
Ethical Commentary—Abortion and Physician Conscientious Action

FRANÇOISE BAYLIS

I. Introduction

Key facts in the case of *R v Bourne*,¹ as per the summing-up provided by Justice Macnaghten, are that on 14 June, 1938, Mr Aleck William Bourne performed an abortion on a 14-year-old girl who was brutally raped. Bourne was not a professional abortionist, but a qualified obstetrical surgeon in good standing with the requisite skills and qualifications to perform a safe abortion. The abortion was performed under favourable conditions at St Mary's Hospital. No fee was charged. These facts, as presented to the jury, were not in dispute. The question before the jury was whether these facts, taken together, constituted a crime.

At that time, intending to procure a miscarriage was a crime under s 58 of the Offences Against the Person Act 1861:

... whosoever, with intent to procure the miscarriage of any woman, where she be or be 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 (emphasis added).

The challenge for the jury was in determining whether Bourne acted lawfully or unlawfully when he performed the abortion.²

In his directions to the jury, Macnaghten referenced the Infant Life Preservation Act 1929, as a potential source of meaning for what might be *lawful* action in this instance. This statute provided for the legal destruction of 'a child capable of being born alive' when the action taken to bring about its death was done 'in good faith for the purpose only of preserving the life of the mother'. As a point of clarification, Macnaghten further noted:

It is not contended that those words ['in good faith for the purpose only of preserving the life of the mother'] mean merely for the purpose of saving the mother from instant death

¹ *R v Bourne* [1939] 1 KB 687.

² According to the 'rule against surplusage' or the 'presumption against tautology', every word in a piece of legislation is included for a reason. Were it not possible for the actions to be taken lawfully, there would have been no reason to include the word unlawfully.

... I think those words ought to be construed in a reasonable sense, and, if the doctor is of the opinion, on reasonable grounds and with adequate knowledge, that the probable consequence of the continuance of the pregnancy will be to make the woman a physical or mental wreck the jury are quite entitled to take the view that the doctor who, under those circumstances and in that honest belief, operates, is operating for the purpose of preserving the life of the mother.³

In his defence, Bourne had argued that he examined the girl to confirm that she: (i) was pregnant as a consequence of a violent rape; (ii) not infected with venereal disease;⁴ and (iii) of good character (neither feeble-minded nor of a 'prostitute mind'). On the basis of these facts, he determined that continuing the pregnancy would likely cause serious injury to the young girl owing to her mental state. On the basis of this determination, he concluded that 'it was his duty to perform the operation'.⁵ Acting on this conclusion, he used his clinical skills safely and effectively to terminate the pregnancy.

While Bourne may have acted *in the right way*—exercising clinical judgement and then acting with appropriate clinical skill—did he act *for the right reason*? That is, did he act 'in good faith for the purpose only of preserving the life of the mother'? This pivotal question can usefully be parsed into two questions: Did Bourne act in good faith? And, did Bourne act only to preserve the life of the mother?

II. Did Bourne Act in Good Faith?

To assert that Bourne acted in good faith is to affirm that he acted honestly and out of conviction in a manner that he understood to be consistent with his fiduciary obligations to the patient. The opposite would be to claim that Bourne acted in bad faith—out of self-interest, malice or ill will—with no intention of promoting or protecting his patient's interests.

There are no facts to support a claim of sinister intention and neither Justice Macnaghten, nor our alternate Justices Dellapenna or McGuinness suggest this is the case. There is no evidence that Bourne sought to take advantage of the patient, or her family for personal gain (financial or other).⁶ Moreover, there is no evidence of duplicity, fraud or deception. Rather, it is clear that Bourne believed that

³ *Bourne* at [692], [693–94].

⁴ Consistent with a desire to promote health and not cause injury, Bourne 'satisfied himself that [the girl] had not been infected with venereal disease'. A termination of pregnancy under those circumstances would have risked spread of the disease. *Bourne* at [688].

⁵ *Bourne* at [688].

⁶ In his memoir, *A Doctor's Creed: The Memoirs of a Gynaecologist* (London, Victor Gollancz Ltd, 1962), Bourne describes this case as a 'God-given opportunity' to seek clarity on the law regarding termination of pregnancy (at p 99). While this might be construed by some as taking advantage of the situation, this is clearly not for personal gain.

in certain circumstances abortion was medically necessary. Indeed, he had come to this conclusion once before in a case three years prior involving a 15-year-old girl.⁷

In Macnaghten's summing-up, the jury is directed to assess not whether the testimony provided by Bourne and the evidence provided by expert witnesses support the claim that Bourne acted in good faith, but rather whether the Crown has proven otherwise. The jury is specifically told, 'the question that you have got to determine is not are you satisfied that he performed the operation in good faith for the purpose of preserving the life of the girl. The question is, has the Crown proved the negative of that?'⁸ Preceding this statement is the following reminder:

Mr. Bourne in this case thought it right to perform the operation... the learned Attorney-General accepts this evidence as a frank statement of what actually passed through his mind. In view of the age and character of the girl and the fact that she had been raped with great violence he thought that the operation ought to be performed...⁹

To the contrary, Dellapenna stipulates for the jury that the question they must answer is: 'whether Mr. Bourne has proven, based on all of the evidence presented, that he ended the pregnancy of this girl in good faith for the purpose of preserving her life'. No summary of the evidence on which the jury should reflect in answering this question is provided. To this point, the jury has mostly been told of the competing interests of the pregnant woman and the developing fetus (whom Dellapenna, in my mind prejudicially, refers to as the mother and the unborn child). There is in his direction to the jury scant attention paid to the particular details of this case.

The second alternate summing-up, authored by McGuinness, emphasises issues of reproductive freedom and social justice. As regards to whether Bourne acted in good faith, her direction to the jury is, shall we say, 'directive'. She writes,

He took seriously his role as a clinician and, in this role, his obligation to X [the patient]... He wished to protect her future life, and indeed her future capacity to act as a loving mother to a wanted child ... The basis for Dr. Bourne's belief was clear: abortion was, in certain circumstances, a necessary medical procedure... He feels certain the law is on his side.

In this way, McGuinness summarises for the jury the affirmative defence that Bourne acted in good faith believing the termination of pregnancy to be medically necessary and legally permissible. McGuinness also effectively conveys a sense of inner conviction on the part of the physician.

On my reading of this case, Bourne's action in terminating X's pregnancy can reasonably be interpreted as conscientious action reflective of the values of compassion, service and altruism. In contemporary Western bioethics, discussions of

⁷ Bourne, *A Doctor's Creed* (n 35) 99.

⁸ Bourne at [695].

⁹ Bourne at [695].

physician conscience and conscientious action often focus on the ways in which physicians interfere with patients' timely and convenient access to medical treatment. In relation to abortion, this explains the focus on physician refusals to provide terminations of pregnancy, or to refer patients to other qualified physicians willing and able to assist. Not all conscientious actions, however, are conscientious refusals. There can also be conscientious offers. Arguably, this is what happened in this case.

In his memoirs, *A Doctor's Creed*, Bourne explains how he received a letter from Dr Joan Malleson, one of the initiators of the Abortion Law Reform Association (ALRA), outlining the details of the case and asking him to admit the girl to St Mary's Hospital for observation with a view to terminating the pregnancy. He responded in writing:

I am interested in this case of rape which you describe in your letter. I shall be delighted to admit her to St. Mary's and curette her. I have done this before and have not the slightest hesitation in doing it again... I have said that the next time I have such an opportunity I would write to the Attorney-General and invite him to take action.¹⁰

In the event, he did not write to the Attorney-General.

On the dominant view of conscience in contemporary Western bioethics, physician conscientious action (whether for offering care or refusing to provide care) aims to promote personal moral integrity, typically understood as inner harmony (ie, the ability to live with oneself in peace).¹¹ In this case, there is no evidence that Bourne acted to preserve his personal moral integrity. Rather, it appears that consistent with the physician's fiduciary duty to patients Bourne acted for the benefit of his patient, firm in the belief that abortion of a child pregnancy following rape or incest was medically indicated, morally required and legally permissible. In his memoirs, he describes the young girl in this case as having 'suffered the extremity of cruelty and horror and was, withal, an innocent child'.¹² He describes medicine as 'humanitarian'¹³ and he describes himself as 'a reputable man [acting] in all sincerity'.¹⁴

This orientation fits a different view of conscience than the one anchored in personal integrity. In my own writing, I describe this alternative view as relational conscience; and I explain how integrity is both a personal and a social virtue. In this way, conscience is other-oriented insofar as it is about 'improving human ethical practice by refining our understanding of right and wrong'.¹⁵

¹⁰ Bourne, *A Doctor's Creed* (n 35) 98.

¹¹ M Benjamin, 'Conscience' in B Jennings (ed), *Bioethics*, 4th edn (Farmington Hills, MI, Macmillan Reference USA, 2014); M Wicclair, 'Conscience and Professionals' in H LaFollette (ed), *International Encyclopedia of Ethics* (London, Blackwell, 2013).

¹² Bourne, *A Doctor's Creed* (n 35) 99.

¹³ Bourne, *A Doctor's Creed* (n 35) 99.

¹⁴ Bourne, *A Doctor's Creed* (n 35) 108.

¹⁵ F Baylis, 'A Relational View of Conscience and Physician Conscientious Action' (2015) 8 *International Journal of Feminist Approaches to Bioethics*, 18, 31–32.

My relational view of conscience draws distinctions between *conscience* (a by-product of dialogical thinking), *acts of conscience* (judgements about right and wrong), and *conscientious action*. On this view, conscience is what comes of thinking. More precisely, it is a by-product of thoughtful, reflective inner deliberation (soundless, solitary dialogue with oneself) about which values, beliefs, and commitments to endorse as one's own. This thinking is followed by judgement, at which time there is the exercise of one's best judgement about what should be done in a particular circumstance, taking into consideration a shared interest in living justly and well—that is, a shared interest in improving human ethical practice. This judgement is the act of conscience. It is a determination about what should be done consistent with the goal of promoting harmony of the whole (ie, harmony for the 'self-in-community').¹⁶ In turn, an act of conscience may lead to conscientious action—an action aimed at keeping one in proper relation to oneself and fitting oneself for proper relations with others. To put this in other words:

Acts of conscience (in the mind) and *conscientious action* (in the world) are ... the fruits of *conscience*—thoughtful, reflective inner deliberations about which values, beliefs, and commitments to endorse as one's own as part of the shared interest in improving human ethical practice, thereby contributing to harmony of the whole.¹⁷ (emphasis added)

On this relational view of conscience, people are called on to do work both in orienting their conscience, and in making careful judgements about what should be done in order to be responsive to others. The underlying presumption is a shared interest in living justly and well. Ultimately, conscience is not just about promoting inner harmony (ie, harmony for the self), but is also about promoting harmony of the whole (ie, harmony for the 'self-in-community').

On the facts of this case, it is reasonable to assert that Bourne's conscientious action was grounded in concern for the young rape victim. In his opinion, 'continuance of the pregnancy would probably cause serious injury'.¹⁸ Indeed, in the words of a specialist in medical psychology, there was the risk that 'she would become a mental wreck'.¹⁹ As well, Bourne alluded to the possibility of death that 'might occur within measureable distance of the time of labour'. He advanced this claim in support of his view that there was no clear demarcation line between 'danger to health and danger to life'.²⁰ Beyond this, it is important to remember that the alternative to a hospital-based abortion provided by a skilled medical professional such as Bourne would have been a so-called back street abortion, of which many pregnant women were known to have died.

McGuinness's directions to the jury notwithstanding, Bourne's conscientious action was not taken in defence of women's right to control their bodies. Bourne

¹⁶ 'Community' here refers to the human community (hence, the reference to human ethical practice), and not the community of medical or health professionals.

¹⁷ Baylis, 'A Relational View' (n 44) 30.

¹⁸ Bourne at [688].

¹⁹ Bourne at [689].

²⁰ Bourne at [692].

‘favoured abortion where it was necessary for economic or health reasons.’²¹ He did not support abortion for women who desired this service for spurious reasons. Among these women, Bourne identified those ‘who objected to motherhood because it would curtail their social amenities.’²² Further, Bourne believed that ‘[a]bortion would become largely unnecessary in a socialised State with adequate wages, stability, social services, education, and an improvement in the position of women.’²³ Though McGuinness includes an extensive discussion of reproductive autonomy and equitable access to abortion services in her summing-up, for which I am a sympathetic audience, this is not obviously consonant with Bourne’s conscience.

III. Did Bourne Act to Preserve the Life of the Pregnant Woman?

The interpretation given the words ‘preserving the life of the mother’ is of pivotal importance in this case. Macnaghten directs the jury to give ‘reasonable’ meaning to these words and adds, ‘[i]t is not contended that those words mean merely for the purpose of saving the mother from instant death... [t]he law does not require the doctor to wait until the unfortunate woman is in peril of immediate death.’ Similarly, Dellapenna directs the jury that ‘those words ought to be given a reasonable construction’, and he adds ‘the law does not insist that the doctor wait until the woman is in immediate peril and then snatch her from the jaws of death at the last moment’. Therein lies the rub, however. If the words ‘preserving the life of the mother’ refer to more than immediate risk of death, then how much more?

Both Macnaghten and Dellapenna make mention of the fact that it is undesirable for a young girl whose body is not yet fully developed to bear and birth a child. Both also refer to the risk of mental anguish (emotional distress) resulting from rape and from the fact of being pregnant as a result of rape. Both also allude to potential long-term negative consequences. At the same time, Dellapenna (unlike Macnaghten) carefully directs the jury to weigh such consideration against the fact that ‘[t]he law also has regard for the innocent life of an unborn child’. Whatever legitimate concern there might be for the pregnant woman’s life, this life does not have absolute primacy over the ‘unborn child’s’ life.

McGuinness, for her part, is more directive than either Macnaghten or Dellapenna insofar as she offers a clear interpretation of life in social rather than biological terms. In her summing-up she tells the jury: ‘He wished to protect her future life, and indeed her future capacity to act as a loving mother to a

²¹ Bourne, ‘Social Aspects of Abortion’ (1939) *The British Medical Journal* 598.

²² *Ibid.*

²³ *Ibid.*

wanted child when she was ready to assume this role'. This accords with Bourne's memoirs, in which he recounts in some detail the testimony of expert witnesses who attested to the risk of severe mental or nervous breakdown and lasting neurosis undermining physical health. In his view, 'it was not possible to let a person drift into a mental breakdown in the future and say one was preserving life. Surely it can be claimed that a serious mental breakdown is tantamount to mental death.'²⁴

Today, in countries where abortions are legally permitted to 'preserve the life *or health*' of the pregnant woman, there is greater certainty among physicians regarding the lawfulness of procuring an abortion in circumstances similar to the case involving Bourne. Where there may still be uncertainty, however, is with respect to the scope of the term 'health'. While many embrace the World Health Organization's (WHO) definition of health, which stipulates that health is 'a complete state of physical, mental and social well-being, and not merely the absence of disease or infirmity',²⁵ others insist that this definition of health is too broad insofar as it extends beyond physical and mental health. Still others object to the word 'complete', and worry that the inclusion of this descriptive term in the definition of health is more about happiness than health.²⁶ On the other hand, there are those who think the WHO definition of health is too narrow. For example, Aboriginal peoples in Australia stipulate that 'Aboriginal health' is 'not just the physical well-being of the individual but refers to the social, emotional, and cultural well-being of the whole Community...'²⁷ A similar worldview obtains among certain indigenous groups in Mexico for whom health is a complex interaction of bodies, minds, social relationships within the community and with nature.²⁸

Leaving aside this debate about the proper scope of the WHO definition of health, in jurisdictions where there is: (i) explicit reference to health as a legitimate reason for abortion: and (ii) there is at least a minimal understanding of health as including mental health, forcing a woman to continue an unwanted pregnancy would be understood (unequivocally) as a threat. In the case before the jury, there was no explicit mention of preserving the health of the pregnant woman as a legitimate reason to perform an abortion. There was only a reference to preserving the life of the pregnant woman in the Infant Life Preservation Act. In rendering its decision, the jury elected to understand 'life' in terms of narrative identity, not just biology. From this perspective, one's life is a narrative and dramatic events such

²⁴ Bourne, *A Doctor's Creed* (n 35) 101–02.

²⁵ WHO, Preamble to the Constitution of the World Health Organization as adopted by the International Health Conference, New York, 19–22 June 1946, and entered into force on 7 April 1948.

²⁶ R Saracci, 'The World Health Organization Needs to Reconsider its Definition of Health' (1997) 314 *British Medical Journal* 1409.

²⁷ National Aboriginal Community Controlled Health Organisation (Australia), 'Constitution' (2011), available online: <http://naccho-org-au.cloud.hosting-toolkit.net/wp-content/uploads/NACCHO-CONSTITUTION-Ratified-Ver-151111-for-ASIC-.pdf> 5 (accessed 4 June 2016).

²⁸ G Coronado, 'Competing Health Models in Mexico: An Ideological Dialogue Between Indian and Hegemonic Views' (2010) 12 *Anthropology & Medicine* 165.

as rape followed by unwanted pregnancy and birth, represent a serious threat to one's life narrative.

IV. Conclusion

This case is an important historical illustration of conscientious action that is reflective of the values of compassion, service and altruism. Bourne's challenge then, and our challenge now, when confronted with a difficult ethical quandary, is to do the work required of us to both understand and pursue our shared interest in living justly and well. All of us, at all times, need to be reflective about our values, beliefs and commitments, and to critically examine these in relation to the goal of improving our understanding of right and wrong and thereby improving human ethical practice.

Bourne so exercised his conscience to the best of his ability in reaching the decision that he had a fiduciary duty to assist the young rape victim by providing a termination of pregnancy. A jury of 12 laypersons determined that in so doing he acted lawfully—in good faith for the purpose only of preserving the life of the pregnant woman.