5.5.2. The regulation of abortion

When the Abortion Act 1967 had been introduced, the termination procedure had been surgical in nature, but in the 1970s, the surgical procedure was replaced by the chemical induction of labour. This latter process was twofold in nature: first, a catheter was surgically inserted into the woman and later, a chemical, prostaglandin, was introduced through it. The prostaglandin induced premature labour, which occurred some time, certainly a matter of hours, later. In practice, the first part of the procedure was carried out by doctors. The second part, the introduction of the prostaglandin, was carried out by nursing staff.

Section 1(1) of the Abortion Act 1967 provided that: '. . . 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.'

In a letter dated 21 February 1980, sent to regional and area medical officers and regional, area and district nursing officers, the Department of Health and Social Security purported to explain the law relating to abortion in connection with the termination of pregnancy by medical induction. The Department's advice was that termination using the prostaglandin method could properly be said to be termination by a registered medical practitioner, provided that it was

decided on and initiated by him (*sic*) and provided he remained throughout responsible for its overall conduct and control. This was the case even if the acts needed to bring the termination to its conclusion were done by staff acting on the specific instructions of the registered medical practitioner, but not necessarily in his presence. Consequently, the Department stated that the first stage of the procedure, the insertion of an extra-amniotic catheter, must be carried out by a registered medical practitioner, but that the second stage, connection of labour inducing drugs to the catheter, could be carried out by an appropriately skilled nurse or midwife acting in accordance with precise instructions given by the registered medical practitioner.

The Royal College of Nursing, seeking to clarify the legal position as regards its members, sought a declaration that the circular was wrong in law.

At first instance, Woolf J, as he was then, refused the application and granted the Department a declaration that its advice did not involve the performance of any unlawful acts by members of the College. On appeal, the Court of Appeal unanimously reversed his decision, but on further appeal, the House of Lords, Lord Wilberforce and Lord Edmund-Davies dissenting, re-instated the decision of Woolf J. In reaching their various decisions, the judges made use of different approaches to statutory interpretation, some preferring the literal rule, whilst others preferred to make use of the mischief rule. In the first camp can be placed the three Court of Appeal judges, who saw no reason for reading s 1(1) in any other way than in the limited manner that would preclude the current practice. As Lord Denning MR expressed it (*Royal College of Nursing v DHSS* [1981] 1 All ER 545 at 557):

> Stress was laid by the Solicitor-General on the effect of this ruling. The process of medical induction can take from 18 to 30 hours. No doctor can be expected to be present all that time. He must leave it to the nurses or not use the method at all. If he is not allowed to leave it to the nurses, the result will be either that there will be fewer abortions or that the doctor will have to use the surgical method *with its extra hazards*. This may be so. But I do not think this warrants us departing from the statute [emphasis added].

There is a double irony in this particular judgment – Lord Denning, the great iconoclast and pusher forward of the legal boundaries, appears as a proponent of the essentially conservative literal rule. However, a reading of the rhetorical nature of his judgment also reveals how his reliance on the literal rule allows him to give support to his own personal, and certainly unliberal, views on abortion. Of equal, if not greater, concern is the almost malicious way in which he recognises, only to dismiss, the additional safety to women in the non-surgical procedure (see emphasis added in quotation).

In the House of Lords, the preferred approach, although only by the narrow majority of 3:2, was to adopt the mischief rule and to examine the purpose of the legislation and to read its provisions in line with that purpose. The minority followed the Court of Appeal and preferred to use the literal rule.

Speaking of the Act, Lord Diplock stated ([1981] 1 All ER 545 at 567):

> . . . its purpose in my view becomes clear if one starts by considering what was the state of the law relating to abortion before the passing of the Act, what was the mischief that required amendment, and in what respect was the existing law unclear . . . My Lords, the wording and structure of the section are far from elegant, but the policy of the Act, it seems to me, is clear. There are two aspects to it: the first is to broaden the grounds upon which abortions may be lawfully obtained; the second is to ensure that the abortion is carried out with all proper skill and in hygienic conditions . . .

As has been stated previously, one's reaction to this case will almost certainly be determined by one's approach to abortion. For those who disagree with the extension of termination, the case may represent a black day and the Court of Appeal, especially Lord Denning MR, and the minority in the House of Lords can be seen as attempting to hold back the tide of liberalism. For those who approve of the decision, the House of Lords will be seen as having got it right and deserving of congratulation. But surely this begs the much wider question as to whether such overtly political questions should be in the hands of the courts.

From one point of view, the mischief rule serves a very positive purpose by providing courts with the authority to go behind the actual wording of statutes in order to consider the problems that those statutes are aimed at remedying. Alternatively, it is possible to see the mischief rule as justifying the courts' interference in the areas of public policy that are, strictly speaking, beyond the realm of their powers and competence. It is equally relevant to point out that in cases such as *Royal College of Nursing v DHSS*, such decisions are forced on the courts whether they like it or not. It is only to be hoped that they make proper and socially acceptable decisions, but such questions remain to be considered below.

A related issue was raised in *R (Smeaton) v Secretary of State for Health* (2002), in which the applicant sought a declaration that the unsupervised use of the 'morning after' contraceptive pill was unlawful because its purpose was 'to procure a miscarriage', contrary to ss 58 and 59 of the Offences Against the Person Act 1861. On this occasion, the issue was decided by reference to the literal rule, although in a manner which highlights its inherent uncertainty. In refusing to grant the declaration, the judge held that the pill acted only to prevent the implantation of a fertilised egg, and that such an action did not amount to a miscarriage as the word is generally used nowadays. As Parliament in 1861 had not chosen to define the word, it should be understood according to its accepted modern meaning.