

# The King versus Aleck Bourne

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*The case that established the lawfulness of terminating pregnancy to preserve women's health*

**Europe, July 1938:** Hitler and his Nuremberg rallies are gaining strength; invasion of Czechoslovakia seems imminent; German concentration camps are under construction; and Chamberlain is seeking appeasement. Meanwhile, in London, the Old Bailey criminal court is staging an unusual trial. In the dock of the austere Edwardian building stands Mr Aleck Bourne, FRCS, FRCOG, Consultant Gynaecologist to London's St Mary's Hospital, charged under the Offences Against the Person Act 1861 with unlawfully using an instrument to procure an abortion.<sup>1</sup>

Following the introduction of the harsh measures of the 1861 Act, prosecutions for abortion had been relatively common.<sup>2</sup> However, in virtually all cases the defendants were women with little or no medical training, who performed abortions for small fees — so-called backstreet abortionists.<sup>3</sup> At any one time, around 50 women convicted of the crime were incarcerated for up to 14 years in London's Holloway Prison. Motivation was not necessarily purely financial. One woman said, "I knew it was against the law but I didn't think it was wrong. Women have to help each other".<sup>2</sup>

Bourne, an eminent medical practitioner, was different, though he shared some of the altruistic motivation, performing the procedure with no thought of a fee. On 14 June 1938, he openly carried out an abortion in St Mary's. The 1861 Act stated that "therapeutic" abortion was legal — justified if the woman's life was in danger — but the definition of "therapeutic" was unclear. Very familiar with the disastrous consequences of unsafe abortion for many women, Bourne had previously performed, without publicity, a small number of "therapeutic" abortions he believed to be justified on strong medical grounds. He now felt an urgent need to test the law in court, and was prepared to risk conviction to do so.<sup>4</sup>

Bourne's 1975 obituary in the *British Medical Journal* described him as "a man of great compassion and understanding".<sup>5</sup> In May 1938, he was asked to see a girl of 14 years who had been raped by five officers of the Royal Horse Guards at their London barracks. They had enticed her there promising to show her a horse with a green tail — she was clearly an inexperienced child. Following the rape, the girl and her parents had first sought treatment at St Thomas's Hospital. It soon became evident that the girl was pregnant, and abortion was requested. The response of the consultant at St Thomas's was that, as the rapists were officers and therefore apparently gentlemen, "she might be carrying a future



Aleck W Bourne (4 Jun 1886 – 27 Dec 1974)

*"I ... decided to bring forward a test case, in which there would be no real danger to life ... but in which one might strongly suspect great danger to health. I was also concerned to establish in the eyes of the Law that mental health was just as important as physical health, and in certain cases perhaps even more so."*<sup>4</sup> ♦

Prime Minister of England", and anyway, "girls always lead men on". He refused the request.<sup>1</sup>

At St Mary's, Bourne had no such class illusions. He carefully considered the case, noting that the girl was "not mentally defective and not of the prostitute type".<sup>1</sup> Bourne concluded that, although a plea of danger to her life could not be substantiated, termination of the pregnancy was justified because of the risks to her physical and mental health. He could not, he later told the Court, "draw a line between danger to life and danger to health; if one waited for danger to life the woman would be past assistance".<sup>1</sup> He performed a surgical curettage, then deliberately informed the police.<sup>1</sup>

Justice Macnaghten presided over the case. Bourne's defence lawyers called several of his colleagues, who testified that there were significant risks of both physical and psychological damage if the pregnancy had continued. Macnaghten took the view that, if there was "unlawful" abortion, there should also be situations in which abortion was "lawful". He extended the meaning of "the life of the woman" to include her health, and in his directions to the jury said that "if the doctor is of [the] opinion on reasonable grounds ... that the probable consequences ... will be to make the woman a physical and mental wreck, the jury are quite entitled to

take the view that the doctor ... is operating for the purpose of preserving the life of the mother".<sup>2</sup>

Bourne was acquitted, and his actions were widely applauded by the medical profession. The *Lancet* commented that, although the acquittal "left the legal position ... only a little less obscure than before ... [c]ompulsory pregnancy for the victims of criminal assaults ... is an idea abhorrent to civilised Society".<sup>6</sup> Bourne was commended for "an example of disinterested conduct in consonance with the highest traditions of the profession".<sup>6</sup> A week later, Bourne himself wrote to the *Lancet*: "The Attorney General admitted that abortion is legally recognised when life is in danger. Now we know it is also admitted when there is *serious* danger to health ... the majority of the profession would feel they are on safer ground if the precedent just established were incorporated in a new Act, passed in days when much more knowledge of medicine, surgery and psychology is available than was the case in 1861".<sup>4</sup> In the same issue, another writer called for "the law [to be] amended in an open and straightforward way to meet the demands of justice and humanity".<sup>7</sup> However, it would be 30 years before such changes came to pass. In that time, *R v Bourne* (1939), while not

providing complete legal clarity for practitioners, nevertheless acted as a definite precedent — in Australia and the United States as well as in Britain — allowing doctors to undertake therapeutic abortions when they honestly believed the woman's health was at risk if the pregnancy continued.

The Bourne case was significant in the 1969 landmark ruling of Justice Menhennitt in the prosecution of Dr Ken Davidson for procuring abortions in Victoria.<sup>8</sup> Menhennitt believed that Macnaghten had used the principle of “necessity” in composing his judgment, meaning that an act which would usually be a crime can be excused if it was done to avoid otherwise inevitable and undesirable consequences. Menhennitt ruled that abortion would be unlawful if the person performing the abortion did not *honestly believe* on reasonable grounds that the abortion was *necessary* to preserve the woman from serious danger to her life or her physical or mental health, or if the person did not *honestly believe* that in the circumstances the abortion was *in proportion* to the danger to be averted.<sup>9</sup> Menhennitt's directions to the jury were favourable to Dr Davidson, who was acquitted. The Menhennitt ruling became the basis on which abortion was safely and openly offered to women in Victoria from 1969 onwards, and subsequently the basis for the 1975 Levine and 1986 McGuire judgments, which similarly made abortion more accessible to women in New South Wales and Queensland, respectively.<sup>9</sup> Nevertheless, it is worth noting that abortion remains in criminal legislation in NSW and Queensland, and was only removed from the *Victorian Crimes Act 1958* in late 2008.

In England, the decision in *R v Bourne* made little immediate difference to most women seeking abortion, whatever their reasons — economic, social or medical. Backstreet abortion was as common as ever, with a high mortality for women, although those who could afford it could obtain a safer surgical procedure from a discreet private clinic. This was the subject of the film *Vera Drake* (2004) in which Vera, an English factory worker who, in the early 1950s, provided abortions at no charge for poor women in their own homes, went to prison, whereas the doctor running a lucrative private abortion practice faced no such penalty.<sup>10</sup>

During the 1960s, there was increasing pressure from the new women's liberation movement and other groups for changes to abortion law in Britain. There was also concern among some politicians about the huge discrepancy between the law and the practice of abortion, and this led Liberal MP David Steel to introduce a bill to decriminalise abortion that resulted in the *The Abortion Act 1967* (UK). This Act, with some modifications since, allows induced abortion when continuing the pregnancy poses a greater risk to the life or physical or mental health of the woman, or her existing family or children, than if abortion is carried out. This legislation obviously built on the principles underlying the ruling in the Bourne case.<sup>11</sup>

Interestingly, Bourne himself did not support the introduction of the 1967 Act. He had written in 1938 that: “I would not have it believed that I have worked for a loose interpretation of the law”,<sup>4</sup> and after 1967 he campaigned for the Society for the Protection of the Unborn Child, believing the new legislation to be too liberal. As noted in his obituary, “he never lacked the courage to express in public views which he held with great conviction and sincerity”.<sup>5</sup> He made many contributions to the wider sphere of his discipline, including the struggle to have the importance of psychological factors recognised in gynaecological disorders. A keen yachtsman who often invited his junior staff to join him on board, he retired,

reluctantly, from both active medical practice and sailing in 1964, at the age of 77 years. The place of *R v Bourne* in the history of the decriminalisation of abortion in the English-speaking world should not be forgotten. The *British Medical Journal* noted: “Bourne rightly deserves great credit for his determined and courageous action ... based as it was on a deep sense of responsibility and compassionate understanding”.<sup>5</sup>

## Competing interests

None identified.

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