ANOTHER CLASH OF ORTHODOXIES:[1]

'THE MEANING OF THE UNIVERSE' FROM 'THE OTHER SIDE OF THE POND.' ABORTION IN THE UK

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INTRODUCTION

A plethora of cases concerning abortion have found their way to the Supreme Court of the United States. In one of its less well-known pronouncements on the subject, the Supreme Court said, with some understatement, that "the abortion issue" was [always] "sensitive and earnestly contested."[2] "Earnestly contested" is an apt description of the litigation, before Justice James Laurence Munby, between John Smeaton on behalf of the Society for the Protection of Unborn Children (SPUC) and the Secretary of State for Health.[3] The proceedings became even more 'earnest' with the intervention of Schering Health Care Limited (Schering) and the Family Planning Association (FPA), both of which are described in the proceedings as "interested parties" (indeed they are – on which more later).

In addition to the earnestness of the contest, there is another reason for mentioning American abortion jurisprudence at the outset. In the final paragraph of his judgment, Munby refers, with obvious approval, to three prominent United States Supreme Court decisions concerning contraception.[4] Having delivered himself of a detailed judgment concluding that the operation of the 'morning after pill' does not constitute an offence under the *Offences Against the Person Act* 1861, he asks rhetorically, "are not the underlying principles the same?" By this he means that courts have no business examining the legality of drugs marketed deliberately as a "contragestive" but which also function as an abortifacient precisely because to do so would intrude into "intensely private and personal matters."[5] Such matters, he holds, "ought to be left to the free choice of the individual."[6] In so holding, Munby follows long-established US Supreme Court jurisprudence which places the 'right to privacy' and 'personal autonomy' above and beyond the reach of the law – and certainly above and beyond any other right, such as the right to life.

The following remarks are divided thus: first, we provide some preliminary observations on the judgment(s) of Munby in relation to the hermeneutical and philosophical prisms through which he peers. Secondly, there is a detailed analysis, primarily of the principal, substantive

judgment of 18 April 2002, from an ethical perspective.[7] Thirdly, we canvass certain legal and related questions arising from Munby's approach and conclusions.

Preliminary Observations

In the absence of binding judicial precedent, courts usually search for an alternative jurisprudential or other socially acceptable foundation upon which to erect a legal scaffold around or upon which they construct judgments. It is axiomatic that the quality of the construction will depend on the solidity of its foundations and the quality of materials used. Given that there was a conspicuous lack of relevant United Kingdom judicial authority to provide the judge with 'guidance' in these proceedings, Munby regularly notes his preferred matériel for the construction of his judgment.

A prominent UK academic has said that his "…own guiding medico-legal principle rests on the statement by Lord Chief Justice Coleridge over a century ago: 'every legal duty is founded on a moral obligation.'"[8] Munby categorically rejects such an approach or foundation. Espousing zealous independence from all forms of religious or philosophical traditions (except, as will be seen, unbridled liberty, autonomy and utilitarianism), and adopting the utterly fashionable 'religion' of 'secularism', Munby says:

> 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.[9]
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> [But] [t]he days are past when the business of the judges was the enforcement of morals or religious belief. …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."[10]

In short, unfettered liberty, articulated judicially as 'autonomy/self-determination', is Munby's guiding principle. He accepts unquestioningly that if the arguments advanced by SPUC were to succeed, there would be 'catastrophic social consequences'.[11] We make the claim later that 'social consequences', rather than legal principle, are the pre-eminent lodestars for the Court in this litigation. We also discuss briefly what this portends.[12]

Munby accepts that it is socially acceptable, and thereby legally justifiable, for the State to sanction the chemical destruction of nascent human life - with or without disability. He notes that the Secretary of State supported what he describes as 'the social case' put forward by the intervening Family Planning Association (FPA). Munby found this "social case"[13] inherently attractive and utterly unassailable. In substance, the argument was that if the SPUC case succeeded, not only did pharmacists who sold the drug 'over the counter' (as opposed to dispensing it pursuant to a prescription) run the risk of some sort of prosecution, so also did women who took the drug risk some sort of prosecution. The argument proceeded, saying that the ready availability and significant use of 'emergency contraception' was so socially acceptable and wide-spread that to curtail its use in any way would wreak unmentionable and intolerable burdens on society. A final aspect of the 'social argument' was that 'emergency contraception' was infinitely superior to, and ever so much more desirable than, abortion. Uninhibited access to 'emergency contraception' would continue to ensure, in the words of

FPA, that people in the UK could make "informed choices about sex and to enjoy sexual health free from exploitation, oppression and harm."[14] As a 'thought experiment' it is interesting to speculate what the Court would have done, and what course it would have pursued, had the Secretary of State taken a position opposed to that advanced by FPA.

One might also ask, "if the 'social context' protected nascent human life, would Munby have followed it or would he still have accepted the evidence of witnesses who appeared on behalf of drug companies with their commercial interests under challenge?"

The logic of Munby's approach would require that, if and when euthanasia or any other currently unacceptable practice becomes so widespread as to be at least tacitly condoned, it too would receive judicial imprimatur.

Curiously, in accepting the related proposition advanced by FPA, namely that a woman who takes Levonelle and who is in fact "with child" would also in certain circumstances commit an offence[15], Munby does not address the daily practice of the criminal law which requires that in any and every prosecution there is exercised a discretion whether or not to prosecute. It is odious, therefore, to speculate (for that is all it is) that millions of unsuspecting women are likely to be prosecuted for taking Levonelle and then use these unbelievably unlikely prosecutions[16] as a safe and solid basis for justifying the rejection of the SPUC application.

What is perhaps even more striking about the principal judgment is that Munby so willingly succumbs to the view that the law is 'value-neutral' and that public moral culture is either irrelevant and/or that law has no part to play in its formation. When he cites, with obvious favour, the writings of commentators like Ronald Dworkin,[17] he is hardly adopting a value-neutral position. No such position exists. One is either a protector of human life (at any and all of its stages) or one promotes, at least, under the philosophically contentious tenets of utilitarianism, couched in this judgment in terms of 'autonomy', 'liberty' and or 'social consequences', a culture of nihilistic indifference. But to be indifferent is, itself, to take a certain stand.[18] Moreover, as Munby would know, the jurisprudential tradition, dating at least since the time of Cicero, holds that there are a number of effects or 'objects' of 'the law': it regulates, it protects and it educates. Munby clearly eschews any protective role of the law, at least in relation to nascent human life. He does so on the bases that (a) no one really knows when life begins[19] and (b) there would be so many prosecutions of unsuspecting women if the application succeeded before him that it would cause widespread social upheaval. Moreover, Munby involves himself in self-contradiction when he maintains on the one hand that the social case advanced by FPA is compelling, and on the other, that public moral culture is irrelevant.

It is apposite to note, again summarily, that the course pursued by Munby strikes at the central tradition regarding the role of law in civil society.[20] Taking his lead from Aristotle, among others, Professor George states this tradition thus:

> [politics and] good law aspire not only to help make people safe, comfortable, and prosperous, but also to help make them virtuous.[21]

Munby explicitly eschews this tradition.

As noted above, Munby makes reference to the US decisions of *Griswold, Eisenstadt* and *Carey* These critical decisions reached their apotheosis when the US Supreme Court articulated what has [in]famously come to be known as 'the meaning of the universe' statement in *Planned Parenthood of Southeastern Pennsylvania v Casey*.[22] In that case, relying also upon the three earlier decisions cited by Munby, the majority observing that "Our obligation is to define the liberty of all, not to mandate our own moral code",[23] continued thus:

> Our precedents "have respected the private realm of family life which the state cannot enter" [citation omitted]. These matters involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.[24]

The resonance of these words with those of Munby is obvious. Further comment is made later in relation to the connection between the United States decisions and that of Munby.

So much for the philosophical foundations of the judgment; let us move to the proceedings proper and an analysis of the issues arising therefrom.

The Proceedings

The judicial review proceedings initiated by John Smeaton on behalf of the Society for the Protection of Unborn Children sought 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')."[25]

In this case SPUC argued that the prescription and supply of the morning after pill (MAP) "amounts in principle to a criminal offence under sections 58 and/or 59 of the *Offences against the Person Act* 1861 ("the 1861 Act")."[26] Moreover, asserts Munby, "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."[27]

Munby concluded that SPUC's legal argument was erroneous and dismissed its application with costs in favour of both the Secretary of State and Schering.[28]

CONUNDRUMS & SELF-CONTRADICTIONS

At the heart of this judgment there are a number of fundamental self-contradictions. Indeed one is rather left with an impression that the judge had come to the conclusion that he sought on non-legal (i.e. social) grounds. He states as much with refreshing candour.[29] Clearly, this militates against an objective evaluation of the evidence and legal argument. As already noted, Munby begins thus:

> 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.[30]

Having said all that about "medical and legal questions of great complexity", the medical and legal questions are somehow miraculously solved "simply". He is able to resolve the medical and scientific issues surrounding the central questions of whether or not the prescription, supply and use of the MAP involves the commission of an offence under sections 58 or 59 of the 1861 Act, as well as the disputed meaning of 'miscarriage', on the basis of a reason which he describes as "simple and, in my judgment, unanswerable".[31] Such is the brilliance of the judge that what to mere mortals would be "medical and legal questions of great complexity" are to him patient of a simple and even unanswerable solution.

Remarkably, Munby declares how often the law proceeds on the basis of legal fictions (i.e. artificial constructs which, by definition, do not conform to reality). An example of this is the legal fiction that the humanity of the foetus occurs miraculously at birth, and that therefore the child is not to receive the protection of the law until after birth. As previously observed, Munby pronounces that, "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."[32] Note that Munby says that life, death, and parenthood are "merely" legal constructs, that is "solely or no more or better than" legal constructs. Having made this remarkable observation Munby then goes on to observe about life, "or to be more precise, the beginning of life, whatever that may mean – there is this further difficulty … 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'."[33] Perhaps Munby thought it prudent not to consult standard texts on embryology which hold that it is not only possible, but scientifically certain, to pinpoint the commencement of human life.[34]

Thus, Munby, on his own admission, does not know what "the beginning of life" means nor does he examine the vast literature which would illuminate this issue. Undaunted, he proceeds to discuss what he doesn't know. He makes reference to his understanding of 'biology and medicine' despite having told us that so far as the law is concerned life is "merely" a legal construct. As problematic as that is, he then tries to make a philosophical distinction between 'event' and 'process'. But can Munby tell us what event is not a process, or what process is not an event? A football match is an event; it is also, at any time during the playing of it, a game in progress and process. Fertilisation is an event and a process, an event which takes 20 to 24 hours to be completed. Presumably Munby could tell us when the football event starts - the umpire's whistle. Why can he not see that the beginning of fertilisation, and therefore the beginning of human life, is when the fertilisation process begins, ie insemination? Presumably because he does not know what "the beginning of life means", and even if he did it wouldn't matter since "for legal purposes" life is "merely" a legal construct which can be at variance with biological facts. And if that is the case, one may ask, not unreasonably, "why bother with the facts at all?"

ISSUES OF FACT – EMBRYOLOGY 101

Crucial to the case put before Munby were questions of biological fact. One of these had to do with the meaning of "miscarriage". On SPUC's line of reasoning the expulsion of the embryo represents a "miscarriage" whether or not that embryo has yet implanted in the womb of his or her mother. Munby notes various inconsistencies. For example, he first cites section 1(6) of the *Surrogacy Arrangements Act* 1985 which 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 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 a child.[35]

He then notes that section 2(3) of the *Human Fertilisation and Embryology Act 1990* ("the 1990 Act") 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.

The crucial question before the court in the current proceedings was: is the woman carrying a child when the embryo is not yet implanted such that a medicine or device which prevented implantation could be said to be causing a miscarriage within the meaning of the 1861 Act?

To answer this and other scientific questions Munby does two things. First, he presents the scientific evidence as he interprets it. Then he moves to issues of terminology, that is, the names we call things, however appropriately or inappropriately. This is where science may, and often does, give way to the arbitrary preference and desire of those who have a financial or other motive in 'shifting the goal posts'. Munby seems not to be aware of this aspect of human nature, or at least chooses to ignore it. For example, he accepts unquestioningly the evidence of Professor James Owen Drife, called by Schering Health Care Limited, one of the interveners in the litigation, as an expert witness. Apart from his undoubted academic expertise, Drife does abortions and is a prescriber of the MAP, in this case PC4 or Levonelle.[36] Accordingly, he is not an uninvolved or detached spectator; in political parlance he is 'a player'. Drife was asked to "provide an account of the meanings I ascribe to terms in everyday use in gynaecological practice today."[37] Not only does Drife alert us to the subjective nature of his evidence, he also is keenly aware of the power of language and terminology to obfuscate or direct various meanings. He observes:

> The other reason is a growing sensitivity among doctors to the implications that medical language has for patients.[38]

In rather matter of fact terms, one must be careful not to 'frighten the horses in the street'. In short, Professor Drife provides a fine piece of evidential legerdemain. In media terms, the professor provides convenient 'spin' which Munby is happy to embrace.

The relationship of the preimplantation embryo to the mother

In his section on "Medical science – the processes of pregnancy as understood today", Munby makes a number of self-serving statements, purporting to be statements of fact, but which, upon closer examination, simply do not stand up to scrutiny.

> 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.[39]

Here Munby states his belief that up until implantation, the embryo (he now uses the term embryo) is 'not attached in any way to the woman herself'. Why make this point unless the intention is to make something of it? Which is what Munby does later. The meaning of 'attachment' in this context is a fuzzy one, since we are dealing with events at the molecular level. One could argue that a preimplantation embryo which moves in intimate association (touching, chemical cues, hormonal communication, nourishment, fluid, electrolyte and other exchange) is indeed "attached" to its mother. Certainly it does not float in outer space. The point is this; an intimate relationship has begun between mother and embryo, each of whom has a completely distinct genetic make-up. It seems almost otiose, if not trite, to make the obvious point that each person throughout history has begun his or her life journey in precisely this way. One might also ask, "are our red and white blood cells, body fluids etc attached to us?" By Munby's reckoning, the answer must be "no". But the association is intimate and essential for survival. The further one goes into the nature of the reactions and inter-face between biological surfaces at the molecular level, the more it becomes apparent

that not much significance can be attached (there's that word) to the relationship between the pre-implantation embryo and his or her mother compared with the post-implantation embryo and his or her mother. But Munby thinks, *pace* modern scientific understanding, that this has significance for miscarriage.

When does the embryo begin to take shape?

Munby relies on old science when he makes the following statement:

> 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*.[40] [Emphasis added]

Contemporary research shows that this is not true and that the first sign could be as early as the point of sperm entry. We now know that the embryo begins to take shape from the beginning, possibly even at the one cell stage.[41] In any case, taking shape is of limited significance when the hidden and complex inner changes (in turn driven by the genes themselves) are the real drivers for embryonic development. Even if Munby was correct in his use of [dated] scientific information, the time at which the shape of the embryo appears to the eye is irrelevant in determining what the entity really is, that is an embryonic human being. For all of the data on which he relies, we do not detect him explicitly rejecting the humanity of the foetus/embryo. But he does seem to want to ignore it.

We list the newer scientific data in Appendix 1.

Miscarriage

Leaving aside, for the moment, his opinions on the "start of life", let us examine what he says about "miscarriage". Drife 'considers', 'believes', or it is his 'view' that "pregnancy begins when the pregnancy test is positive, some ten to fourteen days after conception."[42] Here 'conception' is synonymous with 'fertilisation', the beginning of a human life. Drife continues his subjective account of the word "miscarriage" by reference to his 'feelings' about what he was doing when prescribing PC4 or Levonelle.

> Although I carry out abortions, I have never at any time *felt* that prescribing PC4 or Levonelle, or fitting a coil or prescribing a progesterone-only pill is procuring an abortion … 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.[43] [Emphasis added]

Munby is clearly struck by these words of wisdom because he reiterates them, uncritically, in the very next paragraph. But what does this evidence tell us? It gives us an insight into Drife's sentiments (what he *feels*), and into what he claims others *feel*, but it hardly advances the case. What doctors *feel* they are doing may be quite different from what they are *actually* doing as the history of medical practice clearly shows. Left to the medical profession, and presumably Munby, doctors could be carrying on with many unacceptable practices unless the community did not intervene.[44] The issue is not what Drife *feels* he is doing, but what he is *actually* doing, of which Drife seems to have little account. In any case it would be very confronting and, as Sir Humphrey Appleby would say, "courageous", for any gynaecologist who fitted IUDs, prescribed the pill, minipill, and MAP, to acknowledge that they had

behaved illegally by procuring miscarriages. Of this melancholy fact of human nature, again Munby has no account.

Since Drife earlier considered conception to be equivalent to fertilisation[45] how can he, in the context of this debate, legitimately and consistently, call pharmaceutical agents "contraceptives" which, in fact, by his own admission, prevent implantation *after* conception/fertilisation has occurred, that is, after a new human being has been conceived?[46] Moreover, Drife claims that "pregnancy begins when the pregnancy test is positive, some ten to fourteen days after conception … I reserve the term 'pregnancy" for the phase after implantation."[47] But Drife is confused. In fact implantation begins at five to six days after fertilisation. Munby clearly agrees with Drife's confused, confusing and self-serving testimony.[48]

Munby's next move is to call to witness a consultant gynaecologist who gave evidence in another matter, before moving to a consultation, of sorts, through certain medical dictionaries. Here is where it gets rather intriguing. Munby identifies the medical dictionaries and other reference works relied on by all the various witnesses and cites what they have to say about miscarriage. It is the use of the medical literature, rather than the evidence of the gynaecologist, that is more relevant for present purposes.

It is clear from these medical dictionary references that Taylor (1984) supports SPUC, as does the International Dictionary (1986) except that conception/pregnancy is circular, Churchill's (1989), too, supports SPUC to the same extent as the International Dictionary (1986), Butterworth's (1978) supports SPUC on pregnancy and conception, except 'miscarriage' and 'abortion' refer to the foetus, Reiss (1998) does not support SPUC's view, Stedman's (1999) does not support SPUC but appears somewhat confused[49], Melloni's (2000) supports SPUC, and Dorland's (2000) is not definitive in that it supports SPUC on pregnancy and conception but miscarriage refers to "from the uterus" but does say the "products of conception" are expelled.

Incredibly Munby concludes the opposite of what the evidence actually shows. He says: "With the sole exception of *Taylor* none of the dictionaries is unambiguously helpful to SPUC's case."[50]

How can this be so? Eight definitions are given. On pregnancy, Taylor's, Butterworth's, Melloni's, and Dorland's all support SPUC; Reiss's and Stedman's do not, and Churchill's and the International are equivocal. On miscarriage, Taylor's and Melloni's support SPUC; Reiss's and Stedman's do not, Churchill's and the International are not helpful, and while Butterworth's appears not to support SPUC, it is confused on miscarriage, saying that it can only occur after the 8th week. Dorland's is odd since it defines miscarriage as "loss of the products of conception" which it defines as from fertilisation, but also says "from the uterus". How the learned judge can conclude that the medical dictionaries support the view that pregnancy begins once the blastocyst has implanted in the endometrium is anyone's guess. Perhaps he was just brushing up on Lewis Carroll's consideration of Humpty Dumpty about words meaning 'what I want them to mean', or perhaps more relevantly (also from Carroll's pen) "No! No! Sentence first – verdict afterwards."[51]

A detailed analysis of the definitions used in these and other medical dictionaries is set out in Appendix 2, but in summary the reality is this:

On pregnancy it is 4 for SPUC, 2 against and 2 indecisive.

On miscarriage, it is 3 for SPUC, 2 against and 3 problematic either way.

Let us recall, at this juncture, that Munby himself attempts no analysis of the definitions used. He simply states them, presuming their import of legitimising his conclusions. Then without justification he states his conclusions, conclusions distinctly unfavourable to SPUC and in the face of evidence he himself quotes and which is at variance with that conclusion. It is here, regrettably, that Munby's biases are plainly in view: *viz* against SPUC, and in favour of those who favour a 'social consequences' analysis, and who also have financial interests at stake.

Munby's 'essential' reason for dismissing SPUC's application is that "as a matter of law" his decision "must ultimately turn *not* on what the word "miscarriage" was understood to mean in 1861 but rather on what it means today", and that whatever the word meant in 1861 "the word 'miscarriage' today means the termination of an established pregnancy, and there is *no established pregnancy* prior to implantation."[52] [Emphasis added] Not only has this not been proved by the 'evidence' on which he relies, it is fairer to say that the opposite was more likely to have been shown. And why does Munby qualify the word "pregnancy" with the word "established". If there is no "established pregnancy" prior to implantation, as Munby states, is there at least a pregnancy? How is the ontological character of the embryo changed by a pregnancy becoming "established"? Munby simply does not say. Moreover, Munby gratuitously observes that in any case he does not "accept SPUC's case as to the meaning of the word "miscarriage" in 1861". In the first place he has already contended that "as a matter of law" what the word meant in 1861 is not relevant, and secondly, and true to form, he does not bother to communicate his reasons for this "observation". Why does he do this? Is it the case that Munby is being definitive about something which is debatable to undermine the evidence marshalled by SPUC, and especially its reliance on the work of prominent medico-legal academic, John Keown? We are now at the heart of the legal contest: if Keown (and Tunkel[53]) are correct, SPUC's application must succeed. Likewise, for SPUC to lose, Keown's thesis must be discredited. His Honour, right readily, acknowledges this – as one would expect in any adversarial proceedings.[54]

The beginning of a human life

Munby's account of the beginning of human life is replete with the mischievous and tendentious use of language where fertilisation and the developing human embryo are concerned. The clearest example of this refers to sperm, ovum or egg, and embryo, with reference sometimes made to the egg in the process of fertilisation. But clarity is the enemy of opacity. And transparency is the one virtue which can hardly be said to apply to Munby's expressed understanding of embryology. The use of terms like 'fertilised egg' and 'egg' as the equivalent of embryo is more typical of partisans who, for their own purposes, wish to reduce the moral significance of the embryo by the use of labels, no matter how inapt those labels might be.

So it is that Munby variously refers to the human embryo as "the fertilised egg", or even "the egg".[55]

Munby also seriously confuses 'life' with 'a life'. Instead of accurately posing the relevant legal, biological, and ethical question, "When does a human life begin", he talks vaguely about the beginning of life or "when it is that 'life' in fact 'starts'".[56] No wonder he says that he does not know what the term "the beginning of life" means because, in the context of the matter before him, it is without any clear meaning. Instead of using terms which serve only to obfuscate, why does he not seek refuge in clarity and specificity?

It is time now to return to a matter referred to briefly above, namely Professor Drife's account of the beginning of a human life, which, as noted, Munby accepts uncritically. Drife, it will

be recalled, is one of the partisans in the debate. He is hardly to be regarded as a disinterested expert witness. He is more accurately described as 'a player' who, could be affected directly by a ruling from the court that would circumscribe the unfettered availability of the MAP.

In his largely unchallenged evidence which, as noted earlier, the Court accepted at face value, Drife says:

> 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 "an embryonic 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.[57] [Emphasis added]

A more critical observer might have noted the following problems with the passage that Munby quotes from Drife. Drife asserts that a "pregnancy does not necessarily require the presence of an embryo or fetus". If Drife is prepared to call a woman 'pregnant' who *does not have* an embryo developing within her, how can he claim that a woman, who *does have* an embryo within her, is "not pregnant"? The example he gives of a pregnancy which does not have an embryo or foetus present is one in which *embryonic development* has failed at a very early stage. That is, there was an embryo present after all! It is just that the embryo later miscarried.

To add further confusion Drife also says: "Nowadays, pregnancy is confirmed by a positive pregnancy test, which can be carried out on either urine or blood." It may be trite to observe that when one confirms something, it means that that something is already there. That is, pregnancy tests serve to confirm or deny that an embryo is present, that the woman is pregnant. Drife cannot escape the real and rather obvious fact that a pregnancy has started and our methods of detection, being limited, can only tell us that after the event.

One has the impression that Drife is trying to redefine the meaning of the word "pregnancy" to match the result of a particular chemical test, which suggests that he wants to base his argument on the limitations of detection. Which begs the question: "if substances produced by the pre-implantation embryo could be detected prior to implantation would the learned professor change his understanding of pregnancy?" And would the judge follow suit?

The fact remains, however, that Munby uses Drife's logically confused testimony as the basis of his understanding of what the word 'pregnancy' means, and what constitutes the beginning of a human life. Munby quotes from Drife's testimony by way of conclusion:

> 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.[58]

What do "the large numbers of fertilised oocytes which are believed to be lost during the normal menstrual cycle" have to do with the definition of when a woman is pregnant? All that Drife has to offer us is his 'belief' that these cannot be described as 'pregnancies'. It is hardly reassuring when the scientist gives us the benefit of his 'beliefs' rather than argument based on facts, and even less so when a judge, who, having abandoned reliance on morals or religion[59], accepts such 'beliefs' uncritically, 'beliefs' which have less to be said for them than either religion or morality.

Drife continues with his unscientific and philosophically flawed account of the beginnings of human life with his declaration that he has a penchant for "teaching (sic) students that the processes of spermatogenesis, ovulation and fertilisation [are] a continuum with implantation and early pregnancy development." This, of course, is sheer nonsense. Drife is implying that the combination of distinctly different genetic material from *two* separate individuals is continuous with a *single* genetically distinct new individual. Moreover, if spermatogenesis, ovulation and fertilisation are a continuum with implantation and early pregnancy development, not only are the textbooks wrong, but arbitrary preference determines when a new individual human actually begins. If sperm and egg are continuous with embryo, then why not embryo continuous with born child and so on? *Reductio ad absurdum*. Furthermore, if pregnancy begins, as Drife claims, at about 10 to 14 days after conception, yet implantation begins at 5-6 days, how can pregnancy be said to coincide with implantation, as Munby so categorically states?[60] Munby adds his own confusions to the Drife reflections, upon which he has chosen to rely exclusively, thus:

> **"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".[61]

Here Drife confirms that the issue is really about the limits of detection, and the recognition of a process or an event that has already begun, a process well identified by embryologists. Drife's interpretation of the meaning of the word 'miscarriage' is connected to his understanding of what constitutes a pregnancy. The last half of this paragraph is particularly problematic. First, Drife calls a post-implantation embryo a fertilised egg. Second, he states that a clinically recognised pregnancy cannot be said to have occurred if there is "normal menstruation", even if an embryo has implanted. However, he has earlier stated that a clinically recognised pregnancy occurs with the detection of HCG which, on his view, can only happen *after* implantation. Drife presents differing and conflicting accounts about what constitutes a pregnancy. Is the detection of HCG the determining factor or is it not? Drife is confused. And if he is confused, what hope for any court relying on his evidence?

The Drife/Munby conclusion on the 'start of life'

Munby again quotes Drife about the 'start of life'. Since Munby expresses no disagreement with this conclusion, and seems to have accepted pretty well everything the Schering witness has to say, we may safely say that this is Munby's conclusion too.

> 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.[62]

Munby and Drife have emphasised the words "start of life" by putting them in bold. They also seem to say 'life' is really about self-replicating DNA. Again they use terminology that is at once vague as well as reductionist. It is vague, since what is at stake is *the beginning of a human life.* The sperm is alive, the egg is alive, and the embryo is alive. But the sperm and egg are not the same as an embryo. The embryo is a living human being with all of the capacities necessary for its continuing development to foetus, newborn child, adolescent, and adult. The same cannot be said of sperm and egg. It is wearisome to have to state the obvious. But since the obvious has appeared to escape their attention, it needs to be repeated here.

And Drife and Munby are both reductionist when they suggest that life, in essence, is immortal DNA.

In the first place DNA is not 'immortal'. It is not immortal in the obvious meaning of the word since it can be destroyed. Furthermore it is not immortal in the sense that DNA is not only premixed in the creation of sperm and egg, but then upon the union of egg and sperm a completely new arrangement of the DNA occurs. The fact that genetic information in the form of DNA may be passed on does not mean that by itself it constitutes anything that could be called the identity of an entity. In any case Munby and Drife contradict themselves when they observe that the "immortal DNA" comes to an end "when an individual dies childless". Even here they seem to take no account of identical twins or triplets where only one of them is childless.

Second, since there is at least a 95% homology of DNA amongst mammals, are Drife and Munby suggesting that there is a moral equivalence between say chimpanzees and human beings?

Third, it is absurd to reduce a human life to its DNA since a human being is a complex interaction of the given (DNA as it is organised in a human being from his or her conception), social and environmental influences, and an individual's exercise of free choice.

Finally, knowing when a human life has begun is crucial clinically in, for example, reproductive technology. For Drife to say, as he does, that "dating "the start of life" from a particular point in time is not helpful in a clinical sense" is extraordinary. After all, the company on whose behalf he is giving evidence makes a fortune out of knowing how to stop that event which occurs at "a particular point in time". Indeed the MAP has been developed precisely to prevent that event occurring or, if too late for that, to make sure that the newly conceived embryo cannot implant in his or her mother. In a strictly scientific sense, of course, it must be possible to *know* when human life begins or, again, where would our reproductive technologists and producers of contraceptives be left? Scientists only become confused about the beginning of a human life when it is in their interests to sow confusion, while judges and philosophers obfuscate by recourse to spurious and contentious philosophical distinctions such as between 'humanity' and 'personhood', with only the latter attracting legal protection.

MUNBY, MORALITY AND CONSEQUENCES

In his opening section on law and morals Munby emphasises that, "so far as this court is concerned, this case has nothing to do with either morality or religious belief." He sets himself the following task:

> 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.[63]

Munby's account of the law, then, is that it is not bound by biological facts; nor is it bound by morality, religion, or social consequences. For Munby the law appears to operate in a way that is detached from the moral consciousness of people, their religious sensibilities, the confines of science, or even the social consequences, other than those prescribed by certain pharmaceutical companies.

Where science is concerned he relies almost entirely upon the evidence from one of the "Interested Parties", Schering Health Care Limited, and despite the fact that "there was evidence from a number of eminent doctors explaining in very considerable detail the processes of conception and pregnancy"[64]. So when it comes to morality and social consequences, far from eschewing it as he said he would, he embraces an undeclared and crude form of utilitarianism in which consequences determine the rightness or wrongness of an act.

The first declaration of his hermeneutical prism occurs in the first paragraph of the judgment:

> 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*. [Emphasis added]

Then in a section entitled 'Social Realities', at paras. 71-76, further contours of the consequentialist prism are particularised:

> *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.[65] [Emphasis added]

The consequences, some already noted, that seem to bear heavily on Munby's deliberations and ultimate conclusions are these:

If SPUC succeeds then other 'forms of so-called contraception' would be called into question such as intra-uterine devices, progestogen only pills and even the ordinary combined pill, all of which are "capable of inhibiting the implantation of a fertilised egg."[66]

The ambit of SPUC's challenge is not just to the criminality of women using the MAP, but also to "allegations of serious criminality" involved in using any device or chemical that inhibits implantation.[67]

If SPUC succeeds it threatens the present situation where "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."[68]

If SPUC succeeds women will not be able to get Levonelle on weekends and public holidays and in any case it could only be prescribed by doctors who had complied with the requirements of the Abortion Act 1967. Further consequences would be that Levonelle would either not be administered at all or if it is administered it would be administered at a time when it is less effective and more likely to operate post-fertilisation. Moreover, there would, says Munby, "inevitably be an increase in the number of abortions *as conventionally understood*, a result which, Schering suggests, SPUC would presumably not welcome." [emphasis added][69]

In the context of social consequences Munby repeats the point made by FPA that "emergency contraception is safe, simple and effective. Abortion is both medically and psychologically invasive."[70]

The assertion of Ms Weyman from FPA 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."[71]

What was, at the outset of the judgment, the whiff of attention to "social consequences" becomes, later in the judgment, a suffocating dependence on it. Munby devotes a full seventeen paragraphs to "the social case." Having noted that "the social case for the morning-after pill, and its availability as a pharmacy only, as opposed to a prescription only, medicine, is at the forefront of FPA's case"[72], Munby makes this extraordinary declaration:

> 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*.[73] [Emphasis added]

It is astounding to find that a judge in a court of law, not the court of public opinion or the academy, devotes so much space to something which he has already said is not the issue. Is he using "what for most people this case is really about" as a cloak behind which he can smuggle social consequences onto centre stage? But remember, Munby has previously promised that "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*."[74] [Emphasis added]

Worse still Munby, either through reluctance or incapability, fails to test the evidence or counsel's contentions. For example, Ms Weyman makes an unsubstantiated claim, which Munby declares to be "startling in its implications", that 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"[75]. Well, which countries, and how low is low?[76] Then, just 3 paragraphs later his Honour quotes Ms Weyman clearly contradicting herself:

> 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.[77]

In other words, Ms Weyman does not cite research studies to support this revisionist account, but relies on inferential argument to support her already declared 'view'. In any event, if SPUC's argument is correct, that the MAP causes abortion in some cases, then the overall numbers of abortion may well be said to increase.

So, despite Munby's protestations to the contrary in some parts of his judgment, social consequences clearly bear very heavily upon him and in such a way that it would suggest that he would have been very unlikely to have reached any other conclusion than the one he did. Is it possible that the judge's personal preoccupation with consequences lead him to misconstrue the law? To answer that question we will have to turn, ultimately, to the legal issues at stake.

One might also note, with some alarm, a degree of self-justification and self-satisfaction on this point in the judgment.

> 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*.[78] [Emphasis added]

There are many curiosities in the judgment. For example, one must marvel at Munby's self-contradiction when he avers, on the one hand, that he must divine the intention of parliament, but not as parliament intended when the legislation was enacted. So one might ask, not unreasonably, how one can discern how one gives effect to "Parliament's clear intention" without having recourse to the clear intention of parliament when the legislation was enacted. As his lordship stated at the outset of his judgment, he prescinds from establishing what the word "miscarriage" meant in 1861 in favour of what the word means today.[79] It would seem to be impossible on these grounds to be giving effect to Parliament's clear intention if one is committed to giving a meaning to the essential word or concept which accords with a

contemporary understanding of that word or concept, the so-called "purposive approach" to statutory interpretation.[80]

It seems clear that Munby's preoccupation with FPA's "unanswerable" social case is never far from the surface, even though the judge said that his decision was not in any way dependent on such considerations.

> 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.*[81] [Emphasis added]

It is odd that one of Her Majesty's justices would find argument from someone who appeals strictly to law so unappealing. Munby agrees with Ms Weyman of FPA that the legal and social consequences of SPUC winning the case would be:

- A very large, although indeterminate, number of women would be criminalized
- Users of other abortifacients (what Munby likes to refer to as contraceptives) such as IUDs and "*all* hormonal contraceptive methods" would likewise be criminalized.[82]

Apart from the fact that the claim about *all* rather than *some* hormonal contraceptive methods is false, he asserts that to these claims there is simply no answer. Well, so what? On Munby's own account he is faced with a question of law, and its interpretation, no matter what the social consequences. In any event, how legally relevant are the judge's personal opinions on this matter which he labours through copious references to certain witnesses' social opinions, opinions which on his own account should have had no bearing on the outcome of this case.

And why does Munby taunt SPUC for not attempting to refute FPA's 'social case'? It was surely not for SPUC to waste the Court's time on matters the Court considered irrelevant and which are not, strictly speaking, legal considerations. Rather it was for Munby to set aside such evidence if he truly found it to be irrelevant on the grounds that it would make no difference to what he saw as his job. It is in no way unreasonable, then, to conclude that Munby's judgment seems to have been strongly coloured and influenced, perhaps even determined, by personal social and moral attitudes of a kind antithetical to the legal claims of the applicant, SPUC. His agreement with and use of the FPA 'social case' confirms such a view.

MUNBY VERSUS KEOWN

At the heart of the SPUC case was evidence provided by legal scholar Dr John Keown, who was, at the time of the litigation, Senior Lecturer in the Law and Ethics of Medicine in the University of Cambridge and Senior Fellow of Queens' College, Cambridge. Munby refers to two of Keown's published works. The first is Keown's book *Abortion, doctors and the law*, subtitled *Some aspects of the legal regulation of abortion in England from 1803 to 1982*,

(Cambridge University Press, 1988). The second is his article ""Miscarriage": A Medico-Legal Analysis" published in the *Criminal Law Review* in 1984.

Munby cites from Keown's first witness statement a passage which, he says, most clearly summarised "the thesis underlying Dr Keown's analysis". Keown referred to the research he undertook for his book:

> 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.[83]

The Keown position is this:

?? A correct reading of the 1861 Act must have regard to what the Parliament of the day intended to do by passing that particular Act.

In determining what the Parliament intended to do in 1861, regard should be had to what the key words in the Act meant at the time when the Act was passed, and not to what those words may, for one reason or another, have come to mean more than 140 years later.

?? The word "miscarriage" was understood in 1861 by medical and medico-legal authorities to include "a failure to implant."

?? That being the case section 58 of the Act was intended to prohibit attempts to procure abortion from conception (fertilisation), including any attempt to prevent the embryo from implanting in the uterus.

Munby only looks at some of the texts which Keown considered, and, for reasons not declared, only those Munby personally considers to be the most important. He concludes that the unanimity to which Keown has referred is simply not there, that the texts "are very far from unanimous".[84] Of the texts that Munby identifies as "most important", he considers those of "John Ramsbotham, Burns and Francis Ramsbotham provide Dr Keown with no such support".[85]

What needs to be examined here, then, are these texts, not those which the judge concedes support Keown's thesis. We must recall that Keown is saying that the texts either support his conclusion or at least do not contradict them.

Munby firstly quotes John Ramsbotham who 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.[86]

Munby's assertion, and that is all it is, that John Ramsbotham's position not only does not support Keown but 'on the face of it' contradicts him, is simply untrue. In fact a close reading of Ramsbotham shows that he clearly supports Keown, the only slight ambiguity being in the term 'impregnated uterus'. However, since impregnation, as Munby acknowledges[87], is to be equated with fertilisation, the 'impregnated uterus' likely means the uterus post fertilisation. So it is that Ramsbotham identifies abortion or miscarriage as the "premature expulsion of the contents of the impregnated uterus". This obvious reading of Ramsbotham is especially justified in the light of his more precise comment that follows, *viz* that "this misfortune may take place at any time between the act of impregnation [fertilisation as acknowledged by Munby] and completion of the common term of pregnancy." Munby's interpretation, on his own admission a superficial one[88], relies on linking the word "impregnated" with "uterus" and without regard to the way these words were used either at the time or even later in the same paragraph. Curious, since he himself acknowledges that "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".[89]

Next there is the 1843 text of John Burns, *The Principles of Midwifery including the Diseases of Women and Children* (10th ed.). At pages 304-305 Burns has this to say:

> The usual period of utero-gestation is nine months, but the foetus may be expelled much earlier. If the expulsion takes 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.* [Emphasis added]

At first sight, Burns appears, by mentioning 'detachment' in connection with abortion and miscarriage, not to support Keown. But Burns goes on to say, in the very next paragraph:

> The ovum may be thrown off at different stages of its growth ... The process of gestation may be checked, before the ovum can be readily detected, and when the decidua only is distinct. In this case, which occurs within three weeks of impregnation, the symptoms are much the same with those of menorrhagia.[90]

Burns here describes loss of the "ovum" - the term was commonly equated at that time with the embryo - in the very same breath as he discusses abortion. Indeed, in an earlier edition, Burns expressly states that the "process of gestation may be checked, even before the fetus or vesicular part of the ovum has descended into the uterus …"[91] He is describing loss of the "ovum" *before implantation* as "checking" the "process of gestation" that he has described elsewhere as beginning with conception/fertilisation[92]. Perhaps the only reason he does not expressly call this an abortion is because abortion is precisely what he is already talking about.

It must also be said that the passage seems to be more interested in the *symptoms of abortion*. In the case of the expulsion of the embryo before implantation, that can even take place in a way that is, at a conscious level, asymptomatic as far as the woman is concerned. As a clinician Burns would never have been presented with a situation in which a pregnancy loss

occurred prior to implantation, even though with foresight he acknowledges that such a loss can occur.

Interestingly, Burns elsewhere confirms his views about the significance of life immediately post-conception:

> Some women feel, immediately after conception, a particular sensation, which apprises them of their situation.[93]

And,

> It is not to be supposed that the child is not alive till the period of quickening, though the code of criminal law is absurdly founded on that idea. The child is alive from the first moment that it becomes visible.[94]

Burns was quite able to visualise the pre-implantation embryo as evidenced by his descriptions of them.

At the very least, Keown may justifiably say that Burns does not contradict his position, and if anything, supports it.

Finally, Munby refers to Francis Ramsbotham as one who also contradicts Keown's position. In his *The Principles and Practice of Obstetric Medicine & Surgery in reference to The Process of Parturition* (ed 4, 1856), Ramsbotham wrote (at pages 63-4):

> 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.

Taken in isolation, this passage from F. Ramsbotham does not appear to support Keown. But it is likely that F. Ramsbotham is not being comprehensive in his definition of miscarriage, since he is providing instruction for clinicians who must deal with the possibility of abortion in women after a pregnancy is confirmed. Furthermore, F. Ramsbotham, like others at the time, discusses the failure of ectopic pregnancies occurring outside of the uterus, thereby acknowledging that pregnancy loss is not necessarily limited to expulsion from the uterus. It is just that the loss of a pregnancy prior to uterine attachment was clinically irrelevant in 1856.

Elsewhere, F. Ramsbotham does allude to the fact that abortion means losing the "ovum" at any stage post-conception when, in the section on the history of abortion, he says:

> There is no animal whose habits we are acquainted with that may not lose the fruit of conception prematurely.[95]

Francis Ramsbotham then, while not expressly supporting Keown's position, does not contradict it either.

Munby concludes that these three authors "are strongly supportive of the idea that miscarriage becomes possible only after implantation".[96] But this is seriously to misread these authors, and no amount of assurance from Munby that his view describes "that fact – and fact it is"[97], will change a fair reading of John Ramsbotham, Burns, and Francis Ramsbotham. Munby might like to think that a misrepresentation of three authors out of 18 "is wholly destructive of Dr Keown's thesis"[98], but this stretches his credibility beyond its elastic limit. Perhaps it is at this point that Munby gives up any pretence of being the objective judge, assessing the evidence in a dispassionate manner, to become, instead, the passionate partisan.

Before offering some observations on certain matters of law and jurisprudence to conclude this article, there is one related judgment of Munby that requires brief consideration.

THE COSTS JUDGEMENT

On 10th May 2002, Munby delivered another judgment, related to the substantive proceedings. In it he dealt with three matters: the form of the order to be made, the costs of the proceedings, and whether leave to appeal from His Honour's decision should be granted.

There was no disagreement as to the form of the order. Munby simply made an order dismissing SPUC's claim.

Matters were a little more complex, and rather more contested, on the subject of "costs." Both the Secretary of State and Schering sought costs from SPUC. SPUC argued in the alternative that (a) there should be no order as to costs, or (b) only the Secretary of State should be awarded costs, or (c) any award of costs should be modest. A fundamental argument of SPUC was that it was acting on the basis of, and in, the public interest. Counsel for SPUC also pointed out that a significantly adverse costs order against it would have deleterious effects on SPUC's activities.

Munby rejected SPUC's arguments on costs and made an order in favour of the Secretary of State. But there was more to come.

Acknowledging the important public advocacy role played by SPUC, Munby said that "it is very much in the public interest that organisations such as SPUC and FPA should continue to engage in vigorous debate on matters such as that which I have had to consider."[99] However, he went on to find that what was presented to the court was a "manufactured dispute", that is, a dispute manufactured by SPUC. It is worth quoting him at length:

> …True it is that the topic [of the legality of MAP] was, on one level, the subject of continuing public debate, true that there was, as I have held, no settled or long-held legal interpretation of the word "miscarriage" in this context, and true that there was, to an extent, continuing academic controversy. Granted all that, but the fact remains that in the humdrum world of everyday life, so far as I can see, this was simply not a matter of genuine public concern at all … at least not until SPUC commenced these proceedings.
>
> As I have already remarked, the essential issue underlying these proceedings was identified as long ago as 1962. The morning-after pill has been available to the public since 1984. One cannot help thinking that if there was a real point it could – and would – have been taken a long time ago, indeed at any time since 1984. Mr Gordon [senior counsel for SPUC] was not able to point … to a single prosecution or threat of prosecution or other litigation since 1962 questioning the legality of either the distribution or the use of the pill, the mini-pill or the morning-after pill…. There has been rumbling academic controversy, though even in the Academy the preponderant view has for some time now been entirely contrary to that espoused by SPUC. In the realm of practical politics the matter has really been settled since the statement by [the then Attorney-General] Sir Michael Havers in 1983.[100]

Munby did not believe that SPUC's intention was to clarify the law. His Lordship considered that the proceedings were 'almost doomed to failure'.[101] Such a view clearly coloured the Court's attitude to the quite novel application by Schering to have its costs paid. Such an application was novel for at least two reasons. First, traditionally, interveners do not receive

orders for costs. They intervene, not as a party but because they seek, with the court's permission, to contribute to the ventilation of legal issues which otherwise might not come before the court, and or because the intervener has some legitimate legal interest to protect. The other reason for novelty in the case was the somewhat 'David and Goliath' pairing between SPUC on the one hand, and Schering, a pharmaceutical giant of some means, on the other. SPUC provided the Court with evidence of its difficult financial position and how negatively impacted it would be with a heavy costs order against it.

Schering's arguments for an award of costs were fourfold: (a) that their [financial] interests were directly affected. They alleged, and the Court accepted, that their sales would be tainted by criminality. (b) Schering was a distinct legal entity to the Secretary and required separate representation. (c) Schering's evidence was distinctive and helpful to the court; the court agreed. (d) Schering's evidence was not duplicative of FPA. Munby also held that Schering was in fact the real defendant in the proceedings. Stated pithily, Munby said: "The simple reality is that this case without the active participation of Schering would have been a 'Hamlet without the Prince.'"[102] For these reasons, he awarded costs against SPUC and in favour of Schering, in addition to the costs award in favour of the Secretary of State. Moreover, both the Secretary of State and Schering received an award for all their costs. The Court held that there were no grounds for any reduction in that award.

It is not unreasonable to divine some spite in Munby's cost judgment, a desire to "king hit" a group that he appeared to treat with cynicism, if not disdain.

The final matter for consideration in relation to the 'costs judgment' was permission to appeal. The Court took the view that there was no realistic prospect of an appeal succeeding; accordingly, there would be no grant of permission to appeal. *Munby locuta est. Causa finita est*.

MUNBY, THE LAW & POLICY

It remains apt to offer a few very brief comments on these judgments which clearly do nothing to advance the cause of life, nor, for that matter, the protection of women.

First, Munby considers law as 'value-neutral.' As with every other discipline, this is a convenient fiction. Moreover, he states precisely that the 'social case' of FPA was utterly convincing. But one might reasonably ask how and why should one 'social case' take precedence over any other in a court of law?

Secondly, traditionally, law has contributed to the public moral culture, or moral ecology, of society. In this instance, as in others, moral wrongs are defended legally as rights – hence 'the right to abortion', 'the right to contraception', etc. In advancing such 'rights', culture becomes increasingly nihilistic. Law ought to educate, protect and regulate. According to these judgments, the only thing it does with respect to the morning after pill is to protect the lucrative profits of its manufacturer.

Thirdly, it took exactly ten years for courts in the UK to catch up to the 'enlightened' jurisprudence of the US Supreme Court, on show for all to see in *Planned Parenthood v Casey*. But, catch up, they have.

APPENDIX 1

Recent work by Richard Gardner of Oxford University in the UK reveals that the early embryo already shows some asymmetry even at the single cell zygotic stage.[103] Interestingly,

at first, no one would take Gardner's work seriously. "People were quite hostile," he recalls, and it took 5 years before anyone would listen.[104] Previous research had already shown that the 5-day-old blastocyst has an axis that appears to line up with the later foetus, suggesting that asymmetry is formed at least as early as the blastocyst stage.[105] Work by others went earlier still, even identifying the point of sperm entry as the key for determining axis formation[106], although this work has been challenged. Zernicka-Goetz thinks that if the first cell division in these embryos produces cells that contribute more equally to each half of the blastocyst, it will boost her theory that the point of sperm entry is the key factor.

Zernicka-Goetz and co-workers also found that enough specialisation had taken place in the 2-cell embryo to cause each cell to pursue different lineages in the developmental process.[107]

Further studies that illuminate the directedness of early embryonic development reveal that the early embryo also produces a variety of substances for various signalling purposes. Some of these have been known for some time and their role is partially understood, while others such as various growth factors are currently the subjects of research. Austin notes that the fertilised "egg releases a substance called early pregnancy factor (EPF), which can be detected in the woman's blood and provides useful information should the pregnancy fail at a later stage". [108] In the paper to which he refers, the authors note that "early pregnancy factor (EPF) is known to be detectable in sera of pregnant woman within 24 to 48 hours after conception".[109] Austin also notes that 'platelet activating factor' is released by the blastocyst prior to implantation providing another early indication of pregnancy. [110]

Furthermore, if preimplantation embryos are cultured in groups rather than individually, then they have a better chance of implanting. The study authors suggest that this finding can be attributed to the "beneficial effects of specific embryo-derived growth promoting factors", although they were uncertain what those factors were.[111]

All this suggests that early embryonic development is precise. Furthermore, it would seem that the visible manifestations of specialisation are evidence of the invisible and as yet unidentified machinations within the cells constituting the embryo, which may be gradually revealed as science refines its observational techniques. With the arrival of new information from the Human Genome Project, it is likely that we will rapidly discover more about the complex, orchestrated and highly directive early stages of human embryonic development that are beyond microscopic sight.

At times it has been assumed by some that the early embryo is undifferentiated or unspecialised and therefore less human and with diminished moral worth. These recent findings challenge that view. The human embryo specialises in complex, directed and precise ways from the moment of sperm penetration onwards.

As Helen Pearson notes, the truth is that "your world was shaped in the first 24 hours after conception. Where your head and feet would sprout, and which side would form your back and which your belly, were being defined in the minutes and hours after sperm and egg united. Rather than being a naïve sphere, it seems that the newly fertilized egg has a defined top-bottom axis that sets up the equivalent axis in the future embryo."[112] Pearson concludes that "What is clear is that developmental biologists will no longer dismiss early mammalian embryos as featureless bundles of cells – and that leaves them with some work to do."[113]

APPENDIX 2

The 8 dictionaries used in the judgment by Munby have been supplemented here with 10 additional dictionaries, so that a more comprehensive picture of the current meaning of terms

like ‘conception’, ‘pregnancy’ and ‘miscarriage’ can be obtained. The following medical dictionaries were assessed for the relevant definitions:

Black's Medical Dictionary, 1999.[114]

Urdang Dictionary of Current Medical Terms, 1981.[115]

Mosby's Medical and Nursing Dictionary, 2002.[116]

The Oxford Medical Companion, 1994.[117]

New American Pocket Dictionary, 1978.[118]

English Medical Dictionary, 1987.[119]

Short Encyclopedia of Medicine for Lawyers, 1966.[120]

Stedman’s Medical Dictionary, Lawyer’s Edition, 1982.[121]

Blakiston’s Gould Medical Dictionary, 1979.[122]

Taber’s Cyclopedic Medical Dictionary, 2001.[123]

Conception

In each of these dictionaries conception is equated with fertilisation, with the exception of Taber’s, where conception is defined as from implantation. Since Taber’s defines pregnancy as, “the condition of having a developing embryo or fetus in the body after successful conception”, this interestingly creates a conundrum when it comes to defining an embryo, which Taber’s does as follows:

> In mammals, the stage of prenatal development between fertilized ovum and fetus. In humans, this stage begins on day 15 after conception and continues through gestational week 8.

Thus, Taber’s provides humans with a special definition even though the early developmental stages are very similar to other mammals. Furthermore, this would place the definition of ‘embryo’ as starting some 20 days after fertilisation, that is, 15 days after conception/implantation which occurs at about 5 days. Such a definition is not found in any other dictionary.

The only other slight variation can be found in The Oxford Medical Companion where conception is broadened to include implantation:

> “The fertilisation of an ovum by a spermatozoon and the implantation of the resulting zygote.”

However, rather than a zygote implanting, it is a blastocyst which implants.

Pregnancy

Taber’s aside, each of these dictionaries describes pregnancy as from conception with the exception of Black’s:

> “The time during which a woman carries a developing fetus in the uterus…”

Black’s does however equate conception with fertilisation and also defines fetus in the flowing way:

> "…the human being, like the young of all animals, begins as a single cell, the ovum, in the ovary. After fertilisation …"

Therefore, including the dictionaries used by Munby, of the total of 18 dictionaries, conception and pregnancy are equated with fertilisation clearly in 13, 2 are not clear, and 3 describe pregnancy as from implantation, even though one of these (Reiss's) describes conception as a process beginning with fusion of the gametes and continuing through early development to implantation, and another, (Taber's) is forced to redefine 'embryo' in a quite unique and unsatisfactory way.

A fair conclusion would be to say that by far the majority of dictionaries equate conception and pregnancy with fertilisation, contrary to Munby, and supporting SPUC. And of the three that equate conception and pregnancy with implantation, two have internal inconsistencies.

Miscarriage and Abortion

It is universally agreed that miscarriage and abortion are synonymous and some dictionaries simply refer to miscarriage as spontaneous abortion.

As discussed in the main body of this paper, the texts dealt with by Munby show that 3 support the view that miscarriage includes loss of the preimplantation embryo, 2 support the view that miscarriage refers to the post-implantation embryo, and 3 are unclear. The additional 10 dictionaries listed above define miscarriage/abortion as follows:

"Spontaneous abortion, often called miscarriage may occur at any time before 28 weeks." - Black's

"Expulsion or removal of an embryo or fetus from the womb at a stage of pregnancy when it is incapable of independent survival. (ie at any time between conception and the 28th week of pregnancy)" - Urdang.

"To deliver a nonviable fetus (to miscarry)" - Mosby.

"Termination of pregnancy with expulsion of the products of conception, before the fetus has reached viability (legally 24 weeks in the UK)" - Oxford.

"Expulsion from uterus of products of conception before it is viable." - The New American.

"Situation where an unborn baby leaves the womb before the end of the pregnancy, especially during the first 28 weeks of pregnancy when it is not likely to survive birth" - English.

"The expulsion or removal from the uterus of the embryo" - Short Encyclopedia of Medicine for Lawyers.

"Spontaneous expulsion of the products of pregnancy before the middle of the second trimester." - Stedman's Lawyer's Edition.

"1. The spontaneous or artificially induced expulsion of an embryo or fetus before it is viable. 2. The prematurely expelled product of conception. - Blakiston's.

"Term for termination of pregnancy at any time before the fetus has attained the potential for extrauterine viability" - Taber's.

Keeping in mind that the embryo (or product of conception) spends at least 2 days in the uterus prior to implantation, each of these definitions, with the exception of Mosby and Taber's, is supportive of the view that miscarriage includes the loss of a preimplantation embryo.

Therefore, of the 18 dictionaries cited by Munby or listed here, 11 support the view that miscarriage includes loss of the preimplantation embryo, 3 support the view that miscarriage refers to the post-implantation embryo, and 4 are unclear.

A fair conclusion would be that the majority of dictionaries support the view that miscarriage includes loss of the preimplantation embryo, contrary to Munby and supportive of the proposition put forward by SPUC.

It is notable that in the definition of abortion given in the Short Encyclopedia of Medicine for Lawyers, specific reference is made to sections 58 and 59 of the Offences Against the Person Act 1861:

> … for the purposes of the Offences Against the Person Act 1861 ss 58 & 59, in which the term used throughout is "miscarriage", the latter term may be taken to be synonymous with abortion and may refer to *any point of time before the period of gestation is complete.*[Emphasis added]

In summary, the proposition put forward by SPUC, that conception is to be equated with fertilisation and that a woman is pregnant from fertilisation/conception onwards, and that miscarriage, being synonymous with abortion, refers to loss of the preimplantation embryo, potentially caused by the morning after pill, is upheld by the substantial majority of medical dictionaries.

ENDNOTES

[1] The title borrows from Robert George's important work, *The Clash of Orthodoxies: Law, Religion and Morality in Crisis*, (Wilmington, ISI Books, 2001).

[2] *Colautti v Franklin* 439 US 379 (1979) at 386 per Blackmun J. Similar statements of the obvious are found in standard medico-legal textbooks, *e.g.* "There are few, if any, more contentious areas of medical practice than termination of pregnancy or abortion." I. Kennedy & A. Grubb, *Medical Law* (Third Edition) (London, Butterworths, 2000) p. 1405; J.K. Mason, *Medico-Legal Aspects of Reproduction and Parenthood*, (Second Edition) (Aldershot, Ashgate-Dartmouth, 1998) p. 107.

[3] *R (John Smeaton on behalf of Society for the Protection of Unborn Children) v The Secretary of State for Health* 18 April 2002 [2002] EWHC 610 (Admin); (2002) 66 BMLR 59; (2002) Crim LR 665. A second, significant judgment relating to "costs" was also delivered in these proceedings by Munby on 10 May 2002 [2002] EWHC 886 (Admin); (2002) 2 FLR 146. Separate remarks will be necessary in due course on the second, costs judgment. Unless otherwise noted, all immediate references are to paragraphs in the principal judgment of the Court delivered on 18 April, 2002.

[4] Munby refers [para. 398] colloquially to the three US Supreme Court decisions by their 'shorthand' names of *Griswold, Eisenstadt* and *Carey*. Their more formal citations are: *Griswold v Connecticut* 381 US 479 (1965); *Eisenstadt v Baird* 405 US 438 (1972); and *Carey v Population Services International* 431 US 678 (1977) to which His Honour adverts earlier in his judgment [para. 61]. The importance of these citations is not to be under-estimated. We comment on their use shortly. It is sufficient at this juncture to note the growing confluence between UK judgments and their US antecedents. This is to say that on matters pertaining directly to the protection of nascent human life, courts in both countries have inexorably pursued courses which have lessened, rather than bolstered, that protection. E.g. see the recent decisions of the House of Lords in *Regina v Secretary of State for Health (Respondent) ex parte Quintavalle (on behalf of Pro-Life Alliance) (Appellant)* [2003] UKHL 13 (13 March 2003), and of the Court of Appeal in *The Queen on the Application of Quintavalle v Human Fertilisation and Embryology Authority* [2003] EWCA Civ 667 (16 May 2003). For a detailed exposition of the 'slippery slope' of medical jurisprudence in the US away from the protection of life, see Robert

A. Destro, "Guaranteeing the "Quality" of Life through Law: The Emerging Right to a "Good" Life," in *Guaranteeing the Good Life: Medicine & the Return of Eugenics*, (R.J. Neuhaus, ed.) (Grand Rapids, MI, Eerdmans, 1990) p. 229-266.

[5] Para. 398.

[6] *Ibid*.

[7] Justice Michael Kirby of the High Court of Australia states an obvious truth when he says that "[a] major role of law journals must be criticism. This value-added component must be something that cannot be expected from the law-makers themselves." "Welcome to Law Reviews," (2002) *Melbourne University Law Review* 26:1-14 at p. 3-4.

[8] *R v Instan* (1893) 1 QB 450 at 453, quoted by Professor J.K. Mason, *Medico-Legal Aspects of Reproduction and Parenthood* (Second Edition) (Aldershot, Dartmouth/Ashgate Publishing, 1998) p. 107. The same quote is used, also favourably, in J.K. Mason, R.A. McCall Smith, G.T. Laurie, *Law and Medical Ethics* (Sixth Edition) (London, Butterworths-LexisNexis, 2002) frontispiece and para. 8.2. A thoroughgoing presentation of the relationship between law and civil society is Professor Robert George's seminal *Making Men Moral: Civil Liberties and Public Morality*, (Oxford, Clarendon Press, 1993). Among other matters discussed, George deals in some detail with the famous Hart-Devlin debate in the 1950s and 1960s. Munby also refers to this debate, *en passant* [para. 48]. We return to Professor George's important analysis at the end of this article.

[9] Para. 1.

[10] Para. 48.

[11] Paras. 221-225.

[12] An interesting analysis of the role of judges in general is provided by John Bell, "The Judge as Bureaucrat," in *Oxford Essays in Jurisprudence* (Third Series) (J. Eekelaar & J. Bell, eds.) (Oxford, Clarendon Press, 1987) p. 33-56. Towards the end of this essay, Bell observes (at p. 53-54), "The notion of the 'bureaucratic' nature of law suggests that the judge is not personally responsible for the results of the decisions he makes, since it is the law which decides what is permitted. On this analysis, the judge is merely a mechanism to transmit superior orders. While attractive in some ways, the suggestion belies the fundamental creativity and responsibility of the judge. Given that discretion and dynamism form part of the judicial task, the rules cannot dictate a solution which is not the judge's responsibility. In carrying out policies and making value-choices, the values and perspectives of the individual decision-maker are deployed." The case under discussion highlights Bell's point graphically.

[13] Paras. 209-225.

[14] Para. 212.

[15] Para. 221.

[16] We say unbelievably because of the extreme unlikelihood that a discretion would not be exercised *not* to prosecute and because of the difficulty in obtaining relevant evidence.

[17] See para. 324.

[18] Professor George styles this "liberalism." Among his significant body of work, generally see his *Natural Law, Liberalism and Morality: Contemporary Essays*, (R.P. George, ed.) (Oxford, Clarendon Press, 1996).

[19] "…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."" [para. 60] *Cf* his earlier startling admission "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." [para. 56].

[20] The term "central tradition" comes from Isaiah Berlin's *The Crooked Timber of Humanity: Chapters in the History of Ideas* (New York, Alfred A. Knopf, 1991).

[21] R. George, *Making Men Moral*, *op. cit*. p. 20.

[22] 505 US 833 (1992); 120 L Ed 2d 674.

[23] At p. 697 (L Ed reference) c*f.* the remarks of Munby regarding "law and morals" at paras. 46-53.

[24] At p. 698 (L Ed reference).

[25] *R v Secretary of State for Health*, at para. 20.

[26] *Ibid*., at para. 4.

[27] *Ibid*., at para. 5.

[28] *Ibid*., at para. 16.

[29] Cf i*bid*., at paras. 385,393, & 394.

[30] *Ibid*., at para. 1.

[31] *Ibid*., para. 346.

[32] *Ibid*., at para. 56.

[33] *R v Secretary of State for Health*, at para. 60.

[34] T.W. Sadler, *Langman's Medical Embryology*, Ed. 6 (Baltimore, Lippincott, Williams & Wilkins, 1990). Ch. 1 begins: "The development of the human being begins with fertilisation"; Murray Brooks & Anthony Zietman, *Clinical Embryology: A Color Atlas and Text* (Boca Raton, CRC Press LLC, 1998). Ch. 1, p. 2. "Individual life begins with conception by the union of gametes".

[35] Cf *ibid*., at para. 112.

[36] *Ibid*., at para. 135.

[37] *Ibid*., at para. 131.

[38] *Ibid*.

[39] *Ibid*., at para. 126 (vii).

[40] *Ibid*., at para. 126 (viii).

[41] Gardner, R.L. Specification of embryonic axes begins before cleavage in normal mouse development. *Development* 128(6):839-847, 2001; Piotrowska, K. & Zernicka-Goetz, Role for sperm in spatial patterning of the early mouse embryo. *Nature* 409(6819):517-521, 2001.

[42] *Ibid*., at para. 133.

[43] *Ibid*., at para. 135.

[44] There are many examples of this touching on issues such as informed consent, experiments on human subjects, and forced sterilisation of the mentally incompetent.

[45] *R v Secretary of State for Health*, at para. 133.

[46] This view, of course, is conveniently consistent with that of the IVF industry and its manufacture of thousands of human embryos, very few of whom are, or ever will be, implanted. There is no question that IVF embryos are human. But, by Drife's and Munby reckoning, "miscarriage" and other offences are only ever dependent on "implantation." Thus, in some jurisdictions one can experiment at will on non-implanted human embryos.

[47] *Ibid*.

[48] Cf *ibid*. at paras. 136 and 351.

[49] Stedman's has conception at implantation, contrary to all other dictionaries, and defines embryo as from conception, therefore implantation, again contrary to all other texts.

[50] *R v Secretary of State for Health*, at para. 148.

[51] *Alice's Adventure's in Wonderland,* Ch.12.

[52] *Ibid.*, at para. 17.

[53] V. Tunkel, "Modern Anti-Pregnancy Techniques and the Criminal Law," [1974] *Crim LR* 461. Curiously, even for the sake of completeness, Munby does not refer to Tunkel's later article, "Abortion: How early, how

late, and how legal?" *BMJ* 2:253, 1979. In her balanced consideration of Tunkel's position, Gillian Douglas (who is one of a number of legal academics cited by Munby – see para. 266) conveniently outlines Munby's "social argument" against the logical, legal argument of Keown and Tunkel. Douglas states, with some prescience: "Since such an interpretation [i.e. Tunkel's] would probably outlaw the insertion of all IUDs, it is perhaps not surprising that it is not shared by those responsible for prosecution policy, and the legality of post-coital contraception is unlikely to be challenged in the foreseeable future. Indeed, family planning professionals have argued strongly that greater knowledge of its availability "could save an enormous number of abortions." G. Douglas, *Law, Fertility and Reproduction*, (London, Sweet & Maxwell, 1991) p. 95-96.

[54] At para. 42, Munby states: "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." Put another way, one could argue that the contest is between the precise legal (and medical) analyses offered by Keown and Tunkel, on the one hand, and on the other, that offered, on grounds of social and political expediency, by those holding political office.

[55] *Cf*, for example, *ibid*., paras. 10 (ii) and 13(i).

[56] Para. 60.

[57] *Ibid*., at para. 132.

[58] Para. 133.

[59] *Ibid*., at para. 46.

[60] Para. 351.

[61] Para. 134.

[62] Para. 137.

[63] Para. 46.

[64] Para. 77(i).

[65] Para. 71.

[66] Para. 72.

[67] Para. 73.

[68] *Ibid*.

[69] Para. 74.

[70] Para. 75.

[71] Para. 76.

[72] Para. 209.

[73] Para. 210.

[74] Para. 46.

[75] Para. 214.

[76] The relationship between the ready availability of contraception and abortion is a complex one. What is undeniable is that societies which have embraced artificial forms of contraception have increased rates of abortion as the evidence in South Australia, the UK, and the US bears eloquent testimony. Where the ready provision of MAPs is added to the ready availability of contraceptive and abortion services there is no clear data since the taking of an MAP is essentially unreported and publicly unmonitored.

[77] Para. 217.

[78] Para. 393.

[79] Para. 17.

[80] See, for example, *Fothergill v Monarch Airlines Ltd* [1981] AC 251 at p. 272-73.

[81] Para. 394. It should hardly be a curiosity that a legal challenge should concern or limit itself to points of law!

[82] Para. 221.

[83] Para. 151.

[84] Para. 152.

[85] Para. 165.

[86] John Ramsbotham. *Practical Observations in Midwifery with Cases in Illustration*. (Ed. 2 1842), at page 376 cited in Munby, *ibid*., at para. 156.

[87] Para. 154(i).

[88] Para. 152. Here Munby J says: "Some (of these texts) as I read them, *on their face* contradict Dr Keown's reading." [Emphasis added].

[89] Para 154(i).

[90] John Burns, *The Principles of Midwifery including the diseases of Women and Children* (Ed. 10, 1843), p. 305.

[91] John Burns, *The Principles of Midwifery including the diseases of Women and Children* (Ed. 3, 1814), p. 193-194.

[92] *Ibid*., p. 124.

[93] John Burns, *The Principles of Midwifery including the diseases of Women and Children* (Ed. 10, 1843), p. 249.

[94] *Ibid*., p. 253.

[95] Francis H. Ramsbotham, *The Principles and Practice of Obstetric Medicine & Surgery in reference to the Process of Parturition* (Ed. 4, 1851), p. 648.

[96] Para. 169.

[97] Para. 169.

[98] Para. 169.

[99] Para. 20 of the "costs judgment" dated 10 May 2002. Unless otherwise stated, all references hereafter will be to this judgment.

[100] Paras. 23 & 24.

[101] Para. 28.

[102] Para. 40.

[103] Gardner, R.L. Specification of embryonic axes begins before cleavage in normal mouse development. *Development* 128(6):839-847, 2001.

[104] Pearson, H., Your destiny from day one. *Nature* 418, 14-15, 2002.

[105] Gardner, R.L. *et al.*, Is the anterior-posterior axis of the fetus specified before implantation in the mouse? *J. Exp. Zool*. 264(4):437-443, 1992.

[106] Piotrowska, K. & Zernicka-Goetz, Role for sperm in spatial patterning of the early mouse embryo. *Nature* 409(6819):517-521, 2001.

[107] Piotrowska, K. *et al*., Blastomeres arising from the first cleavage division have distinguishable fates in normal mouse development. *Development* 128(19):3739-3748, 2001.

[108] Austin, C.R., Human Embryos. The debate on assisted reproduction. (New York, Oxford University Press, 1989) p. 10.

[109] Mesrogli *et al.*, Early pregnancy factor as a marker for the earliest stages of pregnancy in infertile women. *Human Reproduction* 3(1):113-115, 1988.

[110] Austin, C.R., *Op. Cit*., p. 13.

[111] Almagor *et al*., Pregnancy rates after communal growth of preimplantation human embryos in vitro. *Fertility and Sterility* 66(3):394-397, September 1996.

[112] Pearson, H., *Op. Cit.*

[113] *Ibid*.

[114] *Black's Medical Dictionary*, Ed. by Gordon Macpherson, (Ed. 39, London, A&C, 1999).

[115] *Urdang Dictionary of Current Medical Terms for Health Science Professionals*, (John Wiley & Sons, 1981).

[116] *Mosby's Medical and Nursing Dictionary*, (Missouri, C.V. Mosby Co., 1983).

[117] *The Oxford Medical Companion*, Ed. by J. Walton, J.A. Barondess & S. Lock, (New York, Oxford University Press, 1994).

[118] *New American Pocket Dictionary*, Nancy Roper, (New York, Longman Inc., 1978).

[119] *English Medical Dictionary*, Ed. by P.H. Collin, (Middlesex, Peter Collin, 1987).

[120] *Short Encyclopedia of Medicine for Lawyers*, Walter Montague Levitt, (London, Butterworth's, 1966).

[121] *Stedman's Medical Dictionary*, Ed. By William H.L. Dornette, (5th Unabridged Lawyer's Edition, Washington DC, Cincinnati & Jefferson Law Book Co., 1982).

[122] *Blakiston's Gould Medical Dictionary*, (Ed. 4, McGraw-Hill, 1979).

[123] *Taber's Cyclopedic Medical Dictionary*, (Ed. 19, F.A. Davis Co., 2001).