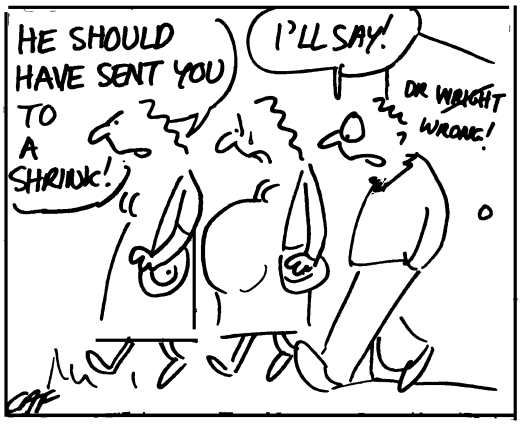
ABORTION retried

Catherine Henry

The legal status of abortion: under question again.



A case decided in the NSW Supreme Court in April 1994, *CES v Superclinics (CES)* has resurrected the issue of the legal status of abortions. The case was the subject of an appeal to the NSW Supreme Court (Court of Appeal) in January this year and, at the time of writing, is not yet determined.* This case is the most significant abortion case since the 'Levine ruling' in *R v Wald* (1971) 3 DCR (NSW) 25 over 20 years ago. Given the dearth of Australian abortion cases, it is somewhat ironic that the *CES* case did not, as the other abortion cases did, arise from a prosecution. Instead, it was a civil damages claim arising from the allegedly negligent failure on the part of certain medical practitioners to diagnose a woman's pregnancy.

The case was one in contract and negligence brought by the parents of a child against a number of general practitioners and a clinic (Superclinics) located in the CBD of Sydney which, it was claimed, employed the doctors. The plaintiff, CES, had consulted the doctors at the Clinic. The plaintiff mother is called CES, as a suppression order was granted to protect the anonymity of the child. It was CES' evidence at the trial that she had told each of the defendants she was concerned to investigate whether her absence of periods meant she was pregnant. It was also her evidence that she had told each doctor at each consultation that if she was in fact pregnant she wished to have an abortion. At the time, CES was 21 years old, a part-time student, earning a meagre income in her mother's handcraft business, living in shared accommodation and in a relationship that was not a happy one. Over a two-month period, there were five visits to the defendant doctors at the Superclinic. CES was pregnant but each of the defendant doctors had failed to diagnose the pregnancy. Finally, some two months after the last visit to the Superclinic, the pregnancy was confirmed by a doctor from the suburbs who had treated CES' family over the years. At the time of diagnosis, the gestational age of the pregnancy was 19½ weeks and the medical opinion available to CES at the time was that the pregnancy was too advanced to terminate.

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

Justice Newman found that there had been breaches of the duty of care owed to the plaintiff CES (with the exception of one of the doctors). He also found, more importantly, that the abortion which CES had wanted but had been denied would not have been recognised by

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*** Editors' note:** This article was written before the NSW Court of Appeal handed down its judgment in *CES v Superclinics.* The decision was delivered on 22 September 1995. By a 2:1 majority the court overturned Newman J's judgment. Kirby P and Priestley JA were of the view that CES would probably not have been guilty of a criminal offence if she had had an abortion after being appropriately diagnosed. (Meagher J was in vehement dissent.) *R v Wald* was affirmed as an accurate statement of the law.

Application has been made for special leave to appeal to the High Court. Despite the subsequent developments we have included this article as we feel it is timely to review the legal history of abortion in Australia in the 20 years leading up to the CES case.

the law. He then went on to apply the common law principle that a plaintiff cannot recover compensation for having been denied the opportunity of having performed an illegal act.

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

The Menhennit and Levine Rulings

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

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

At the trial, Jim Staples (formerly Judge of the NSW Industrial Commission) submitted to Judge Levine that he should direct an acquittal and take the case away from the jury. Staples has since described his address as 'put(ting) the whole law of abortion as conventionally received into issue'. During the course of the address, he had recited the legal and social history of the rules of law relating to the inducing of miscarriages from as early as the 16th century and reviewed all the statutory provisions of the 19th century and the modern rulings of the courts. It was his basic tenet that as long as reasonable care was taken during the abortion procedure, the woman concerned properly consented and no harm or injury occcured, abortion had never constituted a criminal offence. Abortion, he submitted, should only be unlawful if it constituted an assault.

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

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

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

- necessary to preserve the woman from a serious danger to life or her physical or mental health (not being merely the normal dangers associated with pregnancy and childbirth); or
- in the circumstances is not out of proportion to the danger to be averted.

Dr Davidson was acquitted by the jury of all charges.

A period of 'truce'[2]

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

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

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

There has followed since a period of relative but uneasy stability. There are endeavours, from time to time, by the 'Right to Life' movement and politicians, via the mechanisms of private members bills, to attempt to confine the availability of abortion services. Notwithstanding this, the law in this area has been regarded as settled for the past two decades in accordance with the principles laid down in the two formative cases. In this period, there has been almost no prosecutorial activity. While the police are certainly obliged to investigate complaints of so-called 'abortion offences', law enforcers today do not perceive the contravention of abortion laws as a serious law enforcement problem.[6] For instance, neither the NSW nor the Victorian State DPP have formulated prosecutorial guidelines governing the prosecution of unlawful abortions. The laws are regarded as 'unenforceable'[7] as borne out by the local track record. Of direct

relevance is the widespread view that the requisite standard of proof is impossible to sustain. Only in the case of a 'backyard' procedure, would it be likely that the Crown would be successful in establishing that the medical practitioner did not hold the required honest and reasonable belief as to the danger to the woman's physical or mental health.

How many abortions?

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

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

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

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

'Abortion rise blamed on recession'[11]

'Grim choice: mortgage or baby'[12]

CES v Superclinics

In wanting her own pregnancy terminated, CES was motivated by lifestyle and financial reasons and was therefore no different to the many women who have presented to freestanding abortion clinics in the 1980s and 1990s seeking (and obtaining) abortions. At the trial, evidence was led in relation to the state of *CES'* mental health. Evidence of her significant distress at the news of the diagnosis of pregnancy and in the period leading up to the child's birth was given by a number of witnesses. CES did not receive any professional counselling at the time the pregnancy was diagnosed, although, the doctor who finally diagnosed the pregnancy gave evidence at trial that 'there was a serious danger to CES' mental health in allowing the pregnancy to proceed to term'. Despite this evidence, Newman J considered the failure to refer for psychiatric counselling by the GP to be fatal to the case on the criteria of 'danger to mental health', saying:

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

The aftermath of *CES v Superclinics*

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

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

However, women have *not*, it would seem, had to satisfy a doctor of symptoms consistent with a recognisable psychiatric illness in order to have an abortion. Indeed, women presenting to freestanding clinics in the major centres have, more often than not, been counselled pre-procedure, not by doctors, but by non-medically trained women workers.[14] The law can, therefore, be seen to be out of step with practical reality.

It is perhaps trite to observe that women will continue to seek and obtain abortions despite restrictive judgments on paternalistic legislative provisions. However, a climate of doubt and uncertainty which inevitably follows a decision such as *CES* is surely neither helpful nor desirable for women who are experiencing such a stressful life experience as an abortion.

It is therefore to be hoped that the opportunity afforded to the NSW Court of Appeal in the CES case is used to articulate support for a woman's right to choose.

References

1. A useful history of events in the late 1960s and early 1970s is described in Siedlecky, Stephania and Wyndham, Diana, *Populate and Perish: Australian Women's Fight for Birth Control*, Allen and Unwin, Sydney, 1990, Chapter 6.
2. Jim Staples, former NSW Industrial Commission Judge and who earlier in his career defended the two doctors in *R v Wald* describes the 'deal' struck by police and abortion activists in NSW in the period post-Wald as a truce in a paper presented at the 20th anniversary Preterm Foundation dinner on 30 May 1994.
3. Staples, Jim, above, p.3.
4. Staples, Jim, above, p.3.
5. Waller, Louis, 'Any Reasonable Creature in Being', (1987) 13 *Monash University Law Review*, March, p.47.
6. Cica, Natasha, 'The Inadequacies of Australian Abortion Law', (1991) 5(1) *Australian Journal of Family Law* 47.
7. McMichael, Tony (ed), *Abortion: The Unforceable Law*, Law Book Company, Sydney, 1972.
8. Statistics provided by the Functions Statistics Branch of the Health Insurance Commission for the 1993-94 financial year.
9. Finds of the National Science Survey as reported in Kelley, Jonathan and Evans, MDR, 'Should Abortion be Legal? Australians' Opinions and their Sources in Ideology and Social Structure' in Jonathan Kelley and Clive Bean (eds) *Australian Attitudes*, Allen and Unwin, Sydney, 1988.
10. Abortion providers confirm this to be the case from their experience in the conduct of counselling sessions prior to the abortion procedure: statements made by the Medical Director of Australian Birth Control Services in the press after the CES case — see Voumard, Sonya, 'No Regrets for Abortion Doctor', *Sydney Morning Herald*, 20. 4.94, p.6.
11. *Age* 29.3.92.
12. *Sydney Morning Herald*, 3.3.91.
13. These are the view of Tony McMichael in 'Introduction: The Case for Reform' in *Abortion: The Unforceable Law*, above.
14. Coleman, Karen, 'Politics of Abortion in Australia: Freedom, Church and State', (1988) 29 *Feminist Review* 75-97.