

**Episode 9
How This Court Changed Abortion Laws in Victoria**

Gideon Haigh

I was having lunch with an ex-girlfriend of mine who happened to be an obstetrician, and she used the word Menhennitt in our conversation and I sort of – we were talking about abortion – and I said, “What’s Menhennitt?” And she said, “Well, it’s the standard that we apply in late-term abortion.” I wondered where it had come from. She didn’t know, but she knew the name.

Greg Muller

I’m Greg Muller and today on Gertie’s Law we’re taking a close look at what’s called Judge Made Law. And how this concept - 50 years ago - was instrumental in changing the law around one of the most controversial issues of our time. It was the case of Queen Vs Davidson - better known as the Menhennitt Ruling.

Gideon Haigh

So I went looking, as a curious journalist should, and found that it all related to a Supreme Court case in May 1969 where a judge called Clifford Menhennitt had given a ruling about the circumstances under which an abortion, which was otherwise part of the Crimes Act, could be considered lawful.

Greg Muller

Gideon Haigh wrote a book about this case called The Racket - How Abortion became legal in Australia.

Is it fair then to say this was Australia’s Roe v Wade?

Gideon Haigh

It’s not unfair. Yes. It’s accompanied by none of the drama, and theatre and controversy that that ruling has attracted, but, in fact, that ruling in the United States is a good deal more limited than the Menhennitt ruling. It really concerns states’ rights as distinct from abortion per se. So, in some respects, the stroke of Menhennitt’s ruling is an even more dramatic departure than Roe v Wade, and it was a standard that was widely imitated and became the basis of the law going forward in other states as well.

Greg Muller

And despite dealing with such a potentially explosive topic - especially in 1960s Australia - it received surprisingly little attention.

Gideon Haigh

Perhaps that’s the only way that it could have happened, that it had to slip between the cracks and occur when no one was looking. It was amazing, there wasn’t a single journalist in the courtroom the day that Menhennitt gave that ruling. On the day in question, the most important feminist question in the pages of The Age being discussed was, “Should women wear trousers?”

Greg Muller

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We'll get back to the details of the Menhennitt Ruling and the long lasting implications it had - but first - what makes this case particularly interesting is, although it was a criminal matter - it was not decided based on existing legislation. This was an example of judge-made law.

There are three sources of the law: the Constitution, both state and federal, which determines the roles and powers of institutions within the state - such as the executive, parliament and judiciary. These are the rules for how to run the country.

There's statute law which is the basis for much of the criminal law. And there's judge-made law.

To explain this, Principle judge in the Common Law division, Justice Dixon.

Justice Dixon

Now, Australia has a written constitution. Statute law is what parliaments do, and statute law takes precedence over the law that judges make. In other words, what judges do can be overridden by an Act of Parliament. Now, the content of statute law is determined by politicians.

The common law is judge-made law, and most broadly expressed, the common law is the common sense of the community crystallised and formulated over time into principles of law that are applied by the courts when quelling disputes between citizens, or between citizens and the state.

When someone comes to court and says, "I've been wronged. I need a remedy. " And it might be a novel situation and the courts have to consider it.

Greg Muller

And there's an important distinction to be made here between common law and the rule of law.

Justice Dixon

Yes. Well, they're quite different concepts. The rule of law is best explained by distinguishing the rule of law from rule by law. Totalitarian societies are ruled by law. Now, the rule of law is a feature of democratic societies.

The rule of law reflects a fundamental community standard that all citizens are equal before the law, so the Governor-General, the Prime Minister, all politicians, all judges, everybody is subservient to the rule of law. There is no escape.

Greg Muller

Here's an actor speaking the words of Former Chief Justice of the High Court - Justice Brennan, who described it like this.

Actor (Justice Brennan)

It is clear that the common law has developed to its present sophisticated condition by artisan judges who, with knowledge of existing rules, have moulded, added, rejected or resected them, to achieve a measure of justice in particular cases. And that is a technique which is essential to maintaining the law in a state that is

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serviceable for the community. It is a technique which distinguishes a society living under the rule of law from a society that is ruled by law.

Greg Muller

Judge made law is necessary when a matter comes before the courts which doesn't exactly relate to existing legislation.

Retired Appeal Court judge, Marcia Neave.

Marcia Neave

People use the expression judge made law what they're often thinking about is the situation where a novel case comes before the courts and the existing legal principles don't fit perfectly to the situation and therefore the court has to decide whether to extend a principle or to find a new principle which you can do because there may well be other examples or situations that are analogous just but not exactly the same.

And it doesn't happen all that often in the criminal law but sometimes there will be situations where the law has to be developed.

Greg Muller

One of the earliest examples of common law which was a completely judge made law is the law of negligence.

Marcia Neave

And it's something we now take for granted. It's the principle that if you're injured by somebody's negligence whether it's negligence in manufacturing a product or driving a car or supplying medicine that's defective then you can sue the person who was negligent.

Now that's known as the law of negligence and that was invented about 100 years ago - a bit less than 100 years ago. So that was done in a case called Donahue and Stevenson where a woman found a snail in a ginger beer bottle and drank the ginger beer - had drunk the ginger beer before she found the snail and she was very ill. She didn't have a contract with the manufacturer of the ginger beer but the court, English court held that she was entitled to recover damages for negligence. And that shaped the common law right across England, Australia and America and other countries which have inherited English law.

Greg Muller

Another example of judge made law and one closer to home, was the 1992 landmark case in the High Court: Mabo versus Queensland.

Justice John Dixon again.

Justice Dixon

In 1967, Australians voted overwhelmingly to amend the constitution to include Aboriginal people in the census and to allow the Commonwealth Parliament to create laws for them.

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Greg Muller

In the subsequent decades, only a handful of laws were passed, but the issue of land rights gained prominence.

Justice Dixon

In 1992 the High Court acted and it changed the Common Law. Up until that point there was a common law doctrine of terra nullius; the land belonged to nobody at the time when it was first settled, and this was rejected by the High Court as offensive to values of justice and human rights, especially equality before the law.

The High Court identified these fundamental values as aspirations of the contemporary Australian legal system, and a Common Law doctrine of Native Title was formulated.

This new Common Law doctrine was deliberately and openly crafted to reverse a strongly-perceived yet deep-rooted injustice within the Australian legal system, and the court did so without fracturing the skeleton of principle that gives the body of our law its shape and its internal consistency, and as we know, that decision woke up the Commonwealth Parliament.

The Australian community accepted Mabo because they accepted that it genuinely represented values that the community subscribes to, and parliament has never sought to reinstate the doctrine of terra nullius.

Greg Muller

There's also situations where there is existing legislation but it's not conclusive. Marcia Neave was involved in one such matter.

Marcia Neave

A case that was decided by the Victorian Court of Appeal a few years ago was a case about revenge porn. That was a case where a man had filmed himself and his girlfriend having sex and after their relationship broke down he tried to show the film to her parents, to a neighbour and to her employer to have revenge on her. And there was some legislation - not legislation about revenge porn but there was a little bit of legislation that had some relevance but we had to decide whether she should get compensation in those circumstances and we decided that she could.

Greg Muller

So if a judge can pretty much make a call on an issue in the absence of relevant legislation.

Does this open the way for an 'activist judge' pushing their own agenda?

I put this to Justice Dixon.

Justice Dixon

So if the role of the judge is central in this way, why is the rule of law not beholden to values and idiosyncrasies of individual judges?

Well, that's a very good question.

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Judges do not consider that their decision making reflects individual values, and their decisions must meet an externally imposed standard.

As a judge of this court, any decision that I make is subject to an appeal where it's decided by three judges sitting as a bench of three, and then if the litigant doesn't like the decision of the Court of Appeal, they can ask the High Court to consider the case, and if the High Court considers the case there will be either a bench of five judges, or, if it's a very important case, a bench of seven judges so that you can have up to 11 judges consider the dispute and express a view about it. Now, there's a lot of safeguard built into that and the community accepts that's enough. If you've lost in the High Court, well, get on with it; you've had a fair go.

Greg Muller

The Common Law sits underneath the laws made by parliament, the statute law.

The Menhennitt Ruling of 1969 is an example of where statute law and common law intersect.

The Victorian Parliament did eventually pass laws on abortion in 2008, but in the sixties, politicians were reluctant to legislate on such a controversial social issue.

Justice Dixon

The application of the criminal law to termination of pregnancy may be an example, yet the common law must grapple with applicable principles because real cases of persons charged with crimes arising out of, say, termination of pregnancy have and do come before the courts.

Greg Muller

And this is what happened in 1969. So let's set the scene of the Menhennitt Ruling. John Gorton got the Liberals back in, but Whitlam was at his heels; Johnny O'Keefe was topping the charts and The Beatles were photographed on a zebra crossing.

Rod Laver was aceing Wimbledon and thousands of people were protesting against the Vietnam War. In Victoria, women had been permitted to sit on juries for only five years - despite getting the right to vote in 1908. And The Menhennitt Ruling was one year before Germaine Greer published *The Female Eunuch*.

Change was coming.

Greg Muller

Someone who remembers those days clearly is Beth Wilson.
Hi Beth, nice to meet you.

Beth Wilson

Likewise come on in.
My name's Beth Wilson. I'm the former Health Services Commissioner for Victoria and currently a failed retiree.

Greg Muller

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Beth was also a vocal advocate for the removal of abortion from the crimes act. And a regular public speaker. In 2003, Beth was awarded a Centenary Medal for her contribution to Australian health.

Greg Muller

So I'll take you back to 1969. Give me an idea what Victoria was like.

Beth Wilson

Well, so I would have been 20 in 1969. It was a repressive place. Women were supposed to know their place. Girls were always suspected of being immoral and likely to engage in illicit sex and get pregnant and not behave themselves instead of getting married and having children and building up the birth rate for the things that were thought to be important, like defence.

My mother was what was called a "deserted wife" back in those days. A lot of stigma around that. So I loved school. I loved learning but at age 15 I realised that there was no money so I just had to leave. So I worked in factories, shops, anything I could get until I earned enough money and confidence to go back to university at night school.

Greg Muller

And what did you study?

Beth Wilson

I studied law.

Greg Muller

In 1969 Catholics were a powerful force in Australian politics - The DLP -Democratic Labour Party - had split from the ALP 14 years earlier and the effects were particularly visceral in Victoria.

The conservative Liberal, Henry Bolte was Premier and had been for almost two decades, thanks in part to preferences from the anti-communist, and Catholic DLP. This all made abortion reform a particularly difficult issue for the Parliament to deal with.

But this didn't mean they weren't happening

Gideon Haigh.

Gideon Haigh

Basically, abortion has always been available to a greater or lesser degree in Australia almost as a kind of a form of contraception. It's not attracted legal protections, but it has always been understood that it has been available if you knew someone who knew someone who knew someone and were prepared to pay the relevant price.

Now, what had happened in Victoria probably post the Second World War was that an alliance, an unstated alliance had grown up between the police and the doctors

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providing abortion whereby the police would ensure that abortion remained available, but at a price.

Greg Muller

In 1970, the Kaye Inquiry found credible and strong evidence that certain police members demanded, and accepted money from abortionists.

Three senior police, including a chief of the Homicide squad, Inspector Jack Ford were convicted and sentenced for having accepted kickbacks from abortionists.

Gideon Haigh

And at the time abortion was covered, or part of the purview of the homicide squad, the head of the homicide squad used to alternate in those days between a Catholic and a Mason, and the Masons would tend to take a pretty lenient attitude to abortion and the Catholics would attempt in various ways to tighten it up.

In the mid-1960s, a very ambitious Catholic policeman called Frank Holland took over the homicide department and he decided once and for all that he was going to close down abortion providers in Victoria. He said that, "The law says it's illegal and that's good enough for me."

So he set out to arrest various key abortionists and put them on trial not knowing at the time that many of these abortionists had been paying protection money to his predecessors.

So he disrupted a delicate but ongoing relationship between abortionists and their protectors without actually knowing that he was doing so.

Greg Muller

One estimate at the time suggested there were 100,000 abortions a year in Australia in the sixties.

Gideon Haigh

Now, of course, because it was illegal, no one kept definitive statistics on it and everyone was prepared to make a reasonable guess. Often the calculations came on the difference between the expected sort of reproductive rate and the reported reproductive rate. Now, what size did you expect families to be and the size that they actually were? But to this day, no one really knows and it's not an area where it's easy to get reliable figures.

Greg Muller

So how important was the Menhennitt ruling to you and your peers? Was it talked about?

Beth Wilson

It was talked about by women, certainly, because termination of pregnancies back then was a horrible business of backyard practitioners, infections, deaths, or homemade jobs with knitting needles and hot brandy baths and, remember, the pill wasn't around then. The pill made an extraordinary difference to women's lives. So it

was constant pregnancies or the risk of the termination made worse by the fact that it was illegal as well as being very dangerous.

Beth Wilson

It was an extraordinary time. Women were beginning to have their voices heard. We were described as 'shrill' to try and make us shut up but I think women had just had enough of being told by quite extreme people on religious and moral grounds that we had to be lesser citizens and stay in the kitchen, barefoot and pregnant. We wanted more from life and Menhennitt was a really important part of saying to us, "You are citizens. You have legal rights."

Gideon Haigh

So what happened in 1969 was Kenneth Davidson, who was an abortionist who worked in East Melbourne, was raided; his records were confiscated; various women who were present who were to have abortions were arrested; Davidson was put on trial, in the habit that was customary at that time; the abortionist would seek professional privilege and choose not to testify; the women were, essentially, put on trial for their sexual mores and what had placed themselves in the position of being at risk.

So, as part of the normal course of that trial, medical evidence was about to be admitted and the barristers in the case requested Menhennitt to make a ruling on the admissibility of this evidence. If there was such a category as unlawful abortion, did that mean that, under certain circumstances, abortion could be lawful?

So, Menhennitt was asked to clarify this and he applied what was known as the Bourne standard, which was an English case from the 1930s where a doctor called Bourne, disturbed by the ambiguity of the law around abortion, had chosen to conduct an abortion on a young girl who had been raped by a group of horse guards after the Trooping of the Colour at Buckingham Palace and had turned himself in; basically, put himself on trial, asking that the law clarify where abortion could be lawful and where it wasn't.

And, basically, Menhennitt took that ruling and applied it in an Australian context and came up with a ruling that's surprisingly elegant in the sense that it's explicit where it doesn't have to be, and it's vague where it sort of needs to be.

And it sort of suited everyone that a judge would take this out of the hands of the legislature and out of the hands of the police, who were finding it, at that stage, very difficult to deal with.

And it's a particularly – it's a peculiar, freakish circumstance that it should have been Clifford Menhennitt, a 56 year old equity lawyer, whose speciality was the Trade Practices Act who was acting in a criminal jurisdiction, only because it was his turn in the Supreme Court list, who I doubt ever came across an instance of abortion in his own life. He was married to the same woman for a long time and died childless. How ironic that it should be him who turned out to be this de facto quite distinguished judicial activist.

Greg Muller

Could he be referred to as an activist judge?

Gideon Haigh

I'm sure he would have demurred that title. But he was a clear and rigorous legal thinker, who knew how to fortify a judgment against external challenge.

Greg Muller

Here's an Actor reading from the court transcript of Justice Menhennitt.

Actor (Justice Menhennitt)

The accused is charged on four counts of unlawfully using an instrument or other means with intent to procure the miscarriage of a woman and one count of conspiring unlawfully to procure the miscarriage of a woman. The relevant portion of s65 of the Crimes Act 1958, under which the first four counts are laid, is as follows: "Whosoever...with intent to procure the miscarriage of any woman whether she is or is not with child unlawfully administers to her or causes to be taken by her any poison or other noxious thing, or unlawfully uses any instrument or other means with the like intent, shall be guilty of a felony.

The use of the word "unlawfully" in the section implies that in certain circumstances the use of an instrument or other means to procure a miscarriage may be lawful. The word "unlawfully" is nowhere statutorily defined.

Greg Muller

Retired Appeal Court judge, Marcia Neave describes it like this:

Marcia Neave

He said, 'If you use the word unlawfully - that is if the legislation says if you unlawfully use an instrument to procure a miscarriage to bring about an abortion - that implies there must be some circumstances where it's lawful to do that because otherwise you wouldn't need the word unlawful.

And he then said, well there's a doctrine of necessity which exists in the common law and under that doctrine if you commit a crime in circumstances where it's absolutely necessary and a reasonable person would think it was necessary to do what you've done and it's not disproportionate to the evil you're trying to avert then you don't commit the crime. And the classic example of that is self-defence. If you kill someone to protect yourself and you're in serious danger.

So, Justice Menhennitt said in this case if the doctor performed these abortions believing it was necessary to do so and a reasonable person would think that it was necessary to do so to save the life or the mental health of the mother then in those circumstances the crime of abortion was not committed. So, if it was a situation of extreme physical danger for the mother or the mother ends up a - I think the words used in the case were a mental wreck - then in those circumstances the court could say, 'well in this situation he's not guilty of the offence'. So that's an example of a case where there was a very clear gap in the legislation and the court said, well we can fill in the gap. We can interpret the word unlawfully because of the doctrine of necessity which exists at common law.

Greg Muller

So Davidson was found not guilty of unlawfully using an instrument to procure a miscarriage - that is an abortion - a crime which at the time had a sentence of up to life imprisonment.

Gideon Haigh

He wasn't found guilty. I mean, once Menhennitt made his ruling, that trial rather petered out. And in fact, most of the other prosecutions that Holland brought were also failures. It seems as though not only were the judges and the police ready for a change but juries were as well. Because who knew when you might need the services of an abortionist yourself, whether for your wife or your daughter or your sister.

Greg Muller

Interestingly, that case happened just a couple of years after women were allowed to be on a jury.

Gideon Haigh

Yes, yes, exactly, yes. It's part of a general sort of climate of stealthy and almost imperceptible social change.

Greg Muller

Ultimately Justice Menhennitt ruled that abortion could be legal. Again, here's an actor reading the words of Justice Menhennitt.

Actor (Justice Menhennitt)

On the basis of all the foregoing, I accordingly decide that the relevant law in relation to unlawfulness is as follows: for the use of an instrument with intent to procure a miscarriage to be lawful the accused must have honestly believed on reasonable grounds that the act done by him was (a) necessary to preserve the woman from a serious danger to her life or her physical or mental health (not being merely the normal dangers of pregnancy and childbirth) which the continuance of the pregnancy would entail; and (b) in the circumstances not out of proportion to the danger to be averted.

Greg Muller

So it was clear that in Victoria abortion was legal if the mental or physical health of the mother was at risk. But there was still uncertainty as to exactly where that line was. It came down to one Melbourne doctor who decided it needed to be tested.

Bertram Wainer

It wasn't actually until Bertram Wainer, the pioneering abortion activist, decided to publicise an abortion using the protection of the standard that it became clear how profoundly the law had shifted.

Greg Muller

And that was, what, just weeks after the Menhennitt?

Gideon Haigh

That was just weeks after. Yes. There was external and upward pressure on the existing legislative regime, but no one had really foreseen that this particular case, *The Queen versus Davidson*, would lead down this particular path. In fact, if anything, the whole case is an instance of the law of unintended consequences.

Jo Wainer

I'm Jo Wainer. I'm a PhD doctor, academic, and I became involved with the abortion issue. I was the inaugural secretary of the Abortion Law Reform Association, which was set up in 1967 from the University of Melbourne where I was then an undergraduate and that was where I met Bert.

Greg Muller

Bertram Wainer died in 1987, Campaigning alongside Bertram at the time - and continuing well after his death - was his wife, Jo.

Jo Wainer

And we campaigned together until he died in 1987, and I kept going.

Greg Muller

Amnesty Victoria awarded Jo 'Woman of the decade' in the 1970s and in 2010 she became a member of the Order of Australia for her research into women's reproductive rights.

When I met Jo at her home I was greeted by a big dog - a Russian Terrier - a throwback to her activist days when owning protection dogs were necessary in her line of work.

Greg Muller

So what did Bert do immediately after *Menhennitt*?

Jo Wainer

Well, he was struck by, this was a ruling which gave protection to doctors if they were operating to protect a woman's mental or physical health, but nobody knew what that actually meant in practice. So, Bert thought, well what does that mean? Because after Holland had arrested all the doctors, there was no availability of abortion at all – medical abortion – in Victoria. And he, as a GP, was getting women coming to him who'd either been traumatised by backyard abortionists, who'd been interstate and been brutalised. There was nowhere to go and he had no one to refer to. He was a GP; he was not an abortion doctor.

And he realised that, unless the doctors could be persuaded that it was safe to operate and they wouldn't be arrested, then no good had come out of it.

So, he decided to do a test case.

He did ring around, half a dozen gynaecologists, to ask if they would do the test case, and they all said, "Not me. No". So he had a dark knight of the soul that I was with him for, and he decided that, well, he'd have to step up and do it. It's one thing to campaign for change but it's another to say, "Well, I'll have to do an abortion and test that".

And into his office the next day walked a woman named Wilmer, a 21 year-old who'd had a child at the age of 15, had it adopted, because these were very, very different times. Unplanned pregnancy for an unwed mother was a total scandal, and her family rejected her.

At 21, she became pregnant again, and she was, frankly, suicidal. She had attempted suicide in a public park, and had been found and taken to hospital and resuscitated. And because Bert was getting some publicity at that point, had come to him for help.

First of all, he had to find an anaesthetist who would agree to do it, and a hospital that would agree to accommodate him. He contacted a friend of his who was manager of a private hospital, and he said, "This is what I'm planning to do, and I'm going to make it public." And he also told Wilmer that it was going to be public, and she had to agree to that, and she did. So then he did the termination for Wilmer. And then he contacted his solicitor.

So, with his advice, Bert wrote a letter to Inspector Holland and hand-delivered it at Russell Street, which was then police headquarters, expecting to be arrested on the spot.

Inspector Holland looked at him and said, "I think I'm going to have to arrest you". And Bert said, "Well, you know where I am". And he wasn't arrested.

Greg Muller

And so then Bert tried another case?

Jo Wainer

So, he hadn't got what he wanted, which was a public trial which tested how far the Menhennitt ruling went.

So, he had a big, long think about that, and, remember, he's the father of four children, and he said, "I may lose my licence to practice medicine, and I may go to jail, in which case, I won't be able to support my family. Is it worth it?" And, in the end, he decided it was.

Just as he'd reached that decision, another woman turned up. In this case, she'd had nine children. She was 41. Her husband earned money by selling chickens door to door. So this was deep abject poverty. This was a social indication rather than a medical indication, so it suited his purposes. And he went and said the same thing to her, "This will have to be public. I'm going to let people know", and went through the same procedure and he did the termination and waited a couple of days and then announced it to the media.

He was learning how to work with the media, how to get his message out, and he knew that if he were arrested and charged that it would become sub judice, and so there would be no public comment allowed, so he wanted the public comment before he was arrested. So he had a press conference and told the press what he'd done,

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and then he went into hiding for a couple of days. So he couldn't be arrested until the commentary had a chance to travel.

Greg Muller

Here's Bertram Wainer on the ABC in 1969.

Dr Bertram Wainer

I feel I want the nation to know what is occurring and the state of Victoria to know what is occurring before the sub judice clamp comes down. If I'm charged nothing can be published or printed and I want to say what I have to say before I'm silenced by the sub judice business.

News Reporter

Dr Bertram Wainer, the migrant bus driver who worked his way through university is a genial family GP who looks ill at ease in the role of crusader. He chains smokes nervously and he lost a stone and a half surrounding the strain of the first abortion. So, why do a second one?

Dr Bertram Wainer

The woman needed her pregnancy terminated that was the major reason the operation was done.

ABC News Reporter

Did this woman come to you or did she seek you out?

Dr Bertram Wainer

She came to me and she was desperate as you can imagine. She has – she just couldn't face the future with a new baby. She just needed help. She was seeking help.

ABC News Reporter

It was held in the authorities that the first abortion you did was within the law. Do you feel that this one was outside the law?

Dr Bertram Wainer

I don't know – we'll find out.

ABC News Reporter

But you're still at this stage prepared to go to jail?

Dr Bertram Wainer

Well if a young man can do it on conscience, I guess middle aged men can, yes.

Jo Wainer

And then he, again, went to the police station and said, "I've done this".

Greg Muller

And, again, he wasn't arrested.

Jo Wainer

Nothing happened.

Greg Muller

So he still hasn't got the answer. He still doesn't know where that line is.

Jo Wainer

He still doesn't know what the line is, and neither does any other doctor. So still, there was no avenue for women. So remember, there was no public hospital access to abortion. So they were only left with the backyard. And women died. So, this really mattered deeply to him and to me, and he hadn't achieved his objective: the Menhennitt ruling had not been clarified; doctors were not working.

Greg Muller

And then he tried a third time.

Jo Wainer

He did try a third time. He couldn't get a private hospital agree to have him - to admit any of his female patients, actually, because they were a bit alarmed they were might get caught up in this.

And he thought what he would do - because women were coming to him, he had a lot of women from around the state, in fact, Australia-wide coming to him once his name became associated with abortion, because they were desperate.

So, he had a list of women who needed terminations, and he thought, 'Well, I'll do five for social reasons. That will be the woman's decision. I will have a serious consultation with her about the basis of her decision, and if I think she's making a soundly thought-through decision, the decision should be hers', was his position. He couldn't think of anybody else in the community who was better placed to make a decision about whether to have a child or not than the woman involved. He set up his private practice in St Kilda as an operating theatre, and he arranged for the women to come and he arranged for an anaesthetist and he was all set to go when he got a phone call from somebody saying, "Don't go ahead with what you're going to do. They're going to raid you". And he went outside and he looked up the street and he could see a police car up the corner, and he looked up the other way and he could see an unmarked car on the other corner, and he thought, "I can't go ahead", so he closed it down. So it was never tested. He was never arrested.

Greg Muller

So it was never tested, but at the same time, it was also never appealed.

Jo Wainer

It was never appealed, but it was just, a Supreme Court ruling, and it could have been appealed. It was just one judge. So that's how tenuous the law was. So, the way we handled it was, at this point, we were financially and physically and emotionally exhausted, and we went to Queensland for a couple of years, where we became a rural doctor. And then he realised that nothing really had changed: women who had lots of money could get private gynaecologists and doctors to do abortions, call them D and C – dilatation and curettage – women who didn't have any money had to run the gauntlet of the backyard. So we came back to Melbourne he set up

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the Fertility Control Clinic in East Melbourne, which was Australia's first – in fact, the first publicly operating abortion provider in the southern hemisphere, and that clinic continues to this day.

Greg Muller

Beth Wilson again.

Beth Wilson

There were some attempts at prosecution but none successful and, of course, Bertram Wainer campaigned really, really strongly on that, as did people like Beatrice Faust.

Greg Muller

Did it surprise you that it was never appealed?

Beth Wilson

I think it surprised everybody that it was never appealed, but I think it was Sir John Young, Chief Justice, later, who said that Menhennitt nailed it. He just got it right.

Jo Wainer

There was one further charge that I know of, he was a gynaecologist, was charged with illegal abortion, and he was acquitted at the committal proceeding, so it didn't even proceed. To my knowledge it has never been tested, and it wasn't until 2008 when the Labor government took it out of the Crimes Act.

Gideon Haigh

And the remarkable thing, I think, about the Menhennitt ruling is that despite its extremely controversial nature, despite the political environment, despite feminist and anti-feminist ideology, it was never appealed in the duration where it was applied, which was for almost 40 years.

Greg Muller

And the Government of the day had no intention to overrule the decision.

ABC News Reporter

After today's cabinet meeting, the acting Premier - Sir Arthur Rylah made this statement:

Sir Arthur Rylah

The state cabinet this morning considered the question of abortion. They decided that the recent ruling of Mr Justice Menhennitt had confirmed and clarified the law relating to abortion and had defined the considerations which rendered it not unlawful to perform an abortion. The Government have therefore decided not to introduce legislation but rely on the Common Law as interpreted by Mr Justice Menhennitt and this follows the Bourne decision in England.

Gideon Haigh

I don't think anyone – I don't think even Menhennitt realised what he'd done. Menhennitt died, I think, about ten years later and remembered fondly but also as a rather sort of querulous and pedantic legal mind. But perhaps that's just what the

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question required. Someone who was genuinely impartial, someone who didn't have a dog in the fight, who was able to think about it simply in legal terms, rather than moral or ideological.

Beth Wilson

He was no radical out there judge. He was a careful, sensible person, very, very intellectual and studious, and he saw this as a legal problem.

Greg Muller

Beth Wilson again.

Beth Wilson

I think, maybe, at the end of the day, even the opponents knew that abortion was necessary and I think the reason this is such an important instance of judge-made law is that the politicians really did not want to go there. It wasn't popular. It might have ruined their chances at the ballot boxes because women, although we were excluded from a lot of things, we were not excluded from the ballot box.

Greg Muller

And for Beth Wilson, Justice Menhennitt's ruling completely changed the direction of her life.

Beth Wilson

So I became pregnant just after I got into university in my early years. I'd worked so hard to get to university, working nightshift and day shift and I finally realised my dream, got into law school and found myself inconveniently pregnant.

By that stage, we had university doctors on campus, so you could go and consult them and they could refer you. The Menhennitt ruling made that possible.

It wasn't really that straightforward. You had to show that there was a serious risk to your mental health or your physical health which would outweigh the risks of a normal pregnancy. So it wasn't you can just have it on demand. You still had to jump some hoops. And there was still stigma.

If abortion had still been illegal, I wouldn't have had one and I wouldn't have been able to go to uni. I wouldn't have continued. It's as simple as that.

Greg Muller

Retired Appeal Court Judge, Marcia Neave.

Marcia Neave

I believe it was very important because up until that time there was real doubt about the circumstances in which a woman could have an abortion so even if a woman would clearly die as a result of having a child it would be difficult for her to get an abortion because of course doctors would be frightened that if they committed the abortion they might be sent to jail for a very, very long time.

Beth Wilson

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The Menhennitt ruling kind of brought women out of the dark shadows of always having this threat of unwanted pregnancies hanging over them. It lead the way towards greater reforms for women because it freed them up to be able to do things like I did, go and study law, get involved in public life. So I think it's, for me, personally, one of the most important pieces of judge-made law and an excellent example of the courts, in fact, being more progressive than the parliament itself.

Greg Muller

If you want to know more about the Menhennitt ruling, Joanne Boyd, the court archivist here has put together a display which is currently in the law library here at the Supreme Court.

You can read the [full Menhennitt ruling](#) on the free and public website [Austlii.edu.au](#). Once there, search for R v Davidson under the Victorian jurisdiction. Archive audio for this episode from Australian Broadcasting Corporation Library Sales.

Gertie's Law is produced by the Supreme Court of Victoria.

And we're preparing another episode where you get to ask a judge a question - so keep them coming in. Send questions to gertie@supcourt.vic.gov.au. We're loving your feedback too, so please continue to rate and review if your podcast app allows.

ENDS