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Criminal Liability for Complicity in Abortions Committed Outside Ireland

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CRIMINAL LIABILITY FOR COMPLICITY IN ABORTIONS COMMITTED OUTSIDE IRELAND

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The legislative provisions which make it an offence to procure a miscarriage unlawfully or assist in the unlawful procurement are to be found in sections 58 and 59 of the Offences Against the Person Act 1861 (*1*). Section 59 states that:

> "Whosoever shall unlawfully supply or procure any poison or other noxious thing, or any instrument or thing whatsoever, knowing that the same is intended to be unlawfully used or employed with intent to procure the miscarriage of any woman, whether she be or be not, with child, shall be guilty [of an offence] and being convicted thereof shall be liable . . . [to imprisonment for a term not exceeding five years.]"

As recently as 1979, the Oireachtas reaffirmed its acceptance of the 1861 provisions as encapsulating the law on abortion in the Republic. The Health (Family Planning) Act 1979 made this clear (*2*):

> "Nothing in this Act shall be construed as authorising
> a) the procuring of an abortion
> b) the doing of any other thing the doing of which is prohibited by section 58 or 59 of the Offences Against the Person Act 1861."

That Act also amended the sections of the Censorship of Publications Act 1929 regulating the publication, display, distribution and sale of written material "which might reasonably be supposed to advocate the procurement of abortion or miscarriage" (*3*), so as to continue the censorship ban on pro-abortion literature. The Act of 1929 defined printed matter which referred to ". . . drugs, medicines, appliances, treatments or methods for procuring abortion or miscarriage" as being of an "indecent or obscene character" (*4*). The amendments made by the Health (Family Planning) Act merely did away with any reference in the earlier Act to the prevention ("or unnatural prevention") of conception, thus retaining the bulk of the original sections in force and transferring the control of contraception to the 1979 Act.

The Censorship of Publications Act 1946 conferred powers on the Censorship Board to prohibit the sale and distribution of books and

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(*1*) 24 & 25 Vict. c. 94.

(*2*) S. 10.

(*3*) Censorship of Publications Act 1929, s. 16(1), as amended by Health (Family Planning) Act 1979, s. 12(1).

(*4*) Censorship of Publications Act 1929, s. 17(1), as amended by Health (Family Planning) Act 1979, s. 12(2).

periodicals which contain written material advocating the procurement of abortion or miscarriage (5). These remain untouched by the 1979 Act. It simply transfers the responsibility to regulate written material relating to contraception to the Minister for Health (6).

It would appear from section 59 of the Offences Against the Person Act 1861 not only are the principal parties involved in the operation liable to criminal prosecution but also those who assist in the procuring of the miscarriage. Those who counsel the practice may also incur such liability. In recent years the most common way for an Irish woman to obtain an abortion has been to leave the Republic and obtain such an operation in Britain, where the restrictions imposed on the medical profession with regard to performing operations are far less onerous. Up until 1967 the law affecting abortions in England and Wales was substantially similar to that which exists presently in the Republic. This, however, was radically changed by the Abortion Act of that year. Now, what may be a lawful medical operation in England may be a criminal offence in the Republic. How then would the Irish courts view secondary parties to such extra-territorial activities?

Before discussing this, however, it is important to be clear on what constitutes the criminal procuring of a miscarriage in Ireland. The central question for anyone attempting to interpret the relevant legislation in Ireland is what is meant by "unlawfully procuring a miscarriage". It is logical to infer from the wording of such an offence that the legislature envisages situations where abortions may be lawfully carried out. But nowhere in the Offences Against the Person Act is reference made to the conditions under which a miscarriage may be lawfully procured. The Irish courts may not accept that the use of the term "unlawful" in section 58 implies that "lawful" procuring of a miscarriage is the necessary corollary of such an offence. They may prefer to interpret the section as prohibiting abortions generally. However, should they do this, it would be difficult to explain the specific inclusion of the condition that the miscarriage may be procured "unlawfully". It would not be satisfactory to dismiss it as surplusage. Nor would the courts be able to simply sever the word "unlawful" without substantially affecting the meaning of the section. Any attempt at severance would, I suggest, cause the whole section to fall. "Unlawfully" prefaces verbs like "use" and "administer" in sections 58 and 59 no less than six times, and, as such, is an integral part of the offences created by these sections (7).

(5) Censorship of Publications Act 1946, ss. 7 and 9.
(6) Health (Family Planning) Act 1979, s. 12(3) (4).
(7) Even if the courts were to say that to read "unlawful" as implying the existence of the corollary (lawful abortions) would be contrary to the express intention of Art. 41 of the Constitution, this would not justify the severance of the word "unlawful", or an interpretation of the section which ignored its effect. If s. 58 is inconsistent in its present form with the Constitution then it will be void.

The very controversy caused by the term "unlawful", and the uncertainty it

In England, the notion of an "unlawful" abortion must be construed in the light of the Abortion Act 1967. No offence is committed in England or Wales if a pregnancy is terminated by a registered medical practitioner provided that:

(a) the continuance of the pregnancy would involve risk to the mother's life or injury to her physical or mental health or that of any existing children of her family greater than if the pregnancy were terminated (*8*), *or*

(b) where there is a substantial risk that if the child were born it would suffer from some physical or mental abnormality as to be seriously handicapped (*9*).

Two doctors practising in an approved hospital must make the determination of whether a case comes within the above-mentioned categories (*10*).

It would appear that the only situation where a doctor in the Republic could be regarded as lawfully terminating a pregnancy is where the life of the mother is in immediate danger. However, even this condition is not clear. In *Bourne's* case (*11*) the Central Criminal Court in England was faced with the issue of how a doctor was to determine whether it was lawful to terminate a pregnancy. Consideration was given to the proviso to the offence created by the Infant Life (Preservation) Act 1929, which prohibits the killing of any child which is capable of being born alive. The proviso referred to the death of the child being caused in good faith and for the purpose only of preserving the life of the mother. There was no such proviso set out in section 58 of the Offences Against the Person Act, but MacNaughten J. took the view that because the word "unlawfully" was used in that section, it imported the meaning expressed by that proviso and that section 58 must be read as if the words making it an offence to use an instrument with intent to procure a miscarriage must be qualified by a similar proviso. The court in this case also conceded that there is no clear line of distinction between a danger to the health and a danger to the life of the mother. This notion of danger does not mean the instant death of the mother, but such as may be anticipated by the doctor. The doctor's determination of the danger must rest on "reasonable grounds", formed from an "adequate knowledge" of the probable consequences of the continuance of the pregnancy. If the doctor honestly believes that the

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creates, is surely reason enough for the drafting of legislation to clarify s. 58, or its replacement by legislation which stipulates the extent of the prohibition in the offence.

(*8*) When determining the effect a continued pregnancy may have on the mother or her existing child, the doctor may take account of the mother's actual or reasonably foreseeable social and economic environment: Abortion Act 1967, s. 1(2).

(*9*) Abortion Act 1967, s. 1(1).

(*10*) This requirement may not apply in an emergency situation where an abortion is immediately necessary to save the mother's life or to prevent grave personal injury to her physical or mental health: Abortion Act 1967, s. 1(4).

(*11*) [1939] 1 K.B. 687, [1938] 3 All E.R. 615.

continuance of the pregnancy would make the woman "a physical and mental wreck", then his actions in procuring the miscarriage are directed towards preserving the life of the mother (*12*).

Whether the Irish courts would so define the conditions of a lawful abortion or so widely construe the meaning of "a danger to the life of the mother" is open to debate. The matter has not been argued before a superior court in the Republic and, therefore, it is far from clear when the termination of a pregnancy would be seen as lawful in the Republic. It is evident, however, that the situations where abortions are lawfully carried out in the United Kingdom offer a far greater opportunity for Irish women, requiring such an operation, to have their needs satisfied outside this jurisdiction.

Participation in the crime under Irish law

Persons whom the law considers to be participants in a crime are those who commit the act itself and, in addition, those not having taken part in the actual commission of an offence, but who may nevertheless be liable through their connection with it. The participants in the offence itself may be principals in the first degree (the actual perpetrators) or principals in the second degree (those who are present "aiding, abetting or assisting the commission of the offence"). An accessory before the fact is one who "aids, abets, counsels, or procures" the commission of the offence, without being physically or personally present. When one knows an offence has been committed and "receives, comforts, harbours, assists or maintains" any of the participants, one may be liable as an accessory after the fact (*13*).

This paper is primarily concerned with the liability (or otherwise) of aiders and abettors who are not present at the commission of the offence. Secondary parties to abortions may be especially those who assist the woman in some way to leave the Republic and obtain the operation, but we must also consider those who "aid" and "abet" after the miscarriage has been procured.

Liability of secondary parties

The question of the criminal liability of such secondary parties to an abortion procured overseas is complicated by the fact that the law in the Republic may not be identical to that which is in force where the operation is performed. In England, Wales and Northern Ireland, for example, the

(*12*) The interpretation of the precondition for saving the life of the mother was extended in the case of *R.* v. *Newton & Stungo* [1958] Crim. L.R. 469. This case also deals with the issue of the doctor's "good faith" in determining whether the precondition exists. It was deemed important that the doctor have a *bona fide* honest and reasonable belief that the life or health of the mother was in danger.

(*13*) These four categories of participation only apply with respect to felonies. As for misdemeanours, all four degrees of complicity are assimilated into one, with the fourth degree carrying no culpability. Other participants may be tried and punished as if they were a principal in the first degree.

situations where a lawful abortion may be carried out are certainly more numerous than is the case in the Republic. Thus, it must be determined whether one can aid and abet an act, the commission of which would comprise an offence in Ireland but might not offend the criminal law of the jurisdiction in which it was perpetrated.

Before facing this problem, however, we need to be clear on the elements of participation necessary to establish the criminal liability of secondary parties. In order that a person be so convicted, the prosecution must prove

(i) that the accused assisted or encouraged the commission of the principal offence;
(ii) that the principal offence was in fact committed; and
(iii) that the accused had the intention to aid in its commission.

Some problematic issues to confront the prosecution would include: the existence of an intention to aid or encourage, as well as a knowledge of the circumstances of the offence (*14*); the nature of the assistance and encouragement provided; and the extent to which complicity prior to the act may verge on incitement or conspiracy.

Incitement

It is that final issue which introduces another element affecting the liability of secondary parties. The word incitement is really self-explanatory but it includes advice, encouragement and authorization as well as persuasion by threats. Encouragement may be given expressly or may be implied from conduct.

The inciter may be guilty of an offence even though the crime itself is not committed. In these circumstances, he is not an accessory to the substantive offence because there is no consummated offence. If, on the other hand, the substantive offence is committed, the inciter becomes a party to it as an accessory. The act of incitement is the same whether the crime is committed or not.

When dealing with the question of secondary parties' liability through complicity with an offence ultimately committed in another jurisdiction and which does not transgress the laws of that jurisdiction, the charge of incitement may be equally as problematic as one of aiding and abetting. The projected activity to which the incitement relates will not be an offence where it occurs, nor will it occur within the first jurisdiction (in our problem, the Republic), where it may form a substantive offence to which the incitement may be attached as an inchoate offence.

Inchoate offences to be completed outside the jurisdiction

A central authority on the commission of an inchoate offence within one jurisdiction to commit the substantive offence abroad, is the case of

(*14*) See *National Coal Board* v. *Gamble* [1959] 1 Q.B. 11 as to the extent and specificity of such required knowledge, also *R.* v. *Bainbridge* [1959] 3 All E.R. 200.

Board of Trade v. *Owen* (*15*). That case held that a conspiracy to commit a crime abroad is not indictable in England unless the contemplated crime is one for which an indictment would lie in England. The House of Lords took the view that, though the conspiracy in question was to be regarded as a conspiracy to obtain a lawful object by unlawful means rather than a conspiracy to commit a crime, no indictment for such a conspiracy would lie in England, since the unlawful means and the ultimate object were both outside the jurisdiction.

If a conspiracy were alleged in the Republic between the principal and secondary parties to an abortion proposed to be carried out legally in England, the essential elements to establish that conspiracy may not exist. *Board of Trade* v. *Owen* could be distinguished from such an abortion situation. Although an indictment may lie in the Republic for the procuring of such an abortion locally and for any associated conspiracy, the alleged conspirators would not be conspiring to commit *a crime* abroad. In *Owen's* case the object of the agreement *was* clearly criminal.

It could not even be suggested that secondary parties to the abortion were in collusion to commit a lawful object by unlawful means, provided that they complied with the requirements of the Abortion Act 1967 for a lawful abortion. If this was the case, both the "assistance" and the act itself would be lawful in the second jurisdiction. The "means" (whether unlawful or not) *and* the ultimate object may both arise outside the jurisdiction of the Republic. The alleged object of the conspiracy could not have been carried out in Ireland, it might also be argued. The motivation for obtaining the operation outside the Republic is to avoid illegality at home, rather than to engage in crime abroad.

The general principle is that jurisdiction over inchoate crimes appertains to the state that would have jurisdiction had the crime been consummated (*16*). It is not usually the case that a conspiracy would be punishable in this country, the agreement being to violate the laws of another country (*17*). Despite the fact that a conspiracy is considered to be completed when the agreement is formed, it is vitally bound up with the substantive offence which forms the object of that conspiracy. If this substantive offence is to be carried out in another jurisdiction, it would require the courts of the Republic to take account of foreign laws when

(*15*) [1957] A.C. 610.

(*16*) It is interesting to reflect on the rule of international law adopted by certain continental countries and England (with respect to specific offences such as murder and bigamy committed within the "Commonwealth") that a state has jurisdiction over crimes against its laws, committed by its nationals overseas.

(*17*) The unusual case of *Mulcahy* v. *The Queen* (1868) L.R. 3 H.L. 306, might be viewed as authority for the contrary. In that case a conspiracy formed in Ireland "to stir up certain foreigners and strangers and certain citizens of the United States of America and persons resident in America, with force to invade part of the United Kingdom" (to win Ireland) was seen as triable within the United Kingdom. However, there were other charges for conspiracies with purely local treasonous objectives, which were also heard at the trial, and these may have strengthened the court's resolve to hear the charges.

faced with the issue of conspiracy, an approach, it is surmised, which they will not be inclined to take.

In *D.P.P.* v. *Doot* (*18*) the respondents formed a plan to smuggle drugs into the United States by way of England. The original agreement for the venture had been made in Morocco. The drugs were discovered at Southampton, and the respondents were charged with conspiracy to import dangerous drugs. At the trial it was contended that the court had no jurisdiction to try the case because the conspiracy had been entered into abroad. However, the House of Lords took the view that although the conspiracy was complete as a crime when the agreement was made, it continued in existence so long as there were two or more parties to it, intending to carry out the design. Thus, the English courts had jurisdiction to try the offence if the evidence revealed that the conspiracy, wherever and whenever formed, was still in existence when the accused were in England.

However, once again the case law deals with a conspiracy which had a criminal object and unlawful means to achieve it. The conspiracy would not have "continued to be in existence" unless it possessed these characteristics. In *Doot,* the "means" and "object" were unlawful in both England and the jurisdiction in which the agreement was to be fulfilled. No matter when it is completed, or where it may be prosecuted, an inchoate offence is inextricably linked to some future substantive criminal offence.

The logic flowing on from the *Owen* case is that courts will assume responsibility to prosecute a conspiracy entered into abroad to commit a crime here. This is despite the general policy with regard to matters of venue that where a conspiracy remains inchoate, it might be seen as more convenient, from the point of view of evidence, to prosecute in the locality where the agreement was formed. *Brisac's* case (*19*) considered the problem of conspiracies entered into on the high seas. Despite the fact that all the acts that constituted the conspiracy were committed out of the jurisdiction of the common law, and only the object and completion of the conspiracy were to operate on shore, the court decided that it had jurisdiction to try the charges because the final step of the common purpose (*i.e.,* the delivery of the false vouchers) was to be done within the jurisdiction. That final act in pursuance of the purpose of the conspiracy was an offence in the place where the vouchers were delivered. So again the need for an ultimate offence within the jurisdiction that prosecutes is apparent despite the conspiracy being in "another place".

Conspiracy is the widest of the inchoate offences, and the general rules affecting its prosecution will be transposed to incitement and attempt to commit crimes. The question of attempt was discussed in *R.* v. *Harden* (*20*). The court in that case held that section 9 of the Criminal

(*18*) [1973] A.C. 807.
(*19*) *The King* v. *Brisac & Scott* (1803) 102 E.R. 792.
(*20*) [1962] 2 W.L.R. 553. See commentary in [1962] Crim. L.R. 248.

Procedure Act 1851 did not apply because the "offences were in fact completed" (*21*). However, the true reason for the failure of the attempt in this case seems rather that the accused intended to commit an act which was no offence under English law.

Where a court has no jurisdiction on a charge of an extra-territorial substantive crime, the jury could not convict an attempt committed within the jurisdiction to commit such an extra-territorial crime (*22*).

All the above-mentioned cases show instances of the courts' reluctance to act on criminal activities committed extra-territorially. How much more will the courts of the Republic be reluctant to entertain a prosecution for an inchoate offence where the extra-territorial activity does not constitute a crime in the other jurisdiction!

In discussing the case of *H.M. Advocate* v. *Semple* (*23*), where the charge was one of attempted abortion by supplying abortifacients from Glasgow to someone in England, Gordon states the following (*24*):

> "The supply (of abortifacients) could be only criminal if the abortion was criminal and if the abortion was to take place in a country in which the abortion was legal, the supply would not be criminal or at any rate, would not amount to attempted abortion . . . the supplier's guilt was accessory to the guilt of the person who actually tried to procure the miscarriage; now if that person committed no crime by trying to procure the miscarriage . . . where such acts are not criminal, how could the supplier be guilty of being an accessory to that 'crime'."

Even if the attempted abortion were criminal in the second jurisdiction, the accessory in the first country would be committing a crime extra-territorially.

When is the inchoate offence completed

It is generally agreed that an inchoate offence will be complete prior to the execution of the substantive offence which is its object. In practice, they are crimes of themselves without the commission of this object.

In the case of conspiracy, the issue of when the offence is complete is of cardinal importance, as we saw in *D.P.P.* v. *Doot*. If the conspiracy exists at the time the agreement is formed, then a crime may be created far removed from the substantive offence. Thus, the general rule relating to the reluctance to prosecute such inchoate crimes can be viewed as an exception to the usual principles of extra-territorial jurisdiction over completed criminal offences.

Earlier, I have stated that the convention is that inchoate offences are normally prosecuted, if at all, in the jurisdiction where the substantive

(*21*) See *Treacy* v. *D.P.P.* [1971] A.C. 537.
(*22*) See *State* v. *Snow* (1912) 83 N.J.L. 14.
(*23*) 1937 J.C. 41.
(*24*) Gordon, *Criminal Law of Scotland* (1967), p. 89.

offence will be committed. However, if the conspiracy is a complete offence in the first jurisdiction, why should it not be prosecuted there? It has been held that where the conspiracy charged is to "cause a public mischief" (*25*) in the local jurisdiction, or is to injure a citizen of that state by causing damage to him abroad, the conspiracy may be prosecuted locally.

In the abortion situation, it might be said that any agreement to procure an abortion outside the Republic may have the unlawful purpose of evading and preventing the course of justice in the Republic. If this was accepted as an object for criminal conspiracy and the conspiracy was seen as complete as to agreement, then would the Irish courts not be correct in hearing such a charge?

The conspiracy might also be punishable if the conspirators contemplate the illegality may be performed either here or abroad, even though it is performed abroad. In the case of the abortion example, the woman goes outside the jurisdiction to avoid illegality. The alternative is fundamentally different.

Conspiracy might further be successfully alleged when directed towards the commission of another more general object. *Shaw's* case (*26*) is authority in England for the existence of the offence of conspiracy to corrupt public morals. Were the Irish courts to entertain the existence of such an offence in Irish law, a prosecution might conceivably be upheld against parties who conspired to procure an abortion, provided that such an agreement constituted a corruption of morals and that it was formed in circumstances which were seen as sufficiently public in nature.

Despite these particular examples, an inchoate offence would not ordinarily be successfully prosecuted in Ireland where the abortion is procured in England. The alleged offence is completed and yet does not constitute a crime in the external territory. A conviction would only result where either the object of the inchoate offence would be criminal in the second jurisdiction or where the "means" used to achieve the object were, of themselves, unlawful.

Secondary parties to an extra-territorial offence

Where the abortion is actually carried out, the question concerning criminal liability centres on the secondary parties. Though useful to introduce the problem of extra-territoriality, the speculation on whether or not the assistance provided to an illegal operation would constitute an inchoate offence does not influence such liability. Once the substantive offence has been consummated, the issue of inchoate offences is of little consequence. The liability of the secondary party is attached to the

(*25*) Note, however, that in *D.P.P.* v. *Withers* [1975] A.C. 842 the House of Lords held that there is no separate or distinct offence known as a conspiracy to effect public nuisance.

(*26*) *Shaw* v. *D.P.P.* [1962] A.C. 220.

completed offence. To determine the liability of secondary parties in any criminal charge, it must be remembered that, unlike individuals involved in inchoate offences, secondary parties are not guilty of subsisting crimes on their own account. They may only become liable in relation to a crime committed by another. In that respect, the actions of the persons they assist, and the way these actions are viewed by the law, are crucial to the criminality or otherwise of secondary parties.

If the abortion procured in England were criminal, a secondary party can be punished in that state, even though he was not within its territorial jurisdiction at the time when the crime was committed *or* when he gave his assistance. The parties who gave assistance in the Republic of Ireland, for example, became criminally liable for an illegal abortion performed in England because as secondary parties they are not guilty of self-subsisting crimes on their own account, but of participation in a crime committed by another (*27*).

On the other hand, courts in the Republic would not be able to hear charges against the secondary parties to a crime which was ultimately committed outside the jurisdiction, because there is no crime under Irish law to which anyone can be a secondary party. If the action is not seen as criminal within the home jurisdiction, then there is no secondary criminal liability here. The proper procedure for the external territory would be to have those who assisted the action extradited to face prosecution in that jurisdiction. The law of complicity only applies to crimes committed against local law.

In relation to the present abortion example, however, I would agree with Glanville Williams, when he states that it could "hardly be imagined that our courts would punish arrangements for doing something in a state that would be lawful there" (*28*).

The penal law of one nation must be seen as being purely territorial, and this would be subverted if the law of conspiracy or the prosecution of secondary participants could be used to give it world-wide operation.

Criminalizing the non-criminal?

If the courts of the Republic were to uphold prosecutions for

1) aiding and abetting those who obtain lawful abortions outside this jurisdiction; or
2) assisting, inciting or conspiring to assist those who intend to obtain such abortions in England or Wales,

they are effectively extending the criminal law of Ireland to cover actions which occur in another jurisdiction that are deemed by the laws of that jurisdiction not to be criminal. Such an expansion of the jurisdiction must

(*27*) N.B. Glanville Williams, *Criminal Law: The General Part* (2nd ed.), p. 129.

(*28*) Glanville Williams, "Venue and the Ambit of Criminal Law" (1965) 81 *L.Q.R.* 530. This was approved as a correct statement of law by Fenton Atkinson L.J. in *R.* v. *Robert Millar Ltd.* [1970] 2 Q.B. 54 at 73.

amount to a challenge to the sovereignty of an external territory to determine what is criminal and what is not, within its jurisdiction (*29*).

When discussing this in an English context, Glanville Williams submitted (*30*):

> "that the mere fact that Englishmen agree in England to do something abroad that will be lawful abroad but that would be punishable if done here, should not make them guilty of conspiracy even though their purpose is to evade the English prohibition".

If the Irish courts wish to punish these evasions of local prohibitions they can only do so through the statutes of Ireland (*31*) which have extra-territorial effect. As no such statutes exist with respect to abortion, the courts of the Republic cannot cure this deficiency by manipulating the notions of complicity or inchoate liability.

(*29*) Glanville Williams, "Venue and the Ambit of Criminal Law", 81 *L.Q.R.* 530.

(*30*) *Ibid.*, at 537. This view is supported by *R.* v. *Walkem* (1908) 5 W.L.R. 857, where the court in British Columbia held that the accused could not be punished in Canada when she submitted herself to an abortion in the U.S.A., which was not, as such, punishable in Canada.

(*31*) An example of extra-territorial criminal legislation can be seen with respect to homicide (Offences Against the Person Act 1861, s. 9) and bigamy (Offences Against the Person Act 1861, s. 57).