[1979] QB 276, [1978] 2 All ER 987, [1978] 3 WLR 687, 142 JP 497

Paton v **British Pregnancy Advisory Service** Trustees and another

QUEEN'S BENCH DIVISION AT LIVERPOOL

[1979] QB 276, [1978] 2 All ER 987, [1978] 3 WLR 687, 142 JP 497

HEARING-DATES: 24 MAY 1978

24 MAY 1978

CATCHWORDS:
Abortion - Legal abortion - Power of husband to prevent wife having abortion - Wife obtaining necessary medical certificates for legal abortion - Wife wanting abortion - Husband applying for injunction to stop her having abortion - Whether injunction could be granted - Abortion Act 1967, s 1.

HEADNOTE:
A wife, who had conceived a child by her husband, was concerned about her pregnancy. She went, on her own, to see two registered medical practitioners about it. They were of the opinion, formed in good faith, that the continuance of her pregnancy would involve risk of injury to her physical or mental health. They issued the necessary certificates so that her pregnancy could, by virtue of s 1 a of the Abortion Act 1967, be lawfully terminated. She wanted to have the abortion but her husband, who had not been consulted either by her or by the medical practitioners before the certificates were issued, did not want her to have one. He claimed that he had a right to have a say in the destiny of the child and applied to the court for an injunction restraining her from causing or permitting an abortion to be carried out on her without his consent.

a Section 1, so far as material, is set out at p 991 e and f, post

Held - An injunction could not be granted because a husband had no right, enforceable at law or in equity, to stop his wife having, or a registered medical practitioner performing, a legal abortion (see p 991 g to j and p 992 g, post).

NOTES:
For the medical termination of pregnancy, see 11 Halsbury's Laws (4th Edn) para 1194.

For the Abortion Act 1967, s 1, see 8 Halsbury's Statutes (3rd Edn) 682.

CASES-REF-TO:

Elliot v Joicey [1935] AC 209, [1935] All ER Rep 578, 104 LJCh 111, sub nom Re Joicey, Joicey v Elliot 152 LT 398, HL, 49 Digest (Repl) 743, 6965.
Forster v Forster (1790) 1 Hag Con 144, 161 ER 504, 27(1) Digest (Reissue) 557, 4053.
Gouriet v Union of Post Office Workers [1977] 3 All ER 70, [1977] 3 WLR 300, HL.
Jones v Smith (1973) 278 So 2d 339.
Montgomery v Montgomery [1964] 2 All ER 22, [1965] P 46, [1964] 2 WLR 1036,

27(2) Digest (Reissue) 936, 7555.
North London Railway Co v Great Northern Railway Co (1883) 11 QBD 30, 52 LJQB 380, 48 LT 695, CA, 28(2) Digest (Reissue) 959, 24.
Planned Parenthood of Central Missouri v Danforth, Attorney-General of Missouri (1976) 428 US 52, 96 S Ct 2831.
R v Smith (John) [1974] 1 All ER 376, [1973] 1 WLR 1510, 138 JP 175, 58 Cr App Rep 106, CA, 15 Digest (Reissue) 1202, 10,314.
Roe v Wade (1972) 410 US 113, 93 S Ct 705.
White v Yup (1969) 458 P 2d 617.

INTRODUCTION:
Application for injunction. By a specially endorsed writ the plaintiff, William Paton ('the husband') applied for an injunction restraining the first defendants, the trustees of BPAS (**British Pregnancy Advisory Service)**, and the second defendant, his wife, Joan Mary Paton ('the wife'), from causing or permitting an abortion to be carried out on the wife without his consent. The facts are set out in the judgment.

COUNSEL:
Andrew Rankin QC and Stephen J Bedford for the husband. William Denny QC and R E Rhodes for the first defendants. Fielding Hatton for the wife.

PANEL: SIR GEORGE BAKER P SITTING AS AN ADDITIONAL JUDGE OF THE QUEEN'S BENCH DIVISION

JUDGMENTBY-1: SIR GEORGE BAKER P.

JUDGMENT-1:
SIR GEORGE BAKER P. By a specially endorsed writ the plaintiff, who is the husband of the second defendant, seeks an injunction in effect to restrain the first defendants, a charitable organisation, and particularly his wife, the second defendant, from causing or permitting an abortion to be carried out on his wife without his consent.

Such action, of course, arouses great emotions, and vigorous opposing views as was recently pointed out in 1972 in the Supreme Court of the United States by Blackmun J in Roe v Wade n1. In the discussion of human affairs and especially of abortion, controversy can rage over the moral rights, duties, interests, standards and religious views of the parties. Moral values are in issue. I am, in fact, concerned with none of these matters. I am concerned, and concerned only, with the law of England as it applies to this claim. My task is to apply the law free of emotion or predilection.

n1 (1972) 410 US 113 at 116

Nobody suggests that there has ever been such a claim litigated before the courts in this country. Indeed, the only case of which I have ever heard was in Ontario.It was unreported because the husband's claim for an injunction was never tried.

In considering the law the first and basic principle is that there must be a legal right enforceable at law or in equity before the applicant can obtain an injunction from the court to restrain an infringement of that right. That has long been the law. The leading case is North London Railway Co v Great Northern Railway Co n2. Counsel for the husband has helpfully read much of the judgment of Cotton LJ. I will confine myself to

the following well-known passage n3:

n2 (1883) 11 QBD 30

n3 11 QBD 30 at 40

'In my opinion the sole intention of the Section [i e s 25(8) of the Supreme Court of Judicature Act 1873] is this: that where there is a legal right which was, independently of the Act, capable of being enforced either at law or in equity, then, whatever may have been the previous practice, the High Court may interfere by injunction in protection of that right.'

In Montgomery v Montgomery n4, a well-known case in family law, Ormrod J, having cited the passage from Cotton LJ's judgment n3 and reviewed the various authorities, concluded that the court could only grant an injunction to support a legal right, and since the petitioner wife had no proprietary interest in the flat in which the parties were living, the court had no jurisdiction to make a mandatory order to exclude the husband from the flat. The words 'husband and wife' were used, although the parties were no longer joined in matrimony, having been divorced.

n3 11 QBD 30 at 40

n4 [1964] 2 All ER 22 at 23, [1965] P 46 at 50

The law relating to injunctions has been considered recently in the House of Lords, in Gouriet v Union of Post Office Workers n5. Many passages from their Lordships' speeches have been cited. I do not propose to go through them because it is now as clear as possible that there must be, first, a legal right in an individual to found an injunction and, second, that the enforcement of the criminal law is a matter for the authorities and for the Attorney-General. As counsel for the husband concedes, any process for the enforcement of the criminal law in a civil suit must be used with great caution, if at all. The private individual may have the right only if his right is greater than the public right, that is to say, that he would suffer personally and more than the general public unless he could restrain this offence. That proposition is not accepted by counsel for the first defendants or by counsel for the wife, and in any event it is not now suggested that the proposed abortion on the wife will be other than lawful. So, it is not necessary for me to decide that question or to consider Gouriet v Union of Post Office Workers n5 further.

n5 [1977] 3 All ER 70, [1977] 3 WLR 300

The first question is whether this plaintiff has a right at all. The foetus cannot, in English law, in my view, have any right of its own at least until it is born and has a separate existence from the mother. That permeates the whole of the civil law of this country (I except the criminal law, which is now irrelevant), and is, indeed, the basis of the decisions in those countries where law is founded on the common law, that is to say, in America, Canada, Australia, and, I have no doubt, in others.

For a long time there was great controversy whether after birth a child could have a right of action in respect of per-natal injury. The Law Commission considered that and produced a working paper n1 in 1973, followed by a final report n2, but it was universally accepted, and has since been accepted, that in order to have a right the foetus must be born and be a child. There was only one known possible exception which is referred to in the working paper n3, an American case, White v Yup n4, where the wrongful death of an eight month old viable foetus, stillborn as a consequence of injury, led an American court to allow a cause of action, but there can be no doubt, in my view, that in England and Wales, the foetus has no right of action, no right at all, until birth. The succession cases have been mentioned. There is no difference. From conception the child may have succession rights by what has been called a 'fictional construction' but the child must be subsequently born alive. See per Lord Russell of Killowen in Elliot v Joicey n5.

n1 Working Paper no 47

n2 Report on Injuries to Unborn Children, Law Com 60 (Cmnd 5709)

n3 Law Com Working Paper no 47 at p 3

n4 (1969) 458 P 2d 617

n5 [1935] AC 209 at 233, [1935] All ER Rep 578 at 589

The husband's case must therefore depend on a right which he has himself. I would say a word about the illegitimate, usually called the putative, but I prefer myself to refer to the illegitimate, father. Although American decisions to which I have been referred concern illegitimate fathers, and statutory provisions about them, it seems to me that in this country the illegitimate father can have no rights whatsoever except those given to him by statute. That was clearly the common law.One provision which makes an inroad into this is s 14 of the Guardianship of Minors Act 1971, and s 9(1) and some other sections of that Act applicable to illegitimate children, giving the illegitimate father or mother the right to apply for the custody of or access to an illegitimate child. But the equality of parental rights provision in s 1(1) of the Guardianship Act 1973 expressly does not apply in relation to a minor who is illegitimate: see s 1(7).

So this plaintiff must, in my opinion, bring his case, if he can, squarely within the framework of the fact that he is a husband. It is, of course, very common for spouses to seek injunctions for personal protection in the matrimonial courts during the pendency of or, indeed, after divorce actions, but the basic reason for the non-molestation injunction often granted in the family courts is to protect the other spouse or the living children, and to ensure that no undue pressure is put on one or other of the spouses during the pendency of the case and during the breaking-up of the marriage.

There was, of course, the action for restitution of conjugal rights, a proceeding which always belied its name and was abolished in 1970. It arose because in ecclesiastical law the parties could not end the consortium by agreement. In a sense the action for restitution was something of a fiction. The court ordered the spouse to return to

cohabitation. If the spouse did not return then that spouse was held to be in desertion. No more could happen. The court could not compel matrimonial intercourse: Forster v Forster n6. So matrimonial courts have never attempted the enforcement of matrimonial obligations by injunction.

n6 (1790) 1 Hag Con 144, 161 ER 504

The law is that the court cannot and would not seek to enforce or restrain by injunction matrimonial obligations, if they be obligations such as sexual intercourse or contraception (a non-molestation injunction given during the pendency of divorce proceedings could, of course, cover attempted intercourse). No court would ever grant an injunction to stop sterilisation or vasectomy. Personal family relationships in marriage cannot be enforced by the order of a court. An injunction in such circumstances was described by Judge Marger in Jones v Smith n7 in the District Court of Appeal of Florida as 'ludicrous'.

n7 (1973) 278 So 2d 339 at 344

I ask the question 'If an injunction were ordered, what could be the remedy?' And I do not think I need say any more than that no judge could even consider sending a husband or wife to prison for breaking such an order. That, of itself, seems to me to cover the application here; this husband cannot by law by injunction stop his wife having what is now accepted to be a lawful abortion within the terms of the Abortion Act 1967.

The case which was first put forward to me a week ago, and indeed is to be found in the writ, is that the wife had no proper legal grounds for seeking a termination of her pregnancy and that, not to mince words, she was being spiteful, vindictive and utterly unreasonable in seeking so to do. It now appears I need not go into the evidence in the affidavits because it is accepted and common ground that the provisions of the 1967 Act have been complied with, the necessary certificate has been given by two doctors and everything is lawfully set for the abortion.

The case put to me finally by counsel for the husband (to whom I am most indebted for having set out very clearly and logically what the law is) is that while he cannot say here that there is any suggestion of a criminal abortion nevertheless if doctors did not hold their views, or come to their conclusions, in good faith, which would be an issue triable by a jury (see R v Smith (John) n1), then this plaintiff might recover an injunction. That is not accepted by counsel for the first defendants. It is unnecessary for me to decide that academic question because it does not arise in this case. My own view is that it would be quite impossible for the courts in any event to supervise the operation of the 1967 Act. The great social responsibility is firmly placed by the law on the shoulders of the medical profession: per Scarman LJ, in R v Smith (John) n2.

n1 [1974] 1 All ER 376, [1973] 1 WLR 1510

n2 [1974] 1 All ER 376 at 378, [1973] 1 WLR 1510 at 1512

I will look at the 1967 Act very briefly. Section 1 provides:

'(1) ... 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... of injury to the physical or mental health of the pregnant woman... [Then there are other provisions which I need not read].

'(2) In determining whether the continuance of pregnancy would involve such risk of injury to health as is mentioned in paragraph (a) of subsection (1) of this section, account may be taken of the pregnant woman's actual or reasonably forseeable environment...'
That does not now arise in this case. The two doctors have given a certificate.It is not and cannot be suggested that that certificate was given in other than good faith and it seems to me that there is the end of the matter in English law. The 1967 Act gives no right to a father to be consulted in respect of the termination of a pregnancy. True, it gives no right to the mother either, but obviously the mother is going to be right at the heart of the matter consulting with the doctors if they are to arrive at a decision in good faith, unless, of course, she is mentally incapacitated or physically incapacitated (unable to make any decision or give any help) as, for example, in consequence of an accident. The husband, therefore, in my view, has no legal right enforceable at law or in equity to stop his wife having this abortion or to stop the doctors from carrying out the abortion.

Counsel for the husband made one point about a letter, which has now been produced to the court, dated 22nd May, from Dr Macrone, the family doctor. I need only point out that Dr Macrone says in his letter that he had no objection to her seeking a termination of the pregnancy whereas her affidavit seems to put it a little higher, where she says she had the support of Dr Macrone. But really that is a matter of terminology. I do not think there is anything in the point and I am sure counsel for the husband was simply putting it forward as something the court ought to look at, without any conviction that there was any merit in the distinction.

This certificate is clear, and not only would it be a bold and brave judge (I think counsel for the husband used that expression) who would seek to interfere with the discretion of doctors acting under the 1967 Act, but I think he would really be a foolish judge who would try to do any such thing, unless possibly, there is clear bad faith and an obvious attempt to perpetrate a criminal offence. Even then, of course, the question is whether that is a matter which should be left to the Director of Public Prosecutions and the Attorney-General. I say no more for I have stated my view of the law of England.

Very helpfully I have been referred to American authorities. The Supreme Court of the United States has reached the same conclusion, that a husband, or an illegitimate father, has no right to stop his wife, or the woman who is pregnant by him, from having a legal abortion. In Planned Parenthood of Central Missouri v Danforth, Attorney-General of Missouri n1 the Supreme Court by a majority held that the State of Missouri n2 --

n1 (1976) 96 S Ct 2831 at 2841, per Blackmun J delivering the opinion of the court

n2 SI 1968 No 39

'may not constitutionally require the consent of the spouse, as is specified under § 3(3) of the Missouri Act, as a condition for abortion during the first 12 weeks of pregnancy... clearly since the State cannot regulate or proscribe abortion during the first stage when the physician and his patient make that decision, the State cannot delegate authority to any particular person, even the spouse, to prevent abortion during that same period.'

It is interesting to note that the Missouri spousal consent provision would have required the husband' consent even if the was not the father.

A spousal consent provision in an English Act could not of course be challenged as unconstitutional but there is no such provision in the 1967 Act or in the Abortions Regulations 1968 n2 to which a challenge of ultra vires could be made. There is no provision ever for consultation with the spouse and reg 5 prohibits disclosure except in specified instances, of which disclosure to the spouse is not one.

n2 SI 1968 No 39

Counsel have been unable to discover any extant decision in those countries whose laws derive from the common law that the consent of the husband is required before an otherwise legal abortion can be performed on the wife. Counsel for the husband's researches show that in Roman law, centuries ago, the father's consent was required or otherwise abortion was a crime, but today the only way he can put the case is that the husband has a right to have a say in the destiny of the child he has conceived. The law of England gives him no such right; the 1967 Act contains no such provision. It follows, therefore, that in my opinion this claim for an injunction is completely misconceived and must be dismised.

DISPOSITION:
Order accordingly.

SOLICITORS:
Grey, Lloyd & Co, Connahs Quay (for the husband); Rigbey, Loose & Mills, Birmingham (for the first defendants); Maxwell, Cooke & Co, Birkenhead (for the wife).

[1979] QB 276

PATON v **BRITISH PREGNANCY ADVISORY SERVICE**

TRUSTEES AND ANOTHER

[QUEEN'S BENCH DIVISION: LIVERPOOL]

[1979] QB 276

HEARING-DATES: 17, 24 May 1978

24 May 1978

CATCHWORDS:
Husband and Wife - Injunction - Injunction against abortion - Paternal rights - Husband seeking to restrain wife from having abortion - Whether husband having statutory or other right to prevent abortion - Abortion Act 1967 (c. 87), s. 1

HEADNOTE:
The wife, the second defendant, obtained a medical certificate entitling her to a lawful abortion within the terms of the Abortion Act 1967. On an application by the husband, the plaintiff, seeking an injunction to restrain the wife and the first defendants, a charitable organisation, from causing or permitting an abortion to be carried out upon the wife without the husband's consent:-

Held, that, since an unborn child had no rights of its own and a father had no rights at common law over his illegitimate child, the husband's right to apply for the injunction had to be on the basis that he had the status of husband; that the courts had never exercised jurisdiction to control personal relationships

in marriage and, in the absence of the right to be consulted under the Abortion Act 1967, the husband had no rights enforceable in law or in equity to prevent his wife from having an abortion or to stop the doctors carrying out the abortion which was lawful under the Act of 1967.

Per curiam. It would be quite impossible for the courts to supervise the operation of the Abortion Act 1967. The great social responsibility is firmly placed by law upon the shoulders of the medical profession (post, p. 281C).

INTRODUCTION:
APPLICATION

The plaintiff, William Paton, was the husband of the second defendant, Joan Mary Paton. On May 8, 1978, the wife's general practitioner confirmed that she was pregnant. The wife thereafter applied for and obtained the necessary medical certificate entitling her to an abortion within the terms of the Abortion Act 1967. On May 16, 1978, the wife left the matrimonial home.

On May 17, 1978, the husband applied for an injunction to restrain the first defendants, the trustees of the **British Pregnancy Advisory Service,** and the wife from causing or permitting an abortion to be carried out on the wife. Sir George Baker P. adjourned the case for one week to May 24, 1978, to enable all the parties to be

represented. Also on May 17, the wife filed her petition for divorce.

The husband originally put his case on the basis that the wife had no proper legal grounds for seeking the termination of her pregnancy and that she was being spiteful, vindictive and utterly unreasonable in

so doing. At the resumed hearing on May 24, it was accepted by all the parties that the provisions of the Abortion Act 1967 had been correctly complied with. The husband contended that he had the right to have a say in the destiny of the child he had conceived.

COUNSEL:
Andrew Rankin Q.C. and S. J. Bedford for the husband.

W. E. Denny Q.C. and R. E. Rhodes for the first defendant trustees.

T. F. Hatton for the wife.

PANEL: Sir George Baker P

JUDGMENTBY-1: SIR GEORGE BAKER P

JUDGMENT-1:
SIR GEORGE BAKER P: By a specially endorsed writ the plaintiff, who is the husband of the second defendant, seeks an injunction in effect to restrain the first defendants, a charitable organisation, and particularly his wife, the second defendant, from causing or permitting an abortion to be carried out upon his wife without his consent.

Such action, of course, arouses great emotions, and vigorous opposing views as was recently pointed out in 1972 in the Supreme Court of the United States by Blackmun J. in Roe v. Wade (1973) 93 S.Ct. 705, 708-709. In the discussion of human affairs and especially of abortion, controversy can rage over the moral rights, duties, interests, standards and religious views of the parties. Moral values are in issue. I am, in fact, concerned with none of these matters. I am concerned, and concerned only, with the law of England as it applies to this claim. My task is to apply the law free of emotion or predilection.

Nobody suggests that there has ever been such a claim litigated before the courts in this country. Indeed, the only case of which I have ever heard was in Ontario. It was unreported because the husband's claim for an injunction was never tried.

In considering the law the first and basic principle is that there must be a legal right enforceable in law or in equity before the applicant can obtain an injunction from the court to restrain an infringement of that right. That has long been the law.

The leading case is North London Railway Co. v. Great Northern Railway Co. (1883) 11 Q.B.D. 30. Mr. Rankin has helpfully read much of the judgment of Cotton L.J. I will confine myself to the well known passage, where Cotton L.J. said, at p. 40:

"In my opinion the sole intention of the section" (that is section 25 (8) of the Judicature Act 1873) "is this: that where there is a legal right which was, independently of the Act, capable of being enforced either at law or in equity, then, whatever may have been the previous practice, the High Court may interfere by

injunction in protection of that right."

In Montgomery v. Montgomery [1965] P. 46, a well known case in family law, Ormrod J., having cited the passage from the judgment of Cotton L.J., and reviewed the various authorities, concluded that the court could only grant an injunction to support a legal right, and since the petitioner wife had no proprietary interest in the flat in which the parties were living, the court had no jurisdiction to make a mandatory order to exclude the husband from the flat. The words "husband and

wife" were used, although the parties were no longer joined in matrimony, having been divorced.

The law relating to injunctions has been considered recently in the House of Lords, in Gouriet v. Union of Post Office Workers [1978] A.C. 435. Many passages from their Lordships' speeches have been cited. I do not propose to go through them because it is now as clear as possible, that there must be, first, a legal right in an individual to found an injunction and second that the enforcement of the criminal law is a matter for the authorities and for the Attorney-General. As Mr. Rankin concedes, any process for the enforcement of the criminal law in a civil suit must be used with great caution, if at all. The private individual may have the right only if his right is greater than the public right, that is to say, that he would suffer personally and more than the general public unless he could restrain this offence; that proposition is not accepted by Mr. Denny or by Mr. Hatton for the defendants, and in any event it is not now suggested that the proposed abortion upon Mrs. Paton will be other than lawful. So, it is not necessary for me to decide that question or to consider Gouriet further.

The first question is whether this plaintiff has a right at all. The foetus cannot, in English law, in my view, have a right of its own at least until it is born and has a separate existence from its mother. That permeates the whole of the civil law of this country (I except the criminal law, which is now irrelevant), and is, indeed, the basis of the decisions in those countries where law is founded on the common law, that is to say, in America, Canada, Australia and, I have no doubt, in others.

For a long time there was great controversy whether after birth a child could have a right of action in respect of pre-natal injury. The Law Commission considered that and produced a Working Paper No. 47 in 1973, followed by a Final Report (Law Commission Report, No. 60 (Cmnd. 5709)), but it was universally accepted, and has since been accepted, that in order to have a right the foetus must be born and be a child. There was only one known possible exception which is referred to in the Working Paper at p. 3, an American case, White v. Yup (1969) 458 P. 2d 617 - where a wrongful "death" of an 8-month-old viable foetus, stillborn as a consequence of injury, led an American court to allow a cause of action, but there can be no doubt, in my view, that in England and Wales the foetus has no right of action, no right at all, until birth. The succession cases have been mentioned. There is no difference. From conception the child may have succession rights by what has been called a "fictional construction" but the child must be subsequently born alive: see per Lord Russell of Killowen in Elliot v. Lord Joicey [1935] A.C. 209, 233.

The father's case must therefore depend upon a right which he has himself. I would say a word about the illegitimate, usually called the putative, but I prefer myself to refer to the illegitimate father. Although American decisions to which I have been referred concern illegitimate fathers, and statutory provisions about them, it seems to me that in this country the illegitimate father can have no rights whatsoever except

those given to him by statute. That was clearly the common law. One provision which makes an inroad into this is section 14 of the Guardianship of Minors Act 1971 section 9 (1) and some other sections of that Act which applies to illegitimate children, giving the illegitimate father or mother the right to apply for the custody of or access to an illegitimate child. But the equality of parental rights provision in section 1 (1) of the Guardianship Act 1973 expressly does not apply in relation to a minor who is illegitimate: see section 1 (7).

So this plaintiff must, in my opinion, bring his case, if he can, squarely within the framework of the fact that he is a husband. It is, of course, very common for spouses to seek injunctions for personal protection in the matrimonial courts during the pendency of or, indeed, after divorce actions, but the basic reason for the non-molestation injunction often granted in the family courts is to protect the other spouse or the living children, and to ensure that no undue pressure is put upon one or other of the spouses during the pendency of the case and during the breaking-up of the marriage.

There was, of course, the action for restitution of conjugal rights, a proceeding which always belied its name and was abolished in 1970. It arose because in ecclesiastical law the parties could not end the consortium by agreement. In a sense the action for restitution was something of a fiction. The court ordered the spouse to return to cohabitation. If the spouse did not return then that spouse was held to be in desertion. No more could happen. The court could not compel matrimonial intercourse: see Forster v. Forster (1790) 1 Hag.Con. 144. So matrimonial courts have never attempted the enforcement of matrimonial obligations by injunction.

The law is that the court cannot and would not seek to enforce or restrain by injunction matrimonial obligations, if they be obligations, such as sexual intercourse or contraception (a non-molestation injunction given during the pendency of divorce proceedings could, of course, cover attempted intercourse). No court would ever grant an injunction to stop sterilisation or vasectomy. Personal family relationships in marriage cannot be enforced by the order of a court. An injunction in such circumstances was described by Judge Mager in Jones v. Smith (1973) 278 So.Rep. 339 in the District Court of Appeal of Florida as "ludicrous."

I ask the question, "If an injunction were ordered, what could be the remedy?" and I do not think I need say any more than that no judge could even consider sending a husband or wife to prison for breaking such an order. That, of itself, seems to me to cover the application here; this husband cannot by law stop his wife by injunction from having what is now accepted to be a lawful abortion within the terms of the Abortion Act 1967.

The case which was first put forward to me a week ago, and indeed is to be found in the writ, is that the wife had no proper legal grounds for seeking a termination of her pregnancy and that, indeed, not to mince words, she was being spiteful, vindictive and utterly unreasonable in seeking so to do. It now appears I need not go into the evidence in

the affidavits because it is accepted and common ground that the provisions of the Act have been complied with, the necessary certificate has been given by two doctors and everything is lawfully set for the abortion.

The case put to me finally by Mr. Rankin (to whom I am most indebted for having set out very clearly and logically what the law is) is that while he cannot say here that there is any suggestion of a criminal abortion nevertheless if doctors did not hold their views, or come to their conclusions, in good faith which would be an issue triable by a jury (see Reg. v. Smith (John) [1973] 1 W.L.R. 1510) then this plaintiff might recover an injunction. That is not accepted by Mr. Denny. It is unnecessary for me to decide that academic question because it does not arise in this case. My own view is that it would be quite impossible for the courts in any event to supervise the operation of the Abortion Act 1967. The great social responsibility is firmly placed by the law upon the shoulders of the medical profession: see per Scarman L.J. in Reg. v. Smith (John) [1973] 1 W.L.R. 1510, 1512.

I will look at the Abortion Act 1967 very briefly. It provides by section 1:

"(1) ... 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 ... of injury to the physical or mental health of the pregnant woman. ... (2) In determining whether the continuance of a pregnancy would involve such risk of injury to health as is mentioned in paragraph (a) of subsection (1) of this section, accounts may be taken of the pregnant woman's actual or reasonably foreseeable environment."

That does not now arise in this case. The two doctors have given a certificate. It is not and cannot be suggested that the certificate was given in other than good faith and it seems to me that there is the end of the matter in English law. The Abortion Act 1967 gives no right to a father to be consulted in respect of a termination of a pregnancy. True, it gives no right to the mother either, but obviously the mother is going to be right at the heart of the matter consulting with the doctors if they are to arrive at a decision in good faith, unless, of course, she is mentally incapacitated or physically incapacitated (unable to make any decision or give any help) as, for example, in consequence of an accident. The husband, therefore, in my view, has no legal right enforceable in law or in equity to stop his wife having this abortion or to stop the doctors from carrying out the abortion.

Mr. Rankin made one point about a letter, which has now been produced to the court, dated May 22, 1978, from Dr. Macrone, the family doctor. I need only point out that Dr. Macrone says in his letter that he had no objection to her seeking a termination of the pregnancy

whereas her affidavit seems to put it a little higher, in paragraph 8, where she says she had the support of Dr. Macrone. But really that is a matter of terminology. I do not think there is anything in the point and I am sure Mr. Rankin was simply putting it forward as something the court ought to look at, without any conviction that there was any merit in the distinction.

This certificate is clear, and not only would it be a bold and brave judge (I think Mr. Rankin used that expression) who would seek to interfere with the discretion of doctors acting under the Abortion Act 1967, but I think he would really be a foolish judge who would try to do any such thing, unless, possibly, where there is clear bad faith and an obvious attempt to perpetrate a criminal offence. Even then, of course, the question is whether that is a matter which should be left to the Director of Public Prosecutions and the Attorney-General. I say no more for I have stated my view of the law of England.

Very helpfully I have been referred to American authorities. The U.S. Supreme Court has reached the same conclusion: that a husband, or an illegitimate father, has no right to stop his wife, or the woman who is pregnant by him, from having a legal abortion.

In Planned Parenthood of Central Missouri v. Danforth A.-G. (1976) 96 S.Ct. 2831, the Supreme Court by a majority held, at p. 2841 perBlackmun J., that the State of Missouri

"may not constitutionally require the consent of the spouse, as is specified under paragraph 3 (3) of the Missouri Act, as a condition for abortion during the first 12 weeks of pregnancy ... Clearly, since the state cannot regulate or proscribe abortion during the first stage, when the physician and his patient make that decision, the state cannot delegate authority to any particular person, even the spouse, to prevent abortion during that same period."

A spousal consent provision in an English Act could not of course be challenged as unconstitutional but there is no such provision in the Abortion Act 1967 or in the Abortion Regulations 1968 (S.I. 1968 No. 390) to which a challenge of ultra vires could be made. There is no provision even for consultation with the spouse and regulation 5 prohibits disclosure except in specified instances, of which disclosure to the spouse is not one.

It is interesting to note that the Missouri spousal consent provision would have required the husband's consent even if he was not the father.

Counsel have been unable to discover any extant decision in those countries whose laws derive from the common law that the consent of the husband is required before an otherwise legal abortion can be performed on the wife. Mr. Rankin's researches show that in Roman law, centuries ago, the father's consent was required otherwise abortion was a crime, but today the only way he can put the case is that the husband has a right to have a say in the destiny of the child he has conceived. The law of England gives him no such right; the Abortion Act 1967 contains no such provision. It follows, therefore, that in my

opinion this claim for an injunction is completely misconceived and must be dismissed.

DISPOSITION:
Order accordingly.

SOLICITORS:
Solicitors: Grey Lloyd & Co., Connahs Quay; Rigbey, Loose & Mills, Birmingham; Maxwell Cooke & Co., Birkenhead.

[Reported by MISS MARILYN MORNINGTON, Barrister-at-Law]