 of his article that "the lack of judicial authority to support a restricted construction of "miscarriage"" – a matter I consider below – "is matched only by an equal lack of medico-legal authority".

167. In his second witness statement Dr Keown says that:

> "the evidence of the medical and medico-literature of the nineteenth century indicates that 'miscarriage' was generally understood to include the prevention of implantation."

168. Now matters of this sort are not, of course, to be resolved merely by a counting of heads, and I have not been taken by anyone – not even by Dr Keown – to the whole of the literature which he has read. He might be correct were he to say that a considerable body of nineteenth century medical opinion supports his conclusions. But I have to admit to more than passing doubts as to whether he is justified in saying that this reflects what was "generally understood". After all, John Ramsbotham was an expert called in aid by Dr Keown himself in his article and Francis Ramsbotham was, according to Ms Walsh (and not challenged on this point by Dr Keown), "widely regarded as the pre-eminent authority in the field".

169. The fact is that some of the leading and most authoritative medical works of the time available to Parliament in 1861 – I have in mind John Ramsbotham, Burns and, in particular, Francis Ramsbotham – are strongly supportive of the idea that miscarriage becomes possible only after implantation. That fact – and fact it is – seems to me to be wholly destructive of Dr Keown's thesis and, in very large measure, also of SPUC's case.

<u>CONTRACEPTION</u>

170. There are various aspects of contraception which need to be considered, some legal, some social and some medical.

<u>Contraception – legal and social developments</u>

171. The history of contraception so far as it is relevant to inquire into it for present purposes is described by Ms Walsh in her evidence (statement dated 11 July 2001). Supplemented in certain particulars by the accounts given by Professor Glanville Williams in *The Sanctity of Life and the Criminal Law* (1958) pp 43-51 and by Dr Norman St John-Stevas in *Life, Death and the Law* (1961) pp 50-59 and in *The*

Agonising Choice: Birth Control, Religion and the Law (1971) pp 14-44, it can be summarised as follows.

172. The condom appears to have first been described, if indeed not invented, by Fallopio in the sixteenth century. It was in use in this country by the eighteenth century though according to St John-Stevas by the end of that century its use was still associated with immorality and vice.

173. The nineteenth century birth control movement found its origins in the pessimistic theories of Thomas Malthus in his *Essay on the Principle of Population* (1798) and its first clear exposition by Francis Place who, in his *Illustrations and Proofs of the Principle of Population* (1822), suggested that in the use of artificial contraception lay the answer to population problems.

174. Nonetheless, as Ms Walsh points out, while condoms became increasingly available during the nineteenth century, they were not widely used, being expensive and still having associations with disease and prostitution which made them unacceptable for use by married couples. And as late as the mid to late nineteenth century there were no widely available effective methods of contraception. Indeed, there was very little general awareness of the possibility of contraception prior to the decisive event of 1877 – what Sir Alexander Cockburn CJ called the ill-advised and injudicious prosecution of Charles Bradlaugh and Mrs Annie Besant for publishing a treatise on contraceptive methods entitled the *Fruits of Philosophy* which had originally been published in the United States of America in 1832. At the end of a sensational trial (the details of which can be found described in St John-Stevas's *Obscenity and the Law* (1956) pp 70-74) both defendants were convicted of publishing an obscene libel. The basis of their conviction was described thus by Viscount Finlay in *Sutherland v Stopes* [1925] AC 47 at p 67:

> "The conviction of Bradlaugh proceeded on the ground that his book describing and recommending methods of birth control was an obscene libel. The obscenity was simply in describing and recommending such methods of control."

175. Their conviction was eventually overturned on a technicality: *Bradlaugh v The Queen* (1878) 3 QBD 607 reversing (1877) 2 QBD 569. Contemporary views of the matter are evident, however, from the subsequent proceedings in Chancery where it was held that the publication of the book was in itself sufficient grounds for removing Mrs Besant's seven year old daughter from her mother's custody: *In re Besant* (1878) 11 ChD 508.

176. Sitting at first instance Sir George Jessel MR said this at p 514:

> "I am sorry to say that there is another ground, which I should be glad to avoid dealing with if I could. Another accusation against Mrs *Besant* is this: It is said that in addition to these opinions on the questions as to the existence of a Deity and

> other speculative subjects, Mrs *Besant* has been guilty of immoral conduct in publishing an immoral or obscene book, or rather pamphlet. Now, I am sorry to say that on my attention being directed to some of the pages of this pamphlet I can entertain no doubt whatever as to its being an obscene publication.
>
> My view is exactly the same as was entertained by the Lord chief Justice of *England* and a jury on the occasion of the trial of Mr *Bradlaugh* and Mrs *Besant* for the publication of this book, at which trial they were convicted. And although that conviction has been set aside on a technical point, a flaw in the indictment, no Judge, so far as I am aware, has for a moment doubted the propriety of that conviction. Besides that, it has also been condemned by a magistrate to be destroyed, and that decision has been confirmed by a Court of Quarter Sessions, a number of magistrates being assembled there. I think my view of the book is, if I may say so, fully confirmed and borne out by these previous decisions; although, even if I entertained a less strong opinion than I do, I ought not to hesitate to express that opinion.
>
> Well, now, what is the result? The result of it is that Mrs *Besant's* character is to be judged not only by the publication of the book, but by the conviction following from that publication, and one cannot expect modest women to associate with her. She may be a most conscientious person – that is to say, she may believe that all she has done was done by her for the purpose of doing good. I am not unwilling to admit that, and to credit her with good intentions, but if she has adopted a course which is reprobated by a vast majority of mankind, and in fact by the criminal law of this country, I do not think I should be right in saying that it would be beneficial for any young girl to be brought up by such a woman, and I think I should be guilty of a dereliction of duty if I allowed a young girl to be so brought up and educated in that way."

177. Mrs Besant's appeal was dismissed. Giving the judgment of the Court of Appeal at p 521 James LJ said:

> "We have it before us that the Appellant was found guilty by a jury of publishing a work stigmatized by them as being calculated to deprave public morals, and that she, in spite of that finding, determined to persist, and did persist, in publishing that work. That the jury were right in their finding the Judges of the Court of Queen's Bench had no doubt, and we are constrained to say that we entirely concur. The other works charged are substantially of the same character. It is impossible for us not to feel that the conduct of the Appellant in writing and publishing such works is so repugnant, so abhorrent to the

> feelings of the great majority of decent Englishmen and Englishwomen, and would be regarded by them with such disgust, not as matters of opinion, but as violations of morality, decency, and womanly propriety, that the future of a girl brought up in association with such a propaganda would be incalculably prejudiced. The Appellant contends that these are unfounded and unwarranted antipathies and prejudices, like those with which rival sects were wont to regard one another. But the Court cannot allow its ward to run the risk of being brought up, or growing up, in opposition to the views of mankind generally as to what is moral, what is decent, what is womanly or proper, merely because her mother differs from those views and hopes that by the efforts of herself and her fellow-propagandists the world will be some day converted. If the ward were allowed to remain with the mother, it is possible, and, perhaps, not improbable, that she would grow up to be the writer and publisher of such works as those before us. From such a possible future the Master of the Rolls thought it his duty to protect her, and we have no hesitation in saying that we entirely concur with him."

178. Whatever the views of the judges, the effects of the *Bradlaugh-Besant* prosecution were startling. As Ms Walsh points out, the proceedings had the effect of publicising the possibility of using artificial means to control fertility. According to St John-Stevas the trial made contraception a subject debated throughout the country and among all classes. Before 1876 the circulation of *Fruits of Philosophy* had been only 1,000 per year; by August 1881 no less than 185,000 copies had been sold. The Malthusian League was founded in 1878 with Mrs Besant as its first secretary. In 1879 Mrs Besant published *The Law of Population* which had sold 175,000 copies by 1891. According to Glanville Williams, although a variety of other social developments of the time played an important part, this birth control propaganda, and the *Bradlaugh-Besant* trial in particular, accelerated and extended the practice of family limitation, at any rate among what he called – this in 1958 – the lower middle-class and the skilled artisans.

179. Significant also was the introduction in the 1880s of the condom, diaphragm and cap in their modern form, a development only made possible by the discovery in 1843-4 of the process of vulcanising rubber and subsequent advances in rubber technology. But, as Ms Walsh remarks, these methods were still too expensive to be widely accessible.

180. Nonetheless, what Glanville Williams called "the crusade for sexual enlightenment in England", did not proceed entirely without difficulties. Prosecutions for selling birth control literature continued into the twentieth century and as late as 1887 a doctor was struck off the medical register by the General Medical Council for publishing a popular work on birth control. By 1913, however, the Malthusian League was able to publish a practical handbook on birth control, *Hygienic Methods of Family Limitation*, apparently without legal incident. And in 1922 the Home Secretary announced in the House of Commons that:

> "It cannot be assumed that a court would hold a book to be obscene merely because it deals with the subject referred to."

181. The extent to which legal views had changed by the 1920s can perhaps be gauged from *Sutherland v Stopes* [1925] AC 47, where Dr Marie Stopes failed in her attempt to reverse the verdict against her in libel proceedings she had brought in relation to a book which criticised what it called her "monstrous campaign of birth control" and opined, looking back to the events of 1877, that Bradlaugh had been "condemned to jail for a less serious crime" than that which she had allegedly committed.

182. Viscount Cave LC (at p 55) and Lord Shaw of Dunfermline (at p 73) carefully avoided expressing any views on the subject. Lord Wrenbury, who dissented, gave (at pp 85-87) a historically most interesting account of the recent development of thinking on the question of birth control and (at pp 91-93) a summary of the medical and other evidence in the case – accounts which Lord Carson (at p 100) with evident distaste correctly read as being sympathetic to Dr Stopes. Viscount Finlay (at pp 66-71) gave vent to his views in a long passage which the curious might wish to read in extenso. I forebear to quote extensively. For immediate purposes two passages on p 68 suffice. The first:

> "[T]here remain two sentences of the libel which were relied on as expressions of opinion and libellous. The first was contained in the words "the ordinary decent instincts of the poor are against these practices." This, it is said, was libellous. The plaintiff's contention on this point, when analyzed, comes to this, that these words involve the expression of an opinion that there was something reprehensible in these practices which revolted the instincts of the poor. It appears to me that it is impossible to hold that the bounds of fair comment are exceeded by the expression of an opinion honestly held that such practices are revolting to the healthy instincts of human nature. There is an old and widespread aversion to such methods on this ground. This sentiment was voiced by the historian of the Decline and Fall of the Roman Empire when in his fortieth chapter he referred to such practices as "detestable precautions.""

183. The second:

> "The work for the publication of which Bradlaugh was sentenced was, as I have pointed out, confined to the inculcation of methods of birth control. The plaintiff has done what Bradlaugh did, but she has done something more. We were referred in the course of the argument to certain passages in the books published by the plaintiff of such a nature that they were not read aloud. These books have a very large circulation, and for my part I cannot doubt that they are calculated to have a most deplorable effect upon the young of both sexes. It would be absurd to say that the epithet "monstrous" as applied to such

> a "campaign" passes the bounds of fair criticism, or that it was not fair comment to use language implying that such passages as those to which I have referred aggravate the criminality of the obscene libel."

184. It may be that, as St John-Stevas tells us, by the 1930s the birth controllers had effectively carried the day – though only, of course, in relation to the married – but as late as 1941 a judge of what is now the Family Division could refuse to accept as common knowledge the use of contraceptives. In *Firth v Firth* (1941) June 25, unreported (but see [1948] AC 278), Langton J said:

> "[Counsel] said that it was a matter of common knowledge that young people, for a period, at any rate, after their marriage had intercourse only with the intervention of contraceptives. On this part of his common knowledge I can only offer him my sympathy. It is no part of my common knowledge and I decline to accept it as a matter of common knowledge at all."

185. But by 1947 acknowledgement of social realities was forthcoming at the highest level. In *Baxter v Baxter* [1948] AC 274 the House of Lords had to consider whether a wife who insisted that her husband always used a condom was thereby guilty of a wilful refusal to consummate the marriage within the meaning of section 7(1)(a) of the Matrimonial Causes Act 1937. The House held that she was not, for a marriage may be consummated although artificial methods of contraception are used. Pressed with Langton J's comments, Viscount Jowitt LC at p 290 said:

> "Long before the passing of the Matrimonial Causes Act 1937, it was a matter of common knowledge that reputable clinics had come into existence for the purpose of advising spouses on what is popularly called birth control, and (with all respect to a dictum to the opposite effect by the late Langton J in the unreported case of *Firth v Firth*) it is also a matter of common knowledge that many young married couples agree to take contraceptive precautions in the early days of married life."

186. In 1949 the Royal Commission on Population, Cmd 7695, said at para 427:

> "Control by men and women over the numbers of their children is one of the first conditions of their own and the community's welfare, and in our view mechanical and chemical methods of contraception have to be accepted as part of the modern means, however imperfect, by which it can be exercised."

187. The Royal Commission added (paras 434 and 657) that "public policy should assume, and seek to encourage, the spread of voluntary parenthood." It recommended (paras 536 and 667) that all restrictions on giving contraceptive advice to married women under public health services should be removed. The Commission did not suggest giving advice to unmarried women.

188. The National Health Service (Family Planning) Act 1967 was enacted on 28 June 1967, some four months, it may be noted, *before* the Abortion Act, enacted on 27 October 1967. This Act (later amended by the National Health Service (Family Planning) Amendment Act 1972), and the Ministerial directions made under it, swept away the remaining institutional restraints on the provision of contraception for social rather than purely medical reasons and any remaining distinction between the provision under the National Health Service of contraceptives to the married and the unmarried.

189. We are at last in the modern world.

190. So much for the legal and social history of contraception. I must briefly outline what one might call the technical or technological history.

Contraception – modern contraceptive technology

191. On this topic also I had evidence from a number of very eminent medical experts: Dr Connie Smith, Director at the Clinical Effectiveness Unit at the Faculty of Family Planning and Reproductive Health Care of the Royal College of Obstetricians and Gynaecologists (statement dated 12 July 2001); Dr Peter Norman Longthorne, Medical Director of Schering Health Care Limited (statements dated 3 August 2001 and 21 January 2002); Professor Steven Smith, Professor of Obstetrics and Gynaecology and Head of Department in the Department of Obstetrics and Gynaecology at the University of Cambridge (statements dated 19 October 2001 and 6 February 2002); and Professor Chris Barratt, Professor and Head of the Reproductive Biology and Genetics Research Unit at the University of Birmingham and Scientific Director of the Assisted Conception Unit at the Birmingham Women's Hospital (statement dated 22 October 2001).

192. Again these experts were at one on all matters of importance. So far as it is necessary for present purposes the position can be summarised (again in very simplified terms) as follows.

193. The condom in its modern form dates back, as I have said, to the 1880s. Down to the late 1950s for all practical purposes, apart from periodic abstinence, only the so-called "barrier" methods of contraception were in use: that is, the condom and the pessary or diaphragm. Since then there has been a revolution not merely in attitudes to contraception but also in contraceptive techniques.

194. I should briefly describe six different forms of what might, more or less accurately, be called modern contraceptive techniques:

i) *Intra-uterine devices (IUDs, coils)* – Non-chemical coils were first developed in the early years of the twentieth century but it was only in 1959 that their use

in this country became popular. They are now in common use and can be inserted either before or after coitus. They are fitted by a doctor.

ii) *Combined oral contraceptives (the pill)* – These contain a combination of synthetic oestrogen and a progestogen. The initial research was undertaken in the 1940s (hence, no doubt, the reference in *Baxter* at pp 277 and 289 to "a drug taken orally by a woman before intercourse to procure temporary sterility"). Development and testing of a practicable pill followed during the 1950s. The first commercial pill was introduced in Britain in 1961. It is commonly taken as a contraceptive by millions of women. It is taken daily for three weeks out of the four weeks of a woman's menstrual cycle.

iii) *Progestogen-only oral contraceptives (the mini-pill)* – These contain a small dose of a progestogen and are taken daily and continuously. They were developed during the 1970s.

iv) *Intra-uterine progestogens (IUS)* – These are coils which include a chemical. The chemical is the same as that used in the combined pill and the morning-after pill: progestogen. Like other IUDs they are fitted by a doctor and can be inserted either before or after coitus.

v) *Intra-muscular progestogens* and *sub-dermal progestogens* – These are progestogens delivered either by injection every three months or by a sub-dermal implant for up to three years use.

vi) *Emergency hormonal contraceptives (the morning-after pill)* – These fall into two categories: (i) combined emergency hormonal contraceptives containing a combination of oestrogens and progestogen (Levonorgestrel) and (ii) progestogen only emergency contraceptives containing only Levonorgestrel. The first morning-after pill was available in experimental form in the early 1970s. As I have said, it has been available to the public in the United Kingdom since 1984, when Schering PC 4 was launched as a prescription only medicine. This was a combined pill containing oestrogens and progestogens. It was followed by Levonelle-2, a pill containing only Levonorgestrel which was launched as a prescription only medicine in February 2000. Levonelle was launched as a pharmacy only medicine, following the coming into force of the 2000 Order, in February 2001. Levonelle is taken in two doses. The second must be taken 12 hours after the first. Both must be taken within 72 hours of potentially fertile intercourse.

195. The "barrier" methods of contraception – condoms, pessaries and diaphragms – act, as their generic description would suggest, in such a way as to prevent the meeting of ovum and sperm. They therefore act to prevent conception; they are incapable of preventing ovulation or affecting implantation.

196. The precise way or ways in which the other contraceptive pills and devices operate are still not fully understood. What is known, however, and this for present purposes is the vital point is that they *all* – IUDs, the pill, the mini-pill, the morning-after pill and the others – can operate either to prevent conception *and/or* to prevent implantation.

197. The various ways in which such pills and devices may work are summarised by Dr Connie Smith:

> "Acknowledging the uncertainties in this area, the research evidence indicates that contemporary non-barrier contraceptives act at one or more of the currently identified key stages of the early reproductive process, ovulation, sperm migration, fertilisation and embryo implantation into the endometrium. Several commentators have argued that there is little evidence that current contraceptive methods work after fertilisation. However extensive clinical research shows their profound effects on the endometrium. It is therefore plausible that non-barrier contraceptives may act at the level of the pre-implantation pre-embryo, the endometrium or the implantation process."

198. She adds:

> "Contraceptives providing synthetic hormones can act to disrupt endometrial development. Intra-uterine contraceptives provoke an inflammatory reaction in the endometrium and uterine cavity which may prevent either fertilisation or implantation."

199. The various modes of operation of these non-barrier methods can be summarised in simple terms as follows:

i) *Non-chemical IUDs* – These do not affect ovulation. They provoke a local inflammatory effect in the upper genital tract, disrupting both fertilisation and implantation. Dr Connie Smith makes the point that in everyday practice it is not possible to determine which method of operation is involved.

ii) *The pill* – Although its primary effect in most women is to prevent ovulation, the pill can operate in any of three ways: to prevent ovulation, to prevent the sperm from reaching the ovum by reducing sperm penetration into the uterine cavity (and hence to prevent conception) and to prevent the process of implantation by alteration of endometrial receptiveness. It is well known that the pill has a significant effect on the endometrium because it has a significant effect on menstrual flow; in this connection it is to be remembered that the pill contains (albeit in lower quantities) the same active ingredient – progestogen – as the morning-after pill. Dr Connie Smith makes the important point that in

everyday practice it is not possible to determine whether in a particular woman the pill is operating to prevent ovulation, conception or implantation.

iii) *The mini-pill* – This has its main effects on the cervix (preventing sperm penetration) and on the endometrium (disrupting implantation). In some women it will disrupt ovulation. Again Dr Connie Smith makes the point that in everyday practice it is not possible to determine whether the mini-pill is operating to prevent ovulation, conception or implantation.

iv) *IUSs* – These also operate in the same three ways. Again it is not possible to tell how in the case of any particular woman.

v) *Intra-muscular progestogens* and *sub-dermal progestogens* – These operate primarily to prevent ovulation but if the primary mode of action fails will also operate to prevent either conception or implantation. Again, in everyday practice it is not possible to tell in which way they are acting on a particular woman.

vi) *The morning-after pill* – Although there remains some doubt about how precisely it operates, and whilst there is an important difference of opinion as to which is the primary mechanism, it is common ground that, so far as currently understood, the morning-after pill can operate in principle to prevent ovulation, to prevent fertilisation or to prevent implantation. The medical evidence was divided as to where the most common focus of contraceptive effect is to be found: Dr Longthorne believes that the predominant mechanism of action of Levonorgestrel exerts its effect prior to fertilisation; Professor Steven Smith that its principal effect is upon implantation ("there is little effect on sperm penetration" and "a low chance of affecting ovulation"); Professor Barratt that its effect on sperm transport is likely to be negligible. Dr Connie Smith was unwilling to identify the predominant mechanism. I do not think it matters for present purposes. Two things are clear. Once the embryo has implanted the morning-after pill cannot act to cause it to de-implant. Moreover, as Dr Longthorne put it, there is nothing which would enable a woman, her doctor or pharmacists to determine which mechanism or combination of mechanisms operates on any individual occasion when the morning-after pill is taken.

200. Dr Connie Smith helpfully tabulates this information in a chart which can be summarised as follows:

i) *Barrier methods* operate only to prevent fertilisation: they cannot prevent either ovulation or implantation.

ii) *IUDs* operate either to prevent fertilisation or to prevent implantation: they cannot prevent ovulation.

iii) *The pill, the mini-pill, IUSs, intra-muscular and sub-dermal progestogens and the morning-after pill* all operate either to prevent ovulation or to prevent fertilisation or to prevent implantation. The differences between them come down to this, that whereas with the pill the most common focus of contraceptive effect is the prevention of ovulation, the most common focus of contraceptive effect with the mini-pill, IUSs and sub-dermal progestogens is the prevention of either fertilisation or implantation. In relation to the morning-after pill views on the point are, as I have said, divided.

201. Although, perhaps understandably, SPUC was reluctant to acknowledge the full implications of all this evidence, its importance is obvious. *If* SPUC's case is correct in relation to the morning-after pill, then the same legal consequences for which it contends must also follow in the case of IUDs, the pill and the mini-pill.

<u>Contraception – the legal implications of modern contraceptive technology</u>

202. That certain forms of so-called contraception (IUDs in particular) might possibly present objections along the lines of those now taken to Levonelle by SPUC is no recent realisation. In fact the problem has been recognised for a long time.

203. I note in passing that the medical evidence in *Sutherland v Stopes* appears to have been unanimous that one of the two methods of contraceptive birth control advocated by Dr Stopes – what Viscount Cave LC (at p 57) referred to as "an apparatus called the "gold pin""; I assume it to have been an early version of the coil – was in fact an abortifacient, inasmuch as it was "calculated to produce abortion" (see at p 57) or, as Viscount Finlay put it (at p 67), "promotes conception but causes early abortion".

204. Be that as it may, as long ago as 1962 the Report of the British Council of Churches Working Party on Human Reproduction recognised (at pp 20-22) that there was a difficult question as to whether contraceptive techniques which involve interference in one way or another with the fertilised ovum in law constitute abortion. Referring to section 58 of the 1861 Act the Working Party observed at p 22:

> "if considering an interference with a fertilised ovum before nidation, the Courts would have to decide whether or not the interference constituted the procuring of a miscarriage. As 'miscarriage' is not defined in the 1861 Act the question would be resolved by the Court after medical evidence had been given. The legal questions, therefore, remain open so far as the prevention of the development of the fertilised ovum before nidation or the prevention of nidation are concerned."

205. The same point was raised by Glanville Williams in an address entitled *The Legalization of Medical Abortion* given to the Annual General Meeting of the Abortion Law Reform Association in October 1963 and printed in the Eugenics Review for 1964 at p 19. At p 21 he said this:

> "Recent advances in the control of fertility emphasize the arbitrary nature of the line between contraception and abortion. For example, success has recently been achieved with IUCDs (intra-uterine contraceptive devices) for the purpose of birth control, but it is still not known whether their effect is contraceptive (by preventing the fusion of the male and female cells) or abortifacient (by preventing the fertilized ovum from lodging in the womb). I find it hard to believe that those who accept chemical and mechanical methods of birth control will attach importance to the question whether the device operates just before the fusion of the two cells or just after. It is a totally unrealistic point on which to hinge a discussion. No one really believes that detaching the fertilized ovum is equivalent to the murder of a human being."

206. And in 1971 St John-Stevas in *The Agonising Choice* commented at pp 37-39 that it was not then known with any certainty exactly how IUDs, the mini-pill and the morning-after pill (the latter two at that time still at an experimental stage) worked. Of IUDs he said:

> "The question arises whether use of such devices is a method of contraception or of abortion."

Of the morning-after pill he said:

> "The 'morning after' pill could be open to the objection that it is a form of abortion which destroys human life. Whether this is so will depend upon whether human life is considered to begin when the egg is fertilised or only when it becomes implanted in the wall of the womb and begins to develop into an embryo."

207. I return below to consider the more recent commentators.

Contraception – terminology

208. In modern times much of the debate with which I am concerned has been carried on in terms of the asserted contrast between contraception and abortion, between contraceptives and abortifacients. Often the issue is formulated in terms of the question: Is the morning-after pill a contraceptive or an abortifacient? As Professor Grubb has pointed out, this simple contrast may be too simplistic. There are in fact at least three different situations to be considered. In Kennedy & Grubb (eds) *Principles of Medical Law* (1998) he comments at para 11.10:

> "A contraceptive is a medicinal substance or device which prevents fertilisation of the egg by the male sperm. Obvious examples of this are the so-called 'pill' or barrier methods such as condoms. These prevent by chemical or physical means fertilisation. Other methods may not prevent fertilisation but act

> in such a way that the fertilised egg, if any, does not implant in the woman's uterus. Examples of these are post-coital methods like the so-called 'morning after pill' or intra-uterine devices (IUDs) whether fitted post-coitally or not. In these situations it is better to term the methods as contragestive rather than contraceptive since they act *only* to prevent gestation. Further complications may arise … in that the agents may act not to prevent gestation but to end it. In other words, after the developing embryo has implanted they effect its expulsion from the woman's uterus. Are any of these properly subject to the legal regulatory regime for terminations or abortion? The answer depends principally upon one issue: do they effect a 'miscarriage' so as to fall within the criminal prohibition in the 1861 Act?"

THE MORNING-AFTER PILL – THE 'SOCIAL' CASE

209. The social case for the morning-after pill, and for its availability as a pharmacy only, as opposed to a prescription only, medicine, is at the forefront of fpa's case. Evidence on behalf of fpa was given by its Chief Executive, Anne Weyman (statement dated 3 August 2001). fpa's case was elaborated in a most helpful skeleton prepared by its counsel, Ms Nathalie Lieven.

210. fpa's case is important. I should deal with it in some detail because it sets out what for most people, other than lawyers, this case is really about.

211. fpa is well known. It was founded in 1930 as a provider of contraceptive advice and information. It is very widely involved in working with the public and professionals to provide information and services to those who need them in this field. The material deployed by Ms Weyman plainly makes good her claims that "fpa is the UK's leading generalist sexual health charity" and that its "unique expertise in the area of contraception" puts fpa "in a particularly good position to comment upon the importance of emergency contraception, and the needs of those who may wish to take it." As Ms Lieven submits, fpa has a unique position as a national voice on sexual health issues.

212. Ms Weyman makes no bones about fpa's standpoint. She tells us that fpa campaigned for contraception to be made available through the NHS and says:

> "Its mission is to enable people in the UK to make informed choices about sex and to enjoy sexual health free from exploitation, oppression and harm."

213. Ms Lieven submits that in these circumstances 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. The Secretary of State agrees. So do I.

214. Ms Weyman's evidence was startling in its implications. Using the words "pregnancy" and "abortion", as she puts it, "in the way that they are generally understood", she says:

> "Emergency contraception, including Levonelle, is a safe and effective method of preventing unintended pregnancy. It is unique in the area of family planning in that it is the only method that can be used to prevent pregnancy *after* unprotected sex or a contraceptive failure. Provision of emergency contraception and expanding access to emergency contraception has the potential to *significantly* reduce the numbers of unintended and unwanted pregnancy [sic] and as such reduces the need for abortion. Research demonstrates that in those countries which have good contraceptive services and provide good availability of emergency contraception as 'back-up', abortion rates are low."

215. The statistical significance of all this is borne out by the following comments:

> "Evidence from prescriptions dispensed in England in 2000 shows that there is a very high demand for emergency contraception. The Department of Health statistics show that in 2000 there were 273,900 prescriptions for Levonelle, and 280,900 for Schering PC4."

> "The importance of emergency contraception is further illustrated by the following statistics. It is estimated that about half of the pregnancies in the UK are unplanned. About 22% of all pregnancies end in induced abortion. About three quarters of women having an abortion were using some form of contraception when they conceived. Research shows that most women requesting an abortion would have used emergency contraception if they had known what it was, where to get it and the time limits for its use. This research also shows that most of these women would have preferred to have used emergency contraception rather than having an unplanned pregnancy."

216. She adds:

> "Demand for improved and wider accessibility of emergency contraception is well documented in the research literature. Demonstrated need for improved access and availability is shown by the increase in demand for emergency contraception at weekends and public holidays, a time when primary care services (GP, family planning clinic) are not always available."

217. Ms Weyman continues:

> "It is very difficult to produce direct evidence that if emergency contraception ceases to be available, or becomes more difficult to obtain, then the number of abortions will rise. However, in my view it is overwhelmingly likely that this will be the case. It follows from the large numbers of women who use emergency contraception at the present time, that the numbers of unintended pregnancies will increase. Emergency contraception has the potential to reduce the need for abortion."

218. As she points out, emergency contraception is safe, simple and effective. Abortion, although in this country safe and effective, is both medically and psychologically invasive and usually involves procedures which have the possibility of greater and potentially more serious side effects than emergency contraception. As she also observes:

> "On a wholly practical level, abortion care involves numerous health professionals and a far greater cost to the public purse than does the use of emergency contraception."

219. Her conclusions are clear and emphatic:

> "All women using [emergency contraception] are women making responsible choices and should be supported in this choice. … In the view of fpa, there are overwhelmingly strong reasons why it is better to provide emergency contraception than to put more women in a position where they may need to seek an abortion. … It is fpa's view that it is vitally important that Levonelle, or other similar products should be available from pharmacists … emergency contraception is vital area of family planning and is currently an under-utilised part of the contraceptive repertoire. Wider provision and access could contribute to a reduction in unintended and unwanted pregnancy."

220. Ms Lieven's submissions on behalf of fpa focussed on what she called the extraordinary importance of this application and the consequences of the court making the order sought.

221. Focussing on the heart of fpa's concerns she made two submissions to both of which there is, so far as I can see, simply no answer:

    i) Although SPUC seeks only a declaration that a person administering Levonelle to a woman in certain circumstances commits an offence under section 58 of the 1861 Act, and that a person supplying Levonelle in certain circumstances commits an offence under section 59, it must follow from Mr Gordon's argument, if it is correct, that a woman who takes Levonelle and who is in fact "with child" would also in certain circumstances commit an offence. Thus,

says Ms Lieven, the effect of SPUC's argument would be to criminalise a very large, although indeterminate, number of women. She comments, as it seems to me with justification, and as some might think with moderation, that it is not clear whether SPUC has simply not considered the logic of its argument, or whether it merely wants to avoid highlighting this startling consequence.

ii) It is clear from the medical evidence, which SPUC does not seek to dispute, that the effect of its argument is that the alleged criminal consequences of taking, administering or supplying Levonelle, would also apply to the majority of other contraceptive methods, including the use of IUDs and *all* hormonal contraceptive methods. The social consequences of such a decision can fairly, and without exaggeration, she says, be described as catastrophic, yet SPUC has sought to entirely ignore these consequences of its argument.

222. I agree.

223. On this last point Ms Weyman's evidence is sobering:

> "Therefore if [SPUC's] argument succeeds it can be seen that the case will have a much wider effect than merely preventing the sale in pharmacies of Levonelle. It is fpa's view that the impact of such a decision would be devastating both in terms of individual choices and lives and in social policy terms. In 1999 some 34% of all women between the ages of 16-49 in Great Britain were using methods of contraception which could be affected by the outcome of this case. In total that is about 4.5 million women, If this application succeeds it will fundamentally affect their lives and those of their partners" – and, I would add, those of their families and other children.

224. As Ms Lieven says, if the implications of SPUC's arguments for other forms of contraception are taken into account, which, she says and I agree, they should be, then about 4.5 million women would potentially become guilty of criminal offences.

225. The Secretary of State supports the social case put forward by fpa. As I have already said, he stresses that there is what he calls a powerful social case for the morning-after pill both being available and being available as a pharmacy only medicine.

AUTHORITY

226. I have been taken to a number of judicial decisions from the common-law world, to a large mass of academic writing on the topic, to relevant materials (including some judicial decisions) from various foreign legal systems and, finally, to certain non-medical dictionaries. I shall deal with these in turn.

Judicial decisions

227. Surprisingly few authorities are relied on by any of the parties as throwing any light on the problem I have to decide. I have been referred only to six. They come from far and wide. It is convenient if I take them chronologically.

228. The first is *Queen-Empress v Ademma* (1886) ILR 9 Mad 369, a decision of Muttusami Ayyar and Brandt JJ in the Appellate Criminal Court of Madras. In that case a prosecution had been brought under section 312 of the Indian Penal Code, which made it an offence "voluntarily [to] cause a woman with child to miscarry". The trial judge held that the defendant, who had only been pregnant for one month, could not be said to have been "with child", for "according to the evidence, what came away was only a mass of blood" and "there was nothing which could be called even a rudimentary foetus or child". Setting aside the acquittal, and directing a re-trial, the appellate court said this:

> "The term miscarriage is not defined in the Penal Code. In its popular sense it is synonymous with abortion, and consists in the expulsion of the embryo or foetus, ie., the immature product of conception. The stage to which pregnancy has advanced and the form which the ovum or embryo may have assumed are immaterial. Section 312 requires proof that the woman is "with child," but it is enough if the fact of pregnancy and the intentional expulsion of the immature contents of the uterus are established. The words "with child" mean pregnant, and it is not necessary to show that "quickening", ie., perception by the mother of the movements of the foetus has taken place or that the embryo has assumed a foetal form."

229. The next is *R v Trim* [1943] VR 109, a decision of the Full Court (Macfarlan, Martin and O'Bryan JJ) of the Supreme Court of Victoria. In that case the court had to consider section 62 of the Crimes Act 1928, which made it an offence to do certain acts "with intent to procure the miscarriage of any woman", specifically in the context of an argument (rejected by the court) that it was a defence if the defendant believed that the child in the womb was already dead. Martin J, with whom O'Bryan J agreed (Macfarlan J dissented), treated "miscarriage" as synonymous with "abortion" and as referring to what he variously described (at p 116) as the expulsion or removal of "the contents of a gravid uterus", the "untimely emptying of a uterus which contains the products of a conception" and "the emptying of the contents of the womb". It was accordingly neither here nor there that the child was already dead.

230. The third is *Munah Binti Ali v Public Prosecutor* (1958) 24 MLJ 159, a decision of the Court of Appeal of Malaya (Thomson CJ, Whyatt CJ(S) and Good J). In that case section 312 of the Penal Code was in the same terms as that considered in *Ademma*. At p 160 Thomson CJ said:

> "it is quite clear that the expression "causes a woman with child to miscarry" means to cause her to lose from the womb

> prematurely the products of conception and … therefore there can be no offence under the section unless there are products of conception".

231. Thus far the authorities throw little light on the matter. So far as I can see they provide no support either for Dr Keown's thesis or for SPUC's case. If one can safely read anything into them at all – and I have to say I am sceptical – their uniform references to miscarriage as involving the loss of the contents of the uterus would tend to support the defendants' case

232. The next case is *R v Price (Herbert)* [1969] 1 QB 541, a decision of the Court of Appeal, Criminal Division (Sachs LJ, Fenton Atkinson and Cusack JJ). In that case a woman went to consult the defendant, a doctor, as she thought she was pregnant and did not wish to have the child. It was common ground that she told the defendant she thought she was some three months pregnant, that she desired not to have the child and that there was talk of going to Harley Street if there was any question of terminating any pregnancy. Although she exhibited most of the classic symptoms of being pregnant the defendant apparently told her that he did not think she was. The defendant suggested that she should be fitted with a Gynekoil, an IUD, according to the defendant, because she was frightened of becoming pregnant, and according to the woman, to procure an abortion. Two days later, the coil was inserted. The following day the woman went to a police surgeon who concluded she was pregnant and would shortly miscarry which she did on the following day, the foetus being some ten weeks old. The defendant was convicted by the jury of using an instrument – the Gynekoil – with intent to procure a miscarriage, contrary to section 58 of the 1861 Act.

233. The case actually went to the Court of Appeal on a wholly different point from that which I am considering, namely the complaint (in the event upheld by the Court of Appeal) that the trial judge had misdirected the jury in failing to warn them of the dangers of convicting the defendant on the uncorroborated evidence of the woman – she being in law an accomplice. However, in the course of explaining how that issue arose Sachs LJ, having set out the facts as I have summarised them, said (at p 544E):

> "The essential issue for the jury was, did the defendant at the time that he inserted the Gynekoil with the insertion tube know or believe that [she] was pregnant and accordingly introduce the instrument with intent to produce a miscarriage, or did he, as it was his case for the defence, think that she was not pregnant and introduce it for the purpose of allaying anxieties on her behalf as regards the future."

234. Now it is apparent that the defendant must have known that the woman *might* be pregnant – he must have been aware of the *possibility* of there being a pregnancy. After all, he presumably *knew* that she had had unprotected sexual intercourse, given her statement to him that she thought she was pregnant. So when Sachs LJ said that the question was did the defendant "know or believe that [the woman] was pregnant" he must have meant did he know or believe that she was actually pregnant. Thus, while an actual pregnancy need not be proved – for except where the woman herself is

charged the offence is committed whether or not the woman is "with child" – the Crown has always to prove that the accused believed that a pregnancy did in fact exist. Suspicion of pregnancy does not amount to knowledge or belief. As Norrie puts it (K Norrie *Post coital Anti-pregnancy techniques and the law* in Templeton & Cusine (eds) *Reproductive Medicine and the Law* (1990) 11 at p 14), what has to be proved is knowledge or belief in the actuality of pregnancy.

235. So far so good. But valiant attempts have been made by the commentators to read into this case support for the proposition being propounded before me by the Secretary of State, Schering and the FPA. Thus Kennedy & Grubb assert (*Medical Law* p 1412) that:

> "By 'pregnant' it is reasonably clear that Sachs LJ had in mind a woman's condition 'post-implantation'."

236. I can only say that it is very far from clear to me that the Lord Justice had any such concept in mind: the distinction between fertilisation and implantation was plainly irrelevant in a case where the woman, if she was pregnant at all, was on any view many weeks pregnant.

237. Crystal-Kirk (David Crystal-Kirk *Embryo Arrest: The "No-Man's-Land" between Contraception and Abortion* (1989) 57 Medico-Legal Journal 111 at pp 113-114) says this:

> "Now, if one is to assume that Price, as a doctor qualified in and familiar with the use of the Gynekoil, knew how it worked – and if one also assumes that the prosecutor and the Court of Appeal knew how it worked – the direction to the jury is interesting: the only way in which the coil *can ever* work is to impede a blastocyst from implanting in the endometrium. If Price intended this, did he not, by intending that *a* nidation be prevented, either then or later, necessarily intend to induce abortion? Clearly both the Assize Court and the Court of Appeal thought not. *Price* is therefore the only authority on the point in English law – that there is a "no-man's-land" when it is too late for contraception but too early for abortion. During this period, there is no prohibition on embryo arrest."

238. He adds: "the very concept of embryo arrest seems to have been overlooked, except (impliedly) by the Court of Appeal in *Price*." The argument is clever and ingenious but, with respect, seems to me to depend too much on attributing a certain level of understanding to the court on medical matters which there is no reason to believe had ever been explored in evidence and in relation to an issue which, for good or ill, neither the Crown nor the defence had seen fit to raise.

239. I find it difficult to read into, let alone derive from, *R v Price* any clear support for the proposition which some would seek to find in it. The most one could derive from the

case is that necessarily, so it might be thought, one cannot know or believe (as opposed to suspect) that a woman is pregnant until the time has been reached at which – whether by identification of the symptoms of pregnancy, medical examination or some form of 'pregnancy test' – the fact of pregnancy can be objectively determined; and, in the current state of medical knowledge and medical technology, that time *cannot* be earlier than the stage of implantation. But even that, as it seems to me, is probably to read too much into the decision.

240. The highest the point can be put, as it seems to me, is that there is nothing in the decision which stands in the way of the Secretary of State's argument. Whilst there may be nothing in it to support his case there is equally nothing in it to support SPUC's case. And I note that Dr Keown does not refer to it in his article as throwing any light on the problem with which I am concerned.

241. The fifth case is *The Attorney General (ex rel The Society for the Protection of Unborn Children Ireland Ltd) v Open Door Counselling Ltd and Dublin Wellwoman Centre Ltd* [1988] IR 592, a decision of Hamilton P in the High Court in Ireland which led eventually to the proceedings in the European Court of Human Rights to which I have already referred in paragraph [61] above. Referring to sections 58 and 59 of the 1861 Act (which continue to apply in Ireland unaffected by any legislation corresponding to the 1967 Act) he said (at p 598):

> "Sections 58 and 59 of the Offences Against the Person Act 1861 protected and protect the foetus in the womb and having regard to the omission of the words "Quick with child" which were contained in the statute of 1803 … that protection dates from conception. Consequently, the right to life of the foetus, the unborn, is afforded statutory protection from the date of its conception."

242. It may be observed that the point with which I am concerned did not arise for decision in that case. Moreover, unless he was using the word "conception" in the sense of the medical definitions given by *Reiss* and *Stedman* (in which case the passage is of no conceivable help to Mr Gordon) the learned judge's comments would seem to display some internal inconsistency since he refers to statutory protection as being both to "the foetus in the womb" and as existing from "the date of … conception". It is common ground that there is nothing in the subsequent proceedings in the Irish Supreme Court which throws any light on the point.

243. The last case, and as it happens the authority most clearly in point – indeed, the only authority directly in point – is *R v Dhingra* (1991), an unreported decision of Wright J in the Crown Court at Birmingham. Because the case is for some reason unreported, and because it is so directly in point, I propose to set out the relevant parts of the judgment at some length.

244. In that case a doctor who had fitted a patient, Miss Fortey, with an IUD was charged with an offence under section 58 of the 1861 Act. Having heard medical evidence

from two consultant gynaecologists and legal argument the judge withdrew the case from the jury. I need not set out the medical evidence. Suffice it to say that, as summarised by Wright J in his ruling (Transcript pp 2C-3C), the evidence in that case (by which I mean both the evidence relating to the processes of conception and pregnancy and the evidence as to the operation of IUDs, the pill and the morning-after pill) was in all material respects to the same effect as the evidence I have heard in the present case.

245. There is one part of the medical evidence, however, which requires emphasis. As Wright J explained (Transcript p 2G):

> "Both doctors agree that so far as the current thinking of the medical profession is concerned the use of the word "miscarriage" relates to the spontaneous loss of an established pregnancy and not the result of anything done to interfere with the processes of fertilization or implantation."

246. He added (Transcript p 3C):

> "Both doctors agree that in the proper use of modern medical terminology the function of both the pill and the coil in such circumstances is contraceptive, and not abortifacient. To put it in layman's terms, the use of pill or coil in such circumstances is to prevent a pregnancy commencing, and not to displace an established pregnancy."

247. Referring to *R v Price*, Wright J identified the key issue as follows (Transcript p 1F):

> "The essential question for the jury is … whether the defendant, at the time he inserted the coil, knew or believed that Miss Fortey was pregnant, and, accordingly, introduced the instrument with intent to procure a miscarriage, or whether, as is the case for the defence, that he knew or believed that she was not pregnant, in the true sense of the word, and that his purpose in inserting the coil was for contraceptive purposes; in other words, to prevent her from becoming pregnant thereafter."

248. He summarised the factual position in the case as follows (Transcript p 5G):

> "In the light of the evidence as it presently stands, therefore, the uncontradicted position seems to be this: when the defendant fitted Miss Fortey with a coil on the 27th of September 1988, it is improbable that any ovum that had just been, or was about to be, released from her ovary was fertilized or likely to become so. However that may be, it would be contrary to all the available medical evidence, and highly unlikely, that any fertilized ovum present in her body had even begun the

> implantation process, let alone become established. On the evidence that I have heard, that stage can only be said with certainty to have occurred when the next menstrual period is delayed, or by day 20 of the standard 28-day cycle at the earliest.
>
> The generally accepted medical practice in the use of the coil as a post-coital contraceptive device is that it may properly be introduced at any time up to the 20th day. I was informed by [one of the medical experts] that the use of the coil in this way is described with approval in the handbook of contraceptive practice published by the Department of Health. Further, as I have previously indicated, the best medical opinion is that the operation of the coil in these circumstances is to prevent pregnancy from becoming established, and not to terminate an existing pregnancy."

249. Wright J's ruling is then set out in a long passage (Transcript p 6C) which I propose to set out in full:

> "On that factual basis, what is the position in law? It turns, as it seems to me, upon the true construction in section 58 of the word "miscarriage". Does it have the wider meaning of any external interference with the process of reproduction from the time of fertilization; or does it have the narrower meaning of the displacement from the woman's womb, and subsequent loss of, an established pregnancy? It is this more restricted meaning that is used by the medical profession in modern times.
>
> Mr Cliff, on behalf of the Crown in the present case, has indicated that if I take the view, as I do, that the only proper interpretation of the evidence is that the insertion of the IUDC took place at a time when Miss Fortey's pregnancy, if any, had not become established, then he would not wish to contend that the action of the device in such circumstances amounted to the procuring of a miscarriage within the meaning of the 1861 Act. Nevertheless, I am conscious that this whole topic is of very considerable importance to the medical profession and I consider that it is incumbent upon me to make up my own mind about the matter.
>
> The researches of both counsel and myself reveal no previous direct authority on the point, and the 1861 Act itself contains no guidance. This is perhaps not surprising, as I am told by the doctors that in 1861 the mechanics of a woman's reproductive processes were not nearly so well understood as they are today, nor were the modern techniques of interference available; so that when this Act was passed into law it would have been contemplated that the earliest date upon which anyone minded to interfere with the possible consequences of an unprotected

act of sexual intercourse would find it necessary or appropriate to do so would only be after the woman involved had missed her first menstrual period.

There are, however, a number of sources from which some assistance can be gleaned. The Concise Oxford English Dictionary gives a the definition of "miscarriage" in the present context: "the untimely delivery of a pregnant woman, abortion," and, in the medical context: "the delivery of a probably non-viable foetus in the 12th to 28th week of pregnancy." The word "miscarry", when used of a woman, is defined as: "to be delivered prematurely of a child."

The authoritative medical dictionary known as Stedman defines miscarriage as: "spontaneous expulsion of the product of pregnancy before the middle of the second trimester."

These two authoritative definitions tend to confirm me in the view that I had already tentatively formed, that the ordinary meaning of the word relates to some mischance occurring after the initial establishment of a pregnancy, which leads to what is generally known, in the well-known phrase, as the mother "losing the baby." That tentative view is greatly reinforced by the following matters:

1. In the report of the Committee on the working of the Abortion Act 1974, (Cmnd 5579) (The Lane Committee), the word "miscarriage" is defined at pages 265 and 268 as being synonymous with "abortion", which in turn is defined as: "the separation and expulsion of the contents of the pregnant uterus." That definition, which in my respectful opinion coincides with the generally understood meaning of the word, and certainly with its use in medical terminology, is plainly not apt to describe the operation of the IUCD as it is presently understood, and as it was used in the present case, which prevents the pregnancy coming into existence. The situation would of course be different if the device was inserted after a pregnancy had been established. The use of the word "interceptives" by some authorities as describing the function of such a device is also of some assistance.

2. In a statute to some extent *in pari materia* with section 58 of the 1861 Act, although post-dating it by 129 years, namely, the Human Fertilization and Embryology Act 1990, by section 1(1) "embryo" means a live human embryo where fertilization is complete, and references to an embryo include an egg in the process of fertilization. By section 2(3), for the purposes of this Act, a woman is not to be treated as carrying a child until the embryo has become implanted. The medical evidence indicates that at that stage proper terminology will describe it as a foetus.

3. In *The Royal College of Nursing v DHSS* [1981] 1 All ER 545 a case concerned with the impact of the Abortion Act 1967 upon the Nursing profession, the details of which I need not go into, the whole of the discussion at first instance, in the Court of Appeal and in the House of Lords, in relation to the processes there in question, and the application to such processes of the 1967 Act, is entirely in terms of pregnancy and the effect upon the foetus.

When one bears in mind that the action of an IUCD is to inhibit the successful implantation of a fertilized embryo in the uterine wall, and is the same whether the device is implanted before or after an act of intercourse, and bearing in mind the wording of the relevant part of section 58, the adoption of the wider definition of "miscarriage" seems to me to lead to the consequence that an offence under this Section <u>might</u> be committed by anyone who inserted an IUCD in a woman, in the course of routine contraceptive precautions, with the intention of preventing a pregnancy at any time in the future.

A like consideration would seem to me to apply to the administration of any contraceptive pill containing the hormone progestogen, which operates in a similar way, whether that pill was taken pre- or post-coitally. Such an interpretation is so startling, so much in variance with what is ordinarily understood to be the purpose of section 58, and would so interfere with what is by now the well-established practices of the medical profession in the family planning field, that I would be intensely reluctant to adopt this wider construction of the section unless forced to do so by incontrovertible arguments.

In this context I note with interest, on the aspect of public policy that the restricted interpretation of "miscarriage" was advanced by the Attorney General – Sir Michael Havers, as he then was – in a written parliamentary answer on the 10th of May, 1983, when he was explaining his decision not to institute proceedings against those supplying and administering the post-coital pill. He declared:

> "It is clear that, used in its ordinary sense, the word miscarriage is not apt to describe a failure to implant, whether spontaneous or not. Likewise, the phrase 'procure a miscarriage' cannot be construed to include prevention of implantation. Whatever the state of medical knowledge in the 19th century, the ordinary use of the word 'miscarriage' related to interference at a stage of pre-natal development later than implantation."

It seems clear that the medical advice available to the Attorney General's office must have been very similar in nature to the evidence that has been adduced in this court before me.

Professor Glanville Williams, writing in 1958 in his book 'The Sanctity of Life and the Criminal Law,' asserted:

> "English law ... regards any interference with pregnancy, however early it may take place, as criminal, unless for therapeutic reasons. The foetus is a human life to be protected by the Criminal Law from the moment when the ovum is fertilized."

However, this view, and similar views adopted by other academic writers, appears to be based upon the understanding that the process of preventing a fertilized ovum from lodging in the womb is abortifacient in nature. The evidence before me is that that is not the way in which modern, accepted medical opinion regards it. Furthermore, Professor Williams has much more recently, in the second edition of his textbook of 'Criminal Law' (1983), departed from his previously expressed view, and states that there is no reason why a restricted construction of "miscarriage" should not be adopted by a court; that is plainly right. As I have already indicated, there is no binding, or even persuasive authority, in favour of either interpretation.

Further still, and finally, as this is a Criminal Statute, if there are two otherwise equally acceptable constructions of this particular section, I am satisfied that I should adopt that which is more favourable to the defendant.

I have come to the conclusion that I should adopt the narrower interpretation of this part of section 58, and hold that the word "miscarriage" in this context relates to the spontaneous expulsion of the products of pregnancy. I further hold, in accordance with the uncontroverted evidence that I have heard, that a pregnancy cannot come into existence until the fertilized ovum has become implanted in the womb, and that that stage is not reached until, at the earliest, the 20th day of a normal 28-day cycle, and, in all probability, until the next period is missed.

It follows from this – and I so hold – that the insertion of an intra-uterine contraceptive device before a pregnancy has become established, with the intention of preventing the successful implantation in the uterine wall of any fertilized ovum that may result from a prior act of sexual intercourse, does not amount to an offence under section 58 of the Offences Against the Person Act 1861.

It further follows that when the present defendant inserted an IUCD on the 17th day of the complainant's cycle, that that action was not capable of procuring a miscarriage within the meaning of the section."

250. Wright J then turned to consider (Transcript p 9G) questions relating to the defendant's state of knowledge and mens rea before concluding (Transcript p 11A) that there was no case to go to the jury. With those aspects of the case I am not concerned and I accordingly say no more about them: they raise difficult issues in relation to intention which Professor Grubb has considered in Kennedy & Grubb (eds) *Principles of Medical Law* (1998) at para 11.15 and again in Kennedy & Grubb *Medical Law* (ed 3, 2000) at p 1413.

251. I was also referred by Mr Gordon to *Attorney-General's Reference (No 3 of 1994)* [1998] AC 245 and, in particular, to the speech of Lord Hope of Craighead, who (at p 267F) referred to the fact that:

> "an embryo is in reality a separate organism from the mother *from the moment of its conception*." (emphasis added)

252. With that I have absolutely no quarrel but (said as it was in wholly different context and addressing quite different issues) it seems to me to throw no useful light on anything I have to decide. I repeat: I am not here concerned to decide the moment at which life begins or, I might add, the moment at which an embryo can be said to come into existence as an organism. Lord Hope's words do not seem to me to assist in understanding what the 1861 Act means when it refers to "miscarriage" and I cannot help thinking that Lord Hope himself would be surprised to hear it suggested they do.

253. The fact is that the only case to have addressed the issue which is currently before me is *R v Dhingra*. Mr Anderson submits that, as a fully-reasoned decision of a High Court judge, reached after full argument, it is subject to the modern practice that a judge of first instance will as a matter of judicial comity usually follow the decision of another judge of first instance unless he is convinced that that judgment was wrong. That may be, though I confess to a very great reluctance indeed to decide a point as important as this on such a narrow basis. But the fact is that, far from being convinced that Wright J's decision was wrong I am convinced that it was, if I may say so with respect to my brother, entirely and obviously right.

254. True it is that in *R v Dhingra* the consultant gynaecologists retained by the prosecution and by the defence agreed that so far as the current thinking of the medical profession was concerned, a miscarriage could occur only after implantation. But that agreement in no sense diminishes the authority of the court's ruling, which was reached after full consideration of the competing arguments of construction – based also upon dictionary definitions, the 1990 Act, the *Royal College of Nursing* case, legal commentaries, the principle of doubtful penalisation and the presumption against a construction "so startling, so much in variance with what is ordinarily understood to be the purpose of section 58". Wright J made it explicitly clear that he was *not* treating himself as in any way bound by the Crown's concession but on the contrary felt it was incumbent on him to make up his own mind about the matter.

255. I suspect that I have had considerably fuller argument, and been referred to very much more material, than Wright J was in *R v Dhingra* but the simple fact is that I have come to the same conclusion as he did and for much the same reasons.

<u>The commentators</u>

256. As I have already observed, the legal problem with which I am concerned was identified as long ago as 1962. Since then it has generated much discussion by legal commentators. What follows is far from being an exhaustive survey of what I do not doubt is by now a very extensive literature. But I was referred to a number of writings, and have consulted others in the course of preparing this judgment, and it is convenient to examine some of this literature.

257. The starting point in this area of the law is, of course, the late Professor Glanville Williams. As Wright J pointed out in *R v Dhingra*, he first dealt with the topic in 1958 in *The Sanctity of Life and the Criminal Law* when asserting (at p 141):

> "At present both English law and the law of the great majority of the United States regard any interference with pregnancy, however early it may take place, as criminal, unless for therapeutic reasons. The foetus is a human life to be protected by the criminal law from the moment when the ovum is fertilized."

258. That was, of course, before the introduction in this country of either the IUD or the pill, let alone of the mini-pill or the morning-after pill. By 1963, as we have seen, and faced with the IUD, Glanville Williams was expressing a rather different view. I have already set out the relevant passage (see paragraph [205] above) and will not repeat it. His final position is to be found, as Wright J mentioned, in his *Textbook of Criminal Law* (ed 2, 1983) at p 294 where he writes:

> "Formerly it was thought that the vital point of time was fertilisation, the fusion of spermatozoon and ovum, but it is now realised (although the point has not come before the courts) that this position is not maintainable, and that conception for legal purposes must be dated at earliest from implantation. The legislation is unspecific. The abortion section does not expressly refer to conception; it speaks merely of a "miscarriage." There is, therefore, nothing to prevent the courts interpreting the word "miscarriage" in a way that takes account of customary and approved birth control practices."

259. Having referred to IUDs, the pill and the morning-after pill he continued:

> "no one who uses or fits IUDs supposes that they are illegal or are governed by the Abortion Act. The only way to uphold the legality of present medical practice, to make IUDs

> contraceptives and not abortifacients, is to say that for legal purposes conception is not complete until implantation. … The legal argument is that the word "miscarriage" in the abortion section means the miscarriage of an implanted blastocyst."

260. I turn to Professor (now Sir) Ian Kennedy. In his paper *The Legal and Ethical Implications of Postcoital Birth Control*, first read at a symposium held by the Pregnancy Advisory Service in 1982, then published in *Postcoital Contraception: methods, services and prospects* (PAS, 1983, pp 62-70) and re-printed in *Treat Me Right* (1988 pp 32-41), he gave two reasons as justifying his view that postcoital birth control methods operating prior to implantation are lawful. The first is linguistic:

> "In the ordinary use of language, we do not think of a fertilised egg as a 'child'. Nor would we think of a woman as 'pregnant' until implantation has taken place … you cannot procure a miscarriage until you have a carriage, and you would not ordinarily use the notion of 'carrying' a child until it was implanted in the womb."

261. The second argument is perhaps more pragmatic:

> "The use of IUDs as a regular form of contraception has become so widespread that its lawfulness cannot seriously be disputed. If the law allows the use of IUDs as contraception in ordinary circumstances, then to be consistent, it must allow the use of IUDs and the other procedures in the context of postcoital birth control, because the effect is the same in all cases, the prevention of a fertilized egg being implanted in the womb."

262. Similar views (by now supported by the decisions in *R v Price* and *R v Dhingra* and by arguments based on the 1990 Act) are to be found expressed by Professor Kennedy in Kennedy & Grubb *Medical Law* (ed 3, 2000) at pp 1410-1414, 1436.

263. Mr (now Professor) Andrew Grubb takes the same view as Professor Kennedy: see his *Abortion Law in England: The Medicalization of a Crime* (1990) 18 Law, Medicine & Health Care 146 at p 156, *The New Law of Abortion: clarification or ambiguity?* [1991] Crim LR 659 at p 666, and Kennedy & Grubb (eds) *Principles of Medical Law* (1998) paras 11.10-11.15. In the last of these he writes as follows:

> "It is clear that a purely contraceptive agent does not produce a 'miscarriage'. A failure to fertilise cannot properly be considered a 'miscarriage'. By contrast it is widely accepted that if the effect is to cause an implanted embryo to be expelled from the mother's uterus that is a 'miscarriage' and the effect is abortifacient rather than contraceptive. The Abortion Act 1967 must be complied with for this to be done legally. What, however, of the contragestive method? Is a failure to implant

also a ‘miscarriage’? In one sense, the woman has ceased to ‘carry’ and, hence has ‘miscarried’. What was previously within her body will be expelled. However, this does not tally within the ordinary notion of ‘miscarriage’ which would entail a lost ‘pregnancy’ (ie which had become established to the woman’s knowledge). This, of course, only occurs once a period is missed which itself can only follow the implantation of the developing embryo. Also, a broad notion of ‘miscarriage’ is not consistent with modern medical usage. While legislation has to be interpreted in the sense intended at the time of its enactment (originally 1803), attempts to show that the broader meaning was intended merely illustrate the ambiguity in the language used or the relative ignorance of the time about the reproductive process.”

264. That is, as a footnote makes clear, a reference to Dr Keown’s article. Grubb continues:

“In short, little of any value can be gleaned about the meaning of ‘miscarriage’ by reliance on early or late nineteenth century medical or legal dicta.

What then amounts to a ‘miscarriage’? The weight of legal writing supports the view that ‘carriage’ requires the developing embryo to have implanted. This comports most easily with accepted notions of what it is to be pregnant and for it to end by means of an abortion. Further, there is no convincing public policy argument which would bring contragestive measures within the mischief or desirable scope of the law regulating abortions.

In addition, there is strong support for the need for implantation from the (then) Attorney General in a written answer in the House of Commons in 1983 and Parliament has, in effect, accepted that the concept of ‘carriage’ requires implantation in the Human Fertilisation and Embryology Act 1990. Section 2(3) provides, for the purposes of the 1990 Act, that ‘a woman is not to be treated as carrying a child until the embryo has become implanted’. Other jurisdictions have made this interpretation explicit in their legislation based upon the 1861 Act.

As a result, purely contragestive methods of birth control are not regulated by the 1967 Act. However, where the method may work pre- or post-implantation, the position may be otherwise. This may occur with an IUD. The legal issue is whether the doctor acts ‘with intent’ to procure a miscarriage. Certainly, if he believes the woman is pregnant, in the sense of ‘carrying’ a foetus in utero, what he is doing falls within the 1861 Act and he must comply with the requirements of the Abortion Act.”

265. Professor J K Mason takes the same view as both Professor Kennedy and Professor Grubb, and for much the same reasons: see his *Medico-Legal Aspects of Reproduction and Parenthood* (1990) pp 54-56 and Mason, McCall Smith & Laurie *Law and Medical Ethics* (ed 5, 1999) pp 111-112, 129-130. He adds (*Medico-Legal Aspects* at p 54) an interesting argument as to why preventing implantation is *not* procuring a miscarriage:

> "Medically speaking … there is wealth of difference, the most particular being that the contents of the body's passages which are open to the exterior are, themselves, 'external' to the body. A simple example is to be seen in the ingestion of a toxic substance; an analysis of the stomach or bowel contents may indicate the fact of ingestion but cannot demonstrate poisoning – the substance has not been absorbed and is, accordingly, still 'external' in nature. Something which is external is carried only in the loosest sense – it can be dropped either intentionally, accidentally or naturally. There can be little or no doubt that bodily 'carriage' implies some kind of integration with the body or, as Kennedy has said: 'there can be no miscarriage without carriage'."

266. A number of other commentators, albeit with differing degrees of confidence, take essentially the same position: David Crystal-Kirk *Embryo Arrest: The "No-Man's-Land" between Contraception and Abortion* (1989) 57 Medico-Legal Journal 111, K Norrie *Post coital Anti-pregnancy techniques and the law* in Templeton & Cusine (eds) *Reproductive Medicine and the Law* (1990) pp 11-17, Gillian Douglas *Law, Fertility and Reproduction* (1991) pp 31-32, 48, 95-96 and Margaret Brazier *Medicine, Patients and the Law* (1992) pp 293-295.

267. Norrie puts the argument very clearly:

> "the question of when human life begins as a matter of morality, or indeed biology, is not the same as the question of when pregnancy begins for the purposes of the law. Human life may – or may not – begin in a test-tube, but the mere existence of a fertilised egg in a test-tube does not make the woman who produced the egg pregnant. The important issue, in law, is when *pregnancy* begins. A number of legal systems contain statutory definitions of the commencement of pregnancy rather than the commencement of human life, and many define it to commence on the completion of implantation … There is no such statute in Scottish or English law. However, the British courts have traditionally accepted the medical profession's definitions of such things as death, live-birth, mental competency and maturity, and many other things besides; and one can safely predict that the courts will also accept the medical definition of when pregnancy begins. Medically speaking, pregnancy begins on implantation, that is the completion of the process whereby the fertilised egg attaches itself to the wall of the uterus. It

> follows that any anti-pregnancy technique that prevents implantation does not terminate pregnancy, because there is no pregnancy, and therefore cannot be abortion."

268. Thus I agree entirely with Grubb's assertion that "The weight of legal writing supports the view that 'carriage' requires the developing embryo to have implanted." Indeed, apart from the articles by Tunkel and Keown to which I must now turn, the only contrary voice appears to be that of Smith & Hogan's *Criminal Law* (ed 9, 1999) where at p 390 it is said, with a reference to Tunkel, that:

> "Certain modern anti-pregnancy techniques appear to offend against the law because they function after fertilisation of the ovum."

269. Interestingly the authors do not refer to either *R v Price* or *R v Dhingra*.

270. The heart of Tunkel's argument is in the following passage [1974] Crim LR 461 at p 465. Responding to the argument that "miscarriage" presupposes implantation he says:

> "the argument is unsound both as a matter of interpretation and of policy. In the first place it has been pointed out that the operator's intention to procure miscarriage is all that need be shown; the woman need not actually be pregnant at all. Secondly, the use of the word "miscarriage" has always been understood to include any fatal interference with the fertilised ovum" – and there then follows a reference to Glanville Williams' 1958 statement – "To hold otherwise would, in effect, give a sort of free-for-all moratorium of a week or more after intercourse during which every sort of abortionist could ply his craft with impunity. The law may permit the douching of the vagina soon after intercourse, but that seems the limit of allowable post-coital prevention."

271. The first argument seems to me, with all respect to Tunkel, to be entirely circular. The question is what is meant by "miscarriage". One does not answer this by pointing out that the statutory offence is not causing a miscarriage but doing certain things with intent to cause a miscarriage. The second, as Mr Parker pointed out, might be thought to overlook sections 23 and 24 of the 1861 Act, which make it an offence unlawfully and maliciously to administer "any poison or other destructive or noxious thing" in the one case so as thereby to endanger life or inflict grievous bodily harm or, in the other case, with intent to injure, aggrieve or annoy". More generally I agree with Kennedy & Grubb when they comment (*Medical Law* at p 1412) that:

> "These arguments do not appear to be relevant to the discussion concerning the difference between pre-implantation and implantation. They appear to be more concerned with the difference between 'conception' and 'quickening', particularly

> in the light of the fact that the nineteenth-century authorities were unaware of the detail of the physiological processes between conception and birth, save in the most general terms."

272. Dr Keown's article, if I may say so, correctly and helpfully identifies the issue (at p 604):

> "The crucial question is whether the term "miscarriage" presupposes the implantation of the fertilised ovum in the lining of the uterus. If it does, then interceptive means, which operate by frustrating implantation, are not prohibited by sections 58 and 59."

273. In addressing that question Dr Keown refers first to nineteenth century medical usage of the words "miscarriage" and "abortion" and then, by reference to (i) the statutory provisions, (ii) judicial authority, (iii) medico-legal authorities and (iv) the policy of the law, to the legal usage of those terms. His conclusion (pp 613-614) is that:

> "The fourfold evidence presented above, reinforced by the unrestricted usage of "miscarriage" in both medical and popular contexts, renders untenable a restricted interpretation of section 58. It therefore indicates that the post-coital fitting of an IUD or administration of a post-coital pill with intent to terminate pregnancy, if such exists, is prohibited by section 58, and the procurement or supply of such means, by section 59. It is submitted that the post-coital use of interceptive means of fertility control, and their procurement and supply, are prohibited by sections 58 and 59 respectively … , and that this is so whether they are intended to procure the miscarriage of actual or suspected pregnancies. This submission has been grounded in an analysis of the word "miscarriage" as used in these sections. The unrestricted use of the term in the nineteenth century abortion provisions, its equally unrestricted interpretation by legal and medico-legal authorities, and the policy of the legislation, indicate the legal irrelevance of implantation, and the intention of the legislature to prohibit abortion from the time of fertilisation."

274. Now without any disrespect to Dr Keown I do not propose to dissect his article in detail. It would serve no useful purpose. I concentrate on a few key points.

275. Significant portions of his article appear principally directed towards establishing that by 1861 it was recognised that miscarriage could occur before as well as after "quickening" (not a disputed issue in these proceedings) and to establishing that in this context the terms miscarriage and abortion are, and were in 1861, synonymous (again, not disputed by anyone in these proceedings).

276. So far as concerns the remainder of the article – and without pretending that this is in any way an exhaustive refutation of Dr Keown's argument – I would make only the following points:

i) As I have already observed, analysis of the medical sources cited by Dr Keown in his article reveals a much more complex and contradictory picture than the one which he seeks to present, and one which, in my judgment, wholly undermines the conclusion at p 613 of his article that "the lack of judicial authority to support a restricted construction of "miscarriage" is matched only by an equal lack of medico-legal authority".

ii) The judicial authorities to which he refers – this of course *before* the decision in *R v Dhingra* – do not in my judgment support his thesis.

iii) Much of his analysis is rooted in nineteenth century medical or medico-legal texts. His reference to twentieth century academic writing is fairly limited and, writing in 1984, he does not of course grapple with the mass of more recent material, including importantly the modern medical dictionaries, to which I have been referred. Nor, of course, does he consider the modern principles of statutory construction elucidated by the House of Lords in a number of more recent authorities to which I must come in due course.

277. Finally I note the curiosity that Archbold *Criminal Pleading, Evidence and Practice* (2002) is entirely silent on the question whilst Blackstone's *Criminal Practice* (2002) at para B1.66 describes the question as being "a matter of some controversy". Neither, incidentally, refers to either *R v Price* or *R v Dhingra*.

Foreign legal systems

278. In response to a question from the Bench I was provided with information as to the legal position in relation to the morning-after pill in a number of foreign countries. That information comes from three sources.

279. The first is an article by Cook & Dickens, *International Developments in Abortion Laws: 1977-88* (1988) 78 American Journal of Public Health 1305. They state (at p 1308) that Austria, West Germany, Liberia, The Netherlands and New Zealand have "expressly decriminalised medical interventions for the period between fertilisation and completion of implantation of the fertilized ovum" with the consequence that in these countries "the use of contraceptive methods during this time period does not need to meet the requirements of abortion law."

280. I was in fact shown the relevant New Zealand legislation. Sections 183 and 186 of the Crimes Act 1961, closely reflecting sections 58 and 59 of the 1861 Act, make it an offence to do certain acts intending or knowing that someone intends "to procure

miscarriage". Section 182A, inserted by the Crimes Amendment Act 1977, provides that for this purpose "miscarriage" means:

> "(a) The destruction or death of an embryo or fetus after implantation; or
>
> (b) The premature expulsion or removal of an embryo or fetus after implantation, otherwise than for the purpose of inducing the birth of a fetus believed to be viable or removing a fetus that has died."

281. The second is a witness statement dated 13 February 2002 by Martin Bagwell who was the Senior Policy Manager at the Medicines Control Agency responsible for the consultation exercise in relation to Levonorgestrel. He contacted the agencies responsible for medicines control of all the European Economic Area member states and asked them: (i) whether the legal view in their country is that hormonal emergency contraception is an abortifacient or a contraceptive and (ii) whether they were aware of any legal judgment in their country on the point. He produced the responses he had received from Belgium, Denmark, Finland, France, Iceland, Italy, The Netherlands, Norway, Portugal and Sweden. With the sole exception of France none of his respondents was aware of any relevant legal judgment. All, without exception, reported that such substances were considered in their countries to be contraceptives and not abortifacients.

282. The third source is SPUC itself, which was able to provide information in relation to Ireland and The Philippines and copies of legal judgments in Argentina and Chile.

283. In The Philippines Levonorgestrel is considered as having an abortifacient effect and accordingly its sale and use is prohibited by a Circular of the Department of Health, Philippines Bureau of Food and Drugs dated 7 December 2001.

284. In Ireland the proposed twenty-fifth amendment of the Constitution, which was voted on in a referendum in March 2002, would have had the effect of repealing sections 58 and 59 of the 1861 Act and replacing them with new legislation – the Protection of Human Life in Pregnancy Act 2002 – defining abortion as "the intentional destruction by any means of unborn human life after implantation in the womb of a woman". As is well known the Irish people voted to reject the proposed amendment, so the position in Ireland remains governed by sections 58 and 59 of the 1861 Act.

285. The three foreign judicial authorities to which I have been referred are decisions of the Section de contentieux (Judicial Section) of France's Conseil d'Etat on 25 April 2001, of the Constitutional Chamber of the Supreme Court of Chile on 30 August 2001 and of Argentina's Supreme Court of Justice of the Nation on 5 March 2002.

286. The Conseil d'Etat dismissed complaints by the 'Association choisir la Vie – Association pour l'objection de conscience a l'avortement' against the authorisation by the French l'agence du medicament of the marketing of two morning-after pills

containing Levonorgestrel – one called Norlevo (complaint no 216521), the other Tetragynon (complaint no 211638). The Conseil d'Etat held in each case that the product was a hormonal contraceptive and not an abortifacient ("un contraceptif hormonal … et non un produit abortif"). It further held that there was no breach of Article 2 of the Convention (nor, I note, of either Article 6 of the International Covenant on Civil and Political Rights or Article 6 of the Convention on the Rights of the Child).

287. The Supreme Court of Chile by a majority declared null and void the decision of the Institute of Public Health (Instituto de Salud Publica) on 21 March 2001 registering a morning-after pill containing Levonorgestrel called Postinal. The basis of the decision (see paragraphs 14, 18-20) was that human life as protected by the Chilean Constitution and Civil Code starts at fertilisation ("la fertilizacion") or conception ("la concepcion") and not at implantation ("la implantacion en el utero"). The authorisation of Postinal was illegal because the effect of the morning-after pill was "synonymous with abortion which is penalised as a crime in the Criminal Code and prohibited in the Health Code, even as a therapeutic measure" ("sinonimo de aborto penalizado como delito en el Codigo Penal y prohibido aun como terapeutico, en al Codigo Sanitario").

288. The Supreme Court of Argentina, by a majority, annulled the previous authorisation and prohibited the manufacture, distribution and marketing of a morning-after pill called Imediat. The basis of the decision was that Imediat has abortifacient effects in preventing the implantation of the embryo in the endometrium (paragraphs 3-10) and that the right to life guaranteed by the Constitution was recognised (paragraphs 12 and 14) both by prior Argentine judicial decision and by the Argentine Civil Code and by Article 4.1 of the American Convention on Human Rights (the Pact of San Jose, Costa Rica) as commencing not at the stage of implantation but rather at the moment of conception. It may be noted that the Court, differing in this respect from the French Conseil d'Etat, also derived this conclusion from Article 6 of the Convention on the Rights of the Child.

Non-medical dictionaries

289. The ordinary dictionaries throw little useful light on anything I have to decide. As Mr Anderson commented, they are too general to be of real assistance on the point in issue. Todd's 1827 edition of Johnson's Dictionary defines miscarriage as meaning "Abortion; act of bringing forth before the time" and abortion as meaning "The act of bringing forth untimely." Latham's Dictionary of 1866 defines both words in precisely the same terms. In the first edition of the Oxford English Dictionary miscarriage was defined as meaning "Untimely delivery (of a woman): usually taken as synonymous with abortion = expulsion of the foetus before the twenty-eighth week of pregnancy". Pregnancy was defined as meaning "The condition of being pregnant, or with child or young" and pregnant as meaning "That has conceived in the womb; with child or with young; gravid." Those definitions are carried forward unchanged into the second edition.

PRINCIPLES OF STATUTORY CONSTRUCTION

290. A number of principles of statutory construction have been pressed on me.

The principle against doubtful penalisation

291. One is the principle against doubtful penalisation: see Bennion *Statutory Interpretation* (ed 3, 1997) at pp 637-638. That, as we have seen, was relied on by Wright J in *R v Dhingra*. Mr Anderson and Ms Lieven submit that were there any doubt as to the applicability of sections 58 and 59 to the action of Levonorgestrel, this principle would militate against its criminalisation.

292. Ms Lieven suggests that the principle applies in two ways. One of the offences under section 58 requires that the woman be "with child", yet it is apparent from the evidence that at the date when emergency contraception is taken it would not be possible on SPUC's construction of the phrase for the woman to know whether she was "with child" or for the Crown to prove that she was. The court should presume that the legislature did not intend the offence to extend to such a situation. Further, says Ms Lieven, the very ambiguity of the situation, whether viewed on the medical evidence in 1861 or today, should lead the court to a construction which does not give rise to potential criminalisation, particularly given the very serious criminal offence which is here in issue.

293. Mr Anderson submits (referring to Bennion at pp 689-691) that where the legal meaning of a word or phrase is doubtful, and the mischief against which an enactment was originally directed has changed, the court will give much weight to the principle against doubtful penalisation.

294. He suggests that there has indeed been such a change in the mischief against which the 1861 Act was originally directed:

i) An important purpose of sections 58 and 59 when enacted in 1861 was the protection of women from the dangers of illegal abortion, which, on the evidence I have heard, included frequent deaths from infection and from the administration of poison intended for the foetus. He refers to *R v Trim* where Martin J (at p 115) said that "one, and perhaps the chief, evil which the Legislature wished to prevent was the possibility of harm being done to the woman." Following advances in healthcare, and the passage of the 1967 Act (which made back-street abortions unnecessary), abortions no longer constitute a major threat to women's health and Levonorgestrel – unlike the methods used to procure miscarriage in 1861 – has an excellent safety profile. Although the 1861 Act may well have been intended in part to protect women, the safety concerns that are relied upon to support a broad construction of "miscarriage" no longer exist, particularly in relation to Levonorgestrel.

ii) Inhibiting implantation through the use of emergency hormonal contraceptives was not envisaged in 1861 and was certainly not a mischief against which the 1861 Act could be said to have been directed.

iii) To the extent that the 1861 Act was designed to protect the foetus, it is also relevant to take into account changes in social attitudes as exemplified by the passage and retention in force of the 1967 Act, which legalises even late-term abortion on specified grounds.

295. I have to confess to being reluctant to resort, unless compulsively driven to it, to so pessimistic a principle as that which is here in question. In fact there is no need for me to do so, for applying other and more directly applicable principles of construction the meaning of sections 58 and 59 is, in my judgment, clear.

296. Moreover, whilst I have no particular difficulty with the way in which the principle was used by Wright J and is sought to be relied upon by Ms Lieven, those parts of Mr Anderson's argument which focus upon changes in social values or attitudes seem to me on reflection to be misconceived. I put it that way because I have to confess that in putting this argument Mr Anderson was simply picking up on certain comments I had made during the course of argument.

297. This is a matter to which I must return below but on this point, as it seems to me, Mr Gordon is correct. As he observes, where the word or phrase which must be construed is itself, in context, one whose meaning to some extent depends on what is, and what is not, regarded as morally or socially acceptable, it may well be necessary to import into the meaning of the word changes in social values. (*Fitzpatrick v Sterling Housing Association Ltd* [2001] 1 AC 27 to which I refer below is, as he points out, a perfect example of this.) But, he says – and I entirely agree – the crucial word "miscarriage" with which we are dealing in the present case does not have a meaning which is in any respect dependent on social *mores.* Opinions may differ as to whether it is acceptable to procure a miscarriage at this or that stage. But that can have no bearing whatsoever on whether what is procured is, in fact, a miscarriage. In short, the word "miscarriage" as used in the 1861 Act is not 'value sensitive.' It may be – indeed in my judgment it plainly is – 'medical knowledge sensitive'. But that is, as Mr Gordon submits, a very different matter.

<u>The presumption in favour of long-held interpretation</u>

298. Another principle to which I was referred is the presumption in favour of long-held interpretations: see Bennion at pp 704-705. In this connection I was referred to *Thompson v Nixon* [1966] 1 QB 103, where the Divisional Court treated the point at issue – the meaning of the word "bailee" in section 1(1) of the Larceny Act 1916 – as concluded by the decision of Court of Crown Cases Reserved in *Reg v Matthews* (1873) 12 Cox CC 489, whilst making it quite clear that, absent this authority, it would have come to precisely the opposite conclusion.

299. Sachs J (with whom Lord Parker CJ and Browne J both agreed) said at p 109B:

> "the present case falls four square within the decision in *Reg v Matthews*. … That case having been quoted in the textbooks ever since, no writer had ever suggested that it was bad law. … Dealing as we are today with a statute that affects the liberty of the subject, it does not seem to me that it is permissible to adopt a different construction of the relevant words to that which has so long stood as law, and now for the first time in effect to construe them adversely to the defendant in this case."

300. Mr Anderson submits that, as the views expressed by the Attorney-General and others in Parliament show, all concerned have operated since emergency hormonal contraception was introduced on the understanding that its supply and administration is lawful, and not contrary to sections 58 or 59 of the 1861 Act. That may be so, but it does not, as it seems to me, meet the criteria indicated by *Thompson v Nixon*.

301. As I have already observed, the *only* judicial decision in point – *R v Dhingra* – is as recent as 1991, is unreported and hardly features in the leading practitioners' textbooks. As the wealth of discussion by the commentators shows, the matter is certainly not free from controversy. Nor must it be forgotten that the Attorney-General's statement preceded, and indeed in part precipitated, Dr Keown's article (see at pp 604-605). Moreover, one leading work – Smith & Hogan, referring to Tunkel's article – actually suggests that the law is as contended for here by SPUC.

302. There is, in my judgment, no settled or long-held legal interpretation of the word "miscarriage" in this context.

<u>The principle of updating construction</u>

303. In my judgment the true answer to the problem with which I am presented is to be found in one particular application of the principle of updating construction, that part of the law relating to statutory construction on which I heard the most detailed and the most interesting arguments.

304. It is convenient to take the authorities in chronological sequence. The first is *Attorney-General v The Edison Telegraph Company of London Limited* (1880) 6 QBD 244. The Telegraph Act of 1869 gave the Postmaster-General a monopoly of transmitting telegrams. Telegrams were defined as messages transmitted by telegraph. A telegraph was defined to include 'any apparatus for transmitting messages or other communications by means of electric signals'. When the Act was introduced the only such means of communication functioned by interrupting and re-establishing electric current, thereby causing a series of clicks which conveyed information by morse code. Then Bell and Edison invented the telephone which conveyed the human voice by wire by means of an entirely novel process. It was argued that because this process

was unknown when the Act was passed, the Act could not apply to it. The Court rejected this submission.

305. Giving the judgment of the Exchequer Division, Stephen J said at p 254:

> "Of course no one supposes that the legislature intended to refer specifically to telephones many years before they were invented, but it is highly probable that they would, and it seems to us clear that they actually did, use language embracing future discoveries as to the use of electricity for the purpose of conveying intelligence. The great object of the Act of 1863 was to give special powers to telegraph companies to enable them to open streets, lay down wires, take land, suspend wires over highways, connect wires, erect posts on the roofs of houses, and do many other things of the same sort. The Act, in short, was intended to confer powers and to impose duties upon companies established for the purpose of communicating information by the action of electricity upon wires, and absurd consequences would follow if the nature and extent of those powers and duties were made dependent upon the means employed for the purpose of giving the information."

306. In *Royal College of Nursing of the United Kingdom v Department of Health and Social Security* [1981] AC 800 the question was whether the termination of pregnancy by medical induction using the extra-amniotic method was "by a registered medical practitioner" within the meaning of section 1(1) of the 1967 Act when, although the termination was decided on and initiated by a medical practitioner who remained throughout responsible for its overall conduct and control, certain specific acts were done by nursing or midwifery staff acting on his specific instructions but not in his presence. Reversing the unanimous decision of the Court of Appeal, the House of Lords by a bare majority held that such a termination was carried out "by" a registered medical practitioner because Parliament had contemplated that the termination of a pregnancy made lawful by the 1967 Act should be a team effort.

307. Lord Wilberforce, who was one of the dissentients, set the scene at p 821G:

> "I start from the point that in 1967 - the date of the Act - the only methods used to produce abortions were surgical methods; of these there were several varieties, well enough known. One of these was by intra-amniotic injection - i.e. the direct injection of glucose or saline solutions into the amniotic sac. It was not ideal or, it appears, widely used. Parliament must have been aware of these methods and cannot have had in mind a process where abortifacient agents were administered by nurses. They did not exist. Parliament's concern must have been to prevent existing methods being carried out by unqualified persons and to insist that they should be carried out by doctors. For these reasons Parliament no doubt used the words, in section 1(1) "

> … pregnancy ... terminated by a registered medical practitioner ... ”
>
> Extra-amniotic administration of prostaglandin was first reported in 1971, and was soon found to have advantages. It involves, or admits, as shown above, direct and significant participation by nurses in the abortifacient steps. Is it covered by the critical words?”

308. He then set out at p 822B principles which, although he was one of the dissentients, have subsequently been treated as authoritative:

> “In interpreting an Act of Parliament it is proper, and indeed necessary, to have regard to the state of affairs existing, and known by Parliament to be existing, at the time. It is a fair presumption that Parliament’s policy or intention is directed to that state of affairs. Leaving aside cases of omission by inadvertence, this being not such a case, when a new state of affairs, or a fresh set of facts bearing on policy, comes into existence, the courts have to consider whether they fall within the Parliamentary intention. They may be held to do so, if they fall within the same genus of facts as those to which the expressed policy has been formulated. They may also be held to do so if there can be detected a clear purpose in the legislation which can only be fulfilled if the extension is made. How liberally these principles may be applied must depend upon the nature of the enactment, and the strictness or otherwise of the words in which it has been expressed. The courts should be less willing to extend expressed meanings if it is clear that the Act in question was designed to be restrictive or circumscribed in its operation rather than liberal or permissive. They will be much less willing to do so where the subject matter is different in kind or dimension from that for which the legislation was passed. In any event there is one course which the courts cannot take, under the law of this country; they cannot fill gaps; they cannot by asking the question “What would Parliament have done in this current case - not being one in contemplation - if the facts had been before it?” attempt themselves to supply the answer, if the answer is not to be found in the terms of the Act itself.”

309. He then added this comment, on which Mr Gordon placed some reliance:

> “In my opinion this Act should be construed with caution. It is dealing with a controversial subject involving moral and social judgments on which opinions strongly differ. It is, if ever an Act was, one for interpreting in the spirit that only that which Parliament has authorised on a fair reading of the relevant sections should be held to be within it.”

310. The next case is *R v Ireland* [1998] AC 147 where the question was whether, for the purposes of sections 20 and 47 of the 1861 Act (which make it respectively an offence to inflict "grievous bodily harm" and an offence to occasion "actual bodily harm") recognisable psychiatric illness brought about by repeated harassing telephone calls fell within the statutory phrase "bodily harm", notwithstanding that, as Lord Steyn recognised at p 158G, psychiatry was in its infancy in 1861. The House of Lords held unanimously that it did.

311. The main speech was given by Lord Steyn, who at p 158C said this:

> "although out of considerations of piety we frequently refer to the actual intention of the draftsman, the correct approach is simply to consider whether the words of the Act of 1861 considered in the light of contemporary knowledge cover a recognisable psychiatric injury. It is undoubtedly true that there are statutes where the correct approach is to construe the legislation "as if one were interpreting it the day after it was passed:" *The Longford* (1889) 14 PD 34. … Bearing in mind that statutes are usually intended to operate for many years it would be most inconvenient if courts could never rely in difficult cases on the current meaning of statutes. Recognising the problem Lord Thring, the great Victorian draftsman of the second half of the last century, exhorted draftsmen to draft so that "An Act of Parliament should be deemed to be always speaking:" *Practical Legislation* (1902), p 83 … In cases where the problem arises it is a matter of interpretation whether a court must search for the historical or original meaning of a statute or whether it is free to apply the current meaning of the statute to present day conditions. Statutes dealing with a particular grievance or problem may sometimes require to be historically interpreted. But the drafting technique of Lord Thring and his successors have brought about the situation that statutes will generally be found to be of the "always speaking" variety: see *Royal College of Nursing of the United Kingdom v. Department of Health and Social Security* [1981] AC 800 for an example of an "always speaking" construction in the House of Lords.
>
> The proposition that the Victorian legislator when enacting sections 18, 20 and 47 of the Act of 1861, would not have had in mind psychiatric illness is no doubt correct. Psychiatry was in its infancy in 1861. But the subjective intention of the draftsman is immaterial. The only relevant inquiry is as to the sense of the words in the context in which they are used. Moreover the Act of 1861 is a statute of the "always speaking" type: the statute must be interpreted in the light of the best current scientific appreciation of the link between the body and psychiatric injury."

312. Lord Hope of Craighead at p 166B considered whether the making of a series of silent telephone calls can amount in law to an assault. Holding that it can he commented:

> "The legislation appears to have been framed on the basis that the words which it used were words which everyone would understand without further explanation. In this regard the fact that the statute was enacted in the middle of the last century is of no significance. The public interest, for whose benefit it was enacted, would not be served by construing the words in a narrow or technical way. The words used are ordinary English words, which can be given their ordinary meaning in the usage of the present day. They can take account of changing circumstances both as regards medical knowledge and the means by which one person can cause bodily harm to another."

313. In other words, those who inflict psychiatric injury by use of the telephone can commit offences under the 1861 Act notwithstanding that the telephone had not then been invented and that such psychiatric injury would not then have been recognised.

314. The next case is *Fitzpatrick v Sterling Housing Association Ltd* [2001] 1 AC 27 where the question was whether the deceased tenant's homosexual partner was either his "spouse" and/or a member of his "family" within the meaning of the Rent Act 1977 – a provision originally to be found in the Increase of Rent and Mortgage Interest (Restrictions) Act 1920. The House of Lords, by a bare majority, reversed the Court of Appeal, which had itself been divided, and held that although he was not a spouse he was a member of the deceased's "family".

315. At p 33E Lord Slynn of Hadley said this:

> "It has been suggested that for your Lordships to decide this appeal in favour of the plaintiff would be to usurp the function of Parliament. It is trite that that is something the courts must not do. When considering social issues in particular judges must not substitute their own views to fill gaps. They must consider whether the new facts "fall within the Parliamentary intention": *Royal College of Nursing of the United Kingdom v Department of Health and Social Security* [1981] AC 800, 822 per Lord Wilberforce. Thus in the present context if, for example, it was explicit or clear that Parliament intended the word "family" to have a narrow meaning for all time, it would be a court's duty to give effect to it whatever changes in social attitudes a court might think ought to be reflected in the legislation. Similarly if it were explicit or clear that the word must be given a very wide meaning so as to cover relationships for which a court, conscious of the traditional views of society might disapprove, the court's duty would be to give effect to it. It is, however, for the court in the first place to interpret each phrase in its statutory context. To do so is not to usurp Parliament's function; not to do so would be to abdicate the

> judicial function. If Parliament takes the view that the result is not what is wanted it will change the legislation."

316. He added at p 35A:

> "It is not an answer to the problem to assume (as I accept may be correct) that if in 1920 people had been asked whether one person was a member of another same-sex person's family the answer would have been "No". That is not the right question. The first question is what were the characteristics of a family in the 1920 Act and the second whether two same-sex partners can satisfy those characteristics so as today to fall within the word "family". An alternative question is whether the word "family" in the 1920 Act has to be updated so as to be capable of including persons who today would be regarded as being of each other's family, whatever might have been said in 1920: see *R v Ireland* [1998] AC 147, 158, per Lord Steyn … If "family" could only mean a legal relationship (of blood or by legal ceremony of marriage or by legal adoption) then the plaintiff must obviously fail. Over the years, however, the courts have held that this is not so."

317. Having considered the authorities which bore out that last proposition he continued at p 38B:

> "Given on the basis of these earlier decisions that the word is to be applied flexibly, and does not cover only legally binding relationships, it is necessary to ask what are its characteristics in this legislation and to answer that question to ask further what was Parliament's purpose. It seems to me that the intention in 1920 was that not just the legal wife but also the other members of the family unit occupying the property on the death of the tenant with him should qualify for the succession. …
>
> The hallmarks of the relationship were essentially that there should be a degree of mutual interdependence, of the sharing of lives, of caring and love, of commitment and support. In respect of legal relationships these are presumed, though evidently are not always present as the family law and criminal courts know only too well. In de facto relationships these are capable, if proved, of creating membership of the tenant's family. If, as I consider, this was the purpose of the legislation, the question is then who in 1994 or today (I draw no distinction between them) are capable in law of being members of the tenant's family. It is not who would have been so considered in 1920. In considering this question it is necessary to have regard to changes in attitude. The point cannot have been better put than it was by Sir Thomas Bingham MR in *R v Ministry of Defence ex p Smith* [1996] QB 517, 552-554 when, although dealing with the validity of an administrative decision rather than the meaning of

a few words in a statute, he said, after referring to changes of attitude in society towards same-sex relationships:

> "I regard the progressive development and refinement of public and professional opinion at home and abroad, here very briefly described, as an important feature of this case. A belief which represented unquestioned orthodoxy in year X may have become questionable by year Y and unsustainable by year Z. Public and professional opinion are a continuum."

If "meaning" is substituted for "opinion" the words are no less appropriate."

318. Lord Nicholls of Birkenhead posed the question at p 45E:

> "This submission raises the question whether the word family as used in the Rent Acts may change its meaning as ways of life and social attitudes change. Can the expression family legitimately be interpreted in 1999 as having a different and wider meaning than when it was first enacted in 1920? The principles applicable were stated cogently by Lord Wilberforce in *Royal College of Nursing of the United Kingdom v Department of Health and Social Security* [1981] AC 800, 822. A statute must necessarily be interpreted having regard to the state of affairs existing when it was enacted. It is a fair presumption that Parliament's intention was directed at that state of affairs. When circumstances change, a court has to consider whether they fall within the parliamentary intention. They may do so if there can be detected a clear purpose in the legislation which can only be fulfilled if an extension is made. How liberally these principles may be applied must depend upon the nature of the enactment, and the strictness or otherwise of the words in which it was expressed.
>
> In the present case Parliament used an ordinary word of flexible meaning and left it undefined. The underlying legislative purpose was to provide a secure home for those who share their lives together with the original tenant in the manner which characterises a family unit. This purpose would be at risk of being stultified if the courts could not have regard to changes in the way people live together and changes in the perception of relationships. This approach is supported by the fact that successive Rent Acts have used the same undefined expression despite the far-reaching changes in ways of life and social attitudes meanwhile. It would be unattractive, to the extent of being unacceptable, to interpret the word family in the Rent Act 1977 without regard to these changes."

319. A little later at p 46C he said this:

> "In one respect of crucial importance there has been a change in social attitudes over the last half-century. I am not referring to the change in attitude toward sexual relationships between a man and woman outside marriage or toward homosexual relationships. There has been a widespread change in attitude toward such relationships, although differing and deeply felt views are held on these matters. These differing views are to be recognised and respected. The crucial change to which I am referring is related but different. It is that the morality of a lawful relationship is not now regarded as relevant when the court is deciding whether an individual qualifies for protection under the Rent Acts. Parliament itself made this clear in 1988, when amending the Rent Acts in the Housing Act 1988. Paragraph 2(3) of Schedule 1 envisages that more than one person may be living with the tenant as a surviving spouse under the extended definition. In so enacting the law Parliament was not expressing a view, either way, on the morality of such relationships. But by this provision Parliament made plain that, for purposes of Rent Act protection, what matters is the factual position. The same must be true of homosexual relationships.
>
> It is for this reason that I do not accept the argument that the inclusion of a tenant's homosexual partner within the ranks of persons eligible to qualify as members of his family is a step which should be left to Parliament. It really goes without saying that in cases such as this the courts must always proceed with particular caution and sensitivity. That is not to say the courts can never proceed at all."

320. Lord Hobhouse of Woodborough was one of those who dissented. He put the point very clearly at p 68D:

> "On any view it is difficult to see what fresh set of facts has since come into existence. Homosexual relationships have been known about and existed throughout any relevant period of time and homosexual couples have shared accommodation. Not much has changed; the highest that it can be put is that the public attitude to such relationships has changed. This has nothing to do with any social policy concerning statutory tenancies by succession. If, contrary to what I have just said, it does have relevance, it is a matter for Parliament to consider not for the courts to ask themselves: "What would Parliament do now?""

321. Next is *Birmingham City Council v Oakley* [2001] 1 AC 617 where the question was whether the absence of a wash-hand basin in a water closet adjacent to a kitchen meant that the premises were in such a state as to be prejudicial to health within the meaning of section 79(1)(a) of the Environmental Protection Act 1990. The House of

Lords, yet again by a bare majority, reversed the Divisional Court of the Queen's Bench Division, holding that they were not.

322. The case is important because of what Lord Hoffmann said. At p 628E he put the case in context:

> "My Lords, on the surface, this does not look like a very momentous case. The question is whether Mr and Mrs Oakley's landlord should have provided them with a basin in the wc. The statute which they say made it necessary to install one is ambiguous. The language is capable of bearing such a construction. On the other hand, it is very unlikely that this was what Parliament intended. So the courts have a choice. If they say that Mr and Mrs Oakley should have had a basin, landlords of old houses and flats all over the country will have to instal them. Local authorities and housing trusts will have to incur very considerable expense. Under the surface, therefore, the case raises a question of great constitutional importance. When it comes to the expenditure of large sums of public and private money, who should make the decision? If the statute is clear, then of course Parliament has already made the decision and the courts merely enforce it. But when the statute is doubtful, should judges decide? Or should they leave the decision to democratically elected councillors or members of Parliament?"

323. At p 631E he said this:

> "Mr Supperstone argued that section 79(1)(a) must be construed in the light of modern conditions. When it speaks of a "state ... prejudicial to health", this does not mean a state which would have been so regarded in 1846. It requires the application of modern knowledge and standards of hygiene. The words must be construed as "always speaking" in the sense used by Lord Steyn in *R v Ireland* [1998] AC 147, 158-159. I quite agree that when a statute employs a concept which may change in content with advancing knowledge, technology or social standards, it should be interpreted as it would be currently understood. The content may change but the concept remains the same. The meaning of the statutory language remains unaltered. So the concept of a vehicle has the same meaning today as it did in 1800, even though it includes methods of conveyance which would not have been imagined by a legislator of those days. The same is true of social standards. The concept of cruelty is the same today as it was when the Bill of Rights 1688 (1 Will & Mary, sess 2, c 2) forbade the infliction of "cruel and unusual punishments" (section 10). But changes in social standards mean that punishments which would not have been regarded as cruel in 1688 will be so regarded today.

> This doctrine does not however mean that one can construe the language of an old statute to mean something conceptually different from what the contemporary evidence shows that Parliament must have intended. So, for example, in the recent case of *Goodes v East Sussex County Council* [2000] 1 WLR 1356, the House of Lords decided that the statutory duty of highway authorities to "maintain" the highway did not include the removal of ice and snow. Although the word "maintain" was capable of including the removal of ice and snow and such removal might be expected by modern road users, the contemporary evidence showed that the concept of maintenance in the legislation was confined to keeping the fabric of the road in repair. To require the removal of ice and snow would not be to apply that concept in accordance with modern standards (such as requiring a metalled surface instead of gravel) but would be using the word "maintain" to express a broader concept than Parliament intended. Such a change would not be in accordance with the meaning of the statute. Likewise it seems to me in this case that an extension of the concept of "premises in such a state as to be prejudicial to health" to the absence of facilities, as such, is an illegitimate extension of the statutory meaning.
>
> My Lords, it seems to me that the temptation to make such an extension should be resisted … In my opinion the decision as to whether or not to take such a step should be made by the elected representatives of the people and not by the courts."

324. As Mr Parker pointed out, Lord Hoffmann's use here of the word "concept" and his observation that "the content may change but the concept remains the same", reflect Professor Ronald Dworkin's distinction between "concept" and "conception": see *Taking Rights Seriously* (1977) pp 134-136 (where the discussion is by reference to the concept of 'fairness') and *Law's Empire* (1986) pp 70-72 (where the discussion is by reference to the concept of 'courtesy'). The essential point is brought out when Dworkin, giving an example in the first work at p 134, says:

> "I might say that I meant the family to be guided by the *concept* of fairness, not by any specific *conception* of fairness I might have had in mind."

325. In the later book he epitomises the distinction with his reference (at p 71) to:

> "the proposition that … respect provides the *concept* of courtesy and that competing positions about what respect really requires are *conceptions* of that concept. The contrast between concept and conception is here a contrast between levels of abstraction".

326. The final case is even more recent: *R (Quintavalle) v Secretary of State for Health* [2002] EWCA Civ 29, [2002] 2 WLR 550. The interest of the case lies in the willingness of the Court of Appeal, in a field – embryology – not very far removed from this, to adopt what it recognised to be a "strained" construction of a statute where (i) the construction was "viable" as opposed to straining the language to breaking point and (ii) it was "plainly necessary" to do so in order to "give effect to Parliamentary intention" and prevent the "clear purpose of the legislation" being defeated: see per Lord Phillips of Worth Matravers MR at paras [20], [22], [27], [38] and [42].

327. Before leaving these authorities there is one final point, particularly apposite in the present case, which I ought to emphasise. As Lord Steyn has said on a number of recent occasions "courts of law must act on the best medical insight of the day": *R v Ireland* [1998] AC 147 at p 156D, *Frost v Chief Constable of South Yorkshire Police* [1999] 2 AC 455 at p 492B, *Morris v KLM Royal Dutch Airlines* [2002] 2 WLR 578 at p 591D (para [25]). In the latter case, Lord Hope of Craighead at p 605A (para [82]) said that statutes of the 'always speaking' type:

> "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."

328. Now as to some medical matters the court has judicial knowledge: see for example *Preston-Jones v Preston-Jones* [1951] AC 391 at p 401D (the normal period of human gestation). But the court is not condemned to act only on the basis of that which falls within its judicial knowledge. It can and must hear expert medical evidence.

<u>Updating construction in the present context</u>

329. Lord Hoffmann in *Oakley* referred, as we have seen, to "advancing knowledge, technology or social standards". The cases in fact suggest that there are at least four different types of change in what Lord Wilberforce in the *Royal College of Nursing* case called "the state of affairs existing, and known by Parliament to be existing, at the time" and which the doctrine of the "always speaking" statute may have to accommodate when an elderly statute is to be applied in modern conditions: first, changes in our understanding of the natural world (for example, the developments in psychiatry considered in *Ireland*, *Frost* and *Morris*); secondly, technological changes (the invention of the telephone considered in *Edison* and *Ireland* or of the new types of vehicle referred to by Lord Hoffmann in *Oakley*; the changes and advances in medical technology considered in the *Royal College of Nursing* case and in *Quintavalle*); thirdly, changes in social standards (the improving standards of hygiene considered in *Oakley*); and, fourthly, changes in social attitudes (the attitudes to homosexuality considered in *Fitzpatrick* and to punishment referred to by Lord Hoffmann in *Oakley*).

330. Superficially it might be thought that the present case involves – and in the most acute form – at least three of these categories of change: changes in our understanding of

medical science, in particular of the processes of pregnancy; astonishing changes and advances in medical technology, in particular in the technology of contraception; and equally dramatic changes in social attitudes towards both contraception and abortion. That, no doubt, is so as a matter of fact. It is not so, however, as a matter of law.

331. The search for the true solution has, in my judgment, to proceed on a much narrower front and, moreover, not on the basis upon which much of the current debate is conducted. For it is important to realise that the terms in which the current debate is often carried on are utterly anachronistic. Let me explain why and also explain why it is important to appreciate the significance of the observation.

332. The world of 1803 or even of 1861 was very different from our own. A society which could believe that the pillory and the gallows were appropriate punishments for abortion is so utterly alien to our own as to make it almost impossible to bridge the gulf of incomprehension. Even in 1861 our society was only on the brink of the beginnings of the modern world. What, not least in this context, were probably two of the most important of all the books written in that remarkable century – John Stuart Mill's *'On Liberty'* and Charles Darwin's *'On the Origin of Species'* – had only just been published, both, as it happens, in 1859. Bishop Samuel Wilberforce's famous confrontation with T H Huxley at the meeting of the British Association for the Advancement of Science at Oxford had taken place as recently as June 1860. One has only to look at the *Bradlaugh-Besant* litigation in the 1870s to see a society which in matters sexual was almost unimaginably different from ours. Not for nothing did Mill when writing in 1869 on *'The Subjection of Women'* suggest that

> "If married life were all that it might be expected to be, looking
> to the laws alone, society would be a hell upon earth".

333. A poet famously suggested that "Sexual intercourse began / In nineteen sixty-three". That caustic comment, which Larkin mordantly related to what he called "the end of the *Chatterley* ban", conceals an important truth. The simple fact is that, as in so many other matters sexual, so far as concerns contraception, in both its technological and its social aspects, the modern world – our world – is a world which has come into being during the lifetime of many of us alive today. It is a development of the 1960s – whether 1963, the poet's Annus Mirabilis, or 1967, Parliament's year of activity, matters not for present purposes.

334. But that does not mean that a judge can simply re-write the 1861 Act in the light of all these medical, social and cultural changes. On the contrary, the very fact that the world of 1861 is almost irrecoverable to us – "there lies a gulf of mystery which the prose of the historian will never adequately bridge. They cannot come to us, and our imagination can but feebly penetrate to them" – makes it all the more important, as it seems to me, to resolve the issue at hand *not* by conducting the debate either on some assumption, almost certainly erroneous, as to how the wider debate was being conducted in 1861, or in the modern terms in which it is currently so often pursued, but rather, strictly and faithfully, within the narrow parameters of the debate which is enjoined on us by the language in which in 1861 Parliament chose to legislate. That,

after all, as I read such cases as *Ireland*, *Fitzpatrick* and *Oakley*, is the judicial duty mandated by our system of Parliamentary democracy.

335. The modern debate, as we have seen, is typically conducted by asking such questions as whether the morning after pill is truly a contraceptive or whether it is rather an abortifacient. Now I do not doubt that in the context of the contemporary medical, social, moral and ethical debate, the answers to such questions are very important. But they are, as it seems to me, almost wholly irrelevant to anything I have to decide.

336. As I have already remarked, the society which legislated on this issue from 1803 to 1861 was very different from our own. The truth is that, at least in relation to such issues as those which I have to grapple with, it is so utterly alien to our own that speculations – and that is all they can be – as to what lay behind the nineteenth-century Parliamentary process would be both inappropriate and dangerous. There are, as it seems to me, two – and only two – things that one can quite clearly and safely derive from the legislative history from 1803 to 1861. But they are enough.

337. The first is that Parliament never had the question of contraception in mind at all. By this I do not mean merely that Parliament did not have in mind all those contraceptive techniques which, however familiar to us now, in 1861 lay far away in what I strongly suspect would then have been an almost inconceivable future. No, what I really mean is that Parliament in 1861 simply would not have seen the debate in terms of contraception at all. The *Bradlaugh-Besant* litigation shows clearly enough, as it seems to me – and this is its importance – that even in the late 1870s the issue of contraception was simply beyond the bounds of permissible debate not merely in polite society but also in legal and Parliamentary circles. Indeed, the subsequent history as I have summarised it above shows that in some influential circles such attitudes persisted well into the last century. So the terms of the modern debate are utterly anachronistic. In 1861 – unlike in 1967 – Parliament was not legislating to ban abortion whilst permitting contraception. It was simply legislating to punish abortion – albeit not with the savagery which had characterised the statute book down to 1837. So, if I am to be faithful to *Ireland* and *Oakley* what I have to focus on is the law of abortion and that alone.

338. The other thing is this. As I have already remarked, the one consistent feature of all the legislation from 1803 to 1861 is the criminalisation of abortion by reference to the same fundamental principle: that the gist of the offence lies in the doing of certain acts intending (or knowing that someone else intends) "to procure a miscarriage". The procuring of a "miscarriage" is thus what Lord Hoffmann (adopting Professor Dworkin's terminology) would call the "concept" employed by Parliament for this purpose. My task, therefore, is to ascertain what Lord Hoffmann would call the "content" – Professor Dworkin the "conception" – of that concept, always remembering that, as Lord Hoffmann was at pains to point out, I cannot construe the 1861 Act "to mean something conceptually different from what the contemporary evidence shows that Parliament must have intended." And as I have already observed, the word "miscarriage" as used in the 1861 Act is not 'value sensitive'. So I cannot, as it seems to me, construe its meaning simply by having regard to the enormous changes and advances in medical and contraceptive technology since 1861 or to the equally

dramatic changes in social and sexual attitudes since then. As Mr Gordon points out, the relevant type of up-dating is not that which was in issue in *Fitzpatrick*.

SPUC'S CASE

339. Both the general contours of SPUC's case, and much of the detail of it, will by now be apparent. But it is convenient at this point to summarise the way in which Mr Gordon puts it.

340. He helpfully and correctly identifies the question upon which SPUC's claim turns as being whether one who causes the expulsion or destruction of an embryo prior to implantation procures a miscarriage within the meaning of sections 58 and 59 of the 1861 Act.

341. SPUC's case that this question must be answered in the affirmative was summarised by Mr Gordon in the following propositions:

i) The primary legal question is the meaning of the word "miscarriage" in the 1861 Act. That has to be addressed having regard to the purpose of the 1861 Act and contemporary understanding of the meaning of the word.

ii) The purpose of the 1861 Act was to protect the life of the unborn and also to protect the health of women by criminalising the procuring of miscarriage. The intention of the 1861 Act was to remove the previous temporal limitation on the scope of the offence and to provide that a miscarriage could occur at any time after life had started, or at least at any time after fertilisation.

iii) When the 1861 Act was passed the word "miscarriage" was understood to include the expulsion or destruction of the embryo prior to implantation.

iv) There is now some disagreement on the proper meaning of the word "miscarriage". However, there is at least a very strong body of medical opinion which understands the term in the same way as in 1861.

v) That being so the principles of statutory up-dating are not engaged.

vi) If, contrary to SPUC's submission, there has been any relevant change in the use of the word "miscarriage" since 1861, such a change cannot alter the conceptual reach of the 1861 Act. Only legislation could do that.

vii) The twin purposes of the 1861 Act would, in any event, not justify up-dating.

342. I must explain in a moment why in my judgment SPUC's case is wrong both in fact and in law. In summary, however, SPUC is wrong in law in seeking to tie the meaning of the word "miscarriage" to the sense in which it was understood in 1861 (whatever that was) and in the limited effect it allows to the principle of updating construction. There is nothing in the 1861 Act to demonstrate a Parliamentary intention to protect "life" from the point of fertilisation. The construction for which the defendants contend does not involve any alteration in the conceptual reach of the 1861 Act. Parliament's intention in 1861 was to criminalise the procuring of "miscarriages". The content of that Parliamentary intention has, as a matter of law, to be assessed by reference to current – not nineteenth century – understanding of what the word means.

"MISCARRIAGE" - THE MEANING OF THE 1861 ACT

343. There are, in my judgment, a number of separate reasons why SPUC is wrong and why, as I have concluded,

i) the word "miscarriage" when used in section s 58 and 59 of the 1861 Act presupposes that the fertilised ovum has become implanted in the endometrium of the uterus; and

ii) accordingly there is nothing in sections 58 and 59 of the Act which in any way criminalises, makes unlawful, or otherwise prohibits or inhibits the prescription, supply, administration or use of the pill, the mini-pill or the morning-after pill (or, so far as the evidence before me bears on this aspect of the case, of IUDs).

344. In *R v Dhingra*, as we have seen, Wright J expressed his conclusion in these words:

> "I … adopt the narrower interpretation of this part of section 58, and hold that the word "miscarriage" in this context relates to the spontaneous expulsion of the products of pregnancy. I further hold, in accordance with the uncontroverted evidence that I have heard, that a pregnancy cannot come into existence until the fertilized ovum has become implanted in the womb …
>
> It follows from this – and I so hold – that the insertion of an intra-uterine contraceptive device before a pregnancy has become established, with the intention of preventing the successful implantation in the uterine wall of any fertilized ovum that may result from a prior act of sexual intercourse, does not amount to an offence under section 58 of the Offences Against the Person Act 1861."

345. I entirely agree.

346. In my judgment the prescription, supply, administration or use of the morning-after pill does not – indeed cannot – involve the commission of any offence under either section 58 or section 59 of the 1861 Act. On the evidence I have heard – corresponding in all material respects, so far as I can see, with the evidence which Wright J heard – neither the 1861 Act nor the 1967 Act has anything whatever to do with the use of the pill, the mini-pill or the morning-after pill.

The meaning of the 1861 Act

347. The first, and, on its own, determinative, reason for coming to this conclusion is simple and, in my judgment, unanswerable.

348. SPUC's entire argument in effect requires one, as Mr Parker put it, to 'freeze the frame' in 1861 and to give the word "miscarriage" the meaning it was then understood as having. In effect SPUC's case is put on the basis that Parliament intended a particular construction in 1861 and that nothing which has happened subsequently has altered or is capable of altering that construction.

349. Now quite apart from the artificiality of freezing the frame in 1861, when the word had been consistently used in this context ever since the beginning of the century, and the impossibility in fact of ascertaining "the" meaning of the word in 1861, SPUC's whole approach is, with respect to Mr Gordon, entirely inapt – in fact quite inconsistent with a proper application of the principles of updating construction.

350. Applying the principles to be found, in particular, in *Ireland*, *Fitzpatrick* and *Oakley*, the correct approach can be set out in the form of four propositions:

i) the 1861 Act is an "always speaking" Act;

ii) the word "miscarriage" is an ordinary English word of flexible meaning which Parliament in 1861 chose to leave undefined;

iii) it should accordingly be interpreted as it would be *currently* understood;

iv) it should be interpreted in the light of the best current scientific and medical knowledge that is available to the court.

351. Now whatever Mr Gordon may say, there is in truth no substantial dispute as to the current meaning of the word "miscarriage". Pregnancy begins once the blastocyst has implanted in the endometrium. More particularly, miscarriage is the termination of such a post-implantation pregnancy. Current medical – and, indeed, I would add, current lay and popular – understanding of what is meant by "miscarriage" plainly excludes results brought about by IUDs, the pill, the mini-pill and the morning-after

pill. That, in my judgment, is clear in the light of Professor Drife's evidence and the various current medical dictionaries to which I have referred – just as it was clear to Wright J in the light of the very similar evidence he heard.

352. At the end of the day – and despite the length of this judgment – the resolution of this case is as short and simple as that.

353. I should add that this conclusion accords with the meaning properly attributed to "miscarriage" by linguistic analysis. The word "miscarriage" as a matter of language presupposes some prior carriage. There can be no miscarriage (or what is by common consent its synonym, abortion) in the absence of true carriage. Prior to implantation there is no true carriage. It may be theoretically possible to argue that carriage can occur when the embryo is free floating in the fallopian tube or in the uterus. However, the much the more natural meaning involves not merely presence in the woman's body and interaction with it, but attachment to it in a real sense such as occurs only with implantation.

354. A certain amount of play was made by Mr Gordon with what he said was the "purpose" of the 1861 Act. No-one really disputed that two of the purposes of the Act were plainly the protection of women and the protection of the unborn. But the fact that one of the legislative purposes of the 1861 Act was – is – the protection of unborn human life has no direct bearing on the issue before me: How far back does the protection afforded by the Act extend? As Mr Anderson pointed out, the various purposes underlying the Act are all capable of expression in abstract terms (protection of women; protection of the unborn; facilitating proof of an offence): but they can be given effect only to the extent that they are reflected in the words used by Parliament. Nothing that is said about statutory purpose can relieve SPUC from the obligation to show that the words of the 1861 Act (in particular, "miscarriage") have the meaning claimed for them. And that, in my judgment, SPUC has signally failed to do.

355. Mr Gordon pressed me with Lord Wilberforce's analysis of the updating principle in the *Royal College of Nursing* case as set out in paragraphs [308]-[309] above. As Mr Anderson commented, Lord Wilberforce's test is perhaps of greatest assistance in a case (such as *Quintavalle* or, indeed, the *Royal College of Nursing* case as it was perceived by Lord Wilberforce) in which Parliament's intention is more clearly expressed in a limited manner and it is sought by purposive construction to extend that intention to an entirely different situation. That is not this case. The word used here by Parliament is, as I have said, an ordinary English word of flexible meaning which Parliament in 1861 chose to leave undefined. In such a case the proper approach, as I see it, is that marked out by *Ireland* and *Oakley*. I should add that Mr Gordon's submissions involved placing on the word "only" in Lord Wilberforce's phrase "a clear purpose in the legislation which can only be fulfilled if the extension is made" a weight which, if the whole passage is read in context, it simply cannot bear.

356. I agree with Mr Anderson when he submits that the presence of the words "whether she be or be not with child" in sections 58 and 59 of the 1861 Act cast no light on the point at which Parliament intended that the protection of life should begin. As he

observes, from SPUC's point of view the words prove too much: a criminal offence may be committed even if the woman is not and never has been pregnant.

The 1861 Act considered in the context of the 1967 Act

357. Further support – though in the view I take of it further support is unnecessary – is afforded for this conclusion when the 1861 Act is considered in the context of the 1967 Act.

358. Parliament when it originally enacted the 1967 Act did so, as section 6 shows, expressly by reference to sections 58 and 59 of the 1861 Act. Section 5(2) of the 1967 Act, read in conjunction with section 6, provides avowedly for the 1967 Act to define that which is (un)lawful for the purposes of the 1861 Act. The 1861 Act and the 1967 Act operate as a statutory code in relation to the procuring of abortions or miscarriages – the two words being used synonymously – the 1967 Act defining that which is lawful and the 1861 Act that which is criminal.

359. Bearing in mind that IUDs had been in popular use since 1959 and the pill since 1961, and that the National Health Service (Family Planning) Act 1967 had been enacted only some four months previously, I find it quite inconceivable that Parliament when it enacted the 1967 Act intended to bring the use of IUDs and the pill within the limited confines of the 1967 Act.

360. As Mr Anderson submits, the 1861 Act and the 1967 Act should be construed so that they can, as Parliament plainly thought they could, sit side by side in a coherent statutory regime.

361. The point does not end there because, as we have seen, section 5(2) of the 1967 Act was amended by the 1990 Act in such a way as to link the concepts of "miscarriage" and "foetus". Section 5(2), which itself refers via section 6 to sections 58 and 59 of the 1861 Act, now incorporates the phrase "miscarriage of any foetus", and the word "foetus" is on any view a reference to the organism at a stage after implantation.

362. Reading the 1861 Act in the context of and as part of the statutory scheme created by the 1967 Act and modified by the 1990 Act, such things as IUDs, the pill, the mini-pill (developed in the 1970s) and the morning-after pill (available to the public since 1984) were plainly not being treated by Parliament in 1990 as within the scope of the 1861 Act or, indeed, within the scope of what the legislation calls "the law relating to abortion". In this context it is, I think, permissible to have regard to what Lord Nicholls of Birkenhead said in that part of his speech in *Fitzpatrick* which I have set out in paragraph [318] above.

363. I note also in this connection that in 1974 the Report of the Committee on the Working of the Abortion Act chaired by The Hon Mrs Justice Lane DBE, Cmnd 5579, had provided the following definition:

> "Abortion – (or Miscarriage) the separation and expulsion of the contents of the pregnant uterus before the 28th week of pregnancy."

364. Parliament must have been aware of that in 1990. It did not take the opportunity presented by the passing of the 1990 Act to correct this view.

The 1861 Act considered in the context of the 1990 Act

365. Section 2(3) of the 1990 Act, as we have seen, provides that:

> "For the purposes of this Act, a woman is not to be treated as carrying a child until the embryo has become implanted."

366. Now that reference although interesting is, as Mr Gordon correctly submits, nothing more than that. The 1990 Act is not *in pari materia* with the 1967 Act (even as amended by the 1990 Act) and section 2(3) is in any event carefully qualified by the words "For the purposes of this Act". Moreover, as we have seen, section 1(6) of the 1985 Act provides a different definition of "carrying". So it is not as if Parliament has in this branch of the law adopted a uniform terminology.

367. But Mr Parker has a quite separate, and as it seems to me compelling, point derived from the 1990 Act. Put shortly, he submits that SPUC's approach to the construction of sections 58 and 59 of the 1861 Act is, in relation to the protection afforded by the law to early embryos, inconsistent with the view taken by Parliament in passing the 1990 Act.

368. I have already summarised the scheme of the 1990 Act (see paragraphs [113]-[122] above). As Mr Parker correctly observes, the effect of the legislation is that the holder of a licence (whether for research or treatment purposes) can create an embryo *in vitro* and, if it is no longer required, simply dispose of it at any time up to the earlier of the appearance of the primitive streak or 14 days after creation.

369. But, and this is the importance of Mr Parker's submission, the 1990 Act not only sanctions the use and destruction of embryos up to 14 days after creation *in vitro*, but also makes provision for the taking from a woman of an embryo created *in vivo* and its subsequent use and disposal – ie, destruction.

370. The use of such embryos had previously been considered in 1984 in the Report of the Committee of Inquiry into Human Fertilisation and Embryology chaired by Dame Mary Warnock DBE, Cmnd 9314. At paragraph 7.1 of its Report the Committee described the technique of 'lavage' in which:

> " … the egg is released naturally from the ovary at the normal time in the donor's menstrual cycle. At the predicted time of

> ovulation she is artificially inseminated with semen from the husband of the infertile woman … Some three to four days later, *before the start of implantation*, the donor's uterus is "washed out" and any embryo retrieved is then transferred to the uterus of the infertile woman." (emphasis added)

371. Having considered the arguments both for and against the licensing of this technique, the Committee concluded at paragraph 7.5:

> "We do however have some reservations about the use of lavage because of the risk to the egg donor. **We recommend that the technique of embryo donation by lavage should not be used at the present time**." (original emphasis)

372. However, the 1987 White Paper which preceded the 1990 Act – *Human Fertilisation and Embryology: A Framework for Legislation*, Cm 259 – indicated the Government's intention that the legislation *should* include provision for licensing the use (and therefore the potential disposal) of embryos obtained by lavage (see paragraph 8). It made clear, however, the intention that licensing would be limited to embryos obtained prior to the start of implantation:

> "The legislation would not however apply to any embryo where implantation (the process whereby an embryo becomes embedded in the wall of the womb) was under way or had completed."

373. In the event, Parliament chose not to follow the recommendation in paragraph 7.5 of the Warnock Committee Report but rather the White Paper. The 1990 Act allows for the use of embryos obtained by lavage: see Schedule 3, paragraph 7(1), which I have already set out.

374. In the light of the Warnock Committee Report and White Paper it is clear that Parliament intended the 1990 Act to allow for the taking of a pre-implantation embryo from a woman, the use of that embryo for treatment or research and its subsequent disposal. In any event, as Mr Parker points out, section 1(2)(b) of the 1990 Act itself makes clear that Schedule 3, paragraph 7, refers – and refers only – to embryos fertilised *in vivo*.

375. The consequence is, says Mr Parker, and I agree, that an embryo created *in vivo* may, prior to implantation and with the consent of the woman concerned, be removed from her body, used to provide treatment services or in research and subsequently disposed of up to 14 days after fertilisation.

376. It is, submits Mr Parker, inconceivable that Parliament would have considered this acceptable whilst at the same time intending the criminalisation of women taking the morning after pill within 72 hours of intercourse, or those administering or supplying it.

377. This is, as it seems to me, a powerful argument. If SPUC is right, Parliament in 1990 created an anomaly every bit as great as that excoriated in 1849 by Tyler Smith. I cannot believe that it did.

Judicial authority

378. My conclusion is supported by such judicial authority as there is from the common-law world. None of the authorities to which I was referred provide any support either for Dr Keown's thesis or for SPUC's case. The simple fact is that the only authority in point – *R v Dhingra* – plainly supports the defendants' case.

379. As I have said, I am convinced that Wright J's decision in that case far from being wrong was entirely and obviously right.

The commentators

380. My conclusion is also supported by the overwhelming weight of legal writing by those commentators who have considered the matter. As Professor Grubb has correctly said, "The weight of legal writing supports the view that 'carriage' requires the developing embryo to have implanted."

381. I cannot accept the contrary analyses from Mr Tunkel and Dr Keown.

Other countries

382. My conclusion accords with what appears to be the position in all the Western European and Scandinavian countries of which we have information. It would be concerning if the position in this country were to differ on this point from that which obtains in Austria, Belgium, Denmark, Finland, France, Iceland, Italy, The Netherlands, Norway, Portugal, Sweden and West Germany.

383. My conclusion, although arrived at by a different line of reasoning, also accords with that of France's Conseil d'Etat. That is comforting.

384. I recognise, of course, that my conclusion differs from that arrived at by the courts in Chile and Argentina, but in each case the decision, as I read it, was based on a reading of a written constitution.

Social realities

385. Finally, it is not irrelevant to note that my decision accords with social realities. I am declaring licit – not criminal – that which has in fact been the daily practice of countless people in this country for many, many years.

CONCLUSION

386. On 10 May 1983, as I have already mentioned, the Attorney-General, Sir Michael Havers QC, gave a written answer in the House of Commons. I think I should set out the question and the answer:

> "**Dr Hampson** asked the Attorney-General how many complaints have been received, either by himself or by the Director of Public Prosecutions, which relate to the supply of what is commonly called the "morning after" pill; and whether he proposes to institute criminal proceedings in connection with any of the complaints.
>
> **The Attorney-General:** One complaint has been made direct to my Department and three to the Director of Public Prosecutions. Each complaint alleges that the supply and administration of such post-coital medications contravenes sections 58 and 59 of the Offences against the Persons Act 1861 and that a woman using such medication may commit an offence under section 58 of the Act.
>
> Such pills are intended to be taken by women following unprotected intercourse to inhibit implantation in the womb of any fertilised ovum. The sole question for resolution therefore is whether the prevention of implantation constitutes the procuring of a miscarriage within the meaning of sections 58 or 59 of the Offences against the Persons Act 1861. The principles relating to interpretation of statutes require that the words of a statute be given the meaning which they bore at the time the statute was passed. Further, since the words were used in a general statute, they are prima facie presumed to be used in their popular, ordinary or natural sense.
>
> In this context it is important to bear in mind that a failure to implant is something which may occur in the manner described above or quite spontaneously. Indeed in a significant proportion of cases the fertilised ovum is lost either prior to implantation or at the next menstruation. It is clear that, used in its ordinary sense, the word "miscarriage" is not apt to describe a failure to implant – whether spontaneous or not. Likewise, the phrase "procure a miscarriage" cannot be construed to include the prevention of implantation. Whatever the state of medical knowledge in the 19th century, the ordinary use of the word

> “miscarriage” related to interference at a stage of pre-natal development later than implantation.
>
> In the light of the above I have come to the conclusion that this form of post-coital treatment does not constitute a criminal offence within either sections 58 or 59 of the Offences against the Persons Act 1861. No proceedings are to be instituted.”

It follows from what I have already said that I agree entirely with everything Sir Michael said.

387. In the course of a debate in the House of Commons on 2 July 1998 the Minister of Public Health, Ms Tessa Jowell MP, said:

> “Emergency contraception is precisely that: contraception to be used in an emergency, possibly when the regular form of contraception fails. … However, it is intended to be used occasionally, and is not a form of long-term birth control. As the hon Lady said – I want to underline this – neither is it a form of abortion.”

388. On 19 July 2000, as I have said, the matter was again referred to in the House of Commons by the Minister of Public Health, on this occasion Ms Yvette Cooper MP:

> “**Mr Gummer:** To ask the Secretary of State for Health if he defines the morning-after pill as an abortifacient; and if he will make a statement.
>
> **Yvette Cooper:** The accepted legal and medical view is that emergency contraception is not a method of abortion. Emergency contraception pills work before implantation and so before a pregnancy has been established. Emergency contraceptive pills will not cause an abortion if taken after implantation.
>
> My right hon Friend the Attorney-General, in answering a parliamentary question in 1983, stated that medical practitioners would not be prosecuted for illegal abortion if they sought to prevent implantation by the use of the ‘morning-after pill’ or an inter-uterine device.”

389. On 24 January 2001, in the course of debate on the 2000 Order in the House of Commons Standing Committee on Delegated Legislation, the Minister of Public Health, Ms Cooper, said this:

> “Levonorgestrel … works prior to implantation and prevents pregnancy. The accepted legal and medical view is that emergency contraception is not a method of abortion.”

390. Again, I agree entirely with everything said by successive Ministers of Public Health.

391. This application must be dismissed.

392. In my judgment the prescription, supply, administration or use of the morning-after pill does not – cannot – involve the commission of any offence under either section 58 or section 59 of the 1861 Act.

ENVOI

393. This is a conclusion which I have arrived at by what is, I believe, nothing more than a strict application of the principles of statutory construction clearly established by cases such as *Ireland*, *Fitzpatrick* and *Oakley*. There has been no need for me in this case, as there was for the Court of Appeal in *Quintavalle*, to strain the Parliamentary language. Far from my having impermissibly usurped Parliament's function I have merely performed my judicial duty in striving to give effect to what I believe was Parliament's clear intention. Nonetheless I have to confess that this is a conclusion which I have come to without any regret. Quite the contrary.

394. 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 abiding citizens have been doing day in day out for so many years is and always has been criminal. I am glad to be spared so unattractive a duty. The social case put by fpa, and supported in all particulars by the Secretary of State, remains wholly unanswered by SPUC. Preferring to concentrate, as it is entitled to, upon narrow legal issues, SPUC has not attempted to refute fpa's case. I strongly suspect that it could not, even if it wished to.

395. There is another point. I say nothing about abortion, as that word would commonly be understood by the man on the Clapham omnibus or the woman on the Underground, nor about the use of contraceptives by those under the age of discretion. These are matters which raise very different issues – issues which I am not in any way concerned with to-day. But I have to say that I cannot see that it is any part of the responsibilities of public authorities – let alone of the criminal law – to be telling adult people whether they can or cannot use contraceptive devices of the kind which I have been considering.

396. It is, as it seems to me, for individual men and woman, acting in what *they* believe to be good conscience, applying those standards which *they* think appropriate, and in consultation with appropriate professional (and, if they wish, spiritual) advisers, to decide whether or not to use IUDs, the pill, the mini-pill and the morning-after pill. It is no business of government, judges or the law.

397. Government's responsibility is to ensure the medical and pharmaceutical safety of products offered in the market place and the appropriate provision of suitable guidance and advice. Beyond that, as it seems to me, in this as in other areas of medical ethics, respect for the personal autonomy which our law has now come to recognise demands that the choice be left to the individual. This is a topic appropriately regulated by the Medicines Act 1968: it is no proper part of what is regulated by the Offences against the Person Act 1861.

398. Decisions on such intensely private and personal matters as whether or not to use contraceptives, or particular types of contraceptives, are surely matters which ought to be left to the free choice of the individual. And, whilst acknowledging that I have had no argument on the point, I cannot help thinking that personal choice in matters of contraception is part of that "respect for private and family life" protected by Article 8 of the Convention. The reasoning of the Supreme Court of the United States of America in *Griswold*, *Eisenstadt* and *Carey* no doubt reflects a different constitutional background, but are not the underlying principles the same?