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Born Alive: The Legal Status of the Unborn Child in England and the U.S.A.

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INTRODUCTION

On a charge of murder or manslaughter it must be shown that the person killed was one who was in being. It is neither murder nor manslaughter to kill an unborn child while still in its mother's womb although it may be the statutory offences of child destruction or abortion. If however the child is **born alive** and afterwards dies by reason of an unlawful act done to it in the mother's womb or in the process of birth, the person who committed that act is guilty of murder or manslaughter according to the intent with which the act is done. [Halsbury's *LAW OF ENGLAND*, 4th ed. reissue, Vol. 11 (1). London: Butterworths, 1990.]

The Born Alive rule is a rule of the common law which holds that a person cannot be held responsible for injuries inflicted on a foetus *in utero* unless and until it is born alive. While there was some initial indecision about how the common law would regard the killing or injury of the foetus *in utero*, the Born Alive rule was established at a relatively early stage in its history. It has since become entrenched, particularly in English law, so much so that Kennedy & Grubb feel justified in saying that "the 'born

alive' rule is now unassailable in England"¹ However, in the U.S.A., the rule has been abrogated in many circumstances; first, in civil law and, more recently, in the area of criminal law.

The conservatism of the Common Law is notorious. Once a rule is established, there are only two ways to escape its reach. The first way is via the blunt instrument of statute, a remedy not without its own dangers but having its uses as a sword to cut through Gordian knots; the second way to escape the reach of an established rule is by distinguishing it to death.

The status of the Born Alive rule in England is such that there is at present no movement to circumvent it by the making of distinctions and the whole thrust of legislation has been in the opposite direction to what is required by the revelations of medical science. Nevertheless, the circumstances in which the Born Alive rule came to be and to operate no longer obtain so that it is unreasonable for the law to resist its disestablishment. To the extent that the Born Alive rule was ever justified, that justification depends on a fiction, that of denying the essential humanity of the foetus, and "criminal liability [or lack thereof] should not turn on fictions."²

The inertia of the common law is well illustrated by Lord Macmillan's *obiter dictum* in *Read v. J. Lyons and Co. Ltd.*³ when he said to his fellow Law Lords: "Your Lordships are not called upon to rationalize the law of England. That attractive if perilous field may well be left to other hands to cultivate. It has been necessary in the present instance to examine certain general principles advanced on behalf of the appellant because it was said that consistency required that these principles should be applied to the case in hand. Arguments based on legal consistency are apt to mislead

¹ Ian Kennedy & Andrew Grubb, *Medical Law* 3rd ed. (London: 2000), 1487.

² Sir John Smith and Brian Hogan, *Criminal Law* 8th ed. (London: 1996), 49.

for the common law is a practical code adapted to deal with the manifold diversities of human life and as a great American judge [Oliver Wendell Holmes] has reminded us 'the life of the law has not been logic; it has been experience'. However, it was Oliver Wendell Holmes who also said: "It is revolting to have no better reason for a rule of law than that it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since and the rule simply persists from blind imitation of the past." The Born Alive rule is a classic example of a rule whose raison d'être has long since disappeared; it is time to give its corpse a decent burial.

³ [1947] A.C. 156, 175. For some very interesting examples of Common Law rules that have persisted for no apparent reason beyond that of mere antiquity see Carleton K. Allen, *The Making of Law* 7th ed. (Oxford, 1964), 327ff.

HISTORICAL BACKGROUND

From the Hittites to the Romans

In ancient cultures and civilisations the legal status of the child normally comes to be considered in the context of abortion or infanticide or in the context of assaults on pregnant women. The Hittites, Assyrians, Babylonians, Greeks, Romans and various post-Roman barbarian kingdoms have all of them reflected on the issues involved.¹

The rank of the perpetrator of the assault, the rank of the victim, and the state of embryological development of the child are all factors that play a role in determining the seriousness of the offence. Discussing the Babylonian laws relating to assaults on pregnant women G. Driver & J. Miles note that the laws of the Hittites varied the penalty according to the rank of the victim and the state of development of the unborn child. They add “a trace of the Hittite rule is to be found in the translation of the Septuagint where the penalty varies according as the embryo is not yet or is ‘fully formed’ ...being in the first case a fine and in the second a life for a life. There does not seem to be any borrowing by any one from any other of these laws...”²

Jewish law was based on the following passage from *Exodus*: “And if men strive together, and hurt a woman with child, so that her fruit depart, and yet no harm follow—he shall be surely fined, according as the woman’s husband shall lay upon him; and he shall pay as the judges determine. But if any harm follow—then thou

¹ “The current abortion debate in many countries is not a new or unique historical phenomenon,” writes Nora Gallagher in her thesis *A Comparative Analysis on the Right to Abortion and its Application in Europe* (LLM thesis, University College Dublin, 1996), 3.

shalt give life for life.” [Exodus 21:22-23] There is a divergence in the interpretation of this passage according as one reads the ‘harm’ in ‘...any harm follow’ as attaching to the foetus or to the woman. Menachem Elon believes that the harm attached to the foetus and not the mother. The Septuagint, however, distinguished between the abortion of an incomplete foetus and the abortion of one that was complete; a fine was attached to the abortion of the incomplete foetus, while the penalty for the killing of a complete foetus was a life for a life. On the other hand “The talmudic scholars, however, maintained that the word ‘harm’ refers to the woman and not to the foetus.... Similarly, Josephus states that a person who causes the abortion of a woman’s foetus as a result of kicking her shall pay a fine for ‘diminishing the population,’ in addition to paying monetary compensation to the husband...”³

Among the Greeks, the Hippocratic Oath famously forbade abortion [“I will not give to a woman an abortive remedy.”⁴] but it is not known how widely representative this attitude was among other Greek physicians or among physicians elsewhere. Plato, notoriously, through the mouth of Socrates in the *Republic*, appears to recommend infanticide for eugenic reasons: “...the offspring of the former [the best men and women] must be reared, but not the offspring of the latter [inferior men and women]...the children of inferior parents, or any child of the others born defective, they will hide...in a secret and unknown place.”⁵ In his translation of the *Republic*, G. M. A. Grube is in no doubt that “Plato is here recommending infanticide by exposure

² G. R. Driver & John C. Miles (ed. trans. and commentary), *The Babylonian Laws* Vol. 1, (Oxford, 1952), 415-16

³ Menachem Elon ed., *The Principles of Jewish Law* (Jerusalem, 1975), 482. In his classic and pioneering work in sociology, William Graham Sumner, citing Exod. xxi, 7, notes that while “Jews abominated infanticide” they might sell their children to other Jews. William Graham Sumner, *Folkways* (New York, 1906), 313.

⁴ Translation from the Greek by Ludwig Edelstein. *From The Hippocratic Oath: Text, Translation, and Interpretation*, by Ludwig Edelstein (Baltimore, 1943).

⁵ Plato, *Republic*, 459e, 460c.

for these babies, a practice which was quite common even in classical times.”⁶ It may be that Plato is indeed recommending infanticide (though this has been doubted⁷) but even if so it must not be forgotten that Plato’s surviving writings are dramatic dialogues in which various figures take various positions and it may well be as mistaken to attribute to Plato the opinions of a character in one of his dialogues as it is to attribute to a playwright opinions expressed by a character in his play.

Aristotle writing discursively rather than dramatically appears to support the views expressed by Socrates in the *Republic*: “As to the exposure and rearing of children, let there be a law that no deformed child shall live.” He goes further, however, and adds “when couples have children in excess, let abortion be procured *before sense and life have begun*; what may or may not be lawfully done in these cases depends on the question of life and sensation.”⁸ Where Socrates appeared to be moved by eugenic considerations Aristotle is moved by demographic considerations. However, as the passage I have emphasised stresses, the timing of the abortion was important inasmuch as it was to be procured before the advent of sense and life. This is Aristotle’s version of the Septuagint distinction between the complete and the incomplete foetus.

While abortion is not specifically mentioned in the New Testament, the *Didache* (the Teaching of the Twelve Apostles), which dates from the 1st century A.D., teaches in its second chapter, among the prohibitions on murder, adultery, fornication and stealing: “do not kill a foetus by abortion, or commit infanticide”, a clear rejection of

⁶ G. M. A. Grube trans, *Plato’s Republic* (Indianapolis, 1974), 122, n.6.

⁷ See the discussion in Karen Brennan, “Evidence of Infanticide and Exposure in Antiquity: Tolerated Social Practice, Uncontrolled Phenomenon or Regulated Custom?,” *University College Dublin Law Review* (2002) 2 UCCLR, 92 at 113ff.

⁸ Aristotle, *Politics*, Book VII, ch. 16, 1335b 20-26.

both. Again, in its fifth chapter, which describes the Way of Death, included among its many paths is the murdering of children who are God's image.⁹

Even though there were laws against it, the practice of abortion among the Romans was not uncommon. In the *Digest*, we find the following attributed to Ulpian (*Edict, book 33*): "If it is proved that a woman has done violence to her womb to bring about an abortion, the provincial governor shall send her into exile."¹⁰ Administering potions to bring about abortion "although followed by no evil result, was punishable with condemnation to the mines in the case of common people, and by relegation and fine in the case of persons of rank"¹¹ and "by a rescript of Severus and Antoninus it was determined that a married woman procuring abortion should be punishable with exile for defrauding her husband of children."¹²

In *A History of the Criminal Law in England* Sir James Stephen wrote that "A woman who procured her own miscarriage was liable as for an 'extraordinarium crimen,' but not under the Lex Julia against homicides. An unborn child was not regarded as a human being."¹³ Stephen noted that "it must be remembered that 'crimen' means accusation and not offence, and that 'extraordinarium' refers to the nature of the procedure and not to the quality of the offence. The expression indicates, in fact, a less formal mode of procedure than had originally been appropriated to the Publica Judicia..."¹⁴ Bernard Dickens comments "Abortion was not widely

⁹ James A. Kleist (trans. and annotated), *The Didache, The Epistle of Barnabas, The Epistles and the Martyrdom of St. Polycarp, The Fragments of Papias, The Epistle to Diognetus* (London, 1957). First published 1948. Volume 6 of the Ancient Christian Writers series.

¹⁰ In her essay on 'Criminal Trials', O. F. Robinson writes that "Murder...which as a statutory offence originated in brigandage (*Lex Cornelia de sicariis*), came to cover abortion and even castration..." O. F. Robinson, "Criminal Trials" in Ernest Metzger (ed.), *A Companion to Justinian's Institutes*, (London, 1998), 234.

¹¹ Paul, Sent. 5, 23, 14. See W. A. Hunter, *A Systematic and Historical Exposition of Roman Law* (London: 1885), 1069.

¹² D. 47, 11, 4; D. 48, 8, 8. See Hunter, 1072.

¹³ Sir James Fitzjames Stephen, *A History of the Criminal Law in England*, in 3 vols. (London, 1883). Reprinted 1996. Vol. I, 25.

¹⁴ Stephen, *Criminal Law*, Vol. I, 24.

condemned, an unborn child being only a *spes animantis*, not an *infans*. In the later Roman Empire, a woman who procured her own miscarriage was guilty of an *extraordinarium crimen*, but this is not a precept of the law relating to homicide, and appears to be a wrong to the husband in depriving him of children.”¹⁵ Despite these prohibitions, the Roman attitude to abortion seems to have been remarkably casual, being availed of by women for economic and for sensual reasons, for the preservation of a woman’s beauty and for convenience. Whatever may have been the official position of the law, the opinion of the Roman in the street was that it was not a seriously repugnant practice.¹⁶

The Visigothic Code

The Visigothic Code is one of the longest, most complicated and legally sophisticated post-Imperial legal systems.¹⁷ Book VI, title III, which concerns abortion, contains seven sections, of which the most significant are sections I, II and VII.¹⁸

I. If anyone should administer a potion to a pregnant woman to produce abortion, and the child should die in consequence, the woman who took such a potion, if she is a slave, shall receive two hundred lashes, and if she is freeborn, she shall lose her rank, and shall be given as a slave to whomever we may select.

¹⁵ Bernard Dickens, *Abortion and the Law* (London, 1966), 15. See the *Digest of Justinian*, 47-11.4.

¹⁶ “It was probably regarded by the average Roman of the later days of Paganism much as Englishmen in the last century regarded convivial excesses, as certainly wrong, but so venial as scarcely to deserve censure.” Lecky, *History of European Morals* (1890), ii, cited in Dickens, 15.

¹⁷ S. P. Scott (trans. and ed.) *The Visigothic Code (Forum Judicum)* (Boston, 1910), 206-8. Reprinted 1982.

¹⁸ The other provisions of the title are: “III. Where a freeborn woman, either by violence or by any other means, causes another freeborn woman to abort, whether or not she should be seriously injured as a result of said act, she shall undergo the same penalty provided in the cases of freeborn men. IV. Where a freeborn man produces abortion upon a female slave, he shall be compelled to pay twenty *solidi* to the master of the slave. V. Where a slave produces abortion upon a freeborn woman, he shall receive two hundred lashes in public, and shall be delivered up as a slave to said woman. VI. Where a slave produces abortion upon a female slave, he shall be compelled to pay ten *solidi* to her master, and, in addition, shall receive two hundred lashes.” See P. D. King, *Law and Society in the Visigothic Kingdom* (Cambridge: 1972), 172.

The difference in treatment accorded to the low and the high is evident here yet again:
for the slave, a lashing; for the freeborn, a loss of status.

II. If anyone should cause a freeborn woman to abort by a blow, or by any other means, and she should die from the injury, he shall be punished for homicide. But if only an abortion should be produced in consequence, and the woman should be in no wise injured; where a freeman is known to have committed this act upon a freewoman, and the child should be fully formed, he shall pay two hundred *solidi*; otherwise, he shall pay a hundred *solidi*, by way of satisfaction.

Here, a distinction is drawn between an action that results in the death of the unborn child only, and one that also results in the death of the woman. For the latter, the punishment is as for homicide; for the former, the punishment is a compensatory fine, the amount of the fine to depend upon whether the child is fully formed or not.

VII. Concerning those who kill their children before, or after, they are born. No depravity is greater than that which characterizes those who, unmindful of their parental duties, wilfully deprive their children of life; and, as this crime is said to be increasing throughout the provinces of our kingdom and as men as well as women are said to be guilty of it; therefore, by way of correcting such license, we hereby decree that if either a freewoman or a slave should kill her child before, or after its birth; or should take any potion for the purpose of producing abortion; or should use any other means of putting an end to the life of her child; the judge of that province or district, as soon as he is advised of the fact, shall at once condemn the author of the crime to execution in public; or, should he desire to spare her life, he shall at once cause her eyesight to be completely destroyed; and if it should be proved that her husband either ordered, or permitted the commission of this crime, he shall suffer the same penalty.

Given that the punishment for abortion or infanticide is no mere fine but the loss of life or eyes, the severe tone of this section is remarkably out of keeping with the more relaxed provisions of sections I and II. P. D. King remarks that “The horror felt at the use of malefatory potions is illustrated by the provision that the poisoner should die a *turpissima* death....In the same way, the administration of an abortifacient potion was a capital offence, while abortion brought about by a blow or some other means was penalised only by a fine – though a heavy one.”¹⁹

¹⁹ King, 149.

Scott believes that the Visigothic legislation on abortion was a copy of the Roman law.²⁰ While this might be so in the case of sections I and II it is clearly not the case in section VII. How much these provisions reflect the original, pre-Roman laws of the Visigoths is a matter of some controversy. “The laws of the Visigoths are too Roman to be taken as evidence of what may have been the ancient tribal *wergelds* of the Goths.”²¹ On the other hand, King distinguishes the Visigothic law from the Roman law in respect of the parental power of life and death, noting that the punishment for abortion was remarkably severe, consisting of either the blinding or the capital punishment of the woman, with her husband partaking of this punishing if he should have ordered or condoned her crime. “No doubt abortion and the exposure and sale of children continued, but due credit must be accorded the legislators for their attempts to check the practices. It is not the least mark of the level of Visigothic civilisation that it upheld the right to live even of the unborn child.”²²

A similar difference of punishment according to status of the woman and according to whether or not the woman died in addition to the foetus can be found in the laws of the Bavarians.²³ The difference in punishments according to status is such that “If any woman gives a drink [to a woman] so that she causes an abortion, if it is a maidservant, let her receive 200 lashes, and if it is a freewoman, let her lose her freedom and be assigned to slavery to whoever the duke orders.”²⁴ The difference in punishments according to whether or not the woman dies is such that “If anyone causes an abortion in a woman through any blow, if the woman dies, let it be considered the same as a homicide. However, if the child alone is killed, let him

²⁰ See Scott, note 208.

²¹ Frederic Seebohm, *Tribal Custom in Anglo-Saxon Law* (London, 1911), 126.

²² King, 238; 240.

²³ Theodore John Rivers, *Laws of the Alamans and Bavarians* (Pittsburgh, 1977).

²⁴ Rivers, 141.

compensate twenty solidi if the child does not come forth alive. If, however, it was living [at the time of the abortion], let him pay the wergeld.”²⁵

The Laws of Hywel Dda

In eleventh century Wales, according to the Laws of Hywel Dda²⁶ in the Venedotian Code,²⁷ the compensation due for the injury of the foetus is determined by its stage of gestational development and by its sex, which is presumed to be male (the higher rate).

1. Some are doubtful with respect to the foetus of a woman, if injured, as to what is due for it; whether gwyneb-werth²⁸ or galanas.²⁹ The law says, that galanas is due for it; and for this cause: during the first three months, it is white, and then the third of a galanas is to be on it; during the second three months, it is ruddy, and then two parts of a galanas are to be on it; and, during the last three months, it is perfect in its members and life, and then a full galanas is to be on it.³⁰
2. Some say, that it is not more right to pay the galanas of a man than that of a woman for it, since it is not known what it is, whether male, or female; the law says, that it is most right to decide from the higher subject, and that the galanas of a man is to be on it; and that until it be baptized; and this is the cause: every person, whose galanas is required, is to be named, whether male or female; and no one can be called by name until baptized; and therefore it is conclusive that it should have the privilege of a male, until baptized.

²⁵ Rivers, 141.

²⁶ *Ancient Laws and Institutes of Wales*, comprising laws supposed to be enacted by Howel the Good. Printed under the direction of the Commissioners of the Public Records of the Kingdom MDCCCXLI, with a Preface by Aneurin Owen. 2 Vols. Book II, chapter xxviii

²⁷ According to Aneurin Owen, this code is said to be the compilation of Jowerth, son of Madog, son of Raawd, containing allusions to alteration of the laws of Hywel dda by Bleddyn, Prince of North Wales, about 1080.

²⁸ The meaning of this term is given as ‘the fine payable for insult.’ ‘Glossary’ of *Ancient Laws and Institutes*. Cf. the equivalent ancient Irish *eneclann*, the honour-price or price of the face. Frederic Seebohm, *Tribal Custom in Anglo-Saxon Law* (London: Longman, Green and Co., 1911), 75.

²⁹ The meaning of this term is given as ‘the sum assessed upon the criminal and his relatives as the retribution for murder as well as for the crime itself.’ ‘Glossary’ of *Ancient Laws and Institutes*. “The system of payments for homicide amongst the ancient tribes of Ireland as described in the Brehon Laws differed widely from that of the Cymric Codes. In the first place, the Brehon laws describe no scale of galanas or wergeld, directly varying with the social rank of the person killed. Gradations of rank there were indeed, and numerous enough. But there appears to have been only one *coirp-dire*, or body fine, the same for all ranks, namely seven cumhals or female slaves—the equivalent of twenty-one cows.” Frederic Seebohm, *Tribal Custom in Anglo-Saxon Law* (London, 1911), 74.

³⁰ An interesting anticipation of the trimesterisation of pregnancy which plays such an important role in *Roe v. Wade*.

Just as there appears to be doubt as to whether the Visigothic law we have on record is a true picture of the original, so too Owen, in his preface to *Ancient Laws and Institutes*, says that “The mist of obscurity envelopes all accounts of the ancient institutions of the island of Britain” adding that “little has descended to us of the usages in early ages.”³¹

In many of the ancient codes, there is, to put the matter somewhat anachronistically, a strong tort element in the attitude towards the killing of the unborn child. Someone, usually the father though also perhaps the state, has wrongfully been deprived of a child, its future society and service, the punishment for which is the payment of compensation. “In Anglo-Saxon England, both secular and ecclesiastical laws dealt with cases of abortion, but the two legal approaches differed in that the secular law was concerned with compensation while the ecclesiastical law dealt in spiritual sanctions.”³² There is little or no sense of there being a specifically criminal aspect to the killing of the child³³ unless the mother also should die from the assault. It is not until the High Middle Ages that the wrongful killing of the unborn child comes to be considered homicide and then primarily in the context of the ecclesiastical courts. “The ecclesiastical courts became more severe in their treatment of abortion, and throughout the Middle Ages in western Europe, guilty women were condemned on a capital charge, as the Sixth Ecumenical Council had ordained.... “[L]ay texts ignored the matter [of abortion], regarding it as purely ecclesiastical, although noting the distinction between abortion and the crime of

³¹ *Ancient Laws and Institutes*, ix.

³² Dickens, 18. “The Laws of King Alfred enacted ‘If a man kill a woman with her child, while the child is in her, let him pay for the woman her full “wer-gild” and pay for the child half a “wer-gild”, according to the status of the father’s kin’.”

³³ An exception to this generality can be found among the Cheyenne Indians, by whom it was believed that the unborn child had tribal status and, because of that, a legal personality. Even though abortion was regarded as a matter both religious and criminal, because the violence had occurred within the intimate family unit, no blood feud was possible. See Karl N. Llewellyn and E. Adamson Hoebel, *The Cheyenne Way: Conflict and Case Law in Primitive Jurisprudence* (London, 1941), 118, 119.

encis, where a third party killed the child or the mother, which regional courts treated severely.”³⁴

From Bracton to Blackstone

Bracton wrote “if one strikes a pregnant woman or gives her poison in order to procure an abortion, if the foetus is already formed or quickened, especially if it is quickened, he commits homicide.”³⁵ Clarke Forsythe remarks that “Bracton did not require any live birth rule, although, given the medical technology of the day, it is questionable whether one could tell that the fetus was ever ‘animated’ unless the mother could so testify or unless it was observed outside the womb (live birth).”³⁶

[B]ecause the offence was of ecclesiastical cognisance...the writings of authorities on English criminal law have few references to abortion. The protection the Common Law afforded to human life certainly extended to the unborn child but whether abortion (i.e. after quickening) amounted to homicide or a lesser offence is not clear beyond doubt from the authorities, and possibly altered at different periods. Bracton, writing in the early part of the thirteenth century said that abortion after animation was homicide. Furthermore, George Crabbe [A History of English Law (1829)] alleges this to have been the position long before; ‘If, in Bracton’s time, anyone struck a pregnant woman so as to cause abortion, it was homicide, after the foetus was formed. This appears to have been the law in the time of the Saxons.’³⁷

Fleta who wrote an epitome of Bracton towards the end of the thirteenth century noted that “He, too, in strictness is a homicide who has pressed upon a pregnant

³⁴ Dickens, 19. “The Leges Henrici...dealt with cases of deliberate abortion in the context of ecclesiastical jurisdiction and laid down... ‘If a woman deliberately got rid of her foetus within forty days, she must do penance for four years; if it was done after it was alive, *because it amounts to homicide* she must do penance for seven years’.” [Dickens, 18. Emphasis added.]

³⁵ “Si sit aliquis qui mulierem praegnantem percussit vel ei venenum dederit, per quod fecerit abortivum, si puerperium iam formatum vel animatum fuerit, et maxime si animatum, facit homicidium.” Bracton, *De legibus et consuetudinibus angliae (On the Laws and Customs of England)*, Vol. 2, George E. Woodbine ed., translated, with revisions and notes, by Samuel E. Thorne, (Cambridge, Massachusetts, 1968). Published in association with the Selden Society. In Maitland’s opinion “Bracton’s book is the crown and flower of English medieval jurisprudence.” Sir Frederick Pollock and Frederic William Maitland, *The History of English Law before the Time of Edward I*, Vol. 1, 2nd ed. (Cambridge: 1968: Original edition 1895).

³⁶ Clarke D. Forsythe, “Homicide of the Unborn Child: The Born Alive Rule and other Legal Anachronisms”, *Valparaiso University Law Review*, Vol. 21, Spring 1987, 563 at 580, n. 84.

³⁷ Dickens, 20.

woman or had given her poison or has struck her in order to procure an abortion or to prevent conception, if the foetus is already formed and quickened, and similarly he who has given or accepted poison with the intention of preventing procreation or conception. A woman also commits homicide if, by a potion or the like, she destroys a quickened child in her womb.”³⁸

Forsythe is unclear as to why neither Bracton and Fleta required a live-birth rule but held instead that the killing of the unborn child was in itself homicide. He believes, however, that their understanding and interpretation of the laws “was influenced by canonists of the 12th-13th centuries, such as Raymond of Pennaforte.”³⁹ An interesting conflation of the legal and moral spheres is found in Roland Bandinelli (d. 1181) who held that even the will to kill amounted to homicide, whether or not the death of the human being followed.⁴⁰ J. Reeves confirms the interpretation of Stephen and Forsythe. He believes that the rule at the time of Glanville and Bracton was that “if, after the fetus was formed and animated, any one struck a woman and so caused an abortion, or even if any thing was given to procure an abortion, it was homicide.”⁴¹

Bracton and Fleta, then, agree that the killing of the foetus, at least if the foetus is formed and animated, is a species of homicide. Later authorities, however, do not tend to support this view. Sir William Staunford⁴² writing about 1557 reported that in

³⁸ Fleta, Vol. II, Prologue, Book I, Book II. Edited with a translation by H. G. Richardson and G. O. Sayles. Selden Society edition, (London, 1955), Book I, c. 23, 60-61: Qui eciam mulierem pregnantem oppresserit vel venenum dederit vel percusserit ut faciat abortiuum vel non concipiat, si fetus erat iam formatus et animatus recte homicida est, et similiter qui dederit vel acceperit venenum sub hac intencione ne fiat generacio vel concepcio. Item facit homicidium mulier qui puerum animatum per potacionem et huiusmodi in ventre deuastauerit.” Liber primus, c. 23.

³⁹ Forsythe, 581, note 86. See also J. Connery, *Abortion: The Development of the Roman Catholic Perspective*, 97, 102, n. 39. (1977). Stephen remarks that “Procuring abortion seems to have been regarded as an ecclesiastical offence only.” Stephen, *Criminal Law*, Vol. 1, 54.

⁴⁰ Forsythe, 581, note 86.

⁴¹ J. Reeves, *History of the English Law*, (2nd edition 1787, Rothman Reprint 1968), 10-11.

⁴² Guillaume Staunford, *Les Plees Del Corone, dividees in plusor titles & Common Lieux*, Cap. 13. Londini: Ex Typographia Societatis Stationariorum, 1607. “Est requisit que le chose occise, soit in *rerum natura*. Et pour ceo si hōe tua enfant in le venter sa mier, ceo nest felony, ne il forfefera ascun chose, & ceo pur deux causes: Lun pur ceo q[ue] la chose occise nauer nosme de baptisme, lauter que il est difficil daijger sil luy occist ou non, s. si lenfant murrust de cel baterie de sa miere, ou per auter

order for a homicide to take place, it was necessary for the victim to be *in rerum natura*. The killing of the child in the womb is no felony and no penalty is to be imposed. Two reasons are advanced for this: first “because the thing killed has no baptismal name” and second “because it is difficult to judge whether he killed it or not, that is, whether the child died of this battery of its mother or through another cause.” Although dismissing the requirement for a baptismal name, which was based on a 1348 case in which an indictment for killing a child in the womb was held to be bad because no baptismal name was mentioned in the indictment, Staunforde accepted the evidential difficulties of associating the injury inflicted on the pregnant woman with the death of the child in the womb.

William Lambarde wrote, “If the mother destroy hir childe newly borne, this is Felonie of the death of a man, though the child have no name, nor be baptized Coron. Fitzh. 418. And the Justice of Peace may deale accordingly. But if a childe be destroyed in the mothers belly, is no manslayer nor Felone to be imprisoned upon this Statute, Coron. Fitz. 146. & 263.”⁴³ Andrew Horne (if indeed he was the author of *The Mirror of Justices*) agrees: “As to an infant who is slain we must distinguish whether he is slain *en ventre sa mère* or after birth, for in the former case there is no homicide, for no one can be adjudged an infant until he has been seen in the world so that it may be known whether he is a monster or no; and as to infants slain in their first year, this belongs to the cognisance of the church.”⁴⁴

encheson.” See P. H. Winfield’s “The Unborn Child”, 4 *University of Toronto Law Journal* 278, 280 (1942) reprinted in 8 *Cambridge Law Review* 76, 79 (1942). See also, D. Seaborne-Davies, “Child-Killing in English Law”, 1 *Modern Law Review*, 203 (1937) and 269 (1937).

⁴³ William Lambarde. *Eirenarcha or The Office of Justices of Peace* (1581/2). Classical English Law Texts, general editor P. R. Glazebrook. London: Professional Books Limited, 1972. The First Booke, Cap. 21, 217-218. Forsyth is of the opinion that it is not easy to determine precisely which statute Lambarde is referring to. [See Forsyth, 583, note 89.]

⁴⁴ Des enfaunz occis distinctez, li quel il soient occis es ventres des meres ou pus lur nativite; el primer cas nest nul homicide jugeable pur ceo qe nul ne poet juger enfant avant ceo qil soit veu el secle le quel il soit monstrie ou non. E des enfaunz occis el primer an de lur eage soit a la conoissance del eglise. Horne, A., *The Mirror of Justices*, ed. William Joseph Whittaker, Professional Books 1978,

Sir Matthew Hale wrote, “If a woman be quick or great with child, if she takes, or another gives her any potion to make an abortion, or if a man strike her, whereby the child within her is *killed*, it is not murder nor manslaughter by the law of *England*, because it is not yet *in rerum natura*, tho it be a great crime, and by the judicial law of *Moses* was punishable with death, nor can it legally be known, whether it were killed or not, 22 E.3 Coron. 263. So it is, *if after such child were born alive, and baptized, and after dies of the stroke given to the mother, this is not homicide*. I E.3. 23.b.Coron.146.”⁴⁵ Hale expresses the customary evidential doubts about the relation between the aggressor’s actions and the death of the child in the womb but he is willing to go further than the others in discounting the death of the infant, after it had been born alive, as murder. This view was rejected by William Hawkins. “And it was anciently holden, that the causing of an abortion, by giving a potion to, or striking a woman big with child, was murder. But at this day it is said to be a great misprision only, and not murder, unless the child be born alive and die thereof, in which case it seems clearly to be murder, *notwithstanding some opinions to the contrary*.”⁴⁶

The most influential statement of the ‘born alive’ rule is that of Sir Edward Coke:

“If a woman be quick with childe, and by a Potion or otherwise killeth it in her

139. On the historical value of *The Mirror of Justices*, the editor of the Selden Society volume has this to say: “It would be long to tell how much harm was thus done to the sober study of English legal history....Gradually suspicions collected. It became known that the *Mirror* was to be used with some circumspection, that it was not to be put alongside of Granvill and Bracton as a co-ordinate historical authority.” [p. x.] And Theodore Plucknett adds that “the *Mirror* is certainly the most fantastic work in our legal literature....[the author’s] method is to give a description of contemporary law, freely criticised in the light of a golden age, which he places in the reign of King Alfred, of whose legal work he tells a great many wild stories. In some places he seems acute and earnest; in others he must be joking.” [Theodore F. T. Plucknett, *A Concise History of the Common Law* 5th ed., (Boston, 1956).] Given the similarity of the passage cited from the *Mirror* to other passages from more reputable authors, it would seem that in this case at least, the author of the *Mirror* was being acute and earnest rather than jesting.

⁴⁵ Sir Matthew Hale. *Historia Placitorum Coronae (The History of the Pleas of the Crown)*. Published from the original manuscripts by Sollom Emlyn of Lincoln’s Inn, Esq. A new edition by George Wilson, Serjeant at Law, in Two Volumes: London, MDCCLXXVIII (1778), 143. Emphasis added

⁴⁶ *A Treatise of the Pleas of the Crown*. 8th edition. 2 Vols. Vol. 1 “Of Criminal Offences” arranged by John Curwood Esq, Barrister at Law. London 1824. Chapter XIII “Of Murder”; section 16, 94-5. Emphasis added.

wombe, or if a man beat her, whereby the childe dyeth in her body, and she is delivered of a dead childe, this is a great misprision and no murder; but if the childe be born alive and dyeth of the Potion, Battery, or other cause, this is murder; for in law it is accounted a reasonable creature, *in rerum natura*, when it is born alive.”⁴⁷ According to Seaborne Davies while “Staunford, Lambard and Hale, impressed by the difficulty of proving that the death of a live-born child was occasioned by a defendant’s pre-natal acts, took a different view from Coke.” Coke’s view “is the view generally accepted in modern times.”⁴⁸ While Staunford, Lambard and Hale did indeed differ from Coke in their estimation of the difficulty of establishing the causal nexus between the act of the defendant and the damages suffered by the child they were at one with him in holding that *unless* it were born alive before its subsequent death that death did *not* constitute murder.

Finally, Sir William Blackstone, discussing murder under the definition of that crime provided by Sir Edward Coke (which is “when a person of sound memory and discretion, unlawfully killeth any reasonable creature in being, and under the king’s peace, with malice aforethought, either express or implied.” [3 Inst. 47]), remarked that “to kill a child in its mother’s womb is now no murder but a great misprision: but if the child be born alive and dieth by reason of the potion or bruises it received in the womb, it seems, by the better opinion, to be murder in such as administered or gave them.”⁴⁹

[E]ven accepting that in Coke’s period (1552-1634) abortion was an offence bordering on the capital, it would probably not have been prosecuted in the Common Law courts, as the ecclesiastical courts retained a criminal jurisdiction, and abortion was generally regarded as their province. However, the Reformation in the mid-sixteenth century challenged this jurisdiction, and in 1641, during the political turmoil immediately before the Civil War, Parliament

⁴⁷ 3 Co Inst (1648) 50.

⁴⁸ Seaborne Davies, 208, 209.

⁴⁹ Sir William Blackstone, *Commentaries on the Laws of England* (1765), 3 Inst. 50; 1 Hawk. P.C. 80, and 1 Hal. P.C. 433.

abolished the senior ecclesiastical courts, the Court of High Commission and the Court of Delegates and these took into abolition with them the whole system of ecclesiastical courts. In these new circumstances, the Common Law had an impetus to develop its own principles, but at the Restoration in 1661, the ordinary ecclesiastical courts were re-established, and much of their old criminal jurisdiction revived, in theory. However, in fact this was becoming increasingly diminished by the growing practice of making ecclesiastical offences statutory felonies, which took them into the Common Law courts. Moreover even where offences were not so removed from the ecclesiastical courts, the Common Law was generating its own concurrent growth, and it was not until 1803 that procuring abortion was made a statutory felony.⁵⁰

It is important to note that Coke, while denying that the killing of the child in the womb was murder, did not deny such killing all legal significance; while not murder it was, nonetheless, a great misprision. This aspect of Coke's doctrine appears not to have been developed by the common law and it wasn't until the introduction of the abortion statutes in the nineteenth century that the matter was legally addressed. Furthermore, even when addressed under such statutes, the killing of the child in the womb was not treated as an aspect of general homicide but as a specific statutory offence. Giving evidence to the Capital Punishment Commission of 1866, Willes J. remarked that "the law of misprision is antiquated, and in truth you will never find an indictment in practice except for concealment or for murder...practically I think it must be taken that there is no law applicable to that case by reason of the obsolete character of the law of misprision."⁵¹

⁵⁰ Dickens, 22.

⁵¹ British Parliamentary Papers 1866, 21, 274.

THE ENTRENCHMENT OF THE BORN ALIVE RULE IN ENGLISH LAW

We have seen what the authorities have to say about the origins of the Born Alive rule. Now we turn our attention to the cases and statutes from the late sixteenth century to the beginning of the twenty first century in which the legal status of the unborn child has been considered to witness the entrenchment of the rule.

The Cases from 1601 to 1935

In *Sims' Case*¹ (1601) charges of trespass and assault were brought against a certain Sims by a husband and wife because of Sims' alleged beating of the wife. The case report says, "If a man beats a woman who is great with child, and after the child is born living, but hath signes, and bruises in his body, received by the said batterie, and after dyed thereof, I say that this is murder." For this to be a case of murder four elements must be present: 1. the woman must have been pregnant ('great with child'); 2. the child must have been born alive and died subsequently; 3. the assailant must have battered the woman; and 4. the child's death must have been caused by the assailant's battery (the evidence for the causal link between the battery and the death being the 'signes and bruises').

¹ *The English Reports*, Vol. LXXV, King's Bench Division IV 1075, containing Plowden, Volumes 1 and 2; Gouldsborough, 176-177. "De Term. Hill. an. Reg. Eliz. Gouldsborough's reports cover the years 1586-1601.

The importance of the child's being born alive is noted for what appear to be evidential reasons:

[T]he difference is where the child is born dead, and where it is born living, for if it be dead born it is not murder, for non constat, whether the child were living at the time of the batterie or not, or if the batterie was the cause of the death, but when it is born living, and the wounds appeare in his body, and then he dye, the batteror shal be arraigned of murder, for now it may be proved whether these wounds were the cause of the death or not, and for that if it be found, he shall be condemned.

If the child were born dead then it could not be established beyond doubt either that it had been alive at the time of the battery or that the battery had been the cause of its death; but upon its being born alive, with the evidence of the wounds on its body, then the causal link between the battery and the child's wounds (and eventual death if that should come about) could be established.

In *The Earl of Bedford's Case (1586-87)*² a man devised "to his brother Henry Clarke and his assigns, for his life, remainder to the use and behoof of all and every such child or children of his said brother as should be living at the time of his decease." Henry died, leaving several children. At the time of his death, his wife was pregnant; seven months later she gave birth to a daughter. The court held that the child, though posthumous, should take under the will; Chief Justice Eyre remarking that an infant *in ventre matris*, who by the course and order of nature was then living, came clearly within the description of children living at the time of his death.³ It must be made clear that although the child was considered, for the purposes of inheritance,

² *The English Reports*, Vol. LXXVII King's Bench Division VI, containing Coke, parts 5 to 13. 7 Co. Rep. 7a-9b. Coke's Reports extend from 1572-1616, and are to be found in Vols. 76 and 77 of *The English Reports*. The reference "Mich. 28 and 29 Elizabeth" establish this cases as occurring in the years 1586-1587.

³ See the treatment of the so-called succession cases in *C v. S and Another* below.

as if it were already born, nonetheless, it had to be born alive before there could be any transfer of property to it.⁴

“And although *filius in utero matris, est pars viscerum matris*, yet the law in many cases hath consideration of him in respect of the apparent expectation of his birth”, [8b/9a] The first idea expressed in this passage—that the foetus is but part of its mother—is one that persisted in English law until decisively rejected recently in *Attorney-General’s Reference (No. 3 of 1994)*.⁵ The second idea—that the law in many cases considers the child in the apparent expectation of his birth—has had an equally long history. It is generally considered to be of Civil Law origin and to occur pre-eminently in cases of inheritance. It is therefore ironic that the reporter in the instant case uses an illustration derived from the criminal law to make his point. “An adulterer doth counsel the woman to kill the child when he is born, who doth accordingly; the adulterer is accessory, yet at the time of the counsel the child was in his mother’s womb.” [9a]⁶

Our next case, *Thelluson v. Woodford. Woodford v. Thelluson (1798-99)*,⁷ takes us two hundred years forward. It too deals with inheritance. From the report it is clear that the claim had been made that a child *en ventre sa mère* is a non-entity. “Let us see,” say the reporter dryly, “what this non-entity may do. He may be vouched in a recovery, though it is for the purpose of making his answer over in value. He may be an executor. He may take under the Statute of Distributions. He may take by devise. He may be entitled under a charge for raising portions. He may have an injunction;

⁴ According to Jewish law, an embryo “is incapable of acquiring rights, for only a person born can possess rights. Accordingly, if an embryo dies in its mother’s womb, it does not leave the right of succession, to which it would have been entitled had it been alive when the deceased died, to those who would have been its heirs had it been born alive when the deceased died. Instead, such right of succession passed to the heirs of the deceased as if the embryo had never existed....All agree, however, that a child born alive after the death of its father inherits its father as though it had been alive when he died.” *Elon*, 433.

⁵ HL: [1998] AC 245; [1997] 3 All E.R. 936; [197] 3 W.L.R. 421.

⁶ See below *R. v. Shephard* which deals with this precise point.

and he may have a guardian”—quite a repertoire of actions for a non-entity. The reporter goes on to claim that the point is rendered indubitable by other cases, noting that Lord Hardwicke L.C. in *Wallis v. Hodson* said that ““the Plaintiff was *en ventre sa mere* at the time of her brother’s death, and consequently a person *in rerum natura*, so that both by the rules of the Common and Civil law she was to all intents and purposes a child as much as if born in the father’s life-time.””⁸ This comment by Lord Hardwicke is quite striking in its generality. First, a child, simply by being *en ventre sa mère* is *ipso facto* a person *in rerum natura*, and that by virtue of the rules of the civil and common law. Given that the status of being a person *in rerum natura* is generally denied to the unborn child, it is quite remarkable that Lord Hardwicke asserts it here. It could be argued, however, that the context of Lord Hardwicke’s statement is such that the attribution of personhood to the child *in utero* is impliedly restricted to like cases of inheritance and not to cases of criminal or tort import. However, the same Lord Hardwicke remarks in yet another inheritance case, *Millar v. Turner*, “the destruction of him [the child in utero] is murder; which shews the laws considers (sic) such infant as a living creature.”⁹

In *R. v. Shephard*¹⁰ the appellant wrote to a pregnant woman, soliciting her to kill her child when it should be born. He was charged under s. 4 of the Offences Against the Person Act 1861—“whoever shall solicit, encourage, persuade, or endeavour to persuade, or shall propose to any person, to murder any other person...shall be guilty of a misdemeanour”. The court held that for the purposes of the section the person whose murder was solicited or encouraged did not have to be in existence at the time of the incitement; it was sufficient if he were in existence at the time when the act of

⁷ *The English Reports*, Vol. XXXI, Chancery XI, containing Vesey Junior, vols. 4-6

⁸ *The English Reports*, Vol. XXVI, 473; 2 Atk. 117.

⁹ *Millar v. Turner*, *The English Reports*, Vol. XXVII, 907 at 908; 1 Vesey Sen. 86.

¹⁰ *R. v Shephard* (CCA) Court of Criminal Appeal 31 March 1919. [1919] 2 K.B. 125.

murder was to be committed. The case is of interest because of the clear recognition by the court that, at the time of the incitement, the child in the womb was incapable of being a subject of murder: “Held, that the child, having been born alive, the incitement to murder it was an incitement to murder a ‘person’ within the meaning of the section notwithstanding that at the date of the incitement it was incapable of being the subject of murder...”

The appellant appealed against his conviction on the grounds that there must be a person capable of being in existence at the time of the incitement. Reference was made to Hawkins’ *Pleas of the Crown*, Bk. I; ch. 31, s. 17 where Hawkins wrote that “where one counsels a woman to kill her child when it shall be born, who afterwards does kill it in pursuance of such advice, he is an accessory to the murder” but, the appellant contested, this does not support the conviction of the erstwhile inciter if his advice is not followed and the murder not carried out. The court refused to accept this line of argument, noting that they were not deciding whether the appellant would have been convicted if the child had not been born alive.

On reflection, it is hard not to have some (legal) sympathy with the appellant. From a legal perspective, at the time of the incitement, there is an entity of some kind in existence but whatever it may be it is not such as to be capable of being the subject of homicide; after birth, there is in existence an entity capable of being the subject of a homicide but a question must surely hang over its relation to the intra-uterine entity that is incapable of being the subject of homicide. If the court had considered the possibility of the child’s not having been born alive then they would surely have had to accept that there was no homicidable subject at the time of the incitement nor, *ex hypothesi*, at any other time. How then could the appellant be convicted of incitement to murder? On the other hand, were their intuition such that, as in their actual

decision, they believed the appellant had committed an offence, it is difficult to see how they could maintain the non-homicidability of the child in the womb.¹¹

*Elliot v. Lord Joicey*¹², another inheritance case, dealt with the question of whether a ‘surviving child’ included a child born posthumously. Lord Russell of Killowen said that “From the earliest times the posthumous child has caused a certain embarrassment to the logic of the law, which is naturally disposed to insist that at any given moment of time a child must either be born or not born, living or not living.” [238] This insistence of the law is, one might think, not unreasonable. Lord Russell has, in fact, articulated two disjunctions, not one: the first disjunction is that between the born and the not-born; the second, that between the living and the non-living. These two distinctions together give us four possibilities: 1. born and living; 2. born and not living; 3. not born and living; and 4. not born and not living. Possibilities 1 and 4 are of no interest; but possibility 2 (born and not living) and possibility 3 (not-born yet living) are much more significant. It is no doubt some inchoate recognition of the possibility of the unborn child’s being ‘not-born yet living’ that leads to Lord Russell’s next remark. “This literal realism was felt to bear hardly on the interest of posthumous children and was surmounted in the Civil Law by the invention of the fiction that in all matters affecting its interest the unborn child in utero should be deemed to be already born”. [238] There are parallels between what Lord Russell has described as a Civil Law fiction and the eventual firm acceptance by the criminal law of acts which caused injury or death to the unborn child. In both cases, the unborn child had, until it was born, only a shadowy half-existence—not being quite nothing, yet not being quite something either.

¹¹ The difficulty of discovering a justification of the difference in legal treatment of the intra-uterine

The Statutes from 1803 to 1929

Lord Ellenborough's Act, the first attempt to put the offence of criminal abortion on a statutory basis, received the Royal assent on 24 June 1803.¹³ The purpose of this act was to prevent many mischiefs, among them "the malicious using of Means to procure the Miscarriage of Women."

... if any Person or Persons, from and after the first Day of July in the Year of our Lord One thousand eight hundred and three, shall, either in England or Ireland... wilfully, maliciously, and unlawfully administer to, or cause to be administered to or taken by any of his Majesty's Subjects, any deadly Poison, or other noxious and destructive Substance or Thing, with Intent such his Majesty's Subject or Subjects thereby to murder, or thereby to cause and procure the Miscarriage of any Woman then being quick with Child... then and in every such Case the Person or Persons so offending, their Counsellors, Aiders, and Abettors, knowing of and privy to such Offence, shall be and are hereby declared to be Felons, and shall suffer Death as in Cases of Felony without Benefit of Clergy...¹⁴

According to Dickens "It appears that before 1803 the crime of abortion was a Common Law misdemeanour...only provided that the stage of 'quickening' had been reached"¹⁵ and the reference to quickening is clearly evident in section one of the Act. Lord Ellenborough's Act, while it introduced a penalty somewhat more severe than the Common Law misdemeanour "did not substantially alter the legal definition."¹⁶ However, the situation is somewhat different with section 2:

'And whereas it may sometimes happen that Poison or some other noxious and destructive Substance or Thing may be given, or other Means used, with Intent to procure Miscarriage or Abortion where the Woman may not be quick with Child at the Time, or it may not be proved that she was Quick with Child;' be it therefore further enacted, That if any Person or Persons, from and after the said first Day of July in the said Year of our Lord One thousand eight hundred and three, shall wilfully and maliciously administer to, or cause to be administered to, or taken by any Woman, any Medicines, Drug, or other Substance or Thing whatsoever, or shall use or employ, or cause or procure to be used or employed,

entity and its extra-uterine biological successor will be a recurrent theme of this thesis.

¹² *Elliot v Lord Joicey* [1935] A.C. 209.

¹³ 43 Geo. 3, C. 58

¹⁴ 43 Geo. 3, c. 58; section 1.

¹⁵ Dickens, 23.

¹⁶ Dickens, 24..

any Instrument or other Means whatsoever, with Intent thereby to cause or procure the Miscarriage of any Woman not being, or not being proved to be, quick with Child at the Time of administering such Things or using such Means, that then and in every such Case the Person or Persons so offending, their Counsellors, Aiders, and Abettors, knowing of and privy to such Offence, shall be and are hereby declared to be guilty of Felony, and shall be liable to be fined, imprisoned, set in and upon the Pillory, publickly or privately whipped, or to suffer one or more of the said Punishments, or to be transported beyond the Seas for any Term not exceeding fourteen Years, at the Discretion of the Court before which such Offender shall be tried and convicted.¹⁷

According to Dickens, the significance of this section is that, for the first time, abortion before quickening became a crime. “The practical significance of this provision was widespread, as nearly all women who procure their own abortion do so in the early months of their pregnancy, before quickening.”¹⁸ Moreover, it is the first and only time that that word ‘abortion’ has actually been used in a statute. The customary expression is ‘miscarriage’. A further important distinction that Dickens detects in section 2 is that between *embryo formatus* and *embryo informatus* which, in his view, is an adoption of the ecclesiastical distinction. The distinction between a foetus having life (*formatus*) and a foetus not having life (*informatus*) had been made by the Romans.¹⁹ Canon Law was so far consistent with Roman Law in accepting this distinction; the *embryo formatus* being animate or ensouled; the *embryo informatus* being inanimate or not ensouled.²⁰ Dickens notes that this distinction was rejected by some Christian writers, notably Tertullian who wrote that “nor does it matter whether one takes away a life when formed, or drive it away while forming. He also is a man who is about to be one.”²¹

¹⁷ 43 Geo. 3, C. 58; section 2.

¹⁸ Kennedy & Grubb, 1407.

¹⁹ Dickens, 15.

²⁰ See Gratian *Decretum* ii 32.2.8.

²¹ *Apologeticus*, 9. Dickens, 16.

Lord Ellenborough's Act was repealed by Lord Lansdowne's Act of 1828²² which, however, preserved the distinction between the *embryo formatus* and the *embryo informatus* embodied in the earlier Act. The relevant section of Lord Lansdowne's Act reads:

[I]f any Person, with Intent to procure the Miscarriage of any Woman then being quick with Child, unlawfully and maliciously shall administer to her, or cause to be taken by her, any Poison or other noxious Thing, or shall use any Instrument or other Means whatever with the like Intent, every such Offender, and every Person counselling, aiding or abetting such Offender, shall be guilty of Felony, and being convicted thereof, shall suffer Death as a Felon; and if any person, with Intent to procure the Miscarriage of any Woman not being or not being proved to be, then quick with Child, unlawfully and maliciously shall administer to her, or cause to be taken by her, any Medicine or other Thing, or shall use any Instrument or other Means whatever with the like Intent, every such Offender, and every Person counselling, aiding or abetting such Offender shall be guilty of a Felony.²³

The term 'abortion' is, however, not used in this later Act and so a possible linguistic way of distinguishing between termination before quickening and termination after quickening is lost.²⁴

In the Offences Against the Person Act (1837)²⁵ which amended the law relating to sundry offences against the person, the relevant section reads:

And be it enacted, That whosoever, with Intent to procure the Miscarriage of any Woman shall unlawfully administer to her or cause to be taken by her any Poison or other noxious Thing, or shall unlawfully use any Instrument or other Means whatsoever with the like Intent, shall be guilty of Felony, and being convicted thereof shall be liable, at the Discretion of the Court, to be transported beyond the Seas for the Term of his or her natural Life, or for any

²² 9 Geo. IV. Ch. 31. The relevant section reads: "...if any Person, with Intent to procure the Miscarriage of any Woman then being quick with Child, unlawfully and maliciously shall administer to her, or cause to be taken by her, any Poison or other noxious Thing, or shall use any Instrument or other Means whatever with the like Intent, every such Offender and every Person counselling, aiding or abetting such Offender, shall be guilty of Felony, and being convicted thereof, shall suffer Death as a Felon; and if any person, with Intent to procure the Miscarriage of any Woman not being or not being proved to be, the quick with Child, unlawfully and maliciously shall administer to her, or cause to be taken by her, any Medicine or other Thing, or shall use any Instrument or other Means whatever with the like Intent, every such offender, and every Person counselling, aiding or abetting such Offender, shall be guilty of Felony."

²³ 9 Geo. IV Ch. 31, s. 8.

²⁴ See Dickens, 25.

²⁵ 1 Vict. Cap. 85.

Term not less than Fifteen Years, or to be imprisoned for any Term not exceeding Three Years.²⁶

Compared with the 1803 and 1828 Acts, no mention is made of the quickening/non-quickening distinction and the death penalty for offenders has been omitted.

The nineteenth century initiative to put the law on abortion on a statutory footing culminated in the Offences Against the Person Act, 1861.²⁷ This Act, which has now been in force for almost 150 years, is still the basic law in England and Wales relating to crimes against the person. While ss. 58 and 59 of the 1861 Act provide the basic law concerning abortion, the Infant Life (Preservation) Act, 1929 partly overlaps and is partly distinct from it, and the Abortion Act, 1967 provides a specific defence to charges that could be brought under the 1861 Act.²⁸ Ss. 58 & 59 read:

§ 58 Administering drugs or using instruments to procure abortion

Every Woman, being with Child, who, with Intent to procure her own Miscarriage, shall unlawfully administer to herself any Poison or other noxious Thing, or shall unlawfully use any Instrument or other Means whatsoever with the like Intent, and whosoever, with Intent to procure the Miscarriage of any Woman, whether she be or be not with Child, shall unlawfully administer to her or cause to be taken by her any Poison or other noxious Thing, or shall unlawfully use any Instrument or other Means whatsoever with the like Intent, shall be guilty of Felony, and being convicted thereof shall be liable, [at the Discretion of the Court,] to be kept in Penal Servitude for life, [or for any Term not less than Three Years—or to be imprisoned for any Term not exceeding Two Years, with or without Hard Labour, and with or without Solitary Confinement.]

Comment [G1]:

§ 59 Procuring drugs, etc, to cause abortion

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 a Misdemeanor, and being convicted thereof shall be liable, [at the Discretion of the Court,] to be kept in Penal Servitude [for the Term of Three Years, or to be imprisoned for any Term, not exceeding Two Years with or without Hard Labour.]

²⁶ 1 Vict. Cap. 85, section VI.

²⁷ 24 & 25 Vict. Ch. 100.

²⁸ It must be clearly understood that “the Abortion Act 1967 does not expressly or impliedly create a defence to a charge of murder or homicide. The legislative intention behind the 1967 Act is clear from its provisions which remove criminal liability for an offence under ‘the law relating to abortion’ which

This act appears not to discriminate between different stages of foetal development so that the offence “may be committed at any time before the natural birth of the child, whether it is in the embryonic or foetal stage of development.”²⁹ Effectively, the ecclesiastical distinction between the *embryo formatus* and *embryo informatus* is abandoned and although the term ‘abortion’ is customarily used in the section heading/s of the Act the text of the articles exclusively employs the term ‘miscarriage’.³⁰

To the extent that there has not been implied repeal the 1861 Act is still in force in Ireland preceding, as it did, the emergence of the new legal jurisdiction associated with the Irish Free State and its successor Republic. That ss. 58 & 59 are deemed to have legal force and thus not to have been impliedly repealed in Ireland is evident from the fact that the Act accompanying the recent referendum on abortion explicitly repealed those sections;³¹ moreover, section 10 (b) of the Health (Family Planning) Act, 1979 explicitly relies on ss. 58 and 59 of the Offences Against The Person Act, 1861.³²

The term ‘miscarriage’ is central to the legal approach to abortion. It is, therefore, somewhat surprising to find that the term is not defined in English statute or case law. A question that arises now and one that was echoed in the recent debates on the Abortion Referendum (2002) in Ireland is whether in order to be miscarried a

means under the 1861 Act. (Ss 1(1) and 6(1) and, since 1990, under the Infant Life (Preservation) Act 1929...” Kennedy & Grubb, 1491.

²⁹ Dickens, 29.

³⁰ A series of cases dealing with significant aspects of the legislation followed its promulgation: *R. v. Whitechurch* (1890) 24 Q.B.D. 420 (conspiracy); *R. v. Sockett* (1908) 24 T.L.R. 893 (aiding and abetting); *R. v. Isaacs* (1862) Le & Ca. 220 and *R. v. Hennah* (1877) 13 Cox C.C. 547 (noxious thing). For an extensive discussion of the nuances of the 1861 Act, including the case law history, see Dickens, Chapter II “The Present Law”.

³¹ Twenty-fifth Amendment of the Constitution (Protection of Human Life in Pregnancy) Bill, 2001, s. 6: “Sections 58 and 59 of the *Offences against the Person Act*, 1861, are hereby repealed. (Aisghairtear leis seo ailt 58 agus 59 den *Offences against the Person Act*, 1861.)

fertilised ovum must be implanted. Some hold that “a ‘miscarriage’ is procured whenever a fertilised egg is destroyed or expelled from the body, whether or not it had been implanted in the uterus. If this view were correct, it would mean that any intervention after conception done with the intention of ‘procuring a miscarriage’ as so defined, would amount to an offence under the Offences Against the Person Act, 1861...”³³ If the Human Fertilisation and Embryology Act 1990 is taken as an indicator it will not be possible in law for a miscarriage to occur until after the fertilised embryo has implanted. “[F]or the purposes of this Act, a woman is not to be treated as carrying a child until the embryo has become implanted.” [s.2(3)] In Kennedy & Grubb’s view, this provision “clearly demonstrates Parliament’s view, at least in 1990, and, it is suggested, is highly persuasive when interpreting the scope of the 1861 Act.”³⁴

A significant addition was made to the nineteenth-century legislation on abortion with the passing of the Infant Life (Preservation) Act, 1929.³⁵

1.— (1) Subject as hereinafter in this subsection provided, any person who, with intent to destroy the life of a child capable of being born alive, by any wilful act causes a child to die before it has an existence independent of its mother, shall be guilty of felony, to wit, of child destruction, and shall be liable on conviction thereof on indictment to penal servitude for life.

Provided that no person shall be found guilty of an offence under this section unless it is proved that the act which caused the death of the child was not done in good faith for the purpose only of preserving the life of the mother.

(2) For the purposes of this Act, evidence that a woman had at any material time been pregnant for a period of twenty-eight weeks or more shall be *prima facie* proof that she was at that time pregnant of a child capable of being born alive.

³² Health (Family Planning) Act, 1979, s. 10: “Nothing in this Act shall be construed as authorising— (a) the procuring of 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...”

³³ Kennedy & Grubb, 1410.

³⁴ Kennedy & Grubb, 1413. See also John Keown, “Miscarriage: A Medico-Legal Analysis” [1984] *Criminal Law Review*, 608.

³⁵ 19 & 20, Geo. V, Ch. 35.

In this Act a new crime—that of child destruction—is introduced. More significantly, a specific point in the child’s embryological development is central to the new crime; the child must have reached such a stage of development so as to be capable of being born alive. Whereas the old distinction based on stages of embryological development was that between the non-quickened child and the quickened child, the new one is that between a child that is not capable of being born alive and a child that is so capable which distinction, in modern parlance, has come to be known as viability. What it is for a child to be capable of being born alive is not defined in the Act and, needless to say, this has given rise to substantial debate in cases that purportedly fall under the terms of this Act.

Very significantly, the second paragraph of s.1(1) of the Act introduces the elements of a defence to the charge of child destruction which, given the functional interchangeability³⁶ of s 58 of the Offences Against the Person, 1861 and s. 1 of the Infant Life (Preservation) Act, 1929, has wide ramifications. The exception contained in this paragraph reflects a suggestion from the Criminal Law Commission of 1846 to the effect that the law should contain an exception by which the procuring of a miscarriage would not be punishable provided that the procuring was done in good

³⁶ Section 2, sub-sections 2 and 3 of the Infant Life (Preservation) Act, 1929 provide for the situation in which a jury which finds a defendant not guilty of an offence under s. 58 of the Offences Against the Person Act, 1861, may alternately find him guilty under s. 1 of the Infant Life (Preservation) Act, 1929 (sub-section 2); and jury which finds a defendant not guilty under s. 1 of the Infant Life (Preservation) Act, 1929 may be found guilty under s. 58 of the Offences Against the Person Act, 1861 (sub-section 3). “2(2) Where upon the trial of any person for the murder or manslaughter of any child, or for infanticide, or for an offence under section fifty-eight of the Offences against the Person Act 1861 (which relates to administering drugs or using instruments to procure abortion), the jury are of opinion that the person charged is not guilty of murder, manslaughter or infanticide, or of an offence under the said section fifty-eight, as the case may be, but that he is shown by the evidence to be guilty of the felony of child destruction, the jury may find him guilty of that felony, and thereupon the person convicted shall be liable to be punished as if he had been convicted upon an indictment for child destruction. 2(3) Where upon the trial of any person for the felony of child destruction the jury are of opinion that the person charged is not guilty of that felony, but that he is shown by the evidence to be guilty of an offence under the said section fifty-eight of the Offences against the Person Act 1861, the jury may find him guilty of that offence, and thereupon the person convicted shall be liable to be punished as if he had been convicted upon an indictment under that section. [Section 2, sub-secc (1)

faith with the intention of saving the life of the woman; the 1861 Act contained no such explicit exception. This exception was to prove highly significant some years later in the case of *R. v. Bourne*.

R. v. Bourne (England, 1939) and the Abortion Act, 1967

Some ten years after the enactment of the Infant Life (Preservation) Act, Aleck Bourne, an obstetrical surgeon, carried out an abortion on a 15 year old who had become pregnant as the result of a rape. He was charged under s. 58 of the Offences Against the Person Act, 1861.³⁷ Bourne was of the opinion that “the continuance of the pregnancy would probably cause serious injury to the girl, injury so serious as to justify the removal of the pregnancy at a time when the operation could be performed without any risk to the girl and under favourable conditions.” [688-689] In what, I believe, is a clear reference to s. 1(1) of the Infant Life (Preservation) Act, 1929, the court held that “On a prosecution under s. 58 of the Offences Against the Person Act, 1861, for using an instrument with intent to procure miscarriage, the burden rests on the Crown to prove that the operation was not done in good faith for the purpose of preserving the life of the mother, and, if in the opinion of the jury that burden is not discharged, the accused is entitled to a verdict of acquittal.” [687] The burden of proof is clearly on the prosecution. The court added “The words ‘preserving the life of the mother’ must be construed in a reasonable sense. They are not limited to the case of saving the mother from violent death: they include the case where the continuance of the pregnancy would make her a physical or mental wreck.” [687]

Macnaghten, J. noted that s. 58 of the 1861 Act is a re-enactment of earlier statutes (see 43 Geo. 3, c. 58, s. 1) and, referring to Bracton, he added that even before that

and (4): repealed by the Criminal Law Act 1967, s 10(2), Sch 3, Part II and Section 2, Sub-sec. (5):

statute, according to the common law, the killing of an unborn child was a grave crime.³⁸ “The protection which the common law afforded to human life extended to the unborn child in the womb of its mother.” [690] He clearly reads s. 58 of the 1861 Act from the perspective of the Infant Life (Preservation) Act, 1929.

In my opinion the word ‘unlawfully’ is not, in that section, a meaningless word. I think it imports the meaning expressed by the proviso in s. 1, sub-s. 1 of the Infant Life (Preservation) Act, 1929 and that s. 58 of the Offences Against the Person Act, 1861, must be read as if the word making it an offence to use an instrument with intent to procure a miscarriage were qualified by a similar proviso. [691]

The outcome of the case turned on the significance of the term ‘unlawfully’. Bernard Dickens, even though broadly sympathetic to the outcome of the case, wonders whether the legislature intended to imply what Macnaghten J. read into the Act.

The 1803 Act defined the *actus reus* as being done ‘wilfully, maliciously, and unlawfully’ if the woman was quick with child, and ‘wilfully and maliciously’ if she was not, while the 1828 Act required that the act be done ‘unlawfully and maliciously’ in either case. The 1837 Act first imposed the existing solitary condition that the act be ‘unlawfully done’.”³⁹

If the term ‘unlawfully’ is taken as Macnaghten J. takes it there emerges a curious circularity inasmuch as a certain act turns out to be against the law only when done unlawfully but to determine whether it was done unlawfully or otherwise one must determine whether or not it was against the law. “Macnaghten broke the *circulus in definiendo* by explaining that abortion was legal in certain therapeutic circumstances, but it is doubtful if the legislature contemplated these in 1803, when the term was first used, or even in 1861...”⁴⁰

It is a moot point as to whether Macnaghten J. was justified in his interpretation. Dickens notes the ‘good faith’ proviso recommended by the Criminal Law

repealed by the Police and Criminal Evidence Act 1984, s 119, Sch 7, Part V.

³⁷ *R. v. Bourne* [1939] 1 K.B. 687.

³⁸ Bracton, Book II. (De Corona). fol. 121.

³⁹ Dickens, 39.

⁴⁰ Dickens, 39

Commissioners in 1846 which, as I have indicated, did not in fact become part of the 1861 Act and remarks of it that “It did, however, form part of the Infant Life (Preservation) Act, 1929, relating to child destruction, and Macnaghten J. took this exception to be equally applicable to abortion cases, but speculation may remain about whether the words of the 1861 Act necessarily suggest this.”⁴¹ The intersubstitutability of charges under the 1861 and 1929 Acts permitted by the 1929 Act and its statement of purpose which is to the effect that it is “An Act to amend the law with regard to the destruction of children at or before birth” would go some way to supporting Macnaghten’s interpretation; on the other hand, the non-inclusion of the 1846 proviso in the 1861 Act would seem to make his interpretation somewhat less than completely certain. In any event “whatever the scope of the *Bourne* exception to ss 58 and 59 of the Offences Against the Person Act, 1861, the legal availability of abortion was always subject to the Infant Life (Preservation) Act 1929... [which]... limited abortion to those cases where the foetus or unborn child was not ‘capable of being born alive’ (s 1(1)).”⁴² The Infant Life (Preservation) Act 1929 was enacted to close a loophole in the law as it appeared that the killing of a child in the process of being born was neither procuring a miscarriage nor murder and so not prohibited by existing provisions. Be that as it may, it also “prevented doctors from ‘wilfully’ killing an unborn child by way of an abortion at least after 28 weeks when it was presumed to be ‘capable of being born alive’ ...and probably before if it was capable of surviving....The only exception was where it was ‘done in good faith for the purpose only of preserving the life of the mother’. This exception was far narrower than the interpretation by the courts that we have seen of *Bourne*.”⁴³

⁴¹ Dickens, 40.

⁴² Kennedy & Grubb, 1417.

⁴³ Kennedy & Grubb, 1417.

The law in relation to abortion in England and Wales has been affected in a revolutionary way by the Abortion Act 1967,⁴⁴ the relevant sections of which read:

§ 1 Medical termination of pregnancy

(1)⁴⁵ Subject to the provisions of this section, a person shall not be guilty of an offence under the law relating to abortion when a pregnancy is terminated by a registered medical practitioner if two registered medical practitioners are of the opinion, formed in good faith—

(a) that the pregnancy has not exceeded its twenty-fourth week and that the continuance of the pregnancy would involve risk, greater than if the pregnancy were terminated, of injury to the physical or mental health of the pregnant woman or any existing children of her family; or

(b) that the termination is necessary to prevent grave permanent injury to the physical or mental health of the pregnant woman; or

(c) that the continuance of the pregnancy would involve risk to the life of the pregnant woman, greater than if the pregnancy were terminated; or

(d) that there is a substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped.

§ 5 Supplementary provisions

(1)⁴⁶ No offence under the Infant Life (Preservation) Act 1929 shall be committed by a registered medical practitioner who terminates a pregnancy in accordance with the provisions of this Act.

The 1967 Act was intended to provide a specific defence against the provisions of the 1861 Act. In its original form, the 1967 Act did *not* provide protection against killing a child capable of being born alive; this protection was provided in the amendment of the 1967 Act by the Human Fertilisation and Embryology Act 1990 (s 37(4)).⁴⁷

⁴⁴ 15 & 16 Eliz. 2, c. 87.

⁴⁵ S.1 (1): paras (a)-(d) substituted for paras (a), (b) as originally enacted by the Human Fertilisation and Embryology Act 1990, s 37(1).

⁴⁶ S.5 (1): substituted by the Human Fertilisation and Embryology Act 1990, s 37(4).

⁴⁷ See Robert G. Lee and Derek Morgan, *Human Fertilisation & Embryology: Regulating the Reproductive Revolution* (London, 2001), 243.

WATT V. RAMA (AUSTRALIA, 1972)

This Australian case provides a *locus classicus* for a judicial discussion of the issue of whether or not one could owe a duty of care to the child in the womb. In *Watt v. Rama*¹ two cars collided: one driven by Habib Rama, the other by Sylvia Alice Watt. At the time of the accident Sylvia Alice Watt was pregnant. Sylvia Watt, the plaintiff, was born after the accident suffering, it was alleged, from brain damage and epilepsy caused by the negligence of the defendant. The defendant admitted the collision, denied that the plaintiff was born with brain damage and epilepsy and furthermore denied that the plaintiff's injuries were caused by the his alleged negligence. The core of his defence was that the plaintiff's case was bad in law and that the allegations disclosed "no cause of action against him on the grounds that at the time of the collision the defendant owed no duty of care to the infant plaintiff who was then unborn; and he owed the infant plaintiff no duty not to injure her mother; and the damages sought to be recovered by the infant plaintiff are in law too remote."² [354] The court was asked to make a preliminary determination of certain points raised by the defence for the purpose of which the facts contained in the statement of claim were presumed to have been established, including those denied by the defence.

The principal point of law to be to be determined was: "(a) whether in the circumstances set out in the statement of claim the defendant owed a duty of care not

¹ *Watt v. Rama* [1972] Victorian Reports 353.

to cause injury to the infant plaintiff who was then unborn.” [355] Mr Beach Q.C., for the defendant, argued that “the defendant owed no duty of care to the infant plaintiff she being at the time of the collision *en ventre sa mère*, not an existing person and merely part of her mother.” If indeed Sylvia Watt was, at the time of the collision, *pars viscerum matris* it is difficult to see how she could be owed a duty of care. We owe duties of care to other persons, not to parts of persons. Mr Beach continued:

When an act or omission involving fault which might otherwise be regarded as founding an action occurs, there must, in order for such act or omission to be regarded as negligent, be then and there in existence some legal person to sue or be sued. There must then and there be in existence a legal person having a legal right and another legal person having at that very time a corresponding legal duty. [355]

There would indeed appear to be a correlation between right and duty. X has a duty of care to Y if and only if and only if Y has a right not to be harmed by X: no duty, no right; no right, no duty.³ To avoid concluding that X owes no duty of care to Y one must either deny the correlativity of duty and right, which seems implausible, or deny that there was no person to be harmed in the circumstances—or in other words, accept that Sylvia Watt, as a foetus, was just as such a subject of legal rights.

For the plaintiff, Mr Galbally, Q.C. maintained that that she had a right “not to be injured by acts negligently done by the defendant before her birth and that once those acts were shown to have been tortious, the cause of action was complete and the action maintainable.” [356] The duty of care which, he contended, the plaintiff owed to both mother and child was such as to be in accordance with the principles laid

² Para. 9 of the defendant’s statement of claim.

³ The other points to be determined were: “(b) whether in the circumstances set out in the statement of claim the defendant owed a duty of care to the infant plaintiff not to injure her mother; (c) whether in the circumstances set out in the statement of claim the damages sought to be recovered by the plaintiffs are in law too remote.” [355] As to the second point, its dependence upon the first is obvious in that, if the defendant has no duty not to injure the plaintiff, it is difficult to see how he could have a duty not to injure her mother; not, of course, as a person in her own right but insofar as she is related to the plaintiff. “The law does not recognize such a duty, that is, a duty not to injure the parent of an infant.” [355] And on the third point, Mr Beach simply claimed that the damage could not reasonably have been foreseen by the plaintiff and was therefore too remote.

down in *Donoghue v. Stevenson*.⁴ This duty “attached to and became applicable to the plaintiff at the time of her birth” and “it was immaterial, once injury at birth was established, that the evidentiary facts necessary to prove a breach of that duty occurred before birth.” [356]

The judges were referred by counsel to many cases. Winneke C.J., and Pape J. said that they were unable to extract any clear principle from the American cases; the matter was otherwise in respect of certain Irish and Commonwealth cases. In *Walker v. Great Northern Railway Co. of Ireland*⁵ a claim for damages against the transport company for damages inflicted upon the plaintiff in a railway accident was rejected; at the time of the accident the plaintiff was *en ventre sa mère*. O’Brien C.J. rejected the claim on the grounds that no contract existed between the transport company and the plaintiff; moreover, one could not find that the transport company had a duty towards the plaintiff merely from the fact that her mother was pregnant when she travelled as a passenger. O’Brien J., rejecting various analogies from the criminal and civil law, denied that the unborn child had a right of action. Johnson J. adverted to the situation of the civil law in which, as we have seen in some of the cases discussed above, there can be an imputed existence *in esse* to an unborn child for specific purposes, remarking that “it would appear that according to this fiction an unborn child may in the civil law at the same moment be regarded as *in esse* and not *in esse*; for its own benefit *in esse*, to its prejudice, not *in esse*; and unless for the benefit of itself not *in esse*.”⁶ He concluded that “It is not contended that the duty arose out of contract....If it did not spring out of contract it must, I apprehend, have arisen (if at all) from the relative situation and circumstances of the defendants and plaintiff at the

⁴ [1932] AC 562.

⁵ *Walker v. Great Northern Railway Co. of Ireland* (1891) 28 LR (Ir) 69

⁶ *Walker*, 85.

time of the occurrence of the act of negligence.”⁷ Reasoning in much the same vein as

Mr Beach, O’Brien J. claimed that

[A]t that time the plaintiff had no actual existence; was not a human being; and was not a passenger—in fact, as Lord Coke says, the plaintiff was then *pars viscerum matris*, and we have not been referred to any authority or principle to show that a legal duty has ever been held to arise towards that which is not in esse in fact and has only a fictitious existence in law, so as to render a negligent act a breach of that duty.”⁸

Some forty years after *Walker* a similar fact pattern was exhibited in *Montreal Tramways v. Léveillé*⁹. Three of the judges in this case were willing to apply the civil law fictional doctrine to a Quebec statute which held that “Every person...is responsible for the damage caused by his fault to another.” [357] Cannon J., while agreeing with the decision of his brother judges, nevertheless based his decision not on the fictional attribution of beneficial existence to the unborn child but on another point. He thought it unnecessary to consider the rights of the child whilst in its mother’s womb between the time of conception and birth. His view was that the cause of action arose when the damage was suffered and not when the wrongful act was committed, injury being one of the three essential elements of responsibility absent which no action would lie. In principle the plaintiff’s right to compensation came into existence only when she was born with the bodily disability from which she suffered. It was only after birth that she suffered the injury and it was then that her rights were encroached upon and she commenced to have rights. It could be said that her rights were born together with her; and from birth with her guardian’s help she could bring the action and endeavour to show that the injury from which she suffered was caused prior to her birth through the fault of the defendant. [357]

⁷ *Walker*, 88.

⁸ *Walker*, 88.

⁹ *Montreal Tramways v. Léveillé*, [1933] 4 DLR 339.

While one can sympathise with Cannon J.’s unwillingness to rely on what he perceived to be a legal fiction, he appears to generate a legal fiction of his own, namely, to hold that the injury to the entity in question only comes into being when that entity is born. Whatever may be thought of the civil law fiction which Cannon J. declines to use, Cannon J.’s own fiction depends upon a metaphysical miracle. At time t , the defendant’s activity causes physical damage to a foetus. At time $t+1$ the biological successor to the foetus is born alive with injuries, but the defendant is not active at this time:

Time	Foetus	Defendant
t	physical damage caused at this time	active
$t+1$	continuation, or consequent development, of physical damage caused at time t	inactive

Things are out of joint. At time t , the defendant is active but the law recognises no injury. At time $t+1$ the injury springs into being but the defendant is inactive. Of course, the obvious way to knit everything up is to identify the foetus with its biological successor. The physical damage subsisting in the newborn child could then constitute evidence of the damage inflicted by the defendant on that same child as a foetus *in utero*. Perversely, as it seems to me, the reasoning of Cannon, J. et al. inverts the evidential relation so that the defendant’s acts at time t are taken to be evidence of causality in relation to the injuries which the child is deemed to suffer at birth.

The way in which the legal fiction that the injured child was already a person at the time of the careless act works is through the notion of a contingent retrospective duty. As Ian Kerr puts it “the contingent event of a child’s birth is said to impose a retrospective duty of care on the tortfeasor, issuing back to the time when the alleged

wrong was committed.”¹⁰ Some forty years later in *Duval v. Seguin*¹¹ Fraser J remarked “[I]t is not necessary...to consider whether the unborn child was a person in law or at which stage she became a person. For negligence to be a tort there must be damages. While it was the foetus...who was injured, the damages sued for are the damages suffered by the plaintiff...since birth and which she will continue to suffer as a result of the injury.”¹² Kerr notes, as I have done, the similarity between this and the theory of recovery articulated in *Watt*.¹³ The mode of expressing the point is different but the substantive point is essentially the same in that the elements of contingency (upon a live birth) and retrospection (to the tortfeasor at a time when the injury was inflicted on the foetus before birth) are both present. Winneke C.J. puts it thus: certain events that occur before the child is born constitute “a potential relationship capable of imposing a duty on the defendant in relation to the child if and when born. On birth the relationship crystallised and out of it arose a duty on the defendant in relation to the child.”¹⁴

This theory of recovery common to *Watt* and *Duval*, despite exhibiting what Kerr dryly refers to as ‘conceptual shortcomings’ also possesses, he believes, intuitive appeal. What substantive difference is there between a child who is injured just after birth and one who is similarly injured just before? The answer that Kerr anticipates, and that I would give, is—none at all. But I would wonder, as Kerr does not, why we need a legal fiction. The simplest explanation of our intuition that there is no substantive difference between the pre-natal and post-natal child is that there is in fact no substantive difference.

¹⁰ Kerr, 14.

¹¹ *Duval v. Seguin* [1972] 2 OR 686.

¹² *Duval*, 701.

¹³ *Watt*, 353.

¹⁴ *Watt*, 360.

Even if our intuitions weaken the further the child is from being born, the fictional theory of recovery has its own problems. It would seem to be a basic principle of tort law that if Y sues X for damages and the claim is to have any merits, X should have injured Y and not merely injured some other entity that is contingently associated with Y. But on the theory of recovery based upon contingent retrospective duty, X will have physically injured Y (at time t-1) but cannot be sued by Y (at time t-1) yet can be sued by Y (at time t) whom he did not injure! Lamont J in *Montreal Tramways* said that the “wrongful act...produce[s] its damage on the birth of the child and the right of action [is] then complete.”¹⁵ With all due respect to Lamont J, whatever about the legal probity of this statement, biologically it is nonsense. The injury is inflicted on the foetus and, insofar as the injury is persistent, is maintained in the child who is biologically continuous with the injured foetus. The real fiction here is not that of pretending that the foetus is a person in law but rather that of pretending that the foetus and the child are not biologically continuous.

A similar point was made by Zappala J. in the tort case of *Amadio v. Levin*¹⁶ when he held that a cause of action accrues to X when X suffers an injury causing damage. When X is a foetus, Zappala J. held that the recovery of damages for that injury ought not to depend upon whether the foetus is subsequently born alive. That he regarded as a ‘condition subsequent’.

Why not, then, just overcome the biological fiction and accept the identity of foetus and child? The answer to this question appears to be that

While the ‘born alive’ rule [in Kerr’s sense of that term] may appear unproblematic via-a-visa third party negligence, it becomes theoretically unruly in the case of a child who is suing his or her own mother for injuries caused prenatally. Though a court may be willing to pretend that an unborn child is an independent legal entity in the case of a negligent third party, it is less clear that

¹⁵ *Montreal Tramways*, 463.

¹⁶ *Amadio v. Levin* 501 A.2d 1085 (1985) at 1096.

it ought to do so in the case of a pregnant woman. Mother-child litigation in this context raises a most perplexing legal problem. Because the existence of mother and foetus are inextricably bound at the time of the alleged negligent act, the pedigree underlying the child's right to sue is less obvious. *If, from the point of view of the law, an unborn child is not a person and therefore is not the subject of rights and duties, it must follow that a pregnant woman and her unborn child are one. Consequently, a pregnant woman cannot owe a duty of care to her foetus any more than she can owe a duty of care to herself. Thus the only possible rights that the child could be said to have prior to birth are those which can be derived from the rights of the pregnant woman.*¹⁷

Let us tease out the argument contained in the italicised section of the passage just cited. Letting P stand for the proposition 'the unborn child is a person', S for the proposition 'the unborn child is the subject of rights and duties', W for the proposition 'a pregnant woman and her child are one', D for the proposition 'a pregnant woman can owe a duty of care to her child' and R for the proposition 'the only possible rights that a child can be said to have prior to birth are those which can be derived from the rights of the pregnant woman' the passage may be expressed logically as follows (where '¬ = df. not' and '→ = df. if...then'):

1. $\neg P \rightarrow \neg S$

(If the unborn child is not a person, then the unborn child is not the subject of rights and duties.)

2. $\neg S \rightarrow W$

(If the unborn child is not the subject of rights and duties, then a pregnant woman and her child are one.)

3. $W \rightarrow \neg D$

(If a pregnant woman and her child are one, then a pregnant woman cannot owe a duty of care to her child.)

4. $\neg D \rightarrow R$

(If a pregnant woman cannot owe a duty of care to her child, then the only possible rights that a child can be said to have prior to birth are those which can be derived from the rights of the pregnant woman.)

5. $\neg P \rightarrow R$

(If the unborn child is not a person, then the only possible rights that a child can be said to have prior to birth are those which can be derived from the rights of the pregnant woman.¹⁸)

¹⁷ Kerr, 14-15 [emphasis added].

¹⁸ This conclusion is not explicitly drawn by Kerr but is implicit in the context of the article as a whole.

The argument is clearly valid. Granted 1, 2, 3 and 4, then by the rule of Hypothetical Syllogism, the conclusion, 5, follows. Is the argument sound? The answer to that question, of course, depends on the truth of each of the four premises. To be sound, all the premises must be true; if even one is false, then the argument, while remaining valid, is unsound. That an argument is unsound does not, of course, mean that its conclusion is false, just that its truth has not been established by that specific argument. The first premise seems to me to be obviously true: persons have both rights and duties; non-persons have neither. There are those, such as animal rights activists, who would contest the truth of this premise. For such activists, animals have rights, those rights conferring duties on others to treat them in appropriate ways, while yet, presumably, not imposing duties on the animals themselves. I cannot deal with this contention here; suffice it to say that I believe it to be an entirely wrong-headed way to conceptualise the relations between human beings and animals.

The second premise is not obviously true. An ambiguity is caused by the word 'one'. What could it mean to say that a pregnant woman and her child are one? If this is a biological claim it is false; this has been accepted by the English courts in *Attorney-General's Reference (No. 3 of 1994)* (see below). If it is a legal claim to the effect that a pregnant woman and her child constitute together one person for legal purposes then, given the biological facts, such a legal claim can only be a fiction in the manner in which companies are said to possess legal personality is a fiction. If reality were allowed to intrude on the law at this point and it were held that a pregnant woman and her unborn child are not one, premises 1 and 2 would unravel by the application of Modus Tollens in the following way:

- a. $\neg W$ (a pregnant woman and her child are not one)
- b. $\neg W \rightarrow S$ (If a pregnant woman and her child are not one then the unborn child is the subject of rights and duties)

- c. S (the unborn child is the subject of rights and duties)
- d. $S \rightarrow P$ (If the unborn child is the subject of rights and duties then the unborn child is a person.)
- e. P (the unborn child is a person)

Premise 3 of the original argument appears to self-evidently true. It is true that Kant thought that one could have duties to oneself but few other thinkers have followed him on this path. Given the assumptions of the earlier premises, Premise 4 would also appear to be true. The only weak link in the argumentative chain, then, appears to be Premise 2.

Winneke C.J. and Pape J. summarised: “The real question posed for our decision is not whether an action lies in respect of pre-natal injuries but whether a plaintiff born with injuries caused by the pre-natal neglect of the defendant has a cause of action in negligence against him in respect of such injuries.” The defendant answers ‘No’ to this question “because at the time of his neglect the plaintiff was not in existence as a living person, had no separate existence apart from her mother, was not capable of suing to assert a legal right, and was not a legal person to whom he could be under a duty” This is a concise summary of the argument of counsel for the defendant. But “what creates the difficulty is that such act or omission preceded and was, therefore, separated in point of time from the birth of the plaintiff in her injured condition.” Exactly. How do the judges propose to resolve this difficulty? “Having regard to the state of authority disclosed, to the views expressed by eminent text writers, and to the absence of authority binding on this Court, we think resort must be had to basal principles involved in the tort of negligence.” [358/359] The judges then rehearsed the basic principles of the tort of negligence and concluded that if “the circumstances be such at the time when the act of neglect occurs that it should reasonably be

foreseen that the person in fact injured might be so injured, then at the time of the injury a relationship giving rise to a duty exists.” [359/60]

While the matter of the timing of the injury will turn out to be crucial to the decision in *Watt*, the judges noted that, in most cases, the timing of the injury is not an issue. “In the common case where the act or neglect of the defendant and the injury to the plaintiff are for all practical purposes contemporaneous, the duty attaches to the defendant and is breached when the act or neglect occurs.” Precisely—this is the normal situation in tort.

But where the injury does not occur contemporaneously with the act or neglect, the relationship will not necessarily crystallize so as to create a duty at the time of the act or neglect. Where the injury to the plaintiff occurs only subsequently to the time of the act or neglect in circumstances where the plaintiff is not defined at that time, as for example where he is only one of a class, the relationship and the duty to arise therefrom may be said to be contingent or potential but capable of ripening into a relationship imposing a duty when the plaintiff becomes defined.” [360]

I have been suggesting that the temporal separation of the occurrence of the injury from the act of negligence is a fiction generated by the unwillingness of the law to recognize the legal subjectivity of the child *in utero*. However, for the sake of argument, let us assume that it makes sense to accept the possibility of such a separation. What then? The judges would appear to have had in mind the foundational case for the modern tort of negligence, *Donoghue v. Stevenson*,¹⁹ in which at the time of the negligent act, namely the inclusion of the snail in the bottle,²⁰ there was no actual person, and indeed, there might never be any actual person, who could be affected by the negligent act. Citing the words of Lord Wright in *Grant v. Australian*

¹⁹ *Donoghue v. Stevenson*, 562.

²⁰ Given the foundational character of this case for the tort of negligence, it is amusing to note that MacKinnon L.J. remarked “I detest that snail...When the law had been settled by the House of Lords, the case went back to Edinburgh to be tried on the facts. And at that trial it was found that there never was a snail in the bottle at all! That intruding gastropod was as much a legal fiction as the Casual Ejector.” MacKinnon L.J., *The Statute Book* (Holdsworth Club Presidential Address, 1942), 2.

*Knitting Mill Ltd*²¹ to the effect that “the duty cannot at the time of manufacture be other than potential or contingent, and only can become vested by the fact of actual use by a particular person” the judges found a similar potential relationship “capable of imposing a duty on the defendant in relation to the child if and when born. On the birth the relationship crystallized and out of it arose a duty on the defendant in relation to the child.” [360] Assuming that the defendant is causally responsible for the child’s injuries (which assumption was made for the purpose of the preliminary determination of points of law) then

as the child could not *in the very nature of things* acquire rights correlative to a duty until it became by birth a living person, and as it was not until then that it could sustain injuries as a living person, it was, we think, at that stage that the duty arising out of the relationship was attached to the defendant, and it was at that stage that the defendant was, on the assumption that his act or omission in the driving of the car constituted a failure to take reasonable care, in breach of the duty to take reasonable care to avoid injury to the child. On this view the fact that damage was done to the embryo or foetus before birth, if such was sought to be established, was not an independent element in the plaintiff’s cause of action, but merely an evidentiary fact relevant to the issue of causation. [360/61 Emphasis added]

Note in this passage the phrase “in the very nature of things”. If the nature of things here referred to is reality *per se* rather than some legal interpretation of that reality, then this claim is, with respect, nonsense. The foetus is physically injured at the time of the negligent act. It may not be legally recognised as having suffered damage at that time, having to wait until it is born for that recognition but that, as I have been suggesting, is precisely *not* in the nature of things—it is a legal fiction.

Does this case match *Donoghue v. Stevenson* in the relevant respects? I believe not. In a Donoghue-type case, a negligent act takes place at time t. It is possible that no one may ever be deleteriously affected by this act; for example, the notorious snail-bearing bottle could have been lost or broken and Mrs Donoghue might have had her

²¹ *Grant v. Australian Knitting Mill Ltd* [1936] AC 85, 104.

refreshments from a non-snail-infested bottle without damage to her nerves and the world might have had to wait for who knows how long before the tort of negligence was unleashed upon it. However, if someone is injured then the injury will take place at time t+1. The bottled snail is, as it were, an accident waiting to happen but it doesn't actually happen until Mrs Donoghue opens the bottle and suffers shock. I believe that the situation in the instant case is not caught by the Donoghue-schema. The car accident is not an accident waiting to happen; it has already happened. The injury is not something that may or may not take place at time t+1; it has already taken place at the time of the accident. In *Donoghue*, the victim was Mrs Donoghue—but it could have been anybody; in the instant case, the only victim there could be, apart from the mother, was the infant plaintiff.

Why the intellectual contortions in this case? The judges are, I suggest, reasonably clear that the child has been wrongfully injured and that it would be unjust that she should not be able to recover damages. But they are also firmly in the grip of the born alive rule. The telling phrase in their judgement is “the child could not *in the very nature of things* acquire rights correlative to a duty *until it became by birth a living person*, and as it was not until then that it could sustain injuries as a living person” [emphasis added] Of course, on this assumption, it is understandable that the judges were driven to rely on a dubious application of the *Donoghue v. Stevenson* principle.

Gillard, J. agreed with the conclusions reached by Winneke C.J. and Pape. J. but for different reasons. Considering the arguments of counsel, he made a number of preliminary points: first, the claim is being brought by a person *in esse* and not by an unborn child; second, per Lord Simonds in the *Wagon Mound*²² he noted that there could be no liability until the damage is done, and that it is not the act but the

²² *Wagon Mound* [1961] AC 388.

consequences of the act on which tortious liability is founded; third, “although in most cases, it may be expected that the *injuria* [the act] and *damnum* [the consequences] would be contemporaneous, the law of negligence, as developed, does recognize that in many cases there may be a period of time between the *injuria* and the *damnum*”. [362-363] Having considered a number of cases²³ in the light of these points, Gillard J. then turns [at 374] to a consideration of the arguments of the defendant. Noting that the kernel of the defendant’s arguments concern the claim that, before birth, the unborn child is not a juridical person and is, therefore, owed no duty of care, he laid out two possible answers. The first is the recapitulation of the first of his three points [above] to the effect that “The cause of action for negligence only comes into existence when the damage is suffered. The infant plaintiff at that period on the facts assumed is...a *persona juridica*, with capacity to institute proceedings....The injury whilst *en ventre sa mere* was but an evidentiary incident in the causation of damage suffered at birth by the fault of the defendant.” [374-375] This is basically in line with the thinking of Winneke C.J. and Pape J. However, Gillard J. ‘s second answer to the defendant’s central argument, takes us in a significantly different direction.

If it should be suggested that this view on foreseeability would only go to the question of remoteness of damage but not culpability for the child’s injury on birth, cause either by pelvic injury to the mother, or direct injury to the zygote...or to the foetus (whether actually viable or not), then as a second answer *there is probably at the time of the defendant’s fault also damnum contemporaneous with the injuria to a subject which is sufficiently protected by the rules of the common law*, so that when it reaches the capacity of a person in being by subsequent birth to institute legal proceedings, it is entitled to bring those proceedings for its own benefit in relation to the damage suffered.” [375 Emphasis added.]

²³ In particular, *Hay (or Bourhill) v. Young* [1943] AC 92; *Chapman v. Hearse* [1962] ALR 379; and *Dorset Yacht Co. Ltd. v. Home Office* [1970] AC 1004.

Citing various civil cases²⁴ that bear upon the interests of unborn children, usually in relation to the devolution of property, Gillard J. goes on to say, “From these cases it must be accepted that there is a rule of law which recognizes that an unborn child may possess rights. This implies there are correlative duties imposed on others in favour of the unborn child.” [376] However, property law is one thing; tort another. Gillard J. is aware of this and still makes the point that “*I can find no logical reason for rejecting the notion that the common law would protect a child en ventre sa mere against careless acts causing him or her injury. As its property, real or personal, is protected, so should its physical substance be similarly protected...*” [376 Emphasis added.] Taken together with the previous admission that there probably was *damnum* at the time of the defendant’s fault this is a very significant admission. Gillard J.’s advertence to the beneficial rule in property law cases involving posthumous children has (or should have) the effect of making that civil law fiction somewhat less fictitious and loosening the grip of the Born Alive Rule on the minds of Common Lawyers. Gillard J. continues: “

[T]here appears to be no valid reason, in principle or otherwise, why this concept of protecting the unborn child should not be introduced to the developing law of the independent tort of negligence....biologically a person’s well-being can be influenced, both universally and beneficially, by its pre-natal history and experience....It is obvious that the “person” who is conceived and develops in the mother’s body is biologically the same “person” who survives birth, lives and finally dies.” [377]

This clear recognition of the ontological identity of foetus and child is to be welcomed as a concession, however late, to reality. Also to be welcomed is the suggestion that it is not unreasonable to develop the tort of negligence to protect the unborn child.

²⁴ Including *Wallis v. Hodson* (1724) 2 Atk 117; 26 ER 472; *Villar v. Gilbey* [1907] AC 139.

THE ENTRENCHMENT OF THE BORN ALIVE RULE
IN ENGLISH LAW AFTER *WATT*

Paternal defence of the unborn child

In *Paton v. British Pregnancy Advisory Service Trustees and Another*¹ a married woman became pregnant and obtained a medical certificate entitling her to a lawful abortion within the compass of the 1967 Abortion Act. Her husband [the plaintiff] applied for an injunction to restrain the British Advisory Service Trustees and his wife from “causing or permitting an abortion to be carried out upon the wife without the husband’s consent”. [276] The court held that “since an unborn child had no rights of its own and a father had no rights at common law over his illegitimate child” the husband’s right to apply for the injunction had to be on the basis that he had the status of husband. The court indicated clearly, however, that the courts had never exercised jurisdiction to control personal relationships in marriage and, in the absence of the right to be consulted under the Abortion Act 1967, “the husband had no rights enforceable in law or in equity to prevent his wife from having an abortion or to stop the doctors carrying out the abortion which was lawful under the Act of 1967.” [276-277] It was eventually accepted by all the parties that the provisions of the Abortion Act 1967 had been met, the husband continuing to maintain that he had a right to

¹ *Paton v. British Pregnancy Advisory Service Trustees* [1979] Q.B. 276.

have a say in the destiny of the child he had conceived. In the course of his judgement, Sir George Baker P. said

The foetus cannot, in English law, in my view, have a right of its own at least until it is born and has a separate existence from its mother. That permeates the whole of the civil law of this country (I except the criminal law, which is now irrelevant) and is, indeed the basis of the decision in those countries where law is founded on the common law, that is to say, in America, Canada, Australia and, I have no doubt, in others.” [279]

Sir George went on to consider the question of whether a child could, after birth, have a right of action in respect of pre-natal injuries and said “it was universally accepted, and has since been accepted, that in order to have a right the foetus must be born and be a child....there can be no doubt, in my view, that in England and Wales the foetus has no right of action, no right at all, until birth.” [279] Sir George also considered the matter of the so-called succession cases, and remarked that here there is no difference; “From conception the child may have succession rights by what has been called a ‘fictional construction’ but the child must be subsequently born alive.”² This is as clear a modern re-statement of the Born Alive rule as one could wish.

The case moved on to the European Court of Human Rights as *Paton v. United Kingdom*.³ Here, the applicant argued, *inter alia*, that English law violated articles 2 and/or 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) in that it “allows abortion at all, and/or that it denies the foetus any legal rights”. [410] The relevant articles of the Convention are:

Article 2 Right to Life: 1. Everyone’s right to life shall be protected by law. No one shall be deprived of his life save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law....
Article 5 Right to liberty and security: 2. Everyone has the right to liberty and security of person.

² The case reference is to *Elliott v. Lord Joicey* [1935] A.C. 209.

³ *Paton v. United Kingdom* European Court of Human Rights (1980) 3 EHRR 408.

Responding to the applicant's claims, the following was noted: "The question whether the unborn child is covered by Article 2 was expressly left open in [*Brüggemann and Scheuten v. Germany*⁴] and has not yet been considered by the Commission in any other case. It has, however, been the subject of proceedings before the Constitutional Court of Austria..." which court found that "Article 2(1), first sentence, interpreted in the context of Article 2, paras. (1) and (2), does not cover the unborn life."⁵ [412] In its reflections, the European Commission of Human Rights notes that the term 'everyone' (*toute personne*) is not defined in the Convention. [413] In most instances where 'everyone' occurs, it can be applied only postnatally, though its prenatal application, e.g. under Article 6(1), cannot be entirely excluded. [413] The term 'life' (*vie*) is similarly undefined in the Convention. [413]

The Commission considered three possible interpretations of Article 2: the first, in which it is held as not being applicable to the foetus at all; the second, where it recognises a right to life of the foetus but with limitations; and the third, where it recognises the foetus's absolute right to life. [415] Could the foetus be regarded as having an absolute right to life under Article 2? The Commission thought not. "The 'life' of the foetus is intimately connected with, and cannot be regarded in isolation from, the life of the pregnant woman." [415] If the foetus's right to life were absolute then "an abortion would have to be considered as prohibited even where the continuance of the pregnancy would involve a serious risk to the life of the pregnant woman. This would mean that the 'unborn life' of the foetus would be regarded as being of a higher value than the life of the pregnant woman." [415] Such an interpretation would, according to the Commission "be contrary to the object and purpose of the Convention." [415] Is the foetus not then covered by Article 2 at all, or

⁴ *Brüggemann and Scheuten v. Germany* (1978) 10 D. & R. 100 (App. No. 6959/75), 3 EHRR 244

has it some more limited, circumscribed right under that article? Unfortunately, the Commission decided that in the context of the immediate case, it was not called upon to decide between 'no right at all' and some 'circumscribed right'. [416] In the end, the Commission rejected Mr Paton's contention that art. 8 of the European Convention of Human Rights (the right to respect for family life) gave him a right, as the father of the child, to the injunction, which he sought.⁶

In *C. v. S.*⁷ the putative father of an 18-21 week old foetus applied for an injunction, on his own behalf and on that of the unborn child, to restrain the mother of the child and the Health Authority from going ahead with an abortion in which the conditions of the Abortion Act, 1967 were fulfilled. He argued that the foetus at this stage of development was capable of being born alive and so fell within the provisions of s. 1(1) of the Infant Life (Preservation) Act 1929, preserved (as it then was) in s. 5(1) of the 1967 Act. The whole point of the plaintiff's argument has been rendered moot by subsequent developments in statute law but it is still worthwhile to see the judges wrestle with the legal and conceptual issues involved.⁸ Accepting medical evidence to the effect that the foetus if born at this stage of development

⁵ Decision of 11 October 1974, Erk. Sig. (Collection of Decisions) No. 7400, [1975] Europäische Grundrechtezeitschrift 74.

⁶ The Canadian Supreme Court, in 1989, reached effectively the same decision on the same question. "No court in Quebec or elsewhere has ever accepted the argument that a father's interest in a foetus which he helped create could support a right to veto a woman's decisions in respect of the foetus she is carrying.... There is nothing in the Civil Code or any legislation in Quebec which could be used to support the argument." *Tremblay v Daigle* (1989) 62 DLR (4th) 634.

⁷ *C. v S. (Foetus: Unmarried Father)* [1988] Q.B. 135; [1987] 2 W.L.R. 1108; [1987] 1 All E.R. 1230.

⁸ S. 1(1) of the Infant Life (Preservation) Act 1929 reads: "Subject as hereinafter in this subsection provided, any person who, with intent to destroy the life of a child capable of being born alive, by any wilful act causes a child to die before it has an existence independent of its mother, shall be guilty of felony, to wit, of child destruction, and shall be liable on conviction thereof on indictment to penal servitude for life: provided that no person shall be found guilty of an offence under this section unless it is proved that the act which caused the death of the child was not done in good faith for the purpose only of preserving the life of the mother." The original section 5(1) of the Abortion Act 1967 which reads: "Nothing in this Act shall affect the provisions of the Infant Life (Preservation) Act 1929 (protecting the life of the viable foetus" was substituted by the Human Fertilisation and Embryology Act 1990, s. 37(4) and now reads: "No offence under the Infant Life(Preservation) Act shall be committed by a registered medical practitioner who terminates a pregnancy in accordance with the provisions of this Act." It is clear that s. 1(1) of the Infant Life (Preservation) Act is no longer preserved in s. 5(1) of the Abortion Act 1967.

would be unable to breathe, either naturally or artificially, the judge at first instance, having previously refused to grant the second plaintiff standing, dismissed the first plaintiff's application for an injunction. The appeal was dismissed, the court holding that, on the available medical evidence, a foetus between 18-21 weeks was not a 'child capable of being born alive' within the meaning of the 1929 Act.

The issue really came down to whether the expression 'capable of being born alive' meant either (a) capable of being alive when born, or (b) viable. The affidavits from the medical practitioners were important. Mr Norris, emeritus consultant gynaecologist, stated in his first affidavit that "an unborn child of 18 weeks' gestation, were it to be delivered by hysterectomy, would be 'live-born'" [142] Professor John Richard Newton responded to Mr Norris's affidavit with one of his own, in which he said that "...I believe it confusing in the circumstances to use the words 'live-born' for a foetus of 18 weeks' gestation." [142] He went on to state "It is my conclusion, therefore, that a foetus of anything below 23 weeks cannot survive independently of its mother and has therefore no viability." [143] Mr Norris, in his reply, distinguished between being born alive—which he took to mean 'exhibiting real and discernible signs of life'—and being viable. [143] Counsel for the plaintiff, Gerard Wright Q.C., argued that "being born alive" is "a much more restrictive concept than viability, for that embraces not only being born alive but surviving, for however short a time, thereafter". [145] However, Heilbron, J. remarked that "Mr Wright's case...depends...on the extraordinary and dogmatic assertion with regard to the ability to be born alive of every 18-week foetus, without any personal knowledge or examination of any of these countless unborn children; partly on his interpretation of "being born alive" and partly on the view adumbrated by Mr Wright that, if any doctor was intending to perform an abortion on an 18-week foetus, it would be

perverse of him or her to assert other than that the foetus was capable of being born alive.” [146]

The case went to the Court of Appeal. The applicant argued that Heilbron, J. was wrong in law in that “she (1) failed to appreciate that the interpretation of s. 1(1) of the Infant Life (Preservation) Act was a matter of law and was therefore a judicial not a medical exercise...”; failed to accord *locus standi* to the plaintiff as father of the unborn child; (3) “failed to accept that English law recognised rights in the unborn child; (4) applied the criminal burden of proof to the application for a quia timet injunction.” [149] Counsel for the plaintiff again argued that the expression ‘born alive’ was unambiguous “and does not connote viability...or capability to survive.” [149] They pointed out that the common law does not demand viability in the victims of murder, and that, furthermore, the Births and Deaths Registration Act 1926, which was enacted just three years before the Infant Life (Preservation) Act, makes registrable as a live birth the birth of child that breathes or shows any other sign of life.⁹ [see 149 passim.]

Judicial Interpretation of the 1929 and 1967 Acts

In a letter of 21 February 1980 sent to regional and area medical offices and regional, area and district nursing officers, the Department of Health and Social Services purported to explain the law of abortion in relation to termination of pregnancy by means of medical induction. According to the Department “termination by medical induction using the extra-amniotic method could properly be said to be termination by a registered medical practitioner provided it was decided on and initiated by him and provided he remained throughout responsible for its overall conduct and control

in the sense that acts needed to bring it to its conclusion were done by appropriately skilled staff acting on his specific instructions, but not necessarily in his presence.”

[800] The Royal College of Nursing wasn’t persuaded of the validity of this interpretation of the Abortion Act 1967 and sought a declaration that the circular was wrong in law. At first instance¹⁰ Woolf J. refused the declaration. This was reversed by the Court of Appeal in a unanimous decision.¹¹ The Department appealed against the Court of Appeal’s decision and it, in turn, was reversed by the House of Lords on a split decision.¹²

In his judgement in the Court of Appeal, Lord Denning, M.R. noted that the unborn child had been “protected by the criminal law almost to the same extent as a new-born baby. If anyone terminated the pregnancy—and thus destroyed the unborn child—he or she was guilty of a felony and was liable to be kept in penal servitude for life...unless it was done to save the life of the mother.” [802] This approach to the matter was, as Lord Denning noted, “revolutionised by the Abortion Act 1967”. In passing, he also noted “I can quite understand that many nurses dislike having anything to do with these abortions. It is a soul-destroying task. The nurses are young women who are dedicated by their profession and training to do all they can to preserve life. Yet here they are called upon to destroy it.”[804] In the context of the point at issue, Lord Denning noted that the rejection by the Royal College of Nursing of the advice contained in the Department’s circular would involve the doctor in great practical difficulties but while this might be so he did not think it warranted him in

⁹ For a short contemporary review of this case, see R. J. Cooper, “Child Destruction—Capable of Being Born Alive,” *Journal of Criminal Law*, Vol. 51 No 3 1987, 263.

¹⁰ *Royal College of Nursing of the United Kingdom v Department of Health and Social Security*, [1980] Crim. L.R. 714; (1980) 124 S.J. 615.

¹¹ *Royal College of Nursing of the United Kingdom v Department of Health and Social Security*, [1981] Crim. L.R. 169; (1980) 11 Fam. Law 113..

¹² *Royal College of Nursing of the United Kingdom v Department of Health and Social Security*, [1981] A.C. 800; [1981] 2 W.L.R. 279; [1981] 1 All E.R. 545.

departing from the words of the statute:” I think the Royal College are quite right. If the Department of Health want the nurses to terminate a pregnancy, the Minister should go to Parliament and get the statute altered.” [806]

Brightman L.J. substantially agreed with Lord Denning, holding that “it would be a misuse of language to describe such a termination of a pregnancy as done ‘by’ a registered medical practitioner....The true analysis is that the doctor has provided the nurse with the means to terminate the pregnancy, not that the doctor has terminated the pregnancy.” [810]

Sir George Baker found himself in agreement with his brothers on the bench: “It is not for judges ‘to read words into an Act of Parliament unless clear reason for it is to be found within the four corners of the Act itself,’ per Lord Loreburn L.C.....Nor is a judge entitled to read an Act differently from what it says simply because he thinks Parliament would have so provided had the situation been envisaged at that time.” [813]

The decision in the Court of Appeal was unanimous; not so in the House of Lords. Before their Lordships, the Solicitor-General and others argued the Department’s case. They contended that the provisions of the 1967 Act required the process of pregnancy termination to be “initiated and supervised” by a doctor. [815] The wording of the various provisions indicated, according to the Solicitor-General and his colleagues, that “a narrow or restrictive meaning should not be put on the words of the Act.” [815] Disputing the findings of the Court of Appeal, they claimed that “It does not matter who does what so long as the direction and supervision is by the doctor and what is done is according to normal recognised medical practice.” [816]

Counsel for the Royal College of Nursing basically adopted the reasoning of the judges of the Court of Appeal. They noted, apparently without any sense of irony, that

the 1967 Abortion Act is “unique because it is the only one in which the taking of life is made permissible” [817] and that the 1967 Act “narrows the conditions for abortion, though it widens the circumstances. There is no getting around section 5(2). Moreover by section 5 (1) it is expressly made subject to the Infant Life (Preservation) Act 1929, which is concerned with preserving the life of a foetus capable of being born alive.” [818] Things have moved on since then and now s.5(1) of the Abortion Act 1967 has been substituted by sections of the Human Fertilisation and Embryology Act 1990, so that s.5(1) now reads “No offence under the Infant Life (Preservation) Act 1929 shall be committed by a registered medical practitioner who terminates a pregnancy in accordance with the provision of this Act” which has, I submit, the effect of reversing the relationship of subordination between the 1929 and 1967 Acts.¹³ It has been noted that as originally drafted “the 1967 Act did not provide a defence to the 1929 Act (s 5(1)). As a result, it was the 1929 Act which set the upper time limit for abortion in England and Wales....It will be recalled that, until 1991, the Abortion Act itself contained no time limits.”¹⁴

Delivering the first opinion for the House of Lords, Lord Wilberforce found himself in basic agreement with the judgement of the Court of Appeal. Lord Edmund-Davies found himself in agreement with his colleague Lord Wilberforce and the Court of Appeal.

[D]espite the claims of the Solicitor-General that he sought simply to give the statutory words ‘their plain and ordinary meaning,’ he substantially departed from that approach by submitting that they should be read as meaning ‘terminated by treatment for the termination of pregnancy carried out by a registered medical practitioner in accordance with recognised medical practice.’ My Lords, this is redrafting with a vengeance.” [831]

¹³ “During the passage of the Human Fertilisation and Embryology Bill in 1990...[a] series of complex and alternative amendments to the 1967 Act were tabled proposing changes in both the time limits and the grounds for abortion....Ironically, although the pressure for reform was from those who wished to see limitations introduced into the 1967 Act, [the amendments], in fact, has the effect of significantly liberalising the law.” Kennedy & Grubb, 1419.

¹⁴ Kennedy & Grubb, 1428.

Lord Diplock, on the other hand, adopted in effect the argument of the Solicitor-General: “In my opinion in the context of the Act, when it says ‘when a pregnancy is terminated by a registered medical practitioner’ what it requires is that a registered medical practitioner...should accept responsibility for all stages of the treatment for the termination of the pregnancy.” [828]

Lord Keith of Kinkel appears to be moved explicitly by policy considerations and purposive statutory interpretation, holding that the interpretation of the Abortion Act 1967 by the Department circular “appears to me to be fully in accordance with that part of the policy and purpose of the Act which was directed to securing that socially acceptable abortions should be carried out under the safest possible conditions.” [835]

The Foetus—a ward of court?

In *In re F. (in utero)*¹⁵ a local authority was concerned that a mentally disturbed, nomadic woman, who was pregnant would not take care of or provide appropriate medical attention for her child at and after birth. They made an *ex parte* application to have the foetus made a ward of court. Hollings, J. refused the application holding that the court had no wardship jurisdiction over an unborn child. The case went on appeal to the Court of Appeal which unanimously affirmed Hollings, J.’s decision. The Court of Appeal, denying that an unborn child had any legal rights, held that “since a foetus at whatever stage of its development had no existence independent of its mother, the court could not exercise the rights, powers and duties of a parent over the foetus without controlling the mother’s actions.” [123]

At first instance, Hollings, J. was satisfied that neither *Paton v. BPAS* nor *C. v. S.* had any direct bearing on the issue in contention so that no precedent could be

derived from either for use in the instant case. [128] Adverting to the “principle of paramountcy” embodied in the Children Act, 1975 Hollings, J. claimed that

It is this principle which I think underlines and illustrates why it must be right that, as the law and practice at present stands, wardship can only apply to a living child. For it to apply to a child still within the body of the child’s mother, very serious considerations must arise with regard to the welfare of the mother....one can well imagine that there would be a repugnance on the part of a right thinking person in certain instances to think of applying the principle of paramountcy in favour of the child’s welfare at the expense of the welfare and interests of the mother.” [131]

He asked two questions: Does the court have jurisdiction? And if the Court has jurisdiction, how is that jurisdiction to be exercised? In the context of the first question, because of the possible conflict between the interests between a pregnant woman and her unborn child, Hollings, J. believed such a jurisdiction, if there were one, should not be exercised. He concluded that there is, and should be, no such jurisdiction. [131]

Appealing against the decision, Mr Brian Jubb, for the local authority, made the point that while there is no provision for making an unborn child a ward of court, nonetheless, there was no procedural reason to prevent an unborn child becoming a ward of court. Referring to both *Paton v. BPAS* and to *C. v. S.*, he noted that in these cases there was *lis*, whereas in wardship proceedings there was no *lis*, a wardship jurisdiction being benevolent in orientation. Mr Jubb, arguing that the wardship jurisdiction should be extended only to viable foetuses,¹⁶ contended that there was nothing wrong in restraining a mother in the interests of the child and that “Nothing in any of the Acts to which the court has been referred denies to an unborn foetus of 28 weeks gestation the right to be protected under the wardship jurisdiction.” [134]

¹⁵ *F (In Utero), Re* [1988] 2 All E.R. 193.

¹⁶ May, L.J. in the Court of Appeal stated that if it were held that the courts had the appropriate jurisdiction, he doubted if it could be limited in law or in practice to an unborn child of 28 weeks or more.

In the Court of Appeal, May, L.J. held that the only issue in the appeal was whether or not the courts had the power to make an unborn child a ward of court. [135] Accepting that there was no *lis* between the parties he nonetheless pointed out “Until the child is actually born there must necessarily be an inherent incompatibility between any projected exercise of wardship jurisdiction and the rights and welfare of the mother.” [135/136] He concluded that

Even though this is a case in which, on its facts, I would exercise the jurisdiction if I had it, in the absence of authority I am driven to the conclusion that the court does not have the jurisdiction contended for. I respectfully agree with Hollings J. in this case that to accept such jurisdiction and yet to apply the principle that it is the interest of the child which is to be predominant is bound to create conflict between the existing legal interests of the mother and those of the unborn child....Next, I think that there would be insuperable difficulties if one sought to enforce any order in respect of an unborn child against its mother, if that mother failed to comply with the order. I cannot contemplate the court ordering that this should be done by force, nor indeed is it possible to consider with any equanimity that the court should seek to enforce an order by committal. [138]

Moreover, he claimed that the Supreme Court Act 1981 implies that only minors may become wards of court and reading this in the light of s. 1 of the Family Law Reform Act 1969 would lead to the conclusion that only those who are born can be minors. While he had considerable sympathy with the position of the local authority, he believed that he was driven to the conclusion that “Hollings, J. was right and that the court had no jurisdiction to ward an unborn child.” [138]

In his judgement, Balcombe, L.J. pointed out that “there is no recorded instance of the courts having assumed jurisdiction in wardship over an unborn child” and, with a nod of approval towards *Paton v. BPAS* and *C. v. S.*, he went on to say that “Indeed, the whole trend of recent authority is to the contrary effect.” [140] He does, however, note that the decisions in *Paton v. BPAS* and *C. v. S.* relate directly only to the legal rights of the foetus and are not necessarily decisive in providing an answer to the question of whether or not the court has the power to protect a foetus by making it a

ward of court. Balcombe considered the opposing positions on this question as they were discussed in the periodical literature but concluded, “there is no jurisdiction to make an unborn child a ward of court” principally because of the infringements of the mother’s liberty that would necessarily follow. [143] He went on: “If the law is to be extended in this manner, so as to impose control over the mother of an unborn child where such control may be necessary for the benefit of that child then under our system of Parliamentary democracy it is for Parliament to decide whether such controls can be imposed and, if so, subject to what limitations or conditions....it is not for the judiciary to extend the law.” [144] Summarising the trend of English law up to 2000, Kennedy & Grubb state “The courts will not force a competent pregnant woman to undergo medical treatment or other interventions for the benefit of her unborn child.”¹⁷

In a recent Irish case a woman who was pregnant and HIV positive refused to undergo treatment that would have had the effect of reducing the risk of transmitting the HIV virus to her unborn child. The High Court desired her to facilitate such treatment, the President of the High Court, Finnegan J., advising her that if she refused to give birth in hospital, that he would have to make serious orders affecting her bodily integrity.¹⁸ The report gives no indication of what such serious orders might be—forced medication, incarceration, 24-hour supervision?—so we can only speculate. However, as we shall see below, the approach of the U.S. courts in recent years has been very different from that just expressed to be the status quo in English law, generally tending towards a more interventionist position.

¹⁷ Kennedy & Grubb, 1505.

¹⁸ Reported in *The Irish Times*, 20 July 2002.

R v. Tait (England, 1990); and R. v. Shephard (England, 1919) revisited

A criminal case of recent vintage provided an opportunity for the courts to revisit the issues raised in *R. v. Shephard*. In *R. v. Tait* A man threatened a pregnant woman that if she informed the police he would kill her baby.¹⁹ Charged with making a threat to kill, contrary to s. 16 of the Offences Against the Person Act, 1861, the judge at first instance rejected the submission of the defendant's counsel that since the unborn child of five month's gestation was not legally a person the count should be quashed. An appeal was made and allowed. It was held that the threat to kill the baby could be either a threat to cause the mother to have a miscarriage or a threat to kill the child when born. Since, however, a foetus in utero was not a person distinct from its mother, a threat to kill it could not be a threat to kill a third person within the meaning of s. 16 of the Offences Against the Person Act, 1861.

Counsel for the appellant argued that the present case was distinguishable from *R. v. Shephard*. In that case, the charge was one of soliciting to murder an unborn child as soon as it should be born. He argued further "It was never an offence at common law to kill a child in the womb, until the Infant Life (Preservation) Act 1929." [292] Counsel for the Crown argued, "An unborn child generally would be considered as one who could die or be killed before birth. A 'person' in section 16 should be interpreted in the same sense. Sections 58 and 59, the anti-abortion provisions of the Act of 1861, recognised that an unborn child deserved some protection." [292]

In his judgement, Mustill, L.J. considered, among other things, whether a threat to bring about the miscarriage of a foetus could be an offence under s. 16 of the Offences Against The Person Act, 1861. He began by putting to one side the relevance of such cases as *In re F. (in utero)* and *C. v. S.*, saying "although these

¹⁹ *R. v. Tait* [1990] 1 QB 290.

cases, and those to which the judgments there delivered refer, are very important when ascertaining the status of the foetus in civil and family law, we do not regard them as a safe basis for reaching a conclusion as to the meaning of the Act of 1861, either in its original form or as amended in more recent times.” [297-298] He was similarly dismissive of the relevance of *McCluskey v H. M. Advocate*,²⁰ saying that although it

appears at first sight more promising, since it turns on the meaning of ‘another person,’ it appears on examination that it did no more than apply by analogy the old and strange rule of English law that although it is not murder or manslaughter to cause a foetus to die in utero, there is an offence if the child suffers pre-natal injury to which it succumbs after being born alive. It seems therefore that the point must be decided now for the first time.” [298]

Mustill, L.J. took up the assertion by counsel for the appellant to the effect that it was never an offence at common law to kill a child in the womb, saying “It does seem that although the killing of an unborn child was not murder, it may well have in former times been a misprision at common law: 3 Co. Inst. 50. It does however also appear that by 1861 the offence may have been obsolete...” [299] He commented, with some justification, on the confusion of the criminal law in relation to the position of the foetus and the new-born infant and concluded, somewhat reluctantly it would appear, that “We feel constrained to say that the foetus in utero was not, in the ordinary sense, ‘another person,’ distinct from its mother, and that if the appellant’s threat meant what we now assume it to have meant, no offence is made out.,” adding that “we do not of course express any opinion on the complex legal issues not yet fully worked out, which concern the status of the unborn child in the community, and the obligation of the community and its members towards the unborn child. Nor do we enter into the debate about the respective rights...of the unborn child and the mother who carries it.” [300]

²⁰ *McCluskey v H. M. Advocate* 1989 S.L.T. 175.

He considered a series of possible objections to the Crown case, the gist of which was to the effect that there was no guarantee that the unborn child would ever be born alive, which is to say, no guarantee that there would ever be a third party in a position capable of being killed. He noted that all threats are contingent to some extent, not least as to the threatener having the means and the capacity to carry them out; however, the contingency expressing in this third objection appears more fundamental. “But what of a contingency which affects the question whether the third person will ever exist at all? If it is an offence to threaten the death of any live child born of an existing foetus, there is no reason why a threat addressed to a woman who is not pregnant at all to kill any child which she may have in the future should not also be an offence. Yet this seems to stretch the meaning of ‘third person’ altogether too far.” [300-301]

Mustill L. J. admits to some difficulty with *R. v. Shephard*. It appears to contemplate that “the criminality of an inducement to kill a child when born will, or at least may, depend upon whether or not the child is born alive. With respect, this is hard to accept, for the offence must be complete when the words or writings are uttered, and cannot await the happening of an event which may not even have taken place by the time of trial.” [301]

Status of the Unborn Child in Rance (England 1991), Burton (England, 1991) and De Martell (England 1992)

In *Rance v. Mid-Downs Health Authority*²¹ a child was born with severe spina bifida and hydrocephalus. When the child had been born, the parents of the child discovered that an ultrasound scan had shown that the unborn child exhibited possible spinal

²¹ *Rance v Mid-Downs HA* [1991] Q.B. 587; [1991] 2 W.L.R. 159; [1991] 1 All E.R. 801.

abnormality. They alleged that the defendants (a Health Authority and a doctor) were negligent in failing to diagnose the child's handicap at approximately 26 weeks gestation. Had the Health Authority and the doctor not been negligent the mother of the child would have obtained an abortion under the provisions of the Abortion Act 1967. In the course of their defence, the defendants claimed that, other things apart, the termination of the pregnancy at the time of the scan would have been unlawful under s. 1 of the Infant Life (Preservation) Act 1929.²²

Most of Brooke, J's judgement concerned itself with this last point. However, he also took the opportunity to provide an historical review of the mischief that the 1929 Act was designed to remedy. He cited Blackmun J.'s summary of the position of the English common law (from the case of *Roe v. Wade*) in which Blackmun J. touched on medieval theories of animation, and the legal positions of Bracton, Coke and Blackstone. Brooke J. commented that "However that [the common law position] may be, since 1803 the law which governs the lawfulness of abortions in this country has been enacted by Parliament." He concluded from this that "At all material times between 1803 and 1929, therefore, it was an offence unlawfully to procure the miscarriage of a woman being with child, by any of the prescribed means, at any time during the pregnancy." [619] However, he noted that English law has consistently made a distinction between the status of the unborn child and the status of the child born alive, presenting four nineteenth century cases to illustrate this point: *R. v. Poulton* (1832);²³ *R. v. Enoch* (1833);²⁴ *R. v. Brain* (1834);²⁵ and *R. v. Handley*

²² "By the time the judgment of Brooke, J. in *Rance v. Mid-Downs*... had been reported, the central point that concerned him—the meaning of the phrase 'a child capable of being born alive' in section 1 of the Infant Life (Preservation) Act 1929—had, as a result of the amendments to the Abortion Act 1967 made by section 37 of the Human Fertilisation and Embryology Act 1990, come to be of only marginal significance." P. R. Glazebrook, "Capable of Being, but No Right to Be, Born Alive?" *Cambridge Law Journal*, Vol. 50 No. 2 1991, 241.

²³ *R. v. Poulton* (1832) 5 C. & P. 329.

²⁴ *R. v. Enoch* (1833) 5 C. & P. 539.

²⁵ *R. v. Brain* (1834) 6 C. & P. 349.

(1874).²⁶ In *Poulton*, “there was evidence that the baby had breathed but insufficient evidence that the child had ever been fully born....Littledale J. directed the jury that they must be satisfied that the child had been born alive before they could convict and added: “With respect to the birth....it is not sufficient that the child respire in the progress of the birth.” [619] In *Enoch*, Parke J. adopted Littledale J’s ruling when he directed the jury that the child’s breathing before it was born was not sufficient to make its killing murder and that “there must be an independent circulation of the child.” [619] One year later, in *Brain*, Parke J. directed a jury that a child’s being wholly born was a sufficient criterion for its being alive; there was no necessity that it must breathe. And in *Handley*, Brett J. directed the jury that a child was to be considered as having been born alive if it existed as a live child without deriving that ability to live through or by the mother.

In *Burton v. Islington Health Authority*,²⁷ described as “the first and only case on the status of the foetus in English Common law,”²⁸ the mother of the plaintiff underwent a gynaecological operation as the result of which the plaintiff was born with a series of abnormalities. A claim resulted, upon which the defendant applied to strike out the statement of claim on the grounds that it disclosed no reasonable cause of action. Mr John O. Grace, counsel for the defendants, argued, “At common law the unborn child has no legal status because it has always been regarded as part of its mother. The embryo a fortiori has no legal status if, as in the present case, it has not reached that stage of gestation where it is viable or capable of bring born alive. There can be no duty of care to a legally non-existent being.”²⁹ [639] Counsel continued: “At common law a cause of action arises when the damage occurs, not when it is

²⁶ *R. v. Handley* (1874) 13 Cox C.C.79.

²⁷ *Burton. v. Islington Health Authority* [1991] 1 QB 638.

²⁸ Robert G. Lee and Derek Morgan, *Human Fertilisation & Embryology: Regulating the Reproductive Revolution* (London, 2001), 240.

discovered, and there is no reason why the birth of the plaintiff (which was not itself occasioned by the defendant) should convert a non-actionable injury into an actionable one.”³⁰ [639-640] He went on to note that the court in *Walker v. Great Northern Railway Co. of Ireland (1891)* denied the existence of a cause of action in such cases and that even though this case pre-dated *Donoghue v. Stevenson* it demonstrated the foetus’s lack of legal status. Furthermore, Counsel questioned the reasoning employed in *Watt v. Rama* saying that

To adopt the approach of *Watt v. Rama*, or any other approach which involves the use of a fiction, would be inconsistent with the approach that should be adopted in novel cases: the factual situation in the present case cannot be fitted into the traditional formula of duty, breach and damage, and recognition of the cause of action would be inconsistent with the incremental approach approved by the House of Lords in recent cases.³¹

In his judgement, Potts, J. noted that counsel for the defendants in the instant case adopted the arguments put forward by counsel for the defendants in *Watt v. Rama*, embodied in the following citation:

When an act or omission involving fault which might otherwise be regarded as founding an action occurs, there must, in order for such act of omission to be regarded as negligent, be then and there in existence some legal person to sue or be sued. There must then and there be in existence a legal person having a legal right and another legal person having at that very time a corresponding legal duty. Since the infant plaintiff was at the time of the accident en ventre sa mere she was not then a person or a human being in esse and in fact she had no separate existence apart from her mother. Accordingly, she was not a legal person to whom a duty of care could be owed.”³²

Noting that there was no English authority on the issue raised he stated, correctly, that the defendant’s argument turns on the question of the legal status of the unborn child. Adopting the words of Sir George Baker in *Paton*, he noted that the law is clear as to

²⁹ Reference was made to *Paton v. BPAS, In re F (in utero), C. v. S., and R. v. Tait* [1990] 1 QB 290.

³⁰ Reference was made to *Dorset Yacht Co. Ltd. v. Home Office* [1970] AC 1004, 1026E-1027D; *Dorset Yacht Co. Ltd. v. Home Office* [1970] AC 1004, 60A-F; *Caparo Industries Plc. v. Dickman* [1990] 2 AC 605; and *Murphy v. Brentwood District Council* [1991] 1 AC 398.

³¹ The reference is to *Caparo* and to *Murphy*.

³² 643; ref. to 355 in *Watt*.

its status: “The foetus cannot, in English law, in my view, have a right of its own at least until it is born and has a separate existence from its mother’.”³³

In *Watt* Winneke C.J. and Pape J. had noted that “What creates the difficulty is that such act or omission preceded and was, therefore, separated in point of time from the birth of the plaintiff in her injured condition”³⁴ but Potts J. is clear that “the fact that the negligent act which caused the injury was not contemporaneous with the injury itself is not a bar to recovery”. [646] What *Watt* did was to invent or discover the notion of a ‘contingent’ or ‘potential’ relationship, a relationship that was capable of ripening into the kind demanded by the requirement of normal tort law. To quote Winneke and Pape again: “These circumstances, accordingly, constituted a potential relationship capable of imposing a duty on the defendant in relation to the child if and when born. On the birth the relationship crystallised and out of it arose a duty on the defendant in relation to the child....On this view the fact that damage was done to the embryo or foetus before birth, if such was sought to be established, was not an independent element in the plaintiff’s cause of action, but merely an evidentiary fact relevant to the issue of causation.”³⁵ Potts J. adopted this reasoning, saying

The circumstance created a contingent or potential duty on the defendants which crystallised on birth of the injured child. The wrong to the child was then complete, she having been born alive physically damaged as a result of the defendants [sic] earlier neglect. On birth, the child acquired legal status and legal rights. Thus her cause of action in negligence was complete and accrued to her when she was, ‘a legal person who could sue or be sued,’ and when ‘she was a legal person having a legal right,’ to whom another ‘legal person’ could owe at that time a corresponding legal duty. Therefore I reject the defendant’s principle [sic] submission.” [649]

The case went to the Court of Appeal where it was taken together with an appeal from a preliminary question which had been put to, and answered, by Phillips J., in a

³³ 644; 279 in *Paton v. BPAS*. Sir George’s judgement was followed by Heilbron J. in *C. v. S.* [1988] 1 QB 135, 140-141, and approved by May L.J. in *In re F. (in utero)*.

³⁴ 646; 358 in *Watt*.

³⁵ 648; 360 in *Watt*.

similar case, *Burton v. Islington Health Authority; De Martell v. Merton and Sutton Health Authority*.³⁶ The question to be answered by Phillips J. amounted to the claim of counsel for the defendant Health Authority, Mr Harvey McGregor Q.C., that *B. v. Islington* was wrongly decided and should not be followed and that “The argument that the plaintiff’s injuries were suffered after his birth is a legal fiction.” Counsel for the plaintiff in *De Martell*, using the language of *Watt*, argued that “the health authority thus owes a contingent duty which crystallises on the birth of the injured child when the child acquires a legal status”. [207] Counsel for the health authority retorted in a manner that by now should be very familiar that “At common law a foetus has no legal existence. No duty of care can be owed to a legally non-existent being and, therefore, a person injured whilst in his mother’s womb has no remedy at common law”. [207]

Phillips J. delivered judgement on 10 May 1991. He noted that counsel for the defendants argued three points: “(1) *Walker v. Great Northern Railway Co. of Ireland*, 28 LR Ir. 69 correctly stated the position at English law up to 1976. (2) As the legislature has intervened in this field it is neither necessary nor appropriate for the judiciary to alter the position at common law. (3) The reasoning in *B. v. Islington Health Authority* [1991] 1 QB 638 is unsatisfactory in that it involves a legal fiction.” [209-10] In relation to the third point, Phillips J. asks himself the following questions: “(1) How can the defendant have owed the plaintiff a duty of care at a time when the law did not recognise the plaintiff’s existence? (2) How can the defendant be liable for causing injury to the plaintiff when, at the time that the injury was caused, the law did not recognise the plaintiff’s existence?” [213-214] He then recapitulated the reasoning of *Watt* in regard to the notion of a contingent or potential duty crystallising

³⁶ *Burton v Islington HA De Martell v Merton and Sutton HA (No.1)* Also known as: *B v Islington HA*

into an actual duty and said of it “The concept of the breach of a contingent or potential duty which crystallises into an actual duty after the act or neglect has occurred is not an easy one” [216] with which understated sentiment it is difficult to disagree.

The problem in a nutshell is this; when injured, the plaintiff was not a legal subject; when a legal subject, the plaintiff was not injured. The problem is caused by the plaintiff’s lack of continuity in respect of his legal subjectivity. This problem does not arise in *Donoghue v. Stevenson* cases because even where the plaintiff is not in existence at the time of the manufacture of the offending product, at the time when the product actually causes damage the injurious action and the sustaining of damage occur together. But that is of no help here because, once again, when the harm was caused, it was not caused to any legal subject; and when we had a legal subject, no harm was caused to it at that time. Winneke C.J. and Pape J. referring to the reasoning of Cannon J. in *Montreal Tramways v Léveillé*³⁷ noted that “He [Cannon J.] thought that in principle the plaintiff’s right to compensation came into existence only when she was born with the bodily disability from which she suffered. It was only after birth that she suffered the injury...”³⁸ In *Watt*, Gillard J. agreed that the moment the injury was sustained by the plaintiff was, or should be deemed to be, the moment of the plaintiff’s birth. Phillips J. cited a passage from Gillard J.’s judgement: “The cause of action for negligence only comes into existence when the damage is suffered. The infant plaintiff at that period on the facts assumed is, I repeat, a *persona juridica*, with capacity to institute proceedings and to whom a duty might be owed. The injury whilst *en ventre sa mere* was but an evidentiary incident in the causation

[1993] Q.B. 204; [1992] 3 W.L.R. 637; [1992] 3 All E.R. 833.

³⁷ *Montreal Tramway*, 357

³⁸ 218; 357 in *Montreal Tramways*.

of damage suffered at birth by the fault of the defendant.”³⁹ Phillips J. then adds the following extraordinary comment:

This reasoning Mr. McGregor attacks as involving a legal fiction. He contends that the injuries in *Watt v. Rama* [1972] V.R. 353 and in the present case (on the facts assumed) were caused not upon the birth of the plaintiff but prior to birth. The defects at birth were the sequelae of the prior injury. *Mr. McGregor is right. To say that the plaintiff suffered his injuries the moment after his birth rather than in the period leading up to his birth involves a legal fiction. But the fiction is that which denies the living creature which became the defendant a persona in the period prior to birth.*⁴⁰

Phillips J. is absolutely right, both about Mr McGregor being right and about what the ultimate fiction is here. There would be no problem if the child *in utero* were considered to be not just biologically continuous with the child that is subsequently born but continuous in the matter of legal subjectivity as well. Phillips J. has identified the lack of attribution of legal subjectivity to the child *in utero* as the central fiction here. One good fiction had led to another. As the result of not treating the child in the womb as a legal subject the courts have been forced, in order to see justice done, to pretend that the child suffers the injury when born, when the plain facts are that the child suffers the injury in the womb.

Having clearly perceived the root problem here Phillips J. unfortunately goes on to obscure the point at issue: “It is not open to the health authority to deny liability on the ground that the organism that they injured was not in law the plaintiff and yet to deny responsibility for the defects with which the plaintiff was born on the ground that they inflicted them before birth.” [219] With all due respect, I believe that this is precisely what the health authority can do. It is bizarre to go on to say, as Phillips J. does, that

In law and in logic no damage can have been caused to the plaintiff before the plaintiff existed. The damage was suffered by the plaintiff at the moment that,

³⁹ 219; 374-5 in *Watt*.

⁴⁰ 219 Emphasis added.

in law, the plaintiff achieved personality and inherited the damaged body for which the health authority (on the assumed facts) was responsible. The events prior to birth were mere links in the chain of causation between the health authority's assumed lack of skill and care and the consequential damage to the plaintiff. [219]

It is true that no damage can be suffered by X unless X exists, but it is also true that criminal injury or civil damage cannot magically spring into being in the absence of an agent. The metaphysics here are extremely dubious. Where was the plaintiff before he 'achieved personality'? How is it possible for a human being to 'inherit a body'? Phillips J. is here simply refusing to acknowledge what he had so clearly expressed just a few lines earlier, namely, that all this is a mere fiction contrived to avoid the unpalatable consequences of a yet more basic legal fiction, namely, the denial of legal subjectivity to the unborn child.

In my judgment the reasoning of the court in *Watt v. Rama*...adopted by Potts J. in *B. v. Islington Health Authority*...cannot be faulted. The latter decision does not effect any alteration to the English law of negligence as it was in 1976, or 1967 when the cause of action in that case and this arose. The lack of legal status of the unborn child poses a peculiar problem in the context of the law of negligence, but the resolution of that problem achieved by Potts J. is entirely consonant with the general principles of that law as developed by the highest English and Scottish authority, as Potts J. observed....[I]n a number of cases in England defendants have conceded a liability for the consequences of injury before birth....Not only in Victoria and Quebec, but in South Africa and in every American state liability has been established in negligence for the consequences of pre-natal injury—though not always on the basis of the same reasoning or principle. [220]

The Health Authorities in both *Burton v IHA* and *De Martell* appealed. The appeal went to the Court of Appeal where it was heard by Dillon, Balcombe and Leggatt L.JJ. The grounds of appeal from *Burton v IHA* were that "(1) the judge had erred in law in holding that the plaintiff had at common law a cause of action in negligence against the defendants arising out of physical injury suffered by her before her birth and whilst still an embryo of about six week's gestation en ventre sa mere and (2) the judge ought to have held that no cause of action was recognised at common law in

favour of a living plaintiff in respect of physical injury suffered antenatally.” [220]

The grounds of appeal from *De Martell* were that “(1) the judge misdirected himself in holding that the preliminary issue should be answered in the affirmative and (2) the defendants were not liable in negligence to the plaintiff for any injury, loss or damage suffered by him while a foetus and en ventre sa mere since he was born prior to the passing of the Congenital Disabilities (Civil Liability) Act 1976 and the common law did not recognise such a cause of action.” [221]

Counsel for the Islington Health Authority put it that “At common law a foetus has no legal existence and no rights...No duty can be owed to a legal non-entity.” They also argued that in the post-1945 USA cases “no detailed analysis of the tort of negligence was made and no clear or consistent principle is to be found.” Furthermore, they argued that while in *Watt* the Supreme Court of Victoria upheld an action for pre-natal injuries “the judges differed as to the underlying principle. In English law it is not possible to have damage followed by a duty of care. There has to be duty, breach and consequential loss in that order.” [221] They charged that “*Watt v. Rama* depended on the fiction that the damage is not caused until the baby is born and it was said that the duty of care arose at the moment of birth to be followed instantaneously by the breach of that duty and the damage” and that while the “Congenital Disabilities (Civil Liability) Act 1976...incorporates prudent restrictions on the right to sue for pre-natal injuries”⁴¹ it would appear that “There could be no such restriction on any common law right.” [222]

⁴¹ The Congenital Disabilities (Civil Liability) Act 1976 provides, inter alia, that the mother of the child is specifically exempt from liability to the child. “1(1) If a child is born as the result of such an occurrence before its birth as is mentioned in subsection (2) below, and a person (other than the child’s own mother) is under this section answerable to the child in respect of the occurrence, the child’s disabilities are to be regarded as damage resulting from the wrongful act of that person and actionable accordingly at the suit of the child.” Kennedy & Grubb note that “There are policy arguments for and against a maternal duty of care...[but]...the Law Commission considered the balance was against liability except where the unborn child was injured when the mother was driving a car.” 1505.

Counsel for Merton and Sutton Health Authority argued that “a foetus is not a person in law” and hence “is not entitled to the remedies of or the protection of the common law...” They contrasted the relative legal positions of certain Commonwealth countries with that of the U.K., alleging that the decisions in *Watt* and in *Duval* had been arrived at “because there had been no statutory intervention to put right what was seen as an unjust result” whereas in England “there has been no call for a change in the common law position because the matter has been dealt with in the Act of 1976.” [222]

Dillon, L.J., responding to the appeals, disposed of them simply by saying that the arguments of the appellants now being put the Court of Appeal had earlier been put to Phillips J. and that he would gladly adopt Phillips J.’s judgement. Despite this, he went on to add a significant point of his own to the effect that although there are cases that “establish the general proposition that a foetus enjoys, while still a foetus, no independent legal personality....There are other contexts...in which the English courts have adopted as part of English law the maxim of the civil law that an unborn child shall be deemed to be born whenever its interests require it.”⁴² He held that “it would be open to the English courts to apply the civil law maxim directly to the situations we have in these two appeals, and treat the two plaintiffs as lives in being at the times of the events which injured them as they were later born alive...”

In deciding whether or not a right of action is to be entertained in the context of pre-natal injuries there are, according to P. J. Pace, four possible approaches

The first, a fiction applied to Civil Law jurisdictions and based upon Roman Law, is that a child *in utero*, if subsequently born alive, is deemed as already born if that would be to its advantage. The second involves attributing to the child *in utero* legal personality which, in the absence of a live birth, would have important implications for both opponents and proponents of abortion law

⁴² 22. Reference to *Paton v. BPAS; In re F (in utero)*; and *Blasson v. Blasson* (1864) 2 De G.J. & S. 665, in which latter case Lord Westbury L.C. said “Qui in utero est, perinde ac si in rebus humanis esset, custoditur, quoties de commodis ipsius partus quaeritur...”.

reform. The third, and biologically unsound, view is that the unborn child is merely a part of his mother and, therefore, there can be no action on his behalf, but only on behalf of his mother, if she, while pregnant, sustained injuries through another's negligence. The fourth approach takes the view that, since the tort of negligence is incomplete unless and until damage is suffered by the plaintiff, that tort is in fact completed on the live birth of the injured infant, at which time the infant has legal personality and is able to sue through his next friend, albeit that injuries were inflicted on the infant while he *was in utero*...⁴³

In reviewing the preceding cases we have come upon all these possibilities. Of the four possibilities outlined by Pace I am arguing that the third, as clearly recognised in *Attorney General's Reference (No. 3 of 1994)* (see below), is clearly unsustainable, that the first and the fourth approaches are both inherently fictitious so that, by default, there remains only the second possibility, the attribution of legal personality to the child *in utero*.

Relying on the judgements of both Winneke C.J. and Gillard J. in *Watt, Dillon L.J.* saw no significant difference between them. But, as Kennedy & Grubb point out

With respect to Dillon LJ the theoretical basis on which the cause of action rests is not dealt with entirely satisfactorily. To Winneke CJ a duty attached to the defendant at the birth of the plaintiff and it was then that the defendant breached his duty. Aware of the difficulties of this approach, Winneke CJ went on to suggest that there were in fact a number of theoretical approaches available, each of which produced the result that the defendant owed a duty to the infant plaintiff, viz there was a continuing duty; the duty could be projected into the future; or a duty was breached by an act antecedent to the accrual of the cause of action. It may be interjected that each of these poses considerable theoretical difficulties. Gillard J adopted a different route. For him the cause of action in negligence only came into existence when the damage complained of was suffered. At that time the infant plaintiff had legal personality and could be owed a duty. The antecedent inquiry was merely evidence of the causation of the damage at birth. Aware, however, of the equally problematic theoretical objections to this line of reasoning, Gillard J also relied on such cases as *Villar v Gilbey* [1907] AC 139 (HL). This case reflects a long line of English authorities which have, largely in the context of property law, incorporated the civil law principle of *nasciturus* into English law.⁴⁴

I have already indicated that, of the four approaches outlined by Pace that can be taken to ground a right of action for pre-natal injuries only that approach which

⁴³ P. J. Pace "Civil Liability for Pre-Natal Injuries" (1977) 40 *Modern Law Review* 141 at 141-42.

attributes legal personality to the child *in utero* is ultimately defensible. Kennedy & Grubb, while agreeing that “All attempts to manoeuvre the common law’s building blocks of duty, breach and damage seem at best contrived and at worst flawed” are of a different opinion, believing that “the civil law approach adopted in Montreal Tramways is the only sound basis on which to ground a cause for action.....”⁴⁵

Attorney General v. X and Others (Ireland, 1992)

We now turn to consider a case from another common law jurisdiction which differs from the English in that it possesses a written constitution that embodies articles relevant to the legal status of the unborn child. The Irish case of *Attorney General v. X and Others*⁴⁶ concerned a young girl, X who became pregnant as the result of having been raped. She travelled to England with her mother to have an abortion, such an abortion being legal there. The Attorney General, learning of her intention, sought an injunction *ex parte* in the High Court to restrain her from travelling abroad to have an abortion. When X learnt of this she returned to Ireland and appeared in the High Court to resist the injunction. It was held by Costello J. that in Irish law one effect of article 40.3.3. of the Constitution was to restrict one’s right to travel abroad for an abortion and that the danger to the mother’s life from a threat of suicide did not outweigh the certainty of the death of the foetus. While the Supreme Court, on appeal, held that Costello J. was correct in his judgement that the constitutional provision could be employed to restrict travel abroad, it also held that his assessment of the likelihood of X’s committing suicide was wrong in that the risk to X’s life was significant and, in the circumstances, outweighed the destruction of unborn life. The court therefore allowed the appeal.

⁴⁴ Kennedy & Grubb, 1503.

In balancing the relative risks to the lives respectively of mother and child, Costello J. in the High Court said that “the risk that the defendant may take her own life if an order is made is much less and is of a different order of magnitude than the certainty that the life of the unborn will be terminated if the order is not made.” [12] The case went on appeal to the Supreme Court on twenty two stated grounds, two of which are germane to our concerns:

6. That in balancing the right of the first Defendant [X] to her life as mother and that of the unborn the learned trial judge was wrong in law and in fact in failing to give a preference to the life of the first Defendant as mother such life being a life in being against the life of the unborn *which life is contingent and putative*.
7. That the learned trial Judge was wrong in law and in fact in treating the life of the unborn as a life of equal certainty with that of the first defendant. [43 Emphasis added.]

In the course of his judgement, Finlay C. J. commented on the principles of constitutional interpretation that should be applied to s. 40.3.3. of the Constitution. In balancing the rights to life of the unborn child and mother “the Court must...concern itself with the position of the mother within a family group, with persons on whom she is dependent, with, in other instances, persons who are dependent upon her and her interaction with other citizens and members of society in the areas in which her activities occur.” [53] The Chief Justice went on to state that he was satisfied

that the test proposed on behalf of the Attorney General that the life of the unborn could only be terminated if it were established that an inevitable or immediate risk to the life of the mother existed, for the avoidance of which a termination of the pregnancy was necessary, insufficiently vindicates the mother’s right to life. I, therefore, conclude that the proper test to be applied is that if it established as a matter of probability that there is a real and substantial risk to the life as distinct from the health of the mother, which can only be avoided by the termination of her pregnancy, that such termination is permissible, having regard to the true interpretation of Article 40.3.3. of the Constitution.” [53-54]

⁴⁵ Kennedy & Grubb, 1503.

⁴⁶ *Attorney General v. X and Others* Supreme Court (Ireland) [1992] 1 I.R., 1.

The structure of the argument appears to be as follows: we have a principle of constitutional interpretation derived from, *inter alia*, Walsh J. in *McGee v. The Attorney General* (Irish Supreme Court decision of 1974)⁴⁷ that somehow obliges us, in considering the right to life of the mother under article 40.3.3. to consider not just the mother but the mother in relation to her family, those upon whom she is dependent, those who are dependent upon her, and her interactions with other citizens and members of society. But even if it were established as being somehow necessary to give consideration to all the relational elements in the mother's life, just why, precisely, does it overturn Costello J.'s balancing of the right to life of the mother against the right to life of the child? How does the argument run? Well, you will not be able to find an argument in the Chief Justice's judgement, because there is no argument to be found there. Hederman J. dissented. In the course of his judgement he remarked that

The Eighth Amendment establishes beyond any dispute that *the constitutional guarantee of the vindication and protection of life is not qualified by the condition that life must be one which has achieved an independent existence after birth*. The right of life is guaranteed to every life born or unborn. One cannot make distinctions between individual phases of the unborn life before birth, or between unborn and born life....The extinction of unborn life is not confined to the sphere of private life of the mother or family because the unborn life is an autonomous human being protected by the Constitution. Therefore the termination of pregnancy other than a natural one has a legal and social dimension and requires a special responsibility on the part of the State. There cannot be a freedom to extinguish life side by side with a guarantee of protection of that life because the termination of pregnancy always means the destruction of an unborn life. Therefore, no recognition of a mother's right of self-determination can be given priority over the protection of the unborn life.' [72 Emphasis added.]

He then noted that "The choice is between the certain death of the unborn life and a feared substantial danger of death but no degree of certainty of the mother by way of self-destruction. On the vital matter of the threat to the mother's life there has been a

⁴⁷ *McGee v. The Attorney General* (Irish S.C.) [1974] I.R. 284.

remarkable paucity of evidence. In my opinion the evidence offered would not justify this Court withdrawing from the unborn life the protection which it has enjoyed since the injunction was granted.” [76]

Some Scottish Cases

*Hamilton v Fife Health Board*⁴⁸ concerned a child who, in 1976, died three days after it was born. The parents of the child brought an action against the health board for the loss of their child’s society, claiming that the child’s death resulted from the negligence of the doctors before the child was born. The key to the defence was the claim that there was no person alive at the time the injuries were sustained and so the action could not be sustained under s 1(1) of the Damages (Scotland) Act, 1976⁴⁹ which states that where “‘a person dies in consequence of personal injuries sustained by him’, and the injuries give rise to liability to pay damages to ‘the injured person’, then there also arises a liability to pay damages (according to that section) to any relative of the deceased.” [624] At first instance, the Lord Ordinary dismissed the action.⁵⁰ One of the pursuers reclaimed and the reclaiming motion was heard before an Extra Division in February 1993.⁵¹ In his judgement Lord McCluskey, addressing himself to the central claim of the defence, said, *inter alia*, that

If the injuries with which he [the child] is born are injuries to his organs or skeleton or tissues then they are properly and sensibly described as ‘personal injuries’ even although when they were inflicted he did not enjoy legal personality; *they are injuries to his person although not to his legal persona*. They are to him an impairment of his physical conditions. *To suppose that only*

⁴⁸ *Hamilton v Fife Health Board* Extra Division, 24 March 1993, [1993] SLT 624.

⁴⁹ See *McWilliams v Lord Advocate* Outer House, 28 July 1992, [1992] SLT 1045. In this case, a boy died shortly after birth. His parents took an action for loss of society of the child, alleging negligence in the treatment of the mother immediately before the birth. The defence alleged that “the claim for loss of society was irrelevant since a person only came into existence on birth and therefore there was no person alive at the time the injuries were sustained.” [1045]

⁵⁰ [1992] SLT 1026.

⁵¹ [1993] SLT 624.

one who enjoys legal personality can sustain 'personal injuries' is to attach an artificial meaning to the adjective 'person' in s 1(1)." [629 Emphasis added.]

Lord McCluskey has here provided a useful verbal method of distinguishing the legal from the metaphysical, 'persona' being used to refer to a set of legally constituted rights and responsibilities and 'person' to refer to the real entity which subsists outside the purview of the law. Lord McCluskey stated that legal personality is a legal construct relating to a set of legally recognised rights and responsibilities, and that there were "many examples in history of adult, sentient human beings being denied human status and legal personality and of limited liability companies and even of non-human animals being accorded rights and responsibilities normally appropriate only to human beings." [629]

Lord McCluskey, significantly, went on to say that he saw no reason "to restrict 'personal' in the phrase 'personal injuries' so that it means injuries suffered by one on whom the law has conferred legal personality for certain purposes....the whole phrase 'personal injuries sustained by him' in this context is perfectly apt to include injuries inflicted to the person of a child immediately before his birth..." [629] The question immediately suggested by this is—how far back can one go? As other judges have done before him, Lord McCluskey avoids this question: "Whether or not the phrase would be apt to cover some form of trauma to a foetus in the early days of pregnancy it is not necessary to decide." [629] In the instant case, he is, of course, correct but the question nonetheless remains to be answered. Once one is willing to consider that the law applies to children immediately before birth the question immediately arises as to whether there is any non-arbitrary stopping point between conception and birth. Traditionally, quickening was just such a point, and more recently, as we have seen, viability has played a similar role but, as we shall see below, these termini have come under attack.

One must concede that the notion of legal personality [‘persona’] is, as Lord McCluskey, a ‘construct of the law’, but while admitting this, it cannot be a notion that is arbitrarily and capriciously applied. A company, which is a legal person, has capacities which are sufficiently analogous those of a natural person, for example, a set of purposes, an ability to transact business, a certain kind of responsibility, so as to make the attribution of legal personality to it defensible. However, it is difficult to conceive of sober circumstances in which legal personality could sensibly be attributed to a cucumber. In what significant ways could a cucumber’s capacities be analogised to those of human being? It would appear that, according to current legal orthodoxy, legal personality is properly applied to a proper subset of human beings and to a proper (and very small) subset of non-human beings. In the instant case, we have pre-natal and post-natal continuity of person, while we have, it would seem, legal personality only post-natally.

In *Kelly v. Kelly*⁵² the question of whether or not an unborn child is a person recognised by the law was explicitly discussed. The facts of the case are as follows: A married couple separated while the wife was in a condition of early pregnancy. Two doctors certified that the necessary conditions laid down by the Abortion Act 1967 were satisfied and arrangements were made for a termination of the wife’s pregnancy. The husband sought an interdict and an interim interdict, which was granted *ex parte* but recalled after both parties had been heard. The husband reclaimed against the recall of the interim interdict. On the husband’s behalf it was argued that

any wrongful action sustained by a child in utero was actionable at the instance of the child acting through his parent or guardian, as opposed to at the instance of his mother as an individual; that any actionable wrong was also a wrong capable of prevention by interdict; that a wrong which could be interdicted was not confined to a wrong causing injury only but included a wrong resulting in

⁵² *Kelly v. Kelly* 1997 Second Division (Scotland) [1997] SLT 896.

the death of the child; and that *there should be no fiction that injury caused antenatally only occurred in law at the child's birth.*"⁵³ [897 Emphasis added.]

On the wife's behalf, it was submitted that the foetus was not a distinct legal persona with rights and, in particular, that it had no right to remain in the womb; that the foetus was a part of the mother's body; and that the child's rights only crystallised at birth. Her counsel referred to a number of decisions relevant to the question of the legal status of the foetus: *Paton v. BPAS*; *C. v. S.*; *Re F (In utero)*; *Medhurst v. Medhurst*;⁵⁴ *Borowski v. Attorney General for Canada*;⁵⁵ and *Tremblay v. Daigle*.⁵⁶ *Paton*, *C. v. S.* and *Re F* are already familiar to us; *Medhurst*, *Borowski* and *Tremblay* are not. In *Medhurst*, a case heard by the Ontario High Court of Justice, Reid J. quoted with approval a passage from the judgement of Robins J. in *Dehler v Ottawa Civic Hospital*⁵⁷ in which that judge asked himself the following questions: "What then is the legal position of the unborn child. Is it regarded in the eyes of the law as a person in the full legal sense? Does it have the capacity in law to prosecute an action sounding in tort or to sue for injunctive relief?" and answered both questions in the negative:

While there can be no doubt that the law has long recognised foetal life and has accorded the foetus various rights, those rights have always been held contingent upon a legal personality being acquired by the foetus upon its subsequent birth alive and, until then, a foetus is not recognised as included within the legal concept of 'persons'. It is only persons recognised by law who are the subject of legal rights and duties."⁵⁸

In *Borowski*, the Saskatchewan Court of Appeal held that a foetus was not a person within the meaning of the law and was not covered by the term 'everyone' in s. 7 of the Canadian Charter of Rights and Freedoms. And in *Tremblay*, the Supreme Court

⁵³ This last point in the husband's argument is obviously relevant to the issues raised in *Watt v. Rama*

⁵⁴ *Medhurst v. Medhurst* (1984) 9 DLR (4th) 252.

⁵⁵ *Borowski v. Attorney General for Canada* (1987) 39 DLR (4th) 731.

⁵⁶ *Tremblay v. Daigle* (1989) 62 DLR (4th) 634.

⁵⁷ *Dehler v. Ottawa Civil Hospital et al.* (1979) DLR 686.

⁵⁸ *Medhurst*, 255. Original in *Dehler* at 695.

of Canada rejected the argument that the protection afforded by the Civil Code of Lower Canada to the economic interests of the foetus impliedly recognised the foetus as a juridical person.

In *Kelly*, the court accepted that “the remedy of interdict would be available at the instance of a person or that person’s representative to prevent damage being deliberately caused to that person, being damage which, if it occurred, would sound in an award of damages in favour of that person.” [899] The court also accepted that “if an abortion is an actionable wrong to the foetus as such, we agree that the father would be entitled to take proceedings on behalf of the foetus. However, the critical question is whether the abortion is or can be an actionable wrong.” [899] The court’s judgement was to the effect that

None of the decisions to which we were referred appear to us to provide support for the view that a foetus has a legal persona, or is otherwise recognised as capable of being vested in personal rights for the protection of which the remedy of interdict may be invoked. Counsel for the pursuer submitted that none of the decisions in jurisdictions outside Scotland had answered the question—if it was legally wrong to damage the foetus, why was it not capable of being interdicted as a wrong? However, that question itself begs a further question, namely, given that a claim can be made by or on behalf of a child who has been born in respect of an injury caused by what was done before his or her birth, does it follow that injury to the foetus as such is actionable before the birth?” [901]

The judges give a clear and unequivocal negative answer to this question. “Whether it is an actionable wrong to the unborn foetus for an abortion to be performed depends essentially on whether Scots law confers on the foetus a right to continue to exist in the mother’s womb. Our conclusion is that Scots law recognises no such right on the foetus.” [901]

The judges noted that there are two factors that, while they do not form part of the reasons for their conclusion, tend towards the maintenance of the law in its present form. First, if the foetus were to be recognised as having a right to remain in the

womb, this would inevitably create a conflict with the policy embodied in the Abortion Act 1967. Second, “if the foetus had the right to its own protection which could be vindicated on its behalf by interdict there would be no reason why it should be confined to cases of abortion. If such a right existed it could be used as the basis for a father taking legal action with a view to restraining the mother from some form of activity which was claimed to be harmful to the foetus—such as smoking, and certain sports and occupations.” [901] These very concerns have surfaced over the last fifteen years or so in the U.S.A. and will be considered below.

*ATTORNEY-GENERAL'S REFERENCE (NO. 3 OF 1994) (ENGLAND,
1997)*

“Any society that wishes to distinguish abortion from homicide must draw a (more or less arbitrary) line between *people*, who qualify for the full panoply of legal rights, and *foetuses*, which receive reduced protection.” So begins Stephen Gough’s casenote on the *Attorney-General’s Reference (No. 3 of 1994)*,¹ a case which, he says “has generated less comment than it may deserve”.² While Gough focuses his critical attention upon Lord Mustill’s reservations regarding the legal rules underlying the law of homicide, my concern in this thesis is with the curious status accorded to the foetus by Lord Mustill.

The facts of the cases were as follows [‘D’ is the defendant; ‘M’ is the woman pregnant with his child; ‘S’ is the foetus, and ‘S*’ is the child after birth.] D stabbed M whom he knew to be pregnant with his child S. D pleaded guilty to a charge of wounding M with intent to cause M grievous bodily harm. At this time it did not appear that S had suffered any damage. Shortly after the wounding, and because of it,

¹ HL: [1998] AC 245; [1997] 3 All E.R. 936; [1997] 3 W.L.R. 421.

² Stephen Gough, “Pre-natal injury and Homicide Following *Attorney-General’s Reference (No 3 of 1994)*” (1999) 62 M.L.R. 128.

M went into labour and gave birth to a premature child (S*). It now transpired that D had wounded S in his attack on M, albeit not seriously. S* died 121 days later from a condition resulting from her prematurity but unconnected otherwise with the knife wound. D was charged with the murder of S*. He pleaded not guilty. A submission was made that no criminal offence relating to S* had been established. The trial judge, in a considered ruling, held that there was neither the *actus reus* nor the *mens rea* for murder—no *actus reus* because, at the time of the assault, S was not a live person and the cause of death was the wounding of M not of S; no *mens rea* because D had no intention to kill or do serious harm to anyone other than M or to do any harm to S. The trial judge considered the possibility of constructive (unlawful act) manslaughter since the stabbing of M was manifestly an unlawful and dangerous act but because he believed that there was not at the time of the assault a victim capable of dying as a direct and immediate result of the attack he judged that a conviction for manslaughter could not be sustained.

Court of Appeal: Pars Viscerum Matris

The Attorney-General referred the following two questions to the Court of Appeal.³

1. Subject to the proof by the prosecution of the requisite intent in either case: whether the crimes of murder or manslaughter can be committed where unlawful injury is deliberately inflicted: (i) to a child in utero, (ii) to a mother carrying a child in utero, where the child is subsequently born alive, enjoys an existence independent of the mother, thereafter dies and the injuries inflicted while in utero either caused or made a substantial contribution to the death.” [247G]
2. Whether the fact that the death of the child is caused solely as a consequence of injury to the mother rather than as a consequence of direct injury to the foetus can negative any liability for murder or manslaughter in the circumstances set out in question 1. [247 G-H]

³ As permitted by the Criminal Justice Act 1972 s. 36.

The Court of Appeal held that an intent directed at the foetus as a “child capable of becoming a person in being” was insufficient to found a conviction for murder but went on to say, however, that it didn’t follow that if an intention was directed towards the foetus the charge of murder must inevitably fail because “In the eyes of the law the foetus is taken to be a part of the mother until it has an existence independent of the mother. Thus an intention to cause serious bodily injury to the foetus is an intention to cause serious bodily injury to a part of the mother just as an intention to injure her arm or her leg would be so viewed.” [252D]⁴ The upshot of the doctrine that the foetus is part of the mother was that the Court of Appeal held, on the assumed facts, that a conviction for murder would be justified, there being no difference whether the death of S* resulted from prematurity or from the stab wound because the necessary element of causation was present in either case. The same considerations would apply to the possibility of manslaughter, the obvious difference being that the degree of *mens rea* required would be less than that for murder.

Answering in the affirmative the first question put to them by the Attorney-General the Court of Appeal held that “The requisite intent to be proved in the case of murder is an intention to kill or cause really serious bodily injury to the mother, *the foetus before birth being viewed as an integral part of the mother*. Such intention is appropriately modified in the case of manslaughter.”⁵ [252G Emphasis added] The Court of Appeal answered the second question in the negative.

⁴ See [1996] QB 581, 593.

⁵ See [1996] QB 581, 598.

The House of Lords: "Anomaly, Fiction, Misnomer and Obsolete Reasoning"

D contended that the answers given by the Court of Appeal to both questions were wrong and that the ruling of the trial judge was right. On D's application, the Court of Appeal referred the matter to the House of Lords for its consideration, for which consideration their Lordships took almost twenty months. Their judgment was unanimous. Lord Mustill and Lord Hope of Craighead delivered the speeches; Lord Goff of Chieveley, Lord Slynn of Hadley and Lord Clyde concurred.

Lord Mustill began by noting that any developed system of law should have its law of homicide clear enough to give an unequivocal result on any particular set of facts. However, as he noted wryly, "the law of homicide is permeated by anomaly, fiction, misnomer and obsolete reasoning". [250] In answering the Attorney-General's questions, Lord Mustill was operating on the assumption that the unlawful injury was directed only to the mother with the intention of hurting her alone. This assumption may not be uncontroversial. Gough notes that "the Lords assume a defendant who intends injury to the mother rather than to the foetus. The Court of Appeal had, of course, assumed a defendant who intended injury to the foetus rather than to the mother. A clearer example of the potentially treacherous character of reference cases is hard to imagine."⁶ In any event, on the basis of this assumption, he considered the issue of murder. His strategy was to lay out what he regarded as the established legal rules on murder, of which there are five, describe the ways in which the Crown's arguments are constructed upon these rules, show why one of these arguments can be summarily rejected, give a more considered examination of the second and, finally,

⁶ Gough, "Pre-natal Injury" 130, n.15.

determine whether a principled answer could be given to the Attorney-General's questions.

The Five 'Established Rules' of Homicide

The first of the five established rules expresses the appropriate *mens rea* required for murder. 1. *An act embodying an intention to kill or cause grievous bodily harm to another is sufficient to support a prima facie case of murder.* The second rule concerns the doctrine of 'transferred malice', so-called. Lord Mustill believes the term to be misleading but to be too well-entrenched to be abandoned. 2. *If D does A with the intention of causing harm of kind H to X and inadvertently does that kind of harm to Y, then that intent may be taken to be operative towards the harm actually done to Y.* The third rule relates to the status of the foetus or embryo *in utero* and runs as follows: 3. *Leaving aside statutory provisions, the embryo or foetus cannot be the victim of a violent crime.* In particular, it cannot be the victim of murder. The fourth rule is the continuing act rule. This is not controversial, at least in principle, and runs as follows: 4. *If D does act A with requisite intent I and victim V dies after a period of time [consequence C], then A + I + C = murder provided there is unbroken causal connection between A and C.* The fifth, and final, rule listed by Lord Mustill concerns damage done to the foetus *in utero* which results in harm to the child born alive, and goes as follows: 5. *Violence towards a foetus or embryo in utero which results in harm to the child subsequently born alive can ground criminal responsibility, even where, as per rule 3, the harm wouldn't have been criminal if it had been suffered in utero alone.* Lord Mustill noted that this rule wasn't always accepted, largely for pragmatic reasons, but was firmly adopted by early Victorian times and hasn't been doubted since. He went on to add that "In *R v West* (1848) 2 Car & Kir 784, 175 ER

329...the rule was extended to a situation such as the present where the assault caused the death, not through injury to the child, but by causing the child to be born prematurely.” [255]⁷

While Lord Mustill is critical of all five rules, most of his critical attention is directed at rules 1 and 2. His critical evaluation of rule 1 takes up almost two pages; likewise, his assessment of rule 2 occupies more than two pages; rules 3, 4 and 5 together are summarily dismissed in less than a fifth of a page. If Lord Mustill is willing to subject rules 1 and 2 to critical analysis, why should rules 3 and 5 be exempt? Rules 3 and 5 can be taken to represent respectively particular aspects of a single ‘Born Alive’ rule, rule 3 representing the (negative) common law position that the embryo or foetus cannot, apart from statutory intervention, be the subject of a crime of violence, and rule 5 representing the (positive) development of that position to allow that violence towards an embryo or foetus *in utero* can ground criminal responsibility provided the child is harmed and subsequently born alive. Lord Mustill’s enunciation of the five established rules of homicide was not a gratuitous display of erudition. The rules could be used as a foundation on which to erect new rules.

If D struck X intending to cause her serious harm, and the blow, in fact, caused her death, that would be murder (rule 1). If she had been nursing a baby Y which was accidentally struck by the blow and consequently died, that would also be murder (rules 1 and 2). So, also, if an evil-doer had intended to cause harm but not death to X by giving her a poisoned substance and the substance was, in fact, passed on by X to the baby, which consumed it and died as a result (rules 1, 2, and 3). Again, it would have been murder if the foetus had been injured in utero and had succumbed to the wound after being born alive (rules 1, 2, 4 and 5). It is only a short step to make a new rule, adding together the malice towards the mother, the contemporaneous starting of a train of events, and the coming to fruition of those events in the death of the baby after being born alive. [256B-D]

⁷ The rules are elaborated between 253C-255A.

Lord Mustill felt the attraction of this argument, particularly its simplicity. However, it is

[T]oo dependent on the piling up of old fictions, and too little on the reasons why the law takes its present shape. To look for these reasons is not, to use an expression sometimes met, ‘legal archaeology’ for its own sake. Except in those cases, of which the present is not one, where the rationale of the existing law is plain on its face, the common law must build for the future with materials from the past. One cannot see where a principle should go without an idea of where it has come from. [256E-F]

Lord Mustill accepted the fact that the system combining precedent with the long course of existing law has entrenched the grievous bodily harm element of the *mens rea* requirement in murder; however, he said that it exemplified no new principle that can be applied to a new situation. In a picturesque phrase he described the grievous bodily harm element of the *mens rea* requirement as “an outcropping of old rock from which the surrounding strata of rationalisations have weathered away”. [258H-259A] At the end of his treatment of the doctrine of ‘transferred malice’ he said, “Like many of its kind this is useful enough to yield rough justice, in particular cases, and it can sensibly be retained notwithstanding its lack of any sound intellectual basis. But it is another thing to build a new rule upon it.” [261C]

There is an incipient anti-traditionalism at work in Lord Mustill’s judgment. Legal conservatives would be willing to accept that, in the absence of convincing reasons against it, the existence of a tradition is a justification for retaining a rule, that rule being the product of settled albeit unreflectively appropriated practice. As Gough, for example, puts it “the anomalies, fictions, misnomers and obsolete reasoning of old cases frequently conceal important

insights while the ‘intellectual base’ of the reformer can easily become a smoke screen for ill-considered changes.”⁸

The Foetus: Part of the Mother, Human Being, or Organism sui generis?

We now move on to consider Lord Mustill’s account of what he considers to be two arguments for the Crown. In the first argument, the foetus was identified with the mother. “The decision of the Court of Appeal founded on the proposition that the foetus is part of the mother...”. [255B] To this Lord Mustill responded, “I must dissent from this proposition for I believe it to be wholly unfounded in fact.” [255C] The grounds for Lord Mustill’s dissent here are simply factual and the facts are genetic: there is a genetic diversity between the mother and the foetus. Referring to the victims in the case he said, “The mother and the foetus were two distinct organisms living symbiotically, not a single organism with two aspects. The mother’s leg was part of the mother; the foetus was not.” [255F] Lord Hope substantially agreed with Lord Mustill on this point, holding that the foetus is materially composed of genetic material from both the mother and the father and therefore cannot be identical to the mother.

[A] n embryo is in reality a separate organism from the mother *from the moment of its conception*. This individuality is retained by it throughout its development until it achieves an independent existence on being born. So the foetus cannot be regarded as an integral part of the mother in the sense indicated by the Court of Appeal, notwithstanding its dependence upon the mother for its survival until birth.” [267F-G Emphasis added]

Lord Mustill went on to consider what he regards as the only other ground for identifying the foetus with the mother. “[A] All the case law shows that the child does not attain a sufficient human personality to be the subject of a crime of violence, and

⁸ Gough, “Pre-natal Injury”, 132. The common law is notoriously resistant to ‘rational’ codification. Nowhere is the practice-driven character of the law more evident than in Land Law where, in the opinion of conveyancers at least, the Bench should defer to conveyancing practice.

in particular of a crime of murder, until it enjoys an existence separate from its mother; hence [B] whilst it is in the womb it does not have a human personality; hence [C] it must share a human personality with its mother.” [255G-H]⁹

There are two ‘hences’ in the passage: A hence B hence C. The strange thing about the first ‘hence’ is that it is entirely misleading in that it suggests an argument where there is none, given that A and B are, in effect, the same proposition. To say, ‘A hence B’ is tantamount to saying “the foetus doesn’t have a human personality therefore it doesn’t have a human personality” This isn’t an argument; it’s a tautology. On the other hand, ‘B hence C’ is not only not an argument; it’s a contradiction. One could, charitably, construct an argument from these materials on the following lines. “The foetus cannot have a personality *of its own*, therefore, if it has a personality, it must derive that personality from someone else. And who could that someone else be save its mother.” There is an implicit fallacy of composition here.¹⁰ For example, while my arm is a human arm because it is the arm of a human being it doesn’t make any sense to attribute or deny to it characteristics that can only be attributed to a human being as a whole. A human being as a whole can be said to be intelligent, wicked or in debt but none of these characteristics can meaningfully be either asserted or denied of my arm. My arm is neither intelligent nor non-intelligent, neither wicked nor non-wicked; neither in debt nor not in debt. If someone were to put forward an argument of this kind, it is difficult to comprehend how, on the assumption that the foetus is part of its mother, it shares in its mother’s personality. As a part it cannot do this any more than can the mother’s liver or kidneys.

⁹ [A], [B] and [C] added for purposes of exposition.

¹⁰ The fallacy of composition occurs when properties that belong to part of a whole are attributed to the whole itself. So, for example, each part of a large machine might be light, while the machine as a whole is heavy.

In any event, Lord Mustill rejected this argument. “This seems to me to be an entire non sequitur, for it omits the possibility that the foetus does not (for the purposes of the law of homicide and violent crime) have any relevant type of personality *but is an organism sui generis lacking at this stage the entire range of characteristics both of the mother to which it is physically linked and of the complete human being which it will later become.*” [255H Emphasis added] This is an important point not so much in relation to Lord Mustill’s dismissal of the fatherless argument to which it is a response but considered simply in itself. He continued: “I would, therefore, reject the reasoning which assumes that since (in the eyes of English law) the foetus does not have the attributes which make it a ‘person’ it must be an adjunct of the mother” and adds “Eschewing all religious and political debate, I would say that the foetus is neither [a person, nor an adjunct of the mother]. It is a unique organism. To apply to such an organism the principles of a law evolved in relation to autonomous beings is bound to mislead.” [256A]¹¹

On a general point of interpretation one might agree with this dictum. It may well be illegitimate to take a body of law developed to cover some particular area and extend it to cover another area or to elements within the original area to which it was not previously considered to apply. But this can scarcely be an inviolable principle; at best it can be only a rebuttable presumption, otherwise there could be no development in the law. The mere fact that the law of homicide as it originated may not have had the foetus within its purview does not mean that we cannot now remedy that should we think it advisable given our contemporary knowledge of embryology and human development, such knowledge not having been previously available to the law.

¹¹ I shall focus on Lord Mustill’s ‘unique organism’ thesis below, but it should be noted that the argumentative function of this claim appears to be to deny the Court of Appeal’s ‘part of the mother’ thesis while not allowing any alteration in the law of homicide by ceding to the foetus the status of a human person.

The Born Alive Rule: Substantive or Evidential?

Oliver Wendell Holmes once wrote, “It is revolting to have no better reason for a rule of law than that it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since and the rule simply persists from blind imitation of the past.”¹² Is it the case with the Born Alive rule that the grounds upon which it was laid down have vanished long since? If the rule is fundamentally grounded upon evidential considerations then, despite Kennedy & Grubb’s resounding dictum to the effect that “The ‘born alive’ rule is now unassailable in England”¹³ it is difficult not to conclude, as we shall see below that many of the courts in the U.S.A. have concluded, that it is a rule that has long outlived its usefulness. If, however, it is a substantive rule, which is how the English courts appear to interpret it, then there may be some justification for its retention. Despite their resounding claim, Kennedy & Grubb themselves draw attention to the dissenting judgement of Major and Sopinka JJ in *Winnipeg Child and Family Services (Northwest Area) v. DFG* that the ‘born alive’ rule is outdated and indefensible.

Historically, it was thought that damage suffered by a foetus could only be assigned if the child was born alive. It was reasoned that it was only at that time that damages to the live child could be identified. The logic for that rule has disappeared with modern medical progress. Today by the use of ultrasound and other advanced techniques, the sex and health of a foetus can be determined and monitored from a short time after conception. The sophisticated surgical procedures performed on the foetus before birth further belies the need for the ‘born alive’ principle.¹⁴

¹² Oliver Wendell Holmes, “The Path of the Law” (1897) 10 *Harvard Law Review*, 457, 469. This passage from Holmes was cited by the court in *Hughes v. State*, 868 P.2d 730 (Okla. Crim. App. 1994) (see below). The court went on to note, at 733, that “Medical science now...provide[s] competent proof as to whether the fetus was alive at the time of a defendant’s conduct and whether [her] conduct was the cause of [the injury]...”.

¹³ Kennedy & Grubb, 1487.

¹⁴ *Winnipeg Child and Family Services (Northwest Area) v. DFG* 152 DLR (4th) 193, [1997] 3 SCR 925 (Can SC), ss. 63, 66 and 67.

The conservatism of the common law is notorious. Once a rule has established there are only two ways to escape its reach. The first way is by means of the sharp sword of statute. For those of a conservative bent this is a remedy not without danger but it has its uses in allowing us to cut through the Gordian knot of dead or decaying traditions. The second way to escape the reach of an established rule is by circumventing it. S. F.

C. Milsom asks

How can a system of law, a system of ideas whose hypothesis it is that rules are constant, adapt itself to a changing world?...direct change can be made only by the legislative act....Change has for the most part been indirect. All that the practitioner can do for one hit by a rule...is to look for a way around it. If he succeeds, the rule is formally unimpaired. If the route that the special facts of his client's case enabled him to take can be exploited and broadened by others, the result in the real world may be reversed, but the rule remains.¹⁵

The Born Alive rule in England is firmly entrenched; there is no felt need to circumvent it; and the whole thrust of recent legislation gives no hope for a reasonable prospect of its abolition.

In the course of a long and exhaustive discussion of the 'born alive' rule, Clarke Forsythe notes that Coke's statement that the child born alive is 'in rerum natura' "does not mean that the common law did not view the unborn child as a human being or person before it was born alive....Blackstone viewed the unborn child as a person, but not one that could be the subject of homicide, because the evidentiary problems prevented proof of the corpus delicti of homicide in the case of the stillborn child."¹⁶

The evidentiary function of the born alive rule is clearly seen when considered together with the employment of quickening as presumptive evidence for pregnancy, and the use of the year and a day rule—now abolished in England by the Law Reform (Year and a Day Rule) Act 1996—to indicate the span outside of which it was presumed the causal action of an assailant could not safely be presumed to operate.

¹⁵ S. F. C. Milsom, *Historical Foundations of the Common Law* (London, 1969), xi.

All three rules were dependent upon the state of medical knowledge at the time of their operation. With the advent of modern obstetrical technology quickening became irrelevant as a criterion of pregnancy; similarly, the year and a day rule was abolished; why then should the born alive rule escape a similar fate?

In its adoption of the quickening doctrine, the born alive rule, and the year and a day rule, the common law thus can be seen to have closely followed the medical evidence of the day. It could not be proved that the child *in utero* before quickening was alive so the law adopted the presumption that the child was first alive at quickening and made the production of a miscarriage thereafter a grave offense. Likewise, the law could not prove the *corpus delicti* of homicide until the unborn child was observed alive outside the womb, so the law adopted the presumption that children are stillborn unless there was evidence of a live birth. It was not until a live birth occurred at any time of gestation that the law could prove life, death and causation, and with such evidence, the common law punished the resulting death as a homicide.¹⁷

It is not only on medical matters that technological change can bring about changes in the law. In the criminal law, photographs, fingerprints, microscopic fragments of hair or tissue, DNA analysis – all these have forced changes in the admission and evaluation of evidence. In a recent case involving the evidential value of video-tape evidence, Hardiman J. went so far as to say that in relation to recent technological advances “The law itself has changed to accommodate them.”¹⁸

Similarly, advances in medical knowledge, medical technology, and specifically in obstetrics and foetology have changed forever the information context in which the law in relation to foetuses must operate. Forsythe notes that

Within the past 15 years, however, a scientific revolution has taken place in obstetrics and fetology—that branch of medicine that deals with the fetus *in utero*. Today, the unborn child is viewed as ‘the second patient.’ The medical technologies of real time ultrasound, fetal heart monitoring, fetoscopy, and in vitro fertilization, have caused a fundamental revision in the care of the fetus and the understanding of fetal development. These technologies did not exist before 1965. The specific evidence necessary to prove the *corpus delicti* of the homicide of the unborn child *in utero* consists of three elements, proof of which was made possible by recent development in fetology. The elements are (1)

¹⁶ Forsythe, 587.

¹⁷ Forsythe, 595.

¹⁸ *Dunne v. Director of Public Prosecutions* [2002] 2 I.R. 305, at 309.

proof of pregnancy or the existence of a live fetus, (2) the death of the fetus, and (3) the criminal agency of the defendant (proximate causation).¹⁹ Forsythe's thesis then is essentially that the primitive state of medical technology and medical knowledge, taken together with the severity of punishment for homicide, justified the 'born alive' rule. In his view the rule was not meant to be a substantive judgement on the morality of the killing of the child in the womb. He believes that a second phase in the development of the rule occurred when English and American courts in the 19th century glossed the common law rule by engaging in elaborate tests of live birth. These tests misinterpreted the simple evidentiary nature of the born alive rule and focused not simply on proof of life, as the common law did, but on a medically suspect notion of 'independent existence', since repudiated.

More recently, a third phase in the development of the rule began when modern American courts further distanced themselves from the common law origin of the born alive rule. Ignoring the evidentiary origins altogether, and thus the reasons for the adoption of the rule, modern courts, like the *Soto* court, have often imposed a moral gloss upon the born alive rule and have erroneously assumed that the rule was the common law substantive definition of a 'human being' or 'person'. As a result, despite the medical advances which have eliminated the original evidentiary reasons necessitating the rule at common law, most modern courts still hold on to the rule with a tenacity that is unwarranted in light of their unlearned examination of the rule.²⁰

Mamta Shah agrees with Forsythe. The born alive rule, he believes, was based on unsophisticated medical knowledge and on high prenatal mortality rates. Primitive medical technology made it impossible to conclude that a foetus was alive until it was born. "The impossibility of determining whether and when a fetus was living and when and how it died led to the difficulty of ascertaining whether a defendant's misconduct was the cause of a fetus' death. In homicide cases, the Born Alive Rule provided an evidentiary standard for proving the corpus delicti of the homicide of an unborn child. Adoption of the Born Alive Rule avoided the difficulty of establishing a

¹⁹ Forsythe, 576-577.

²⁰ Forsythe, 564-565.

causal link between a defendant's misconduct and a fetus' death based solely on speculation.”²¹

When discussing above some of the earliest cases that established the born alive rule it was clear that the reason for the rule was evidential. So, in *Sims' Case*, the importance of the child's being born alive was clearly related to considerations of evidence: “[T]he difference is where the child is born dead, and where it is born living, for if it be dead born it is not murder, *for non constat, whether the child were living at the time of the batterie or not, or if the batterie was the cause of the death,* but when it is born living, and the wounds appeare in his body, and then he dye, the batteror shal be arraigned of murder, for now it may be *proved* whether these wounds were the cause of the death or not, and for that if it be found, he shall be condemned.” Similarly, Staunforde underscored the evidential aspect of the rule when he notes that the reason the killing of the child in the womb is no felony is because “it is difficult to judge whether he killed it or not, that is, whether the child died of this battery of its mother or through another cause.”²²

The case for treating the ‘Born Alive’ Rule as a substantive rule of law was made cogently in *Commonwealth v. Booth*.²³ In 1997, a car being driven by Jeffrey Robert Booth went through a stop sign and struck a car being driven by Nancy Boehm. Mrs Boehm's unborn child died in the womb as a result of the trauma she sustained. Booth was charged *inter alia* with homicide by vehicle and homicide by vehicle while driving under the influence. In his pre-trial motion, Booth asked the trial court to dismiss the homicide charges on the grounds that the foetus could not be a victim of

²¹ Mamta K. Shah, “Inconsistencies in the Legal Status of an Unborn Child: Recognition of a Fetus as Potential Life” *Hofstra Law Review*, Spring 2001, 931 at 937-38. [29HOFLR931]

²² The case for a substantive interpretation of the born alive rule was made in the U.S. case of *Commonwealth. v. Booth*, 766 A.2d 843. This will be discussed in the appropriate context below

such crimes on the grounds that the law does not recognise a foetus as a person, citing in precedential support a decision²⁴ from the same district in which a woman charged with delivering cocaine to her unborn child had the charges dismissed, the court holding the penal statutes should be strictly construed. The trial court dismissed the homicide charges. The Commonwealth of Pennsylvania appealed to the Superior Court of Pennsylvania the dismissal of the charge of homicide by vehicle while under the influence and the Superior Court reversed the decision of the trial court. The critical issue, recognised by the Superior Court, was the definition of ‘person’ as it occurs in the relevant section of the Vehicle Code, Section 3725(a). That section runs: “Any person who unintentionally causes the death of another *person*...” [Emphasis added] As the term ‘person’ is not defined in Section 3725(a), the Superior Court (majority) held that it must be subject to the definition of ‘person’ contained in Section 102 of the Motor Vehicle Code which defines ‘person’ as “a *natural* person, firm, copartnership, association or corporation.” [Emphasis added] In considering the assertion of the Commonwealth that a viable foetus is a ‘natural person’ within the purview of Section 102, the majority of the Superior Court acknowledged that “in criminal matters, the Commonwealth recognises the longstanding ‘born alive’ rule, which it defined as ‘the common law principle that only human beings “born alive” are independent persons within the meaning of the law.’²⁵ However, the majority of the Superior Court considered that in the light of its previous decision in *Amadio v. Levin*²⁶ the recognition of the ‘born alive’ rule by the Commonwealth of Pennsylvania

²³ The Superior Court decision is reported in *Commonwealth v. Booth* 729 A.2d 1187 (Pa.Super. 1999). The Supreme Court of Pennsylvania decision is reported in *Commonwealth v. Booth* 766 A.2d 843 (2001). All references are to the latter.

²⁴ *Commonwealth v. Kemp* 75 Westmoreland LJ 5 (1992).

²⁵ *Booth*, 844.

²⁶ *Amadio v. Levin* 501 A.2d 1085 (1985). *Amadio* was a civil case in which the Court held that the estate of a stillborn child could institute an action for the wrongful death of the child in the womb of its mother.

should cease. The Court saw no reason why the progress of medical science should be less relevant to criminal than to civil matters and went on to hold that ‘viable fetuses not yet born are “persons” within the meaning of the criminal laws of general application²⁷ in this Commonwealth’.²⁸

The decision of the Superior Court was reversed by the (State) Supreme Court. The Supreme Court began its analysis by pointing out that Pennsylvania is a ‘code’ jurisdiction, that is, since the codification of the criminal law under Title 18, no act or omission is a crime unless it falls under Title 18 or another statute. In other words, the State of Pennsylvania recognises no common law crimes. Since all crimes are statutory, the task of a Court in analysing the elements of a crime is one of statutory interpretation which, in context, is the ascertainment of the legislative intent of the legislature. The Superior Court had made much of the state Supreme Court’s decision in *Amadio*, stressing the desirability of its extension, by analogy, to criminal cases. The Supreme Court flatly refused to accept the Superior Court’s reasoning in this matter. In its view, the statutes²⁹ on which the Superior Court relied in *Amadio* were remedial in their purpose and were therefore to be liberally construed in order to achieve their purpose. The Supreme Court held, moreover, that *Amadio* was pre-eminently a tort decision. “In that context, advances in medical knowledge were relevant because they served to identify the fetus as a separate individual and therefore, within the context of tort jurisprudence, as potentially a separate victim of negligence. The focus of the *Amadio* Court’s analysis, however, was not on the state of medical progress *per se*, but on the controlling statutes, the remedial nature of the

²⁷ Laws specifically relating to the unborn child, such as the Crimes Against the Unborn Child, and the Abortion Control Act, are unaffected by this holding. The Abortion Control Act defines ‘unborn child’ as ‘an individual organism of the species homo sapiens from fertilization until live birth’; the Crimes Against the Unborn Child Act also adopts this definition.

²⁸ *Booth*, 845, citing the words of the Superior Court in 729 A.2d.1187 at 1190.

²⁹ Wrongful Death Act 42 Pa.C.S. section 8301; and Survival Statute 42 Pa. C.S. section 8302.

same, and the consequent desirability of affording recovery, via the liberal construction of those statutes, to previously unacknowledged victims of tortious injury.”³⁰ The Supreme Court went on to stress that “Those factors, which favored the abolition of the born alive rule in civil cases, are, for the most part, absent in the criminal context”, noting further that “various other jurisdictions that have considered this issue have recognized that ‘the analogy between civil liability for tort and criminal liability for causing death is inapt’”.³¹ On behalf of the Commonwealth of Pennsylvania it was argued that matters regarding the interpretation of criminal statutes could be avoided if the ‘born alive’ rule were to be treated as a rule of evidence rather than as a substantive element of a crime. It was claimed that a precedent had been set in this regard by the Court’s abolition of the ‘year and a day rule’.

In its response, the Supreme Court noted the well-nigh universal acceptance of the ‘born alive’ rule in the U.S.A. from the earliest times,³² this rule (a) prescribing that only one who has been born alive can be the subject of homicide and (b) requiring stringent proof of live birth. The Supreme Court proposed two reasons for these two conditions.

First, owing to the high incidence of prenatal mortality and stillbirths, it was exceedingly difficult to determine that a fetal death or stillbirth had resulted from a defendant’s act and not from natural causes. Second, because the fetus was considered to be dependent upon, and therefore essentially a part of its mother, a prosecution for homicide could not be maintained unless it could be shown that the fetus has become a person separate from its mother.³³

The obvious response to the reasons adduced by the Supreme Court is to indicate that the advances in foetal medicine and neonatology have seriously undermined both (a)

³⁰ *Booth*, 848.

³¹ *Booth*, 848.

³² *Commonwealth v. McKee* [1 Add.1 (Pa.1791)] appears to be the earliest reported decision to deal with the rule.

³³ *Booth*, 850.

and (b), and this is precisely what has occurred.³⁴ This being so, why has not the ‘born alive’ rule been abolished? The Supreme Court’s answer is to refuse to accept the analogy between the ‘year and a day’ rule and the ‘born alive’ rule. The ‘born alive’ rule is not merely evidential (as is the ‘year and a day’ rule) and so subject to review in the light of changed circumstances, but substantive, and so only changeable by the appropriate legislative body. Whereas the definition of homicide contained no reference to the time element that elapsed between the commission of the offence and the death of the victim, the definition of murder did refer essentially to a ‘reasonable creature in being’, that phrase being taken to import a person who had been born and was alive. “In sum, the prevailing view is that the born alive rule implicates a substantive aspect of criminal offenses.”³⁵

³⁴ See *People v. Guthrie*, 97 Mich.App. 226, 293 N.W.2d 775 (Mich.App. Apr 24, 1980).

³⁵ *Booth*, 852.

THE AMERICAN EXPERIENCE

In most states of the U.S.A. the assailant of a pregnant woman can, in addition to charges of assault on the woman, be convicted of another crime—foeticide, or some variety of homicide—if the woman’s unborn child should die. It might seem that almost thirty years after *Roe v. Wade*¹ laws defining such crimes would be anachronistic, perhaps even unconstitutional, but there is one vital difference between these foeticide laws and the abortion law founded upon *Roe*: foeticide laws do not impinge—or have not impinged to date—on consensual abortion, that is, upon foeticide where the cause of the foeticide is the pregnant woman or her agent. There is, then, a distinction in U.S.A. law between 2nd party and 3rd party foeticide: foeticide laws permit 2nd party foeticide (abortion) but not 3rd party foeticide.² The justification of this distinction will be central to the discussion as it unfolds, but first, to contextualise the argument, we need to trace some of the more important cases in which the relevant themes are introduced.

In *Dietrich v. Inhabitants of Northampton*,³ a case very similar in its fact pattern and in its outcome to *Walker v. Great Northern Railway Co. of Ireland*, the Massachusetts Supreme Judicial Court refused to consider an award of damages for

¹ *Roe v. Wade*, 410 U.S. 113.

² This distinction is not peculiar to our time. A treatise on Norman Penal law of the thirteenth century made a distinction between “abortion and the crime of *encis*, where a third party killed the child or the mother...” Dickens, 19.

³ *Dietrich v. Inhabitants of Northampton*, 138 Mass. 14 (1884)

injuries sustained by a five month-old foetus, subsequently born alive, whose mother tripped on a badly-made pavement. Sixty-two years elapsed before the rule denying recovery in such cases was changed in *Bonbrest v. Kotz*.⁴ There were two grounds for the change in policy; first, fifty years before the English courts were to do so in *Attorney-General's Reference* (No. 3 of 1994), the court clearly recognised the medical/biological fact that the foetus and mother are two individuals, and second, the court was struck by the absurdity of recognising the foetus as a separate entity under inheritance law while denying it such recognition in tort law. Now all U.S. jurisdictions allow recovery in such cases, and indeed most have further expanded tort law to allow a personal representative of the injured foetus to sue where that foetus is not born alive but would have been entitled to sue had it been born alive.

*Keeler v. Superior Court of Amador County*⁵ is one of the most significant cases in relation to the status of the unborn child; it is also one of the most notorious. After Mr and Mrs Keeler had been divorced, Mrs Keeler became pregnant by an Ernest Vogt and subsequently began to live with him though she concealed these facts from Mr Keeler. When Mr Keeler learned that Mrs Keeler was pregnant with another man's child he accosted her and saying "I'm going to stomp it out of you" he assaulted her. After a Caesarean section had been performed, the foetus was examined *in utero*. It had suffered a fractured head and was stillborn. While there were some discrepancies between the medical evaluations of the age of the foetus, the size and weight of the foetus indicated a foetal age of between 34-36 weeks. Mr Keeler was charged with unlawfully killing a human being with malice aforethought under section 187 of the California Penal Code. The matter for decision of the court was whether the foetus was a human being within the meaning of the statute. In a split decision, 5-2, the

⁴ *Bonbrest v. Kotz*, 65 F.Supp. 138 (D.C. Cir. 1946).

California Supreme Court adhered to the ‘Born Alive’ rule, holding that the term “human being” in §187 of the Penal Code did *not* to apply to a child until it was born alive.

Mosk J., delivering the opinion of the majority, noted that as the Penal Code is statutory law the relevant principle of interpretation is legislative intent. Section 187 of the Penal Code was taken verbatim from the Crimes and Punishments Act of 1850, the first California statute defining murder. The Penal Code of 1872 declared that its provisions, insofar as they were the same as existing statutes, must be construed as continuations of those existing statutes. Mosk J. stated that it must be assumed that in enacting its statute, the legislature was familiar with the relevant rules of the common law and “when it couches its enactment in common law language, that its intent was to continue those rules in statutory form.”⁶ Mosk J. then proceeded to give the history of the common law on abortifacient homicide, citing Bracton, Coke, Blackstone and Hale, claiming that by 1850 the ‘born alive’ rule had long been accepted in the U.S.A.⁷ In the light of this, Mosk J. concluded that the intent of the legislature in 1850 was that the term ‘human being’ should have the sense of one born alive.

He considered the argument that advances in medical science now give a premature foetus of 28 weeks or more an excellent chance of survival and that, therefore, the common law born alive requirement is no longer in accord with

⁵ *Keeler v. Superior Court*, 2 Cal.3d 619, 470 P.2d 617, 87 Cal.Rptr. 481, 40 A.L.R.3d 420 (Cal. Jun 12, 1970).

⁶ *Keeler*, 483.

⁷ “[I]t appears that by the year 1850 — the date with which we are concerned — an infant could not be the subject of homicide at common law unless it had been born alive. Perhaps the most influential statement of the ‘born alive’ rule is that of Coke, in mid-17th century (see above). ...In short, ‘By Coke’s time, the common law regarded abortion as murder only if the foetus is (1) quickened, (2) born alive, (3) lives for a brief interval, and (4) then dies.’ ...Whatever intrinsic defects there may have been in Coke’s work (see 3 Stephen, *A History of the Criminal Law of England* (1883), 52-60), the common law accepted his views as authoritative. In the 18th century, for example, Coke’s requirement that an infant be born alive in order to be the subject of homicide was reiterated and expanded by both Blackstone and Hale. Against this background, a series of infanticide prosecutions were brought in the English courts in mid-19th century. In each, a woman or her accomplice was charged with murdering a

scientific fact. Against this, Mosk J. proposed two objections that he considered insuperable; one jurisdictional, the other constitutional. On the jurisdictional point, Mosk J. noted that section 6 of the Penal Code provides that “‘no act or omission’ accomplished after the code has taken effect ‘is criminal or punishable, except as prescribed or authorized by this Code, or by some of the statutes which it specifies as continuing in force and as not affected by its provisions...’”⁸ Whether to extend the liability for murder under section 187 of the Penal Code is, therefore, a matter solely for the legislature. On the constitutional point, Mosk J. considered that, even were the liability for murder to be so extended, the requirement of due process would not allow such legal expansion to operate retroactively. Due process requires fair warning and “we find no reported decision of the California Courts which should have given petitioner notice that the killing of an unborn but viable fetus was prohibited by section 187.”⁹

In a strong dissent, Acting Chief Justice Burke accused the majority on the bench of ignoring “significant common law precedents, of [frustrating] the express intent of the Legislature; and of [defying] reason, logic and common sense.”¹⁰ The majority in holding to the traditional principle that the killing of an unborn child while a great misprision is no murder focussed exclusively on the ‘no murder’ element of this principle to the neglect of the ‘great misprision’ element. The killing of the ‘quickened’ child was a ‘great misprision’ because at “common law, the quickened fetus was considered to be a human being, a second life, separate and apart from its mother. As stated by Blackstone, in the passage immediately preceding that portion quoted in the majority opinion, ‘Life is the immediate gift of God, a right inherent by

newborn child, and it was uniformly declared to be the law that a verdict of murder could not be returned unless it was proved the infant had been born alive.”

⁸ *Keeler*, 488.

⁹ *Keeler*, 492.

nature in every individual; and it begins in contemplation of law as soon as an infant is able to stir in the mother's womb”¹¹.

He pointed out that the reluctance of the common law to characterise the killing of a quickened foetus as a homicide was based upon a presumption that it would be born dead. However widespread and justified this presumption may once have been “as we approach the 21st century, it has become apparent that ‘this presumption is not only contrary to experience and the ordinary course of nature, but it is contrary to the usual rule with respect to presumption followed in this state’.”¹²

Based upon the state of the medical art in the 17th, 18th and 19th centuries, that presumption may have been well-founded. However, as we approach the 21st century, it has become apparent that ‘This presumption is not only contrary to common experience and the ordinary course of nature, but it is contrary to the usual rule with respect to presumptions followed in this state.’ (*People v. Chavez*....) If, as I have contended, the term ‘human being’ in our homicide statutes is a fluid concept to be defined in accordance with present conditions, then there can be no question that the term should include the fully viable fetus. The majority suggest that to do so would improperly create some new offense. However, the offense of murder is no new offense....What justice will be promoted, what objects effectuated, by construing ‘human being’ as excluding Baby Girl Vogt and her unfortunate successors? Was defendant's brutal act of stomping her to death any less an act of homicide than the murder of a newly born baby? No one doubts that the term ‘human being’ would include the elderly or dying persons whose potential for life has nearly lapsed; their proximity to death is deemed immaterial. There is no sound reason for denying the viable fetus, with its unbounded potential for life, the same status.¹³

The majority had contended that to regard the killing of the foetus as murder would be, in effect, to create a new offence. Burke C. J. denied this saying, “the Legislature simply used the broad term ‘human being’ and directed the courts to construe that term according to its ‘fair import’ with a view to effect the objects of the homicide statutes and to promote justice.”¹⁴ He noted, “No one doubts that the term ‘human being’ would include the elderly or dying persons whose potential for life has nearly

¹⁰ *Keeler*, 494.

¹¹ *Keeler*, 495.

¹² *Keeler*, 497. The internal reference is to *People v. Chavez* 77 Cal.App.2d at 626.

¹³ *Keeler* 497.

lapsed; their proximity to death is deemed immaterial. There is no sound reason for denying the viable fetus, with its unbounded potential for life, the same status” and he added, citing some dicta of the *Chavez* court to the effect that

There is not much change in the child itself between a moment before and a moment after its expulsion from the body of its mother, and normally, while still dependent upon its mother, the child for some time before it is born, has not only the possibility but a strong probability of an ability to live an independent life....[I] would be a mere fiction to hold that a child is not a human being because the process of birth has not been fully completed, when it has reached that state of viability when the destruction of the life of its mother would not end its existence...¹⁵

In the wake of the *Keeler* decision the California legislature amended its Penal Law §187. It now reads “Murder is the unlawful killing of a human being, *or a fetus*, with malice aforethought.”¹⁶ In *People v. Davis*¹⁷ this statute was held by the California Supreme Court in a majority decision (six to one) to apply from seven weeks gestation onwards:

We agree with the People and the Court of Appeal that viability is not an element of fetal murder under section 187, subdivision (a), and conclude therefore that the statute does not require an instruction on viability as a prerequisite to a murder conviction. In its discussion, the Court held that “The Legislature reacted to the *Keeler* decision by amending the murder statute, section 187, subdivision (a), to include within its proscription the killing of a fetus. (Stats.1970, ch. 1311, § 1, p. 2440.)....The amended statute specifically provides that it does not apply to abortions complying with the Therapeutic Abortion Act, performed by a doctor when the death of the mother was substantially certain in the absence of an abortion, or whenever the mother solicited, aided, and otherwise chose to abort the fetus. (§ 187, subd. (b).) The legislative history of the amendment suggests the term ‘fetus’ was deliberately left undefined after the Legislature debated whether to limit the scope of statutory application to a viable fetus....The Legislature was clearly aware that it could have limited the term ‘fetus’ to ‘viable fetus,’ for it specifically rejected a proposed amendment that required the fetus be at least 20 weeks in gestation before the statute would apply. (Assem. Bill No. 816 (1970 Reg.Sess.))” The Court concluded that “viability is not an element of fetal homicide under section 187, subdivision (a). The third party killing of a fetus with malice aforethought is murder under section 187, subdivision (a), as long as the state

¹⁴ *Keeler*, 497.

¹⁵ *Keeler*, 498.

¹⁶ California Codes: Penal Code, Section § 187, subd. (a.) Emphasis added.

¹⁷ 7 Cal.4th 797, 30 Cal.Rptr.2d 50, 872 P.2d 591 (Calif. 1994).

can show that the fetus has progressed beyond the embryonic stage of seven to eight weeks.¹⁸

*Roe v. Wade*¹⁹ is perhaps the most important case concerned with abortion and allied subjects in the USA in the twentieth century. The right to privacy, first articulated in *Griswold v. Connecticut*²⁰ and extended in *Eisenstadt v. Baird*,²¹ was now held to extend to the decision of a woman, in consultation with her physician, to terminate her pregnancy. “The birth control [privacy] decisions paved the way for *Roe v. Wade* and *Doe v. Bolton*, the abortion decisions of 1973. They rested even more explicitly on privacy grounds than had *Griswold*...”²² Notoriously, the Supreme Court trimesterised the pregnancy and associated with each trimester particular rights. In the first trimester the State might not interfere with a woman’s decision save to insist that the abortion be performed by a licensed physician. After the first trimester, the State had a compelling interest in protecting the woman’s health and might regulate abortion accordingly. At the end of the second trimester the point of foetal viability is reached and now that State had a compelling interest in protecting potential life. In this period, abortion might be proscribed unless it were necessary to protect the woman’s life or health. “[T]his is so because the fetus then presumably has the capability of meaningful life outside the mother's womb. State regulation protective of fetal life after viability thus has both logical and biological justifications.”²³

In *Webster v. Reproductive Health Services*²⁴ a challenge was mounted to a Missouri Act of 1986, which had, among other things, declared that life began at

¹⁸ 7 Cal.4th 797, 30 Cal.Rptr.2d 50, 872 P.2d 591 (Calif. 1994).

¹⁹ *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (U.S.Tex. Jan 22, 1973).

²⁰ *Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (U.S.Conn. Jun 07, 1965).

²¹ While *Griswold* held that the right to use contraceptives belonged only to married couples, just a few years later, in 1972, *Eisenstadt v. Baird* extended this right to individuals and unmarried persons. *Eisenstadt v. Baird*, 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349 (U.S.Mass. Mar 22, 1972).

²² Martin Shapiro and Rocco Tresolini, *American Constitutional Law* 4th edition (New York, 1975), 732.

²³ Alan S. Wasserstrom, “Homicide based on Killing of Unborn Child” *American Law Reports*, ALR5th, Vol. 64 (1998); 64 A.L.R.5th 671 (1998), part I, sect. 2.

conception. The Supreme Court allowed the Act's declaration on the beginning of life to pass unchallenged because there was insufficient evidence to show that it would be used to restrict such protected activities such as contraception or abortion. Following on *Roe* and *Webster* came *Planned Parenthood of Southeastern Pennsylvania v. Casey*.²⁵ While it reaffirmed a woman's right to abortion along the lines of *Roe v. Wade*, the court revoked its longstanding definition of that right as being fundamental. Restrictions on pre-viability abortions are to be allowed provided they do not constitute an 'undue burden' on a woman.²⁶

In *People v. Greer*²⁷ a man beat to death a woman who was pregnant with his child of eight and a half months gestation. Under the relevant homicide statute²⁸ it is provided that "(a) person who kills an individual without lawful justification commits murder." The court adhered to the common law Born Alive rule holding that the killing of a foetus is not murder unless the child is born alive and afterwards dies from the wounds inflicted upon it pre-natally. It concluded that in respect of the death of the foetus, the defendant was not guilty of murder. However, just as the California legislature was to react against *Keeler* by amending its homicide statute, so too the Illinois legislature reacted to the *Greer* decision by enacting a statute that criminalised the nonconsensual killing of an unborn child.²⁹ The statute included a viability requirement. This requirement was subsequently eliminated by the passage of an act

²⁴ *Webster v. Reproductive Health Services* 1989 (US Supreme Court) 492 US 490.

²⁵ *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674, 60 USLW 4795 (U.S.Pa. Jun 29, 1992).

²⁶ For a devastating critique of what he regards as the Supreme Court's pusillanimity see Paul Benjamin Linton, "Planned Parenthood v. Casey: The Flight from Reason in the Supreme Court" *Saint Louis University Public Law Review* (13 STLUPLR 15) 1993.

²⁷ *People v. Greer*, 79 Ill. 2d 103, 37 Ill. Dec. 313, 402 N.E.2d 203 (1980).

²⁸ Ill. Rev. Stat. ch. 38 P 9-1(a) (1977).

²⁹ Ill. Rev. Stat. § 82-303 (1981, Public Act).

in 1986 which repealed the 1981 statute and in which an unborn child was defined as “any individual of the human species from fertilization until birth”.³⁰

In 1984, in the case of *Commonwealth v. Cass*,³¹ the Massachusetts Supreme Judicial Court became the first court explicitly to abandon the born alive rule in holding that a viable foetus is a person for purposes of a state vehicular homicide statute so that it is homicide if injuries are inflicted on a viable foetus which result in its pre-natal death. The facts of the case are as follows: while driving a car, the defendant struck an almost full-term pregnant woman. An autopsy revealed that at the time of the incident the foetus was viable and that its death was caused by the defendant’s action. The court saw no reason not to take ‘person’ as being synonymous with ‘human being’ for the purposes of interpreting the Act. They also held that the progeny of human parents cannot reasonably be considered to be other than human beings, and therefore persons, first within, and then in normal course of events, outside the womb. While accepting that there can be difficulties attached to proving the necessary element of causation in cases involving the death of foetuses, the court nevertheless believed that the difficulty of proving causation was no sound reason for denying criminal liability.

In the same year as *Cass*, the Supreme Court of South Carolina in *State v. Horne*³² held that it would be inconsistent to allow for the recovery of damages for wrongful death in civil cases while refusing to recognise a corresponding crime. The facts of the case are depressingly familiar. A man attacked his wife with a knife, she being almost full term in her pregnancy. She survived the attack but her unborn child did not. The autopsy revealed that the child was viable and that the trauma the mother suffered as a result of the assault was the cause of its death. Since the court already

³⁰ Ill. Rev. Stat. ch. 38, P 9-1.2(b)(1) (1987).

recognised that in civil law recovery could be had for the wrongful death of a foetus it felt it would be 'grossly unfair' if it were not to require criminal liability in the appropriate circumstances. In subsuming the killing of foetuses under its general murder statute,³³ the court saw itself as carrying out its duty to develop the common law in line with changing social requirements.

In *Vo v. Superior Court*³⁴ the defendant shot a woman, killing both her and her viable foetus. In contrast to the situation in *Horne*, the court, while accepting that a stillborn viable foetus was considered to be a 'person' for the purposes of the relevant wrongful death statute, was unwilling to accept that it was a person for the purposes of the penal statute.

In *People v. Ford*³⁵ a man kicked his pregnant stepdaughter in the abdomen. A placental haemorrhage resulted from this assault which in turn caused the death of the woman's foetus. The defendant challenged the constitutionality of the relevant foetal homicide statute³⁶ on the grounds that the statute was arbitrary and capricious in its determination of what constituted human life. The court upheld the constitutionality of the statute, holding that the making of a distinction between 2nd party foeticide (abortion) and 3rd party foeticide did not undermine the state's interest in protecting the potentiality of human life. The Equal Protection Clause of the Federal Constitution was not violated by this distinction as a woman had a privacy interest in the termination of her pregnancy while a third party has no such interest.

³¹ *Commonwealth v. Cass*, 467 N.E.2d 1324 (Mass. 1984).

³² *State v. Horne*, 319 S.E.2d 703 (S.C. 1984).

³³ S.C. Code, s. 16-3-10 (1976).

³⁴ *Vo v. Superior Court In and For County of Maricopa*, 172 Ariz. 195, 836 P.2d 408 (Ct. App. Div. 1 1992).

³⁵ *People v. Ford*, 221 Ill. App. 3d 354, 163 Ill. Dec. 766, 581 N.E.2d 1189 (4th Dist. 1991).

³⁶ Ill. Ann. Stat. ch. 38 P 9-1.2.

In 1994 the Oklahoma Court of Criminal Appeal, in *Hughes v. State*³⁷ (another driving case involving the death of a late term foetus) had no difficulty finding that a viable foetus was a human being for the purposes of the state's first degree manslaughter statute: "The purpose of [the statute] is, ultimately, to protect human life. A viable human fetus is nothing less than human life."³⁸ The status of the foetus was the major obstacle confronting the *Hughes* court. In the very first page of his judgement, Chapel J announced "We now abandon the common law approach and hold that whether or not it is ultimately born alive, an unborn fetus that was viable at the time of injury is a 'human being' which may be the subject of a homicide".³⁹ According to Mary Lynn Kime, "The court persuasively dispelled the reasoning behind the 'Born Alive' Rule, emphasizing that current scientific understanding has eliminated the problem of proving that the fetus was alive and that the defendant's conduct has caused its death. Additionally, the court noted the trend toward allowing recovery for an unborn fetus under civil wrongful death statutes and effectively analogized the decision in *Evans* to the instant case."⁴⁰ Wasserstrom's comments that in the case of *Hughes v. State* "the court held that the common-law, 'born alive' rule was abandoned so that whether it is ultimately born alive, an unborn fetus that was viable at time of an injury was a human being who may be the subject of a homicide under Okla. Stat. tit. 21 § 691 (1981)."⁴¹ In rejecting the Born Alive rule the court acknowledged that advances in medical and scientific knowledge and technology have abolished the need for it.

³⁷ *Hughes v. State*, 868 P.2d 730 (Okla. Crim. App. 1994).

³⁸ *Hughes*, 734.

³⁹ *Hughes*, 731.

⁴⁰ Kime, 557.

⁴¹ Wasserstrom, Part II, sect. 3a.

In 1997 the Missouri Court of Appeals went well beyond simply abandoning the born alive rule. In *State v. Holcomb*,⁴² another case involving the killing of a foetus by a third party, the court found that even a pre-viable foetus could be the object of first-degree murder. It believed this finding to be in accord with a Missouri statute, which states that

1. The general assembly of this state finds that: (1) The life of each human being begins at conception; (2) Unborn children have protectable interests in life, health, and well-being; (3) The natural parents of unborn children have protectable interests in the life, health, and well-being of their unborn child. 2. Effective January 1, 1988, the laws of this state shall be interpreted and construed to acknowledge on behalf of the unborn child *at every stage of development*, all the rights, privileges, and immunities available to other persons, citizens, and residents of this state, subject only to the Constitution of the United States, and decisional interpretations thereof by the United States Supreme Court and specific provisions to the contrary in the statutes and constitution of this state. 3. As used in this section, the term ‘unborn children’ or ‘unborn child’ shall include *all unborn child or children or the offspring of human beings from the moment of conception until birth at every stage of biological development*. 4. Nothing in this section shall be interpreted as creating a cause of action against a woman for indirectly harming her unborn child by failing to properly care for herself or by failing to follow any particular program of prenatal care.”⁴³

Again the court distinguished between 2nd and 3rd party foeticide and rejected the defendant’s claim that he was similarly situated to a woman who consents to an abortion. Holding that an unborn child is a ‘person’ for the purposes of the first-degree-murder statute the court held that it does not follow from the fact that a mother has abortion rights that a third party can evade prosecution in killing a foetus whose death has not been consented to by its mother.

In contrast to *Pellegrini*, and before the decision in *Whitner*, the court in *State v. Ashley*, while recognising the uniqueness of the relationship between a mother and her foetus, held that “we are not persuaded that based upon this relationship, a

⁴² *State v. Holcomb*, 956 S.W.2d 286 (Mo. Ct. App. 1997).

⁴³ Mo. Rev. Stat. § 1.205 (1994). Emphasis added.

mother's duty to her fetus should not be legally recognized."⁴⁴ The court argued that since there could be no principled objection to holding a mother answerable in negligence to her child *after* its birth it would be illogical not to provide redress for such injury just because it occurred some hours, days or months before birth.

In both *Wiersma v. Maple Leaf Farms*⁴⁵ (a tort case) and in *People v. Davis* (a criminal case) the defence put forward essentially the same argument to the effect that there is no legal consistency in allowing an abortion of a pre-viable foetus while imposing civil or criminal liability on the defendant for terminating the life of such a foetus. The courts in both cases rejected this line of argument, holding that only a mother's decision to abort was constitutionally protected under *Roe*. This may well be so in a purely legal factual sense; however, the principled point made by the defendants requires a principled answer. Why does *Roe* allow for this difference? Why is the homicide of a foetus permitted to one class of people and not to another? Answers are possible, such as; persons to whom the homicide is a permitted action are constituted as a class by their all being, for example, under threat to their own lives. This would provide an argument of self-defence to all pregnant women. I am not, by the way, claiming that this is plausible, merely that it is not impossible in principle to find different groups of people differently circumstanced and so in different legal positions. In any event, the constitutional protection in the USA for abortion is grounded not in the reasonably robust, if implausible, right to self-defence, but in the constitutionally suspect right to privacy.

A recent case has threatened to smudge the neat distinction between 2nd party feticide (abortion) and 3rd party feticide upon which the accommodation between the federally supported right to abortion and the States' prohibition of 3rd party foetal

⁴⁴ *State v. Ashley*, 670 So. 2d 1087 (Fla. Dist. Ct. App. 1996) at 1089.

homicide had been predicated. In *Whitmer v. State*⁴⁶ a woman pleaded guilty to, and was convicted of, criminal child neglect “for causing her baby to be born with cocaine metabolites in its system by reason of [her] ingestion of crack cocaine during the third trimester of her pregnancy”. The Supreme Court of South Carolina held that, for the purposes of the state's child neglect statute, a viable foetus was a ‘person’.

The question for this Court, therefore, is whether a viable fetus is a ‘person’ for purposes of the Children's Code....South Carolina law has long recognized that viable fetuses are persons holding certain legal rights and privileges. In 1960, this Court decided *Hall v. Murphy*, 236 S.C. 257, 113 S.E.2d 790 (1960). That case concerned the application of South Carolina's wrongful death statute to an infant who died four hours after her birth as a result of injuries sustained prenatally during viability. *The Appellants argued that a viable fetus was not a person within the purview of the wrongful death statute, because, inter alia, a fetus is thought to have no separate being apart from the mother. We found such a reason for exclusion from recovery ‘unsound, illogical and unjust,’ and concluded there was ‘no medical or other basis’ for the ‘assumed identity’ of mother and viable unborn child....In light of that conclusion, this Court unanimously held: “We have no difficulty in concluding that a fetus having reached that period of prenatal maturity where it is capable of independent life apart from its mother is a person.”* [Emphasis added by court] More recently, we held the word ‘person’ as used in a criminal statute includes viable fetuses.... *it would be absurd to recognize the viable fetus as a person for purposes of homicide laws and wrongful death statutes but not for purposes of statutes proscribing child abuse.* [Emphasis added] Our holding in *Hall* that a viable fetus is a person rested primarily on the plain meaning of the word ‘person’ in light of existing medical knowledge concerning fetal development. We do not believe that the plain and ordinary meaning of the word ‘person’ has changed in any way that would now deny viable fetuses status as persons.⁴⁷

This raises questions once again about the nature and extent of society's interest in foetal life. Some are sanguine about the preservation of the abortion law status quo, suggesting that “maternal acts that represent a ‘reproductive choice’ will be protected by the abortion right of *Roe* and *Casey*, but maternal acts that harm a fetus that she

⁴⁵ *Wiersma v. Maple Leaf Farms*, 543 N.W.2d 787 (S.D. 1996); *People v. Davis*, 872 P.2d 591 (Cal. 1994).

⁴⁶ *Whitmer v. State*, 492 S.E.2d 777 (S.C. 1997); 328 S.C. 1, 492 S.E.2d 777, 70 A.L.R.5th 723 (S.C. Jul. 15, 1997).

⁴⁷ *Whitmer*, 779; 780;781.

nonetheless intends to carry to term might be punished in the name of society's prospective interest in the health of the child to be born.”⁴⁸

However, there are difficult questions to answer. Would a woman be liable to criminal sanctions if, carrying a foetus she could legally abort, she knowingly took drugs that caused severe harm to her child later born alive? Suppose further that, having damaged her foetus by taking these drugs, she were to try to avoid liability by having a (legal) abortion, would her earlier crime have to be considered as being uncommitted? Cari Leventhal notes “[I]t is illogical to impose criminal penalties upon a woman for harming a fetus that she could legally abort. The Act has deemed a fetus a ‘person’ from the moment of conception. Allowing a woman to legally have an abortion at this time but to render her criminally liable for harming her fetus through the use of drugs or other inappropriate behaviour is inconsistent.”⁴⁹ Murphy S. Klasing is similarly impressed with the apparent contradiction: “Although many courts try to explain that abortion law is separate and distinct from tort or criminal law, there would be an ‘inherent conflict in giving the mother the right to terminate the pregnancy yet holding that an action may be brought on behalf of the same fetus under the wrongful death act.’”⁵⁰ Alison M. Leonard⁵¹ remarks that “in Pellegrini, the Massachusetts court held that, while the fetus was a person for purposes of its vehicular homicide and murder statutes, this was only so when an interest of the mother or both parents was asserted via the state action.” She believes that “in distancing itself from the Pellegrini decision, the Whitner court expressly refused to

⁴⁸ Website: <http://hometown.aol.com/abtrbng/feticide.htm>, 2.

⁴⁹ Cari L. Leventhal, “The Crimes Against the Unborn Child Act: Recognizing Potential Human Life in Pennsylvania Criminal Law” (1998) 103 *Dickinson Law Review* 173, at 195.

⁵⁰ Murphy S. Klasing, “The Death of the Unborn Child: Jurisprudential Inconsistencies in Wrongful Death, Criminal Homicide, and Abortion Cases,” (1995) 22 *Pepperdine Law Review* 933, 966. [22PEPLR933]

⁵¹ Alison M. Leonard, “Fetal Personhood, Legal Substance Abuse, and Maternal Prosecutions: Child Protection or ‘Gestational Gestapo’?” *New England Law Review* 32 NENGLR 615

recognize a distinction made by Massachusetts and other jurisdictions; that third party injury to the fetus is actionable, but injury by the mother is not.”⁵²

*In re Unborn Child*⁵³ concerned a woman, Sierra K, who was found to have permanently neglected her first four children so that they were removed from her care. She had a fifth child who was born with a positive toxicology for cocaine. After testing positive for crack cocaine, and admitting prenatal drug use, Ms K surrendered this child. The court ordered that she attend and participate in a drug abuse rehabilitation programme, refrain from the use and possession of any illegal drugs, and attend and participate in a parent effectiveness training programme. At the time of the instant case, Ms K was pregnant with her sixth child but had not complied with the terms and conditions of the court order. A petition was filed by the Legal Aid Society of Suffolk County seeking summary judgement that Ms K’s unborn child is derivatively neglected based on Ms K’s history of drug abuse and child neglect. Freundlich, J. remarked “The focus of any inquiry to determine whether derivative neglect is present is whether the evidence of abuse or neglect of one child indicates a fundamental defect in the parent’s understanding of the duties of parenthood.”⁵⁴ He continued: “Based upon respondent’s past conduct prior to and during this pregnancy, there can be no doubt that the respondent has, and will continue to place this new child at substantial risk of harm from crack cocaine or other illegal drugs.”⁵⁵

Counsel for Ms K. argued that no legal personality had been conferred on the unborn child: Freundlich, J. thought otherwise, providing a brief résumé of New York statutory law in the areas of crime, property, administrative and tort law to support his judgement. In the context of criminal law

⁵² Leonard, 622-23.

⁵³ *In re Unborn Child* 683 NYS S.2d 366 (19 June 1998) (New York Family Court).

⁵⁴ *Unborn Child*, 368.

⁵⁵ *Unborn Child*, 368.

A fetus past 24 weeks is afforded legal status and concomitant protection under the Penal Pal (P.L.). Though 'person' is defined in P.L. Sec. 125.05(1) as a 'human being who has been born and is alive', P.L. Sec. 125.00 specifically includes as a victim, in the definition of Homicide, an unborn child over 24 weeks. The legislative intent here is apparent: if the mother is in the third trimester of pregnancy, acts causing the death of the fetus may be prosecuted as homicide.⁵⁶

And in the context of property law the Estates, Powers and Trusts Law (E.P.T.L) holds that the property interests of children, while not realisable until birth, nevertheless are recognised while the child is yet a foetus.⁵⁷ In the context of administrative law, the New York State Department of Social Services provides an increased allowance of \$50 per month for the appropriate category of pregnant woman, beginning in the fourth month of her pregnancy.

The situation in tort law is slightly more complicated than that in criminal, property and administrative law but it is still in line with Freundlich J.'s position. He notes that "The courts have moved from the position that no duty is owed to the unborn to allowing recovery for injury to a fetus who is subsequently born damaged or who, after birth, dies due to pre-natal injury."⁵⁸ And while the court in *Albala v. City of New York* held that no cause of action lies for a preconception tort that results in injury to a subsequently conceived foetus and held further that no wrongful death cause of action will lie when a child is stillborn, the court nevertheless stated, in distinguishing *Albala* from *Woods v. Lancet*,⁵⁹ that in *Woods* "at the time the tort is committed there are two identifiable beings within the zone of danger each of whom is owed a duty independent of the other and each of whom may be directly injured"⁶⁰ and that "The *Woods* decision...simply brought the common law of this State into accord with the demand of natural justice which requires recognition of the legal right

⁵⁶ *Unborn Child*, 368-369.

⁵⁷ *Unborn Child*, 369.

⁵⁸ *Unborn Child*, 369.

⁵⁹ *Woods v. Lancet* 303 NY 349.

of every human being to begin life unimpaired by physical or mental defects resulting from the negligence of another.”⁶¹

The doctrine that there are two subjects of possible damage in such cases was given further support by a decision of Appellate Division (New York) in *Hughson v. St. Francis Hospital of Port Jervis*.⁶² In the context of Public Health Law relating to the matter of informed consent, the Appellate Division held that the doctor owes two duties of informed consent, one to the mother and another to the foetus.

Stating that the protection of the foetus has been definitively recognised as a legitimate state interest in *Roe* Freundlich J. went on to claim, “In the instant matter, there is no maternal right to privacy involved as it concerns the use of illegal drugs.” He noted that the Wisconsin Court of Appeals, in the case of *State of Wisconsin ex re. Angela M.W. v. Kruzicki*,⁶³ upheld as constitutional “an order for the protective custody of a viable fetus, which, by necessity, required the custody of the mother as well” and held that “the mother’s constitutional rights to due process of law and equal protection under the United States Constitution and the Wisconsin Constitution were not violated by detaining her in custody in order to protect and ensure the welfare of the fetus.”⁶⁴

In support of his judgement, Freundlich, J. cited a case⁶⁵ in which, in the context of sentencing a pregnant defendant, the rights and interests of the unborn child were considered along with those of his mother. “[T]he Court concluded that while Miss Denoncourt deserves imprisonment, the Court did not feel that prison was a suitable

⁶⁰ *Albala v. City of New York* 54 NY 2d 269, 272

⁶¹ *Endresz v. Friedberg* 24 NY 2d 478, 483.

⁶² *Hughson v. St. Francis Hospital of Port Jervis* 92 A.2d 131.

⁶³ *State of Wisconsin ex re. Angela M.W. v. Kruzicki* 197 Wis. 2d 532

⁶⁴ *In re Unborn Child* 683 NYS S. 2d 366, 370.

⁶⁵ *United States v. Denoncourt* 751 F.Supp. 168.

or desirable setting for her unborn baby.”⁶⁶ One could see this either as a *reductio ad absurdum* of recognising the legal personality of the unborn child, or, on the other hand, as simply accepting the legal implications of current medical and scientific facts.

Freundlich, J. pointed up the absurdity of treating essentially similar things dissimilarly: “Making a child endure an unsafe environment in the womb is ludicrous when this same child is afforded protection from illegal drugs and an unsafe environment the moment it takes its first breath outside the womb.” He believed that it was “inconceivable that the legislature would intend a fetus to have property rights and causes of action sounding in tort, but not be protected against threats to its safety or life, from its own mother, while in utero”⁶⁷ and he summed up:

It is evident that the legislature, as well as other courts and other jurisdictions, demonstrates intent to protect the unborn, not only with regard to property rights and tort concerns, but with regard to the safety, physical integrity, and overall well being of the unborn child. It does not follow with any logical certainty that the unborn child should not be protected from the danger associated with drug use and abuse by its mother, when, within moments of gasping its first breath, that same infant will be accorded every necessary protection from a mother who uses illegal drugs. It defies logical reasoning that our laws and society would preclude a mother from illegally introducing narcotics and other illegal drugs into her child and yet not protect the unborn child from those same dangers while the child is still in the womb.⁶⁸

In *In re Unborn Child of Starks*⁶⁹ the Oklahoma Supreme Court refused to be swayed by suggestions that it might not be treating likes things alike and nailed its colours to the mast of strict statutory interpretation. Julie Starks (appellant) and Jimmy Ravon Cook were arrested for making and possessing methamphetamine. Ms Starks was

⁶⁶ *Kruzicki*, 371.

⁶⁷ *Kruzicki*, 371. “The question of fetal personhood is not limited to criminal law. In fact, most advances in fetal personhood law first developed in the area of tort. By first including a viable fetus as having a cause of action in tort, usually a wrongful death action, several jurisdictions then made the segue into criminal law by punishing crimes against the viable fetus.” Leonard, 629.

⁶⁸ *Kruzicki*, 371.

⁶⁹ *In re Unborn Child of Starks* 18 P.3d 342; Okla 2001 (Jan 23 2001)

seven months pregnant (by Mr Cook) at the time of her arrest. On its own motion the trial court convened an emergency hearing at which it took emergency temporary custody of Ms Starks's viable foetus. It proceeded thus (under 10 O.S.Supp. 2000, sect. 7003-2.1) believing that if Ms Starks were to be released from jail and if she were to engage in methamphetamine-related activity her foetus could be harmed. On 23 September 1999, the Oklahoma Supreme Court found that the trial court's actions constituted an unauthorised application of judicial power and, as such, it was inefficacious and unenforceable. Subsequently, the trial court continued to order custody of Ms Starks's foetus and, after the birth of the child, JBC, the court entered an order giving emergency custody of the new-born child to the Department of Human Services. Finally, in a jury trial, on 19 November 1999, the jury held JBC to be a deprived child in accordance with the guidelines of the Oklahoma Children's Code (OCC). Ms Starks appealed against this finding, and against other dispositions of the trial court, asserting that "the trial court lacked subject matter jurisdiction to assume custody of her fetus under the Oklahoma Children's Code....[and]...lacked personal jurisdiction for all custody orders entered."⁷⁰ She also contended that the trial court "violated her right to privacy and autonomy, substantive and procedural due process, equal protection based on gender and right to travel."⁷¹ Addressing this matter again, the Oklahoma Supreme Court limited its attention to whether or not the term 'child' in the Oklahoma Children's Code (OCC) included a foetus. The State of Oklahoma argued that under the OCC it had a duty to Ms Starks's foetus to intervene to prevent it from being harmed, pointing out that "since a fetus may be the subject of homicide and its biological parents may recover damages for its wrongful death, [the

⁷⁰ *Unborn Child of Starks*, 345.

⁷¹ *Unborn Child of Starks*, 345.

courts] should afford a fetus the same protection given to a child under the Oklahoma Children's Code."⁷²

The Oklahoma Supreme Court rejected the State's claim and argument. Referring to the Oklahoma Court of Criminal Appeals' decision in *Hughes v. State*,⁷³ the Supreme Court held that what that court had decided was that medical science could determine whether or not a child in the womb was alive at a given time and whether or not the defendant's action were the cause of its death. Medical science, however, "cannot provide evidence regarding whether a fetus might be emotionally, mentally, physically or intellectually deprived within the definitions of terms contained in the Oklahoma Children's Code. Such evidence cannot be obtained until after the birth of a child."⁷⁴ Moreover, while a foetus may be a child for the purposes of Oklahoma's criminal law "it is not a 'child' under the Oklahoma Children's Code. The set of 'human beings' contains at least three subsets, to-wit: adults, fetuses and children, only the latter of which is protect by the Children's Code."⁷⁵

Defending itself against a possible charge of inconsistency, the Supreme Court noted that its decision to allow for recovery in the case of wrongful death in *Evans v. Olson*⁷⁶ and subsequent cases based thereon was consistent with the intent of Oklahoma's wrongful death statute whereas, in the instant case "We find nothing in the language or intent of the Children's Code to support its application to a fetus, viable or nonviable...". The Supreme Court went on to note that the weight of authority was on its side in its decision to disallow intervention to protect a foetus, noting that the appellant's brief instanced no fewer than sixteen States that also

⁷² *Unborn Child of Starks*, 345.

⁷³ 868 P.2d 730

⁷⁴ *Unborn Child of Starks*, 345.

⁷⁵ *Unborn Child of Starks*, 345.

⁷⁶ 550 P.2d 924

disallowed such interventions.⁷⁷ The Supreme Court chose to illustrate this point by instancing the stances adopted by the States of Florida, Arizona, California, Kentucky, Nevada, Texas and Michigan in relation to the non-extension of their respective child abuse statutes (or their equivalent) to cover the foetus. Concluding its review, the Supreme Court held that the principle of interpretation of statutes must be the intent of the legislature. The judges noted that “When the legislature intends to refer to a fetus or a pregnant woman, it does so specifically”⁷⁸ and that “The legislature uses ‘fetus’ to denote an unborn human being and ‘child’ to denote a born human being. It does not consider these terms to be interchangeable....If the legislature had intended the Children’s Code to apply to a fetus or to a pregnant woman it would have used those specific terms...”⁷⁹

Minnesota, Illinois and Pennsylvania are states with foeticide statutes. The Minnesota Criminal Code contains an example of a modern foeticide statute that is remarkable in terms of its comprehensiveness. According to this statute, unborn child means “the unborn offspring of a human being conceived, but not yet born”. This unborn child can be the subject of murder in the first degree (premeditated intention), murder in the second degree (unpremeditated intent or without intent but while committing or attempting to commit a felony excluding criminal sexual conduct), murder in the third degree (without intent but evincing a depraved mind, without regard for human or foetal life). Charges of manslaughter or assault (in various degrees) may also lie under this statute. Similarly, Illinois’ foeticide law prohibits intentional homicide, voluntary and involuntary manslaughter, battery, and aggravated battery of an unborn child. Since 1998, Pennsylvania has had its own The

⁷⁷ *Unborn Child of Starks*, 346, fn. 1.

⁷⁸ *Unborn Child of Starks*, 347.

⁷⁹ *Unborn Child of Starks*, 347, 348.

Crimes Against the Unborn Child Act.⁸⁰ Like the Minnesota law, the Pennsylvania law also established the crimes of 1st, 2nd and 3rd degree murder, voluntary manslaughter and, if the unborn child is injured, the crime of aggravated assault. Cari Leventhal comments:

Since colonial times, Pennsylvania criminal law has specifically maintained that it is not murder to kill a fetus. Now, after three centuries, this rule has been dramatically altered in Pennsylvania through the enactment of The Crimes Against the Unborn Child Act...By passing the Act, Pennsylvania has aligned itself with twenty-five other states who have also adopted fetal-homicide laws...More importantly, while extending the protection of state criminal laws to a human fetus, the Act deems a fetus to be a human being from conception and a person in the eyes of the criminal courts.⁸¹

She continues, “Without ever seeing the light of day, or extracting a breath of fresh air, a fetus is gradually acquiring legal protection as a ‘person’ in the United States. By way of legislation or court decisions, half the fifty states prohibit the killing of a fetus outside the domain of legal abortion.”⁸²

Some states have arrived at foeticide provisions not by means of new or amending legislation but by court-led statutory interpretation. The Supreme Court of Massachusetts (4-3) in *Commonwealth v. Cass*,⁸³ the South Carolina Supreme Court (5-0) in *State v. Horne*,⁸⁴ and Oklahoma's Court of Criminal Appeals (7-0) in *Hughes v. State*⁸⁵ have all held that their existing homicide statutes applied to viable fetuses. In *Cass*, the court even left open the possibility of subsuming non-viable fetuses under homicide provisions, a possibility realised in 1984, when the Massachusetts Supreme Court (5-0) by a unanimous decision in *Commonwealth v. Lawrence*⁸⁶ held that a viable fetus was a ‘human being’ for the purposes of common law murder.

⁸⁰ 18 PA. Cons Stat. Ann. §§.2601-2609.

⁸¹ Leventhal, 173.

⁸² Leventhal, 177.

⁸³ *Commonwealth v. Cass*, 392 Mass. 799, 467 N.E.2d 1324 (Mass. Aug 16, 1984).

⁸⁴ *State v. Horne*, 282 S.C. 444, 319 S.E.2d 703 (S.C. Aug 17, 1984). 1999).

⁸⁵ *Hughes v. State*, 868 P.2d 730, 1994 OK CR 3 (Okla.Crim.App. Jan 24, 1994).

⁸⁶ *Commonwealth v. Lawrence* 404 Mass. 378, 536 N.E.2d 571 (1989).

Leventhal notes that pro-choice forces in Pennsylvania believe that the Crimes Against the Unborn Child Act “is merely a maneuver by abortion opponents to muddy the legal waters surrounding abortion, while affirming the stance that a fetus has individual guarantees.” She believes this judgement to be mistaken. “[T]he law’s passage will not lead to an erosion of constitutionally protected abortion rights because of one essential distinction: that of a woman’s right of choice regarding her health and body versus an assailant’s unilateral right to destroy her fetus out of malice or recklessness.”⁸⁷ I believe that the foeticide laws have survived constitutional challenge so far inasmuch as they have all been careful not to conflict with *Roe* by the use of a hitherto reasonably clear distinction between 2nd party and 3rd party foetal assaults. However, the circumstances of child neglect/child abuse in regard to the foetus obviously involve the 2nd party. To this extent, there is a latent tension between *Whitner* type cases or statutes modelled along those lines and the Constitutional position after *Roe* and *Casey*.

The Uniform Laws Annotated Model Penal Code⁸⁸ provides that a person may be sentenced to death for murder if the court finds that any of a set of aggravating circumstances obtains without mitigation, among which is included the following: “At the time the murder was committed the defendant also committed another murder.”⁸⁹ The Illinois Statute⁹⁰ mirrors the Model Penal Code in including as an aggravating factor that permits the application of the death penalty the murder of two or more individuals. For the purposes of Illinois law it doesn’t matter whether “the

⁸⁷ Leventhal, 185. See passim 184–190.

⁸⁸ See ULA Penal Code s. 210.2 “Murder is a felony of the first degree [but a person convicted of murder may be sentenced to death as provided in Section 210.6].

⁸⁹ ULA Penal Code, s. 210.6, 3(c).

⁹⁰ IL ST CH 720 s. 5/9-1, b(3). For another case of a double conviction see *State v. Smith* 676 So.2d 1068 (La., 1996). Although the defendant’s original conviction was overturned on ‘double-jeopardy’ grounds inasmuch as the same evidence was used to convict him of both crimes, the Louisiana Supreme Court restored his conviction for both manslaughter and second-degree foeticide.

deaths occurred as the result of the same act or of several related or unrelated acts so long as the deaths were the result of either an intent to kill more than one person or of separate acts which the defendant knew would cause death or create a strong probability of death or great bodily harm to the murdered individual or another...”

In *People v. Kuchan*⁹¹ the defendant was convicted of the murder of his wife and the concurrent intentional homicide of her child *in utero*. The crime of intentional homicide of an unborn child is a statutory offence that was introduced to replace the existing foeticide statute. The foeticide statute protected viable unborn children; the new intentional homicide statute protected all unborn children from fertilisation to birth.

The Delaware Code Annotated removes any possible ambiguity as to whether the killing of a foetus counts as a second instance of murder by including in its set of aggravating circumstances that allow the imposition of the death penalty simply that the victim was pregnant.⁹² In *State v. Virdin*⁹³ the defendant was indicted for the first-degree murder of his then pregnant wife, Stephanie Virdin. The State announced its intention of seeking the death penalty for the defendant under the relevant section of the Delaware Code. The defendant filed a motion to preclude the selection of a death qualified jury on the grounds that 11 Del.C. s. 4209(e)(1)p lacked a rational basis, was arbitrary, and was constitutionally vague. The Superior Court of Delaware rejected the defendant’s arguments and denied his motion.

The position of the unborn child in the United States has shifted from being largely unrecognised by the law to being recognised by different states in varying degrees for the varying purposes of administrative law, property law, tort law and criminal law. A

⁹¹ *People v. Kuchan* 219 Ill.App.3d 739, 579 N.E.2d 1054, 162 Ill.Dec. 240, (Sept. 13, 1991).

⁹² DE ST TI 11 s. 4209; 11 Del.C s. 4209. “In order for a sentence of death to be imposed, the judge must find that the evidence established beyond a reasonable doubt the existence of at least 1 of the following aggravated circumstances...the victim was pregnant.” s. 4209 (e) (1) and (e) (1) p.

persistent tension persists, however, between the abortion regime sanctioned by *Roe* and the foeticide provisions of individual states.

⁹³ *State v. Virdin* 1999 WL 743988(Del.Super.) This case is unpublished and is not reported in A.2d.

UNBORN CHILD VS PREGNANT WOMAN

Whatever difficulties are associated with criminal and civil cases against third parties, they are exacerbated in a morally and intellectually perplexing way when the issue becomes the legitimacy or advisability of the imposition of criminal or civil sanctions on pregnant women for harm they have caused to their unborn children. “Tort theory aside, maternal prenatal negligence cases are further plagued by moral complexity. The imposition of a duty of care upon pregnant women will interfere with their bodily integrity, privacy and autonomy rights in a way that it would not interfere with others persons who are not pregnant.”¹ The Supreme Court of Canada had to deal with this question in *Dobson v. Dobson*.² Here, an action was taken by the grandfather of a child injured *in utero* in a car accident against his daughter, the child’s mother, for the purpose of recovering damages from an insurance company to provide for the future of the child, now born-alive and living with cerebral palsy. The Supreme Court overturned two decisions taken by lower courts. It rejected the claim by Miller J that “[I]f an action can be sustained by a child against a parent, and if an action can be sustained against a stranger for injuries suffered by a child before birth, then it seems to me a reasonable progression to allow an action by a child against his

¹ Kerr, 15.

² *Dobson (Litigation Guardian of) v. Dobson* [1999] 2 SCR 753; (1999) 174 DLR (4th) 1.

mother for prenatal injuries caused by her negligence” on the grounds that the relationship between mother-to-be and foetus is *sui generis* and that therefore there is no ground to sustain an analogy between actions brought for prenatal negligence against third parties and such actions brought against a mother by her child. It also rejected as arbitrary an attempt, made by Hoyt CJNB, to accept in principle the liability of a pregnant woman to her unborn child but to restrict it by limiting the child’s right of action to those cases in which the damaging act was in breach of a general duty of care owed by the woman and by not allowing the child to sustain an action against its mother where the damaging act was a lifestyle choice.

Major J, dissenting from the majority opinion of the court, was willing to adopt the decision from *Montreal Tramways* which arose in the context of third party negligence and apply it to the second party context of the instant case, stating that “Birth transforms the physical injury sustained by the foetus into an actionable harm. Not the injury to the foetus but the injury to child’s mental and physical functioning is actionable.”³ I have already indicated my dissatisfaction with the fictional character of this analysis. Kerr, from a different perspective, expresses a similar point: “Major J offered no explanation as to how birth transforms the physical injury sustained by the foetus into an actionable harm.” Moreover “[Major, J.] failed to provide any account of how the legal duty owed by a woman to her child, once born, can legitimately be applied ex post facto to events which took place prior to birth when it was admitted that no duty was owed to the child at the time those events took place.”⁴

However puzzled Kerr might be by Major J’s reasoning, he is simply astonished by the manner in which the majority of the Supreme Court avoided altogether the question of whether a duty of care is ever owed by a mother to her unborn child.

³ *Dobson v. Dobson*, 806; 39.

Instead of dealing with this issue, the majority simply decided the matter on public policy considerations. Kerr is scathing:

Without a proper investigation of the nature of the relationship between a woman and her foetus, how is it possible to engage in a meaningful examination of the relevant policy considerations? If one simply limits the inquiry to a practical determination of whether the recognition of a novel duty will open the floodgates, one runs the risk of treating the potential recipients of that duty as a mere means to an end. One also runs the risk of being perceived as making decisions based on personal ideology rather than on the basis of established legal principle.⁵

In the United States up to recently, most attempts to prosecute women for harm caused to their children *in utero* by their ingestion of illegal substances have failed.⁶ However, as we have seen, the South Carolina Supreme Court in 1997, in *Whitner v. State*, upheld a conviction of a woman for her use of illegal drugs while pregnant, thus overturning the consistent trend of reversals by appeals courts.

Nova Janssen⁷ believes that the increasing recognition of the foetus as a possible object of criminal action has raised fears that mothers-to-be might be subject to prosecution in certain cases, such as those in which the child has been damaged *in utero* by the mother's actions, in particular, by the mother's ingestion of illegal substances.⁸ She points to a number of arguments that can be raised against the criminalisation of drug abuse by pregnant women. One is that the prospect of a criminal prosecution for drug-damaging her child would unduly burden a woman's choice to have a child inasmuch as it would encourage a woman to have an abortion in order to avoid prosecution. Janssen point out that, of course, the burden imposed on the pregnant woman is not to have an abortion, but to stop using illegal drugs.

⁴ Kerr, 18.

⁵ Kerr, 18.

⁶ See, for example, *Johnson v. State*, 602 So.2d 1288 (Fla. 1992); *People v. Hardy*, 469 N.W. 2d 50 (Mich. Ct. App. 1991); and *Sheriff v. Encoe*, 885 P.2d 596 (Nev. 1994). In all these cases, the appeals courts in the respective states overturned convictions at first instance.

⁷ Nova D. Janssen, "Fetal Rights and the Prosecution of Women for using Drugs during Pregnancy" *Drake Law Review* 2002 741 [48DrakeLR 741].

Another anti-criminalisation argument is that it is not possible to have an absolutely clear criterion to distinguish between those behaviours that should be punishable and those that should not, so that the law in criminalizing one type of behaviour would start out on a slippery slope to the other type of behaviour. Janssen makes the point, however, that the clear criterion is supplied by the distinction between legal and illegal drugs. Whatever the lack of moral difference between a pregnant woman who harms her child by ingesting legal alcohol and another pregnant woman who damages her child by ingesting illegal cocaine, there remains a sharp legal difference.

[T]he law simply has never had the capacity to treat all behaviors that produce a particular outcome the same. The mere fact that some bad behaviors are beyond the reach of the legal system, due to constitutional or other facts, does not mean that society should leave unpunished bad behaviors which are within the reach of the legal system. As with any legal issue, a line must be drawn somewhere, and here it can easily be drawn between legal and illegal behaviors.⁹

Jansen's arguments are good enough as far as they go but they don't go far enough. For one thing, the legitimacy of the distinction between legal and illegal drugs has been questioned. For another, even accepting the legitimacy of this distinction from the point of view of the agent, from the point of view of the injured patient, the unborn child, it makes no difference whether the substance ingested is legal or not.

Wrongful Death statutes are civil law provisions that allow the relatives of a deceased person to recover damages from a third party responsible for that person's death. While every U.S. state (and the District of Columbia) has such a statute, they differ among themselves (in relation to the application of such statutes to unborn children) as to the state of development of the unborn child they require. Twelve

⁸ A similar fear arises in the context of civil law. We have seen how the English courts have dealt with this.

⁹ Janssen, 763-64.

jurisdictions¹⁰ require that the child should be born alive; twenty-nine jurisdictions¹¹ (the majority) require only that the unborn child be viable; and six jurisdictions¹² allow parents to maintain actions for nonviable fetuses.

Some pro-choice activists are opposed to wrongful death statutes and the trend of recent court decisions, fearing that the recognition by the state and the courts that a foetus is a person for the purposes of such statutes will undermine the constitutional protection given to abortion in *Roe*. “If criminal prosecutions against drug-using pregnant women continue to take root, Anderson [Wyndi Anderson, executive director of South Carolina Advocates for Pregnant Women] and others predict the consequences for abortion rights will be dire. ‘If you’re going to treat a foetus as a separate entity from the mother, why wouldn’t you call abortion child abuse?’ asks Anderson.”¹³

Alison Leonard has some sympathy for this view. While she believes that “*Roe*’s fundamental holding, that previability abortion is a woman’s constitutionally protected choice, remains undisturbed” she also notes that some view the post-*Roe* cases as ‘chipping away’ at that holding. “While *Roe* held that a nonviable fetus was not a person under the Fourteenth Amendment,¹⁴ this holding is seemingly in contradiction with the more recent decision of *Planned Parenthood of Southeastern Pennsylvania v. Casey*. *Casey* held that the state’s interest in the fetus begins at conception.”

¹⁰ Arkansas, California, Florida, Iowa, Maine, Montana, Nebraska, New Jersey, New York, Tennessee, Texas and Virginia.

¹¹ Alaska, Alabama, Arizona, Colorado, Connecticut, Delaware, Idaho, Kentucky, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, Utah, Vermont, Washington, Wisconsin.

¹² Georgia, Illinois, Louisiana, Missouri, South Dakota and West Virginia

¹³ Vince Besier, “Fetal Abuse: Recent Developments in the Concept of ‘Fetal Rights’”, *The West Australian Social Worker*, December 2000, 1. Originally published in *Mother Jones Wire*, 14 June 2000.

¹⁴ *Roe*, 163-64.

Other writers share these concerns. Noting that approximately half of the states in the USA have enacted foeticide laws, Alison Tsao¹⁵ raises the possibility that “the new foeticide laws may have the unintended, or perhaps intended, effect of undermining the right of a woman to an abortion.”¹⁶ Some abortion-rights defenders see the relationship between woman and foetus as something of a zero-sum game, “[T]hey reason that as the fetus is given more rights and status as a ‘person,’ a woman’s right to abort it will become increasingly restrained.”¹⁷

Julienne Rut Siano believes that this belief is mistaken: “Roe is not analogous to wrongful death actions and should only be applied in abortion cases. Justices O’Connor, Kennedy, and Souter stated in *Planned Parenthood v. Casey* that ‘abortion is a unique act’ and ‘though abortion is conduct...[the] liberty of the woman is at stake in a sense unique to the human condition and so unique to law.’”¹⁸ Despite this affirmation by the Supreme Court of the uniqueness of abortion, which leads to its being treated in law in a singular manner, not every court is similarly persuaded that the circumstances underlying wrongful death actions and abortions are clearly and distinctly separate. Siano notes that “Some courts find it difficult to interpret wrongful death statutes to include a nonviable fetus and at the same time allow a woman to willfully [sic] terminate her pregnancy” and she cites the court in *Toth v. Goree*¹⁹ to the effect that

If the mother can intentionally terminate the pregnancy at three months, without regard to the rights of the fetus, it becomes increasingly difficulty to justify holding a third person liable to the fetus for unknowingly and unintentionally, but negligently, causing the pregnancy to end at the same stage. There would be

¹⁵ Alison Tsao, “Fetal Homicide Laws: Shield against Domestic Violence or Sword to pierce abortion Rights?” *Hastings Constitutional Law Quarterly*, Spring 1998 (25 HSTCLQ 457).

¹⁶ Tsao, 458.

¹⁷ Tsao, 459.

¹⁸ Julienne Rut Siano, “A Woman’s Right to Choose: Wrongful Death Statutes and Abortion Rights – Consistent at Last.” *Women’s Rights Law Reporter*, Spring 1998 (19 Women’s Rts. L. rep. 279) at 289.

¹⁹ *Toth v. Goree*, 237 N.W.2d 297 (Mich. 1975).

an inherent conflict in giving the mother the right to terminate the pregnancy yet holding that an action may be brought on behalf of the same fetus under wrong death act.”²⁰

Having reviewed a number of significant cases relating to the development of tort law in regard to the issues of foetal injury and death, some well known, some not so well known,²¹ Marilyn G. Hakim concludes that the “recognition of the fetus as a viable entity, with interests and rights separate from and sometimes conflicting with those of the mother, is now well established in tort law.”²² The legal recognition of the rights of the foetus, while achieving its first significant foothold in tort law, has now moved beyond this beachhead into the area of criminal law. Though the early attempts to prosecute pregnant women were initially resisted by the courts, Hakim claims that the recent cases of *Whitner*, *Ashley* and *Zimmermann*²³ are evidence of a trend towards supporting criminal sanctions against pregnant women for injuries caused by them to their foetuses.

The issues raised by these cases put the rights of the unborn child at direct odds with those of the pregnant woman. On the one hand, defenders of women’s rights fear that prosecution of women for acts during pregnancy will cause many women to avoid seeking help for addictive behavior, further jeopardizing both maternal and fetal health. Woman’s rights advocates fear that the long-term outcome of such litigation will be to hold women accountable for any behavior during pregnancy, including smoking, jogging, or not taking prenatal vitamins....On the other hand, fetal rights defenders find such fears exaggerated and unfounded. For some, these cases represent an overdue focus on fetal personhood...²⁴

Whether or not the distinction between second and third party feticide is ultimately defensible, that distinction is not available when it is the pregnant woman who opens

²⁰ Siano 291, citing Toth at 301.

²¹ *Bonbrest v. Kotz*, 65 F.Supp. 138 (D.C. Cir. 1946); *Renslow v. Mennonite Hospital*, 367 N.E.2d 1250 (Ill. 1977); *Smith v. Brennan*, 157 A.2d 497 (N.J. 1960); *Grodin v. Grodin*, 301 N.W.2d 869 (Mich. Ct. App. 1980).

²² Marilyn G. Hakim, “Mother v. Fetus: New Adversaries in the Struggle to Define the Rights of Unborn Children” *Journal of Juvenile Law*, 1997 (18 JJUVL 99) at 101.

²³ *State v. Zimmerman*, 1996 WL 858598 (Wis.Cir. Sep 18, 1996). Though the ruling of the court of first instance in the *Zimmermann* case was reversed after Hakim’s article had been published the points she makes remain essentially unaffected.

²⁴ Hakim, 111.

herself to criminal prosecution by terminating the life of the foetus other than by legal abortion. "Should a pregnant woman get more lenient treatment than a third part, or perhaps, no punishment at all, simply because it is her fetus nestling within her womb? Many courts have answered in the negative."²⁵ Kawana Ashley was convicted of manslaughter for causing the death of her foetus by shooting herself in the stomach; in 1998 Ayana Landon was awaiting trial on a charge of homicide for a self-induced miscarriage that led to the death of her born-alive son. Tsao focuses the point at issue when she notes that cases of maternal-induced foetal homicide

are deeply unsettling, legally as well as emotionally. Assuming that the fetuses were not viable, both women could have gotten a legal abortion at a clinic based on their constitutional right. Yet they are charged with criminal fetal homicide for killing their fetuses by a non-state approved method. In effect, abortion becomes murder based simply on the means employed to reach the same end.²⁶

Similar issues have arisen in the context of English law. The case of *St George's Healthcare N.H.S. Trust v. S.*²⁷ concerned a woman who, being 36 weeks pregnant, was diagnosed as having pre-eclampsia. (Pre-eclampsia is a serious condition of pregnancy characterised by high blood pressure and other symptoms, and formerly thought to be associated with toxæmia.) She was advised of the need for bed rest and an induced delivery, which advice she rejected. She was admitted to a mental hospital against her will and, still refusing to consent to treatment, had a Caesarean section performed on her, the hospital authorities having applied *ex parte* to a judge in chambers and received a declaration which dispensed with the necessity of her consent to treatment. One segment of the discussion (45-50) focussed on the status of the foetus.

²⁵ Tsao, 476.

²⁶ Tsao, 477.

²⁷ *St George's Healthcare N.H.S. Trust v. S.* (1998); *R. v. Collins and Others., ex p S* [1999] Fam 26.

In handing down the judgement of the court, Judge, L.J. remarked that leaving to one side those occasions where the necessity for consent may be dispensed with on the basis of incapacity, “It still does not follow without any further analysis that this entitles her to put at risk the healthy viable foetus which she is carrying.” [45] He went on to note that “Whatever else it may be a 36-week foetus is not nothing: if viable it is not lifeless and it is certainly human” and cited the words of Lord Hope of Craighead in the *Attorney-General’s Reference (No. 3 of 1994)* to the effect that the Human Fertilisation and Embryology Act 1990 ““serves to remind us that an embryo is in reality a separate organism from the mother from the moment of its conception....the foetus cannot be regarded as an integral part of the mother.”²⁸ He put the point at issue in the instant case very sharply when he asked “If human life is sacred, why is a mother entitled to refuse to undergo treatment if this would preserve the life of the foetus without damaging her own?”[46] On the other hand he asked “How can a forced invasion of a competent adult’s body against her will even for the most laudable of motives (the preservation of life) be ordered without irremediably damaging the principle of self-determination?” [46] Focusing on the case of *Winnipeg Child and Family Services (Northwest Area) v. DFG*,²⁹ he cited the judgement of McLachlin J. who said that

To permit an unborn child to sue its pregnant mother-to-be would introduce a radically new conception into the law: the unborn child and its mother as separate juristic persons in a mutually separable and antagonistic relation....for practical purposes, the unborn child and its mother-to-be are bonded in a union separable only by birth....each decision made by the woman in relation to her body will affect the foetus and potentially attract tort liability...the common law does not clothe the courts with power to order the detention of a pregnant woman for the purpose of preventing her from harming her unborn child.³⁰

²⁸ [1998] AC 245, 267.

²⁹ 3 BHRC 611

³⁰ *Winnipeg Child*, cited in the instant case at 49.

Adverting to the *Attorney-General's Reference (No. 3 of 1994)*, he noted that Lord Mustill states, "it is established beyond doubt for the criminal law, as for the civil law...that the child en ventre sa mere does not have a distinct human personality, whose extinguishment gives rise to any penalties or liabilities at common law,"³¹ and he remarked that Lord Hope's language "demonstrates that the concept of being 'born alive' rejected in his dissenting judgment by Major J. in *Winnipeg Child and Family Services (Northwest Area) v. G...* remains undiminished." [50] He then concluded that while pregnancy increases a woman's personal responsibilities "it does not diminish her entitlement to decide whether or not to undergo medical treatment. Although human, and protected by the law in a number of different ways set out in the judgment in *In re M.B. (An Adult: Medical Treatment)*...an unborn child is not a separate person from its mother. Its need for medical assistance does not prevail over her rights." [50]

Despite the remarks of Judge, L.J. and other members of the judiciary, some commentators remain to be persuaded that everything is as it was in relation to the relative rights of pregnant women and their unborn children. Emma Pickworth believes that the decision of the House of Lords in *Attorney-General's Reference (No. 3 of 1994)* "raises the possibility that English law will follow that of the United States in extending criminalization of those who harm a foetus."³² Whatever about the merits of the extension of such criminalization to third parties, Emma Pickworth does not think it advisable to extend such criminalisation to pregnant women, characterising it as "backward-looking, self-defeating and illogical."³³ Apart from the example (presumably bad) of the United States, she believes there are two other

³¹ *Attorney-General's Reference (No 3 of 1994)*, 261.

³² Emma Pickworth, "Substance Abuse in Pregnancy and the Child Born Alive" *Anglo-American Law Review* Volume 27, No 4, 472.

³³ Pickworth, 473.

reasons why English law might criminalise the actions or omissions of pregnant women, which have the effect of damaging their fetuses. The first, according to Pickworth, is that “the decision [in *Attorney-General’s Reference (No. 3 of 1994)*] shows little reasoning why criminalization of injuries to the foetus born alive should be limited to homicide....Nor does it necessarily prohibit criminalization of pregnant women who causes [sic] the injuries to a foetus”.³⁴ The second is that the *Attorney-General’s Reference (No. 3 of 1994)*, taken together with some civil cases,³⁵ demonstrates, in Pickworth’s view, “a willingness of the courts at the highest level to condemn maternal treatment of the unborn child.”³⁶

Broadly in agreement with Pickworth are Sara Fovargue and José Miola who claim that recent trends in English law in relation to court-ordered caesarean sections³⁷ have received unwitting support from the decision of the House of Lords in the *Attorney-General’s Reference (No. 3 of 1994)*.³⁸ They argue that “when the decision in the *Attorney-General’s Reference (No. 3 of 1994)* is combined with the recent court-ordered caesarean cases, and despite explicit judicial statements to the contrary, there is an underlying trend within the judgments to accord precedence to foetal protection over maternal autonomy.”³⁹ The authors provide an analysis of the common law and statute law at the end of which they claim that

the trend of emphasising maternal autonomy, which the Abortion Act supported in theory...continued more or less unabated throughout the latter part of the twentieth century, in both statutory provision and the common law, until the recent decisions regarding court-ordered caesarean section have served to reverse that trend....The caesarean section decisions are, it is suggested, at odds

³⁴ Pickworth, 475.

³⁵ Notably *D. v. Berkshire County Council* [1987] 1 All ER 20, 27 (CA) and 33 (HL); and the ‘forced’ Caesarean cases which include *Re S* [1992] 3 WLR 806.

³⁶ Pickworth, 476.

³⁷ The relevant cases are *Tameside and Glossop Acute Services Trust v. C.H.* [1996] 1 F.C.R. 753; *Rochdale Healthcare (N.H.S.) Trust v. C.* [1997] 1 F.C.R. 274; *Norfolk and Norwich (N.H.S.) Trust v. W.* [1997] 1 F.C.R. 269; *Re M.B.* [1997] 8 Med. L.R. 217.

³⁸ ‘Policing Pregnancy: Implications of the Attorney-General’s Reference (No. 3 of 1994) (Sara Fovargue and José Miola) *Medical Law Review*, 6, Autumn 1998, 265.

³⁹ Fovargue and Miola, 266.

with both the criminal and civil law and represent dangerous interventions into the autonomy of pregnancy.⁴⁰

Ultimately, what Fovargue and Miola are worried about is judicial recognition of the legal personality of the foetus and the impact that such a recognition could have on the autonomy of pregnant women. The balance between maternal and foetal interests that appeared to have tilted so decisively in favour of the woman as a result of the Abortion Act, 1967 and a whole slew of subsequent cases now appears to be moving back in the direction of the foetus. They cite a passage from *Re M.B.* to the effect that “the foetus up to the moment of birth does not have any separate interests capable of being taken into account when a court has to consider an application for a declaration in respect of a caesarean operation. The court does not have the jurisdiction to declare that such medical intervention is lawful to protect the interests of the unborn child at the point of birth”.⁴¹ Reflecting on this passage they note that the judgement of the House of Lords in *Attorney-General’s Reference (No. 3 of 1994)*, which held that a foetus may be the object of an unlawful act, has the effect, presumably unintended, of granting a measure of legal personality to the foetus. “The danger is that, even though the foetus has no *theoretical* legal personality, this assumption will be, and has been, eroded in the minds of the courts... If the courts continue to personalise the foetus, thereby granting it the rights and interests of a legal persons, then it is logical that the foetus must be protected from *all* harm, including that inflicted by the mother.”⁴²

Could there be a successful criminal prosecution under English law of a mother for damage inflicted by her on her child while that child was *in utero* such as was seen in the American case of *Whitner*? Some answer this question in the negative. It would appear to be that “[N]o right, either of dependency or for bereavement can arise out of

⁴⁰ Fovargue and Miola, 273.

⁴¹ *Re M.B.*, at 227.

⁴² Fovargue and Miola, 287-88.

the Fatal Accidents Act, 1976 because death is a precondition of such rights. The courts will inevitably conclude that one who, in the eyes of the law, has never become a 'person' cannot be said to have attained life, and therefore cannot be said to have suffered death..."⁴³ However, for Fovargue and Miola, after *Attorney-General's Reference (No. 3 of 1994)*, this is an open question. They suggest that their fears might be allayed if the criminal law followed the pattern set by the civil law under the provisions of the Congenital Disability (Civil Liability) Act, 1976. Under this act, a mother cannot be liable to her child (unless the injury arises from a car accident) and so "the civil law has achieved an adequate balance between providing a remedy for the injured foetus and the rights of the pregnant woman" whereas "the criminal law has left the question of the potential liability of a pregnant woman for her foetus not so much unanswered but unasked."⁴⁴

While acknowledging that some commentators, such as John Keown, have held that the common law prohibited abortion primarily for the protection of the foetus Fovargue and Miola believe that both the common law and statute also served to protect women. With the introduction of the Infant Life (Preservation) Act in 1929, they believe that the scales were tipped for the first time in the direction of maternal rather than foetal welfare. "[N]otwithstanding the fact that the Act continued the serious view taken of child destruction and abortion, as evidenced in the O.A.P.A., it was the first statute to permit abortion, albeit in very circumscribed situations, and therefore acknowledged the existence of both foetal *and* maternal interests in relation to pregnancy."⁴⁵ The tipping of the balance between maternal and foetal interests in favour of the maternal interests was, they believe, further and dramatically altered by

⁴³ A. Whitfield, "Common Law Duties to Unborn Children" (1993) 1 *Medical Law Review* 28, cited in Kennedy & Grubb, 1516. Kennedy & Grubb source the doctrine that the unborn child has no legal status in *Attorney-General's Reference (No. 3 of 1994)*.

⁴⁴ Fovargue and Miola, 293.

the Abortion Act, 1967.⁴⁶ Any possible conflict between the Infant Life (Preservation) Act, 1929 and the Abortion Act, 1967 was removed summarily by the amendment of the Abortion Act by the Human Fertilisation and Embryology Act, 1990 so that section 5(1) of the Abortion Act now holds that no offence under the Infant Life (Preservation) Act, 1929 will be committed provided the conditions of the Abortion Act, 1967 are met.

The more the legal autonomy of the unborn child is recognised, the greater the risk of a clash between that child and its mother-to-be. The inclination of the English courts has generally been, in line with the Born Alive rule, not to recognise the autonomy of the unborn child and so to accord priority to the interests of mothers-to-be. As was indicated above, however, some view recent court decisions as tending to reverse this trend. In the United States, on the other hand, courts are increasingly according legal rights to unborn children and are thus willing, in principle and often in fact, to intervene to restrain the liberty of mothers-to-be in the interests of their unborn children.

⁴⁵ Fovargue and Miola, 269.

⁴⁶ "...by omitting reference to the needs of the healthy foetus, the Act implies that the legislature regards only the mother's interests as relevant to the abortion decision". J. E. S. Fortin, 'Legal Protection for the Unborn Child'(1988) 51 M.L.R. 54 at 65.

UNBORN CHILD— PERSON, PROPERTY, OR *SUI GENERIS*?

Anomaly, fiction, misnomer and obsolete reasoning

“[T]he law of homicide is permeated by anomaly, fiction, misnomer and obsolete reasoning.”¹ So says Lord Mustill. It is difficult not to characterise the attitude of the criminal law to the foetus in much the same way. Anomalies subsist between the common law and statute and, within statute, between the Offences Against the Person Act, 1861 and the Infant Life (Preservation) Act 1929 on the one hand, and the Abortion Act 1967 on the other. Jane Fortin notes, “The criminal law contains an astonishing hotch-potch of overlapping legislative provisions relating to the unborn child, contained in three different statutes, namely the Offences Against the Person Act, 1861, the Infant Life (Preservation) Act 1929 and the Abortion Act 1967.”² She notes the anomalies and inconsistencies within existing legal principles: “The desire of the criminal law to protect the unborn child is denoted by the existence of the separate and less severe crime of procuring a miscarriage” but “this protection is undermined by the legalisation of abortion, which indicates a greater concern for the

¹ *Attorney-General's Reference (No 3 of 1994)*, 250, per Lord Mustill.

² Jane E. S. Fortin, “Legal Protection for the Unborn Child” (1988) 51 M.L.R. 54 at 62. (See also Bates’ article “Legal Criteria”, 143.) The 1967 Abortion Act originally provided that it should not affect the crime of child destruction but, as amended by the Human Fertilisation and Embryology Act, 1990, s. 5 (1) of the 1967 Act now states that “No offence under [the 1929 Act] shall be committed by a registered medical practitioner who terminates a pregnancy in accordance with the provision of [the

well-being of the mother.”³ Discussing the implications of *D. v. Berkshire C.C.* she notes that

the various branches of the law contain confused aims which are often brought into sharp focus by comparisons with the law relating to the newly born. For example, in the context of the criminal law, the law of homicide denies the unborn child any independent legal personality, and consequently fails to protect it at all, whatever its stage of gestational development. In contrast the newly born child receives the same protection as an adult, merely by virtue of being born alive and attaining an existence separate from its mother.⁴

Does the law recognise the foetus as having any legal personality? It would appear that the answer to this question is yes—but only contingently. Andrew Grubb and David Pearl write that Heilbron J. in *C. v. S.* observed that “the right of an unborn child had been recognised in some instances by English law, for example, the right to inherit property, *but these were contingent upon a live birth.*”⁵ In the context of the possibility of the unborn child’s being made a ward of court, Grubb and Pearl make the eminently sensible point, regarding the notion of ‘the best interests of the child’ that “whether the proposed abortion is based upon social, health or even eugenic grounds under the 1967 Act, the child’s best interests would usually dictate that the abortion be prevented—some life is better than no life.” Immediately, however, they note that “This solution would fly in the face of the policy behind the 1967 Act.”⁶

In 1984, a Committee of Inquiry into Human Fertilisation and Embryology set up by the British Government presented its report. Discussing the recommendations of

Abortion Act 1967].” (Sir John Smith and Brian Hogan, *Criminal Law* 8th edition (London 1996), 397.)

³ Fortin “Legal Protection”, 55.

⁴ Fortin “Legal Protection”, 54-55.

⁵ Andrew Grubb & David Pearl, “Protecting the Life of the Unborn Child” (1987) 103 L.Q.R. 340, 343. Emphasis added. See *Watt v. Rama* [1972] V.R. 353 and ss. 1(1) and 4(2) Congenital Disabilities (Civil Liability) Act 1976; and see Winfield [1942] C.L.J. 76.

⁶ Grubb & Pearl, 345. See also Jane Fortin “Can You Ward a Foetus?” (1988) 51 M.L.R. 768. Contrast the view that “some life is better than no life” with the view expressed by Stephenson L. J. that “it would be better for a child, born to suffer from such abnormalities as to be seriously handicapped, not to have been born at all.” *McKay v. Essex Area Health Authority* [1982] 1 Q.B. 1166.

this report, better known as the Warnock Report,⁷ Jane Fortin makes the point that “since it [the 14-day embryo] had a greater potential, it had a greater right to protection than a younger one, but ironically, the form of protection envisaged is the embryo’s destruction.”⁸ Indeed, the authors of the Warnock Report itself are not oblivious to the possibility of absurdity. Fortin again: “Warnock commented on the illogicality of introducing stringent legislative controls on the research use of the very early embryo whilst maintaining a system of less formal controls on the research use of whole live embryos and more developed fetuses obtained through abortions and miscarriages.”⁹

As we have seen, Fortin recognises that the law’s treatment of the unborn and the newly born is oddly different. “Some argue that it is anomalous for the criminal law to distinguish so inflexibly between the unborn and newly born child’s need for protection, and that the law of homicide should be extended to the unborn child.”¹⁰ A telling point, but, surprisingly, one that she simply dismisses with the remark that such an extension would be unrealistic. Why would it be unrealistic? As we have seen above, the American experience in this regard has not, in general, been wildly extravagant. She is similarly offhand when, although noting that “in many ways the unborn child is very similar to the newly born child in relation to its vulnerabilities, health needs and development”, she goes on to claim that “nevertheless the truth is that the unborn child who died *in utero* was never a human person and extreme artificiality would be introduced into the law if it appeared to indicate otherwise.”¹¹

⁷ The Warnock Report was subsequently published as *A Question of Life* (Oxford 1985).

⁸ Fortin, “Legal Protection”, 60

⁹ Fortin, “Legal Protection”, 60. Dr Mary Tighe commented on the illogicality of condemning “any experimentation on embryos after 14 days of growth, due to the possibility of pain, when, since 1967 over two million embryos, the majority with fully intact central nervous systems, have been fragmented by curettage/suction or forcibly expelled prematurely, a practice not only condoned but vociferously defended by society.” *The Times*, 24 July 1984.

¹⁰ Fortin, “Legal Protection”, 75.

¹¹ Fortin, “Legal Protection”, 79.

We have seen that it is an accepted principle of English law that a child once born can be the subject of crimes of violence so that, in this sense at least, it must be said to be possessed of a human personality. But as measured on any scale the new born child does not appear to possess a degree of personality any more significant than did the foetus *in utero* which it was before its birth. Suppose twins in the womb, both injured *in utero* to the same extent; one dies *in utero*, the other after live birth. Why should a cause of action lie for the one and not for the other? The concept of personality—or person or persona—is critically important to the law. All the more surprising, then, that it is not made the subject of legal analysis by Lord Mustill in *Attorney-General's Reference (No. 3 of 1994)*.

An argument can be constructed on this apparent lack of significant difference between the late foetus and the new born child which runs in two directions: on the one hand, if the foetus *in utero*, while biologically distinct from its mother, doesn't possess personality neither, it would seem, does the new born baby. If there is no significant difference between the late foetus and the newborn child then whatever the legal status of the one, such should be the legal status of the other. "Michael Tooley lucidly presents the argument that since even a newly born child lacks these properties, infanticide is not morally objectionable" says Fortin, adding "although many would find Tooley's conclusions distasteful, its logic cannot be denied."¹² On the other hand, if the new born child possesses a personality or persona which make it a fit subject for criminal assault then surely the foetus *in utero* possesses just as much personality? Cari Leventhal notes that "In *Amadio v. Levin* the Pennsylvania Supreme Court....reasoned that it was illogical to permit a cause of action to be maintained on

¹²Fortin, "Legal Protection", 57. Michael Tooley's "Abortion and Infanticide" can be found, together with Judith Jarvis Thomson's "A Defense of Abortion", Roger Wertheimer's "Understanding the Abortion Argument", and John Finnis's "The Rights and Wrongs of Abortion", in Marshall Cohen, Thomas Nagel and Thomas Scanlan (eds) *The Rights and Wrongs of Abortion* (Princeton 1974).

behalf of a child who survived only an instant outside the womb, yet deny the same right to a fully developed fetus that was capable of an independent existence prior to its demise.”¹³ Infanticide can be justified on many of the same grounds on which abortion is justified yet most people would reject the legalisation of infanticide. Why is this so? If abortion is morally acceptable it is difficult to see why infanticide should be unacceptable. What possible moral or metaphysical difference could the local movement from inside the womb to outside the womb make? If it is wrong to kill an entity the wrongness of the act surely cannot simply depend on that entity’s location. Fortin remarks that there is

a stark contrast between the legal protection accorded to the unborn and to the newly born. In relation to the latter, however premature, the wardship jurisdiction can be used to cast an immediate cloak of protection over the child, thereby ensuring that fundamentally important decisions relating to the child’s future can be considered dispassionately by the High Court. Thus in the case of *Re B.*, the Court of Appeal authorised a life-giving operation on a Down’s Syndrome child, against the wishes of its parents who had rejected it. By contrast, it is clear from the decisions in *Paton* [*Paton v. BPAS*] and *C. v. S.* that although an abortion has a fatal effect on the unborn child, intervention by a third party would be impossible even if in his view the abortion decision had been reached erroneously.¹⁴

Is the Foetus sui generis?

We have seen that Lord Mustill is of the opinion that the foetus is a being *sui generis*, that is, a being of its own kind. What kind is it that Lord Mustill is talking about? Is the foetus the only member of this kind—do we have a genus without any species? How does Lord Mustill know the foetus to be *sui generis*? Does he know it to be such positively on the basis of some evidence—biological, psychological, or developmental—or is he merely positing a dialectical possibility for the sake of countering an argument? I believe that it should be clear by now that Lord Mustill’s

¹³ Leventhal, 179-180.

¹⁴ Fortin, “Legal Protection”, 71.

characterisation of the foetus as an organism *sui generis* is merely the assertion of a dialectical possibility without any independent scientific support. This assertion results from a failure adequately to analyse the nature of the foetus independently of the exigencies of a particular case.

Lord Mustill is not alone in this failure. Moira McConnell reports that while “increasingly the debate is focused on determining the status of the foetus” it seems that “The Supreme Court of Canada does not wish to enter into this debate and is retreating, perhaps rightly, into narrow legalistic decisions.” She concludes, however, that “the cases do seem to reflect a view that the foetus is an entity distinct from other forms of human life and is a form which requires express inclusion in legislation for protection.”¹⁵ An ‘entity distinct from other forms of human life’ would not appear to be all that different from Lord Mustill’s organism *sui generis*.

According to the Supreme Court of Canada, however, the task of the law in this matter is ‘fundamentally normative’, which, again to take the language of the court, seems to mean that ‘[m]etaphysical arguments may be relevant but they are not the primary focus of inquiry’. Nor is science of much help since ‘[t]he task of properly classifying a foetus in law and in science are different pursuits’, nor, again in the words of the court, is the matter one of broad social, political, moral or economic choice. (These are for the Legislature). Nor is the matter one to be decided on the basis of ‘linguistic fiat’: rather what we have is a legal task.”¹⁶

Gough would appear to be in sympathy with this approach. He remarks, apropos Lord Mustill’s refusal to treat intent against the foetus as intent against the mother why anatomy should be thought a fit guide to law “remains a mystery” adding that one

¹⁵ Moira L. McConnell “*Sui Generis: The Legal Nature of the Foetus in Canada*” (1991) 70 *Canadian Law Review* 548, 556. See also, Susan Watson, “The Rashomon of Science: The Legal Position of the Foetus in New Zealand,” (1994) *New Zealand Law Journal* 388; John Remington Graham, “The Human Foetus as a Legal Person,” (1998) 29 *Revue Generale de Droit* 323; Katherine Freeman, “The Unborn Child and the European Convention on Human Rights: To Whom does ‘Everyone’s Right to Life’ Belong?” (1994) 8 *Emory International Law Review* 615; Philip Bates, “Legal Criteria for Distinguishing Between Live and Dead Human Foetuses and Newborn Children,” (1983) 6 *University of New South Wales Law Journal* 143.

¹⁶ McConnell “Legal Nature of the Foetus”, 549.

“might expect legal and moral principle to guide science, not be guided by it.”¹⁷ And in South Africa, in the case of *Christian Lawyers Association of South Africa v. Minister of Health*, the Provincial Division Court held that “the central question was whether ‘everyone’ or ‘every person’ as written in the Constitution applied to an unborn child. *That question had to be determined not with reference to medical, scientific, religious or philosophical evidence on the nature and development of human life but with reference to the proper legal interpretation of s. 11 of the Constitution.*”¹⁸

Why this strange reluctance on the part of the courts to address the substantive question of personhood? “Judges seem almost embarrassed that any pronouncement about the law of persons might have philosophical implications for the broader social meaning of personhood.”¹⁹ But, though couched in terms which imply that the hard-headed realists of the courts are simply avoiding the soft-headed morass of theological, philosophical and sociological disputes and concerning themselves with concrete matters, the extra-legal implications of their choices and decisions cannot be avoided that simply. Indeed, their very protests have a hollow ring to them.

When courts insist that holdings on fetal personality have no extralegal implications, they appear to protest too much. If courts were truly confident that they could manipulate and interpret personhood simply as a legal fiction, no protestations to the contrary would be necessary. The reluctance of judges to engage these issues itself suggests that denying or granting legal personality to fetuses sends a strong message about the state’s valuation of fetal life, either by countenancing the visceral moral wrong of feticide or by threatening the foundation assumption of abortion rights.²⁰

It is interesting that the authors’ own final disjunction is itself evidence of the tension on which they are commenting and, indeed, the authors notice this when they write

¹⁷ Gough, “Prenatal Injury”, 130; 130 n. 16.

¹⁸ *Christian Lawyers Association of South Africa v. Minister of Health* (1999) 50 B.M.L.R. 241.

¹⁹ “What we talk about when we talk about persons: the language of a legal fiction” 114 *Harvard Law Review* 1745 at 1762. No authors are given for this note.

²⁰ 114 *Harvard Law Review* 1745 at 1763.

“In the context of foeticide, the doctrinal confusion regarding legal personhood evidences the two-mindedness of a society that finds fetal murder abhorrent even as it desires to protect the autonomy of pregnant women.”²¹ In the context of English law a thoroughgoing consideration of the legal status of the foetus in the light of contemporary scientific knowledge has been effectively repressed by the thoughtless re-assertion of the born alive rule; and while in the U.S.A. the legal authorities have been willing to change the law in response to the findings of science the constitutionally embedded position of *Roe* has given rise to a latent tension between the *Roe* abortion regime and the new foeticide laws, a tension that cannot ultimately be sustained.

In the end, there is no responsible way to avoid considering the nature of the foetus and reflectively appropriating the results of that consideration into the law.²² It is not good enough to say, as Lord Mustill does, that he is eschewing all religious and political debate. The issue here is neither simply religious nor simply political. To categorise it in such a way is to suggest that it is a matter of private judgment in some neutral public square. But there are no neutral positions here. Simply to say—and even sincerely to believe—that one is not taking sides is not necessarily to avoid taking sides; it is to take the side of the *status quo* without explicit justification. But despite what the Supreme Court of Canada and the Provincial Division Court of South Africa appear to think, law does not subsist all alone in a chaotic world that awaits its creative and formative touch. Law subsists in a physical world that is entirely independent of and prior to it; and in a human world, which, in its social dimension, is only partly constituted by it. If, for example, in a statute concerning the sale of food, the law were to stipulate that for the purposes of the Act, tomatoes were

²¹ 114 *Harvard Law Review* 1745 at 1766.

to be considered vegetables and not fruits no great outrage would have been offered to reality; whatever the law may say, tomatoes remain whatever it is that they are, the statute merely recognising the customary culinary use to which they are put.

However, if the law were to hold that “For the purposes of this act, tomatoes are to be considered bouncy rubber balls” then it would have pushed legal voluntarism to absurd post-modern limits. If it is not to fall into disrepute the law must be chary of stipulating definitions that gratuitously run counter to reality and refusing to adapt its rules in response to our ever clearer understanding of how things are.²³

What we believe something to be cannot but be relevant to how we believe we should treat it. The reason we feel able to lay an axe to a log of wood with impunity but not to a dog presumably has something to do with the fact that the log is inanimate, the dog animate. Our social mores and our laws reflect and implement our appreciation of the log/dog distinction. There are, of course, differences that make no significant moral or legal difference. That one log is pine and another oak is not, in itself, an immediate reason for requiring them to be treated differently though it could become so in certain circumstances, for example, in relation to the purposes of carpentry or joinery or interior decoration.

I am aware that this position is not uncontroversial. The criticisms of modern and contemporary jurisprudential theories have constrained lawyers and legal scholars to reconsider the nature of law, its characteristics, its function, its place and status in society. At the very least, the criticisms would appear to justify the conclusion that a certain one-dimensional, post-Enlightenment understanding of law as being

²² See Warren Murray “The Nature and the Rights of the Foetus,” (1990) 35 *The American Journal of Jurisprudence* 149.

²³ McConnell remarks on the apparent Humpty-Dumptyesque logic by which the Supreme Court of Canada has concluded that “a foetus is not a human being or a person or a part of a women [sic] or a juridical person, although it may also be all of the foregoing.” (McConnell “Legal Nature of the Foetus”, 549–550.)

bloodlessly rational, geometrically determinate, inhumanly disinterested and stoically objective simply cannot be sustained. Another, more radical, conclusion is sometimes drawn from these jurisprudential criticisms to the effect that the law cannot but be irrational, indeterminate, interested and subjective in such a way as necessarily to make it an arbitrary instrument of the dominant cultural group. This is the position adopted by the movement commonly called Critical Legal Studies [CLS]. In their rejection of a certain conception of the law as being determinate, autonomous and value-free, CLS critics sometimes give the impression that the law is simply an unprincipled free-for-all struggle between competing power groups. Such a conclusion is not justified. It is true that the law is not a seamless, homogenous, static mass of rules, doctrines and principles—but neither is it a chaos of irreconcilable antagonisms. It is, rather, a dynamic, sometimes unpredictable, partially indeterminate structure of historical conditions, rules and principles, pragmatic policies, political expediency, casuistic decisions, precedent, analytical reasoning, and overarching, albeit incomplete and inchoate, considerations of justice and fairness.²⁴

The claim that the law operates within the parameters of extra-legal constraints can be rejected in an extreme or in a moderate form. The extreme rejection concedes no structure to any reality independent of human concerns so that the question of such a reality's generating constraints on social, political, moral, or legal conduct is moot from the start. The moderate position does not necessarily deny that reality is what it is; just that it underdetermines what we must do, socially, morally and legally.

²⁴ There is no shortage of works in the Critical Legal Studies tradition. A glance through David Kairys (ed.), *The Politics of Law* (New York, 1982) will indicate some of the principal contributors and themes. For a contemporary example of CLS-style critique, see the attack of the Hall/Williams tradition of the 'General Part of the Criminal Law' in Antony Duff (ed.), *Philosophy and the Criminal Law: Principle and Critique* (Cambridge, 1998). For the object of the attack, see Jerome Hall, *General Principles of Criminal Law* 2nd ed. (New York, 1960) and Glanville Williams, *Criminal Law: The General Part* 2nd ed. (London, 1961). For an up-to-date treatment of the same topic in the grand manner of Hall and Williams, see Finbarr McAuley and J. Paul McCutcheon, *Criminal Liability: A Grammar* (Dublin, 2000).

The extreme position I do not consider here. I believe it to be both self-stultifying and intellectually irresponsible. Furthermore, I seriously doubt if anyone really holds it: it smacks of a theory that could only survive in the rarefied hothouse conditions of academia. The more moderate position we saw exemplified in the Supreme Court of Canada's holding that in the task of determining the legal status of the foetus "[m]etaphysical arguments may be relevant but they are not the primary focus of inquiry." The court appeared to hold that science could not be of much help since "[t]he task of properly classifying a foetus in law and in science are different pursuits." We noted above that Stephen Gough thought it mysterious that anatomy should be considered a fit guide to law, remarking "One might expect legal and moral principle to guide science, not be guided by it."

The Canadian Court at least accepted the possible relevance of science and metaphysics. Its claim that the task of classifying the foetus in law and in science are different pursuits is broadly acceptable if understood along the lines of my example between the culinary and scientific classifications of the tomato but, as I indicated in discussing that matter, there are limits to the diversity that is possible. So too Gough's question can be taken in at least two ways. On the one hand, his claim that one might expect legal and moral principle to guide science is, broadly understood, uncontroversial. On the other hand, his puzzlement as to why anatomy should be thought to be a fit guide to law could either be an expression of Humean scepticism regarding the derivation of 'ought' from 'is' or it could be an attempt to treat the law as if it were an hermetically sealed enterprise, isolated from all other human and social concerns. Here, all I can do is simply to repeat the gist of my preceding

remarks. It is relevant to the making of particular moral judgements to point out the nature of the entities with which we are dealing. This is not a violation of the Humean principle (assuming for the moment that that principle is otherwise unproblematic) because in all such case, the claims regarding the nature of the entities under consideration are accompanied by a moral judgement (often implicit) to the effect that “one should not cause pain to sentient creatures” or some principle resembling this. If Gough’s question is interpreted hermetically then his position changes from being moderate to being extreme and, becoming thus implausible, is unworthy of serious consideration.

In the *Attorney-General’s Reference (No. 3 of 1994)* both Lord Mustill and Lord Hope pointed out the genetic diversity between mother and foetus. While this genetic diversity is correct and significant, its importance should not be overestimated.

Examining the zygote in its specificity, we see, first of all, that its genetic code differs from that of every other organism...we must be very wary of the temptation of trying to establish the individuality of the foetus solely, or even principally, by means of the specificity of its genetic material and its DNA....The individuality of the person lies in the unity of the matter in autonomous development rather than only in the formal aspect of this matter.²⁵

It is because the zygote has begun a journey on an irreversible developmental process that its potential to become a perfect human being is proximate rather than remote.²⁶

Of course, the process of development of the fertilised ovum can, and sometimes does, go wrong. This is hardly surprising in such a long and complicated process. I would argue, however, that the development of the foetus is not directed towards these disasters; these are accidents that happen to a process that is inherently directed towards an end that is implicitly contained in its beginning. The many recognisable

²⁵ Murray, 159-160.

²⁶ “Unlike the two cells of which it is the issue, the zygote is immediately directed by the process of its continuous development to become one day what it has already begun to be: this *complete* human person.” Murray, 158.

stages of this development from conceptus to fully formed adult are none of them a change in the fundamental nature of the entity which is developing.²⁷

To understand the difference between remote and proximate potentiality consider the following. Of a newborn baby it is true to say, in a Gilbertian sense, that it can play the piano. By this all we mean is that in the fullness of time *if* the baby is given sufficient training and *if* it practices then it will eventually be able to play the piano. However, if I were to make the claim of a 20 year old that she can play the piano I would be understood to mean not that her disposition so to do was, as that of the baby's, remote but that she had a developed potential so that she can sit down now and rattle off a tune. In the context of the beginnings of human life the sperm and ovum are only very remotely potential human life; it is not until they come together in conception that the irreversible process of development has begun which is proximately potential not to being human—it is already human—but proximately potential to being the fully perfect adult human being it has the basic capacity to become.

Even if it is conceded that the fusion of sperm and ovum is a human being, that by itself may not settle matters for there are those who regard persons as a proper subset of human beings and in their view it is the person rather than the human being that

²⁷ “The terms *zygote*, *embryo*, *foetus*, *child*, usefully distinguished by biology for its own purposes, but lacking in ontological values, do not designate radically different realities, but rather phases of development of the same human being. In point of fact, from the moment of conception, an individual and autonomous organism, bearing the name of *zygote*, undertakes a development which it pursues through the embryonic and foetal states to become a child at the moment of birth. Paradoxically, perhaps, the fact of birth, in spite of its importance as a radical change in the environment in which it lives, is not accompanied by a radical change in the very being of the child nor in its development.” (Murray, 157.) J. Beck, writing in 1860 notes that “The ancient opinion on which indeed the laws of some countries have been founded, was, that the foetus became animated at this period—that it acquired a new mode of existence. This is altogether abandoned. The foetus is certainly, if we speak physiologically, as much a living being immediately after conception, as at any other time before delivery; and its future progress is but the development and increase of those constituent principles which it then received.” J. Beck, *Elements of Medical Jurisprudence* (11th ed. 1869), 276. (Cited in Forsythe “Homicide of the Unborn Child”, 574.)

counts. The problem such people encounter is that of providing a principled, non-arbitrary criterion or set of criteria to distinguish the subset from the set.

We have seen that the House of Lords believes that the foetus is *sui generis*. (*Attorney-General Reference (No. 3 of 1994)*). Similarly, the *Davis* Court held that embryos were “not just appendages of the mother, but not exactly persons either...the pre-embryo was classified as ‘unique’” [763] George Annas believes that

[E]mbryos could just as easily be considered neither products nor people, but in some other category altogether. There are many things, such as dogs, dolphins, and redwoods that are neither products nor people. We nonetheless legally protect these entities by limiting what their owners or custodians can do with them. Every national commission worldwide that has examined the status of the human embryo to date has placed it in this third category; neither people nor products, but nonetheless entities of unique symbolic value that deserve society’s respect and protection. [758]²⁸

If we recognise a finite and small number of pre-existing categories into which the embryo/foetus may be fitted – person, property, thing – then the results of legal deliberation may take us in different directions. Kayhan Parsi²⁹ notes that the court in *York v. Jones* “applied property law principles to the case and did not consider the early embryos to be persons” whereas “the jury in *Del Zio* rejected the theory that the early embryo in question was property.” Another strategy is to devise a new category for the embryo or foetus, something other than person, property or thing. This is what happened in *Davis v. Davis* where, according to Parsi, embryos were not considered to be “just appendages of the mother, but not exactly persons (or even distinct entities such as late-term fetuses” but were, rather, classified as being unique. The trouble with this strategy is that it bears the appearance of being ad hoc, particularly when it turns out that embryos/foetuses are the only occupants of this category.

²⁸ In Bonnie Steinbock, *Life Before Birth: The Moral and Legal Status of Embryos and Fetuses* (New York, 1992), 216.

²⁹ See Kayhan Parsi, “Metaphorical Imagination: The Moral and Legal Status of Fetuses and Embryos”, *DePaul Journal of Health Care Law* 1999, Vol. 4 1999, 708 at 763. *York v. Jones*, 717 F.Supp.421, 427 (E.D.Va.1989).

Is the Foetus an Appendage

The 1900 case of *Allaire v. St Luke's Hospital*³⁰ is an instance where the majority clung to the 'appendage' metaphor, that is, to the idea that the foetus is merely part of the mother. However, Justice Boggs, dissenting, claimed that at a certain point in pregnancy there were in case two lives not one and that it would be "sacrificing the truth to a mere theoretical abstraction to say that the injury was not to the child but wholly to the mother."³¹ In *Nugent v. Brooklyn Heights Railroad Co.*,³² the appendage metaphor of the foetus was partially eroded. Referring to *Thellusson v. Woodford* and to *Walker v. Great Northern Railway Company of Ireland*, the court was impressed by the fact that the foetus could possess property rights, be the object of homicide and yet be unable to sue for negligently inflicted prenatal injuries. The later cases of *Drobner v. Peters*³³ and *Magnolia Coca Cola Bottling Co. v. Jordan*³⁴ re-asserted the appendage metaphor. In this latter case, Judge Smedley, writing for the majority, while recognising Justice Bogg's dissent in *Allaire*, was unwilling to abandon the clear criterion provided by birth.

There are, however, a number of cases that indicate a reluctance to defer to legal authority and show a willingness seriously to consider the emerging medical evidence. One such case is *Scott v. McPheeters*.³⁵ In this case which involved a claim for damage inflicted while the child was *in utero*, the court challenged the 'appendage' theory of the foetus holding, in terms that anticipate Lord Mustill in *Attorney-General's Reference*, that the late-term foetus was a unique and separate being. In *Bonbrest v. Kotz*, while the court noted the traditional legal position that a

³⁰ *Allaire v. St Luke's Hospital* 56 NE 638. The sequence of cases I consider immediately below follows the sequence traced by Parsi.

³¹ *Allaire v. St Luke's Hospital*, 641.

³² *Nugent v. Brooklyn Heights R. Co.*, 154 A.D. 667, 139 N.Y.S. 367 (1913).

³³ *Drobner v. Peters* 133 NE 567 (N.Y. 1921).

³⁴ *Magnolia Coca Cola Bottling Co. v. Jordan* 78 SW 2d 944 (Tex. 1935).

child *en ventre sa mère* had no juridical existence, it was unwilling to regard the viable foetus as being part of the mother. Furthermore, “the court questioned the distinction different areas of the law made regarding the status of the foetus. For instance, under criminal and property law, a child *en ventre sa mere*...was considered to be a human being. On the other hand, negligence theory considered the fetus to be part of the mother and not a distinct entity.”³⁶ Another case involving the right of a child to sue for prenatal injuries was *Williams v. Marion Rapid Transit*.³⁷ Again, while deferring to *stare decisis*, the court was unwilling to regard the doctrine that the viable foetus was part of its mother as being anything other than an unjustifiable fiction. The court in *Smith v. Brennan*³⁸ went even further claiming that the criminal law recognised the unborn child as a separate entity and that property law accorded the child legal personality for beneficial purposes; medically, the court accepted that the pre-natal child is a distinct entity; whether the foetus was viable or not was of little significance. As we have seen, the situation in English law is now such that after *Attorney-General’s Reference (No. 3 of 1994)* the old doctrine that the unborn child is *pars viscerum matris* no longer has any standing.

³⁵ *Scott v. McPheeters* 92 P. 2d 678 (Cal. App. Ct. 1939).

³⁶ *Bonbrest v. Kotz*, 733.

³⁷ *Williams v. Marion Rapid Transit* 87 NE 2d 334 (Ohio 1949).

³⁸ *Smith v. Brennan* 157 A. 2d 497 (N.J. 1960).

Is the foetus a person?

Is the foetus a person? The answer to this question obviously depends on what you mean by 'person'.³⁹ H. W. Michelmann & B. Hinney⁴⁰ appear to be pessimistic about the possibility of identifying a criterion that is sufficiently clear and distinct.

[T]he point model which tries to set a standardized borderline, applicable in all situations, is an approach which does not help either in facts or methods. It is unquestioned that biologically speaking the beginning of the individual human being is in the zygote, i.e. after the fusion of the pronuclei, and nobody can deny that this early embryo has the potential of becoming an adult. Zygote and person are identical in their basic constitution of genes. But on the other hand, zygote and person are not the same. A zygote has neither the attributes of a person nor are all the essential characteristics of a person already determined inside the genes of an embryo.⁴¹

According to one viewpoint, personhood is a characteristic that is attributed to an entity by us, an expression of the attitude we are willing to take towards it.

Consistent with this view, Michelmann & Hinney go on to hold that the moral status of an embryo is bestowed upon it; it is "not based on its own inner quality but on an attitude towards the embryo from autonomous subjects."⁴² Somewhat surprisingly, having said all this, they conclude by claiming that "The protection of the individual human being has to be valid uniformly during its states in the same manner and from the very beginning. It must not depend on phases of development, so-called 'degrees of humanity', because then they would be criteria of selection. Created life must always and under all circumstances have the right to be born."⁴³

³⁹ An assumption common to both sides in the debate on abortion is that, wherever one draws the line after which one has a person and before which one doesn't, there is a line to be drawn. For a robust attack on this assumption, see Norman C. Gillespie, 'Abortion and Human Rights', *Ethics*, Vol. 87, 1977, 237.

⁴⁰ H. W. Michelmann and B. Hinney, "Ethical Reflections on the Status of the Preimplantation Embryo Leading to the German Embryo Protection Act", *Science and Engineering Ethics* (1995), Vol. 1, 145.

⁴¹ Michelmann & Hinney, 147.

⁴² Michelmann & Hinney, 148.

⁴³ Michelmann & Hinney, 150.

If by person one means an entity capable of exercising adult human rationality and choice then the foetus is most assuredly not a person—but then, neither is a newborn child or indeed any child for a significant period of time after birth. Tooley’s defence of infanticide, however distasteful it might be to some, is perfectly logical. But the actual exercise of rationality and choice is surely much too high a standard for any entity to meet in order for it to qualify as a person—for one thing, it would exclude those of us who are asleep or unconscious or in a coma. If we are to subsist as persons while asleep, unconscious or in a coma, then that subsistence must be premised not on our actual exercise of rationality but on our ability or capacity or potential to exercise such rationality when we awake from sleep or recover consciousness. If our ability, capacity or potentiality to exercise rationality and choice can, in these circumstances, be sufficient to preserve our personhood, there is no reason in principle why a somewhat more remote potentiality might not do the same.

Taking into account neotony and that a man lives a third of his life before reaching his full physical perfection, it would be artificial to impose a criterion to decide at what moment a human being attains his full status as a person and the use of all the parts of his organism in their full perfection. If we had to focus on the full perfection of reason and of free choice, we would have to fix that moment very late in life, and refuse the status of human being permanently to many individuals and perhaps even temporarily to those who are asleep and who have lost consciousness. And less arbitrary and less problematic criteria are not to be found.”⁴⁴

Murray continues

Is the foetus a person?...Is the foetus a subsistent and individual being? It most certainly is. Is it rational and free in its choices, which is something essential to the human being? We must certainly say ‘no’ before birth and even long after....But its potentiality to rationality and liberty is already unique and already specifically human. We have to see in the foetus a human being potentially perfect and in the process of becoming perfect. The foetus, therefore, properly speaking, is a human person in the process of development.”⁴⁵

⁴⁴ Murray, 163.

⁴⁵ Murray, 164.

To insist on the foetus's essential humanity is not, of course, to make the absurd claim that it must actually possess or be granted all the rights of an adult human being. That would be to disregard the reality of the developmental process. We do not make this mistake even with young children—or at least we haven't done so to date. We recognise that children have the right to be protected in various ways while, at the same time, we do not recognise their possession of those rights whose exercise requires a certain maturity. So what rights, if any, does the foetus have? "[T]he foetus has a right to what corresponds to its state of development as a human being; it does not have immediate access to all human rights. We must distinguish between the life which the foetus already possesses in fact and the greater perfection of that life which it will attain later."⁴⁶

Is determining whether or not some entity is a person the most important factor in assigning or recognising its moral status? For Engelhardt, the answer is yes.⁴⁷ For Steinbock, on the other hand, the core issue is not whether or not an entity is a person, but whether it has interests. For others, such as William May, moral worth attaches to an entity simply by virtue of its being a human.⁴⁸

What is so special or different about being human, as distinct, let us say, from being a chimpanzee? The claim that being human is what ultimately counts in the determination of one's moral status would seem to conceal a covert claim about some characteristic or set of characteristics that human beings possess and non-human beings do not. If this is so, it puts personhood (or something very like it) back on the menu.⁴⁹ The standard sort of characteristics the possession of which would constitute

⁴⁶ Murray, 167-168.

⁴⁷ H. T. Engelhardt, *Foundations of Bioethics* (Oxford, 1996), xi.

⁴⁸ William May, *Reverencing Human Life in its Generation: The New Technologies of Birth and Death* (Place of Publication, 1980), 72-3.

⁴⁹ Joseph Fletcher provides a long, idiosyncratic list of psychological indicators for being human. These include minimal intelligence, self-awareness, self-control, sense of time, sense of futurity, sense

something as a person are rationality, self-consciousness and the ability to communicate. Daniel Dennett, for example, in his delineation of personhood specifies rationality, a state of consciousness, ability to reciprocate, verbal communication and self-consciousness, and his list is reasonably typical.⁵⁰ There are, however, problems with any such list. For one thing, the set of characteristics as a whole can appear arbitrary; indeed, some lists contain items not included in others. Is it necessary to possess all the characteristics on any one list to qualify, or is it sufficient if one meets the conditions for membership of a proper subset? For another, even if all the lists have some characteristic in common this seems to have the consequence (whether welcome or not) of excluding some human beings from the class of persons, whether totally or partially. Take rationality, for example. Are newborn babies rational? Not obviously so when compared to a fully-grown human being. What about those suffering from senile dementia? Intuitions differ. And, as I suggested above, if I am to be considered rational when awake and sober do I cease to be rational when drunk or asleep?

In the light of contemporary embryology it has become increasingly implausible to deny that abortion and foeticide involve the killing of a human being although there are some, who are willing to defend this position, notably Mosk J., who wrote the lead opinion in *Keeler*. Dissenting vigorously from the majority in *Davis*, Mosk J. provided the following phenomenological description of a seven-week old foetus, the effect of which is to deny the humanity of that foetus.

Do my colleagues have any idea what a seven-week-old product of conception looks like? To begin with, it is tiny. At seven weeks its 'crown-rump length'—the only dimension that can be accurately measured—is approximately 17

of pastness, capacity to relate to others, concern for others, communication, control of existence, curiosity, balance of rationality/feeling. Joseph Fletcher, *Humanhood: Essays in Biomedical Ethics* (Prometheus Books, 1979), 15.

⁵⁰ Daniel Dennett, "Conditions of Personhood" in Peter French and Curtis Brown (eds) *Puzzles, Paradoxes and Problems* (St Martin's Press, 1987).

millimeters, or slightly over half an inch....It weighs approximately three grams, or about one-tenth of an ounce....In more familiar terms, it is roughly the size and weight of a peanut. If this tiny creature is examined under a magnifying glass, moreover, its appearance remains less than human. Its bulbous head takes up almost half of its body and is bent sharply downward; its eye sockets are widely spaced; its pug-like nostrils open forward; its paddle-like hands and feet are still webbed; and it retains a vestigial tail. As Professor Cynthia R. Daniels aptly put it in her recent book, *At Women's Expense....* 'at eight weeks most features of the fetus are so ill defined that it would be difficult for an uninformed observer to recognize it, viewed in its entirety, as distinctly human.' And as concluded in the Comment relied on by the lead opinion, 'A being so alien to what we know to be human beings seems hardly worth being made the subject of murder.' The contrast between such a tiny, alien creature and the fully formed '5-pound, 18-inch, 34-week-old, living, viable child' in *Keeler....* is too obvious to be ignored. I can believe that by enacting the 1970 [sic] amendment the Legislature intended to make it murder to kill a fully viable fetus like Teresa Keeler's baby. But I cannot believe the Legislature intended to make it murder—indeed, capital murder—to cause the death of an object the size of a peanut.⁵¹

Despite Judge Mosk's protestations, the conceptus, the foetus, the unborn child is genetically human and manifestly alive from the beginning of its existence. With all due respect to Judge Mosk the question of an entity's size appears to be more rhetorical than logical.

For abortion apologists and those suspicious of the effects of foeticide laws, the critical issue has now shifted to an allegedly significant distinction between what it is to be merely a human being (and so *not* the bearer of rights and responsibilities) and what it is to be a person (and thus the bearer of rights and responsibilities.). It is considered that not all human beings are persons and that therefore it is (sometimes) permissible to kill a non-personal human being. Once a distinction is drawn between persons and humans we have four basic possibilities: 1. human beings who are persons; 2. human beings who are non-persons; 3. non-human beings who are persons; and 4. non-human beings who are non-persons. Category 1 is our standard paradigm of the person – the mature adult human being. Category 3 could include

⁵¹ 7 Cal.4th 797, 832-833.

companies (legal fiction), (arguably) the so-called higher animals, for example chimpanzees and dolphins; Category 4 includes most of the rest of the world, from desks to dandelions; Category 2 is the problematic one. There are those, like May, who will not recognise any real distinction between categories 1 and 2. On the other hand, the reality of the gap between 1 and 2 is essential for the maintenance of the viewpoints of Engelhardt and Dennett. Engelhardt is willing to soften the distinction between 1 and 2 to some extent by creating space for an intermediate category of what he terms 'persons in the social sense' which we might number as 1a⁵², category 1 containing persons in the strict sense. We should not be surprised to find that the inhabitants of 1a include the severely retarded, those suffering from dementia, and infants.

Parsi asserts categorically that "There exists almost virtual consensus that embryos and fetuses lack the criteria that would place them within the category of persons in a strict sense." [758] I am not sure that there is in fact such consensus but in any case, it might be worthwhile to see what those criteria are the lack of which makes a human being a non-person. According to Parsi, such criteria include self-consciousness, rationality, a minimal moral sense and freedom. Of course, we need to determine exactly what each criterion is or entails and furthermore, even when we are clear on the definitions and consequences, the question remains of why we should accept any given criterion. The arguments for any given criterion must not be question-begging. Parsi notes that "Engelhardt's two-tiered definition of persons – persons in the strict sense and persons in the social sense – would leave no room for embryos and early fetuses" and that "Warren's set of criteria for personhood (consciousness, self-

⁵² Engelhardt, 116.

consciousness, reasoning, self-motivated activity and language) would not encompass early fetal life either.” [758]

The difficulties of drawing the distinction between human beings and persons sensibly and non-arbitrarily are well known. Michael Lockwood proposes a variation on this theme, suggesting a tripartite distinction between living human organisms, human beings and persons. A ‘living human organism’ is “a (complete) living organism of the species *Homo Sapiens*”.⁵³ A ‘human being’ is what “you and I are essentially, what we can neither become nor cease to be, without ceasing to exist.”⁵⁴ A ‘person’ is a being that is “conscious [and has] the capacity for reflective consciousness and self-consciousness....Mere sentience is not enough”.⁵⁵ Lockwood’s tripartite division is an ingenious attempt to avoid being impaled on a Humean fork: “...either potential counts, and prevention of conception, early infanticide, and abortion are (ignoring side effects) equally wrong; or else only the actual possession of such attributes as rationality and reflective self-consciousness counts, and early infanticide, abortion, and the prevention of conception are (again barring side effects) equally permissible, morally speaking.”

A theme that runs through many of the cases is the fuzzy line that separates the commonsense notion of a person, according to which all human beings are persons and all persons are human beings, from the legal notion of person according to which a person is taken to be that which is the subject of legal rights and duties. “Courts

⁵³ Michael Lockwood, “When Does a Life Begin?” in Michael Lockwood (ed.) *Moral Dilemmas in Modern Medicine* (Oxford, 1985) 8, 10.

⁵⁴ Lockwood, “When Does a Life Begin?”, 13.

⁵⁵ Lockwood, “When Does a Life Begin?”, 10. In an article critiquing the Working Paper of the Law Reform Commission of Canada, Moira McConnell was severely critical of the Commission’s view that according to our ordinary intuitions, the term ‘human being’ refers to the product of human conception and not just to persons already born. (Moira L. McConnell, “Capricious, Whimsical, and Aborting Women: Abortion as a Medical Criminal Issue (Again)” (1989-1990) 3 *Canadian Journal of Women and Law* 661.) In the same issue of that journal, see also Sheila Noonan, “Protection of the Foetus: Denial of the Woman” 667.; Edward M. Goldberg, “The ‘Bad Law’ Argument in *Morgentaler v. The*

have not been able to distinguish cleanly between these two points of view, alternately treating the issue of personhood as a commonsense determination of what is human or as a formal legal fiction unrelated to biological conception of humanity. Furthermore, the expressive dynamic through which law communicates norms and values to society renders impossible a clear divide between the legal definition of 'person' and the colloquial understanding of the term."⁵⁶

Noting that the legal status of the foetus in the U.S.A. varies from state to state, the authors of the Harvard article write "In some cases, courts have assumed that all fetuses are human. The Massachusetts Supreme Judicial Court adopted the strongest version of this approach in *Cass*, when it regarded the issue as resolved by a simple syllogism: all human beings are legal persons; fetuses are human beings; therefore, fetuses are persons."⁵⁷ While some states are sensitive to the apparently arbitrary nature of treating the foetus differently in the contexts of the civil and criminal law⁵⁸ other states seem not to experience any discomfort in such differential treatment.⁵⁹

Whether a court is willing to allow a foetus to be a person depends to a large extent on the degree to which the court thinks that such a notion is primarily a legal one, the attribution of which is determined solely by the legal needs of the jurisdiction, or the extent to which it regards such a notion as responding, however confusedly, to a pre-legal grasp of reality.

To courts that regard similar entities as persons in one area of law but not in another, 'person' represents nothing more than a means of indicating a subject of rights and duties that may vary among bodies of law. A refusal to countenance different meanings of 'person' among different areas of law, however, implies a rejection of—or at least discomfort with—this analysis. An

Queen" at 584; Susanne N. Frost, "*R v. Sullivan*," at 563; and Sheila L. Martin, "Using the Courts to Stop Abortion by Injunction: *Mock v. Brandenburg*" at 569.

⁵⁶ 114 *Harvard Law Review* 1745 at 1745.

⁵⁷ 114 *Harvard Law Review* 1745 at 1757-58.

⁵⁸ The South Carolina Supreme Court found such a difference intolerable; see *State v. Home* 319 S.E.2d 703 (S.C. 1984).

⁵⁹ See *State v. Beale* 376 S.E.2d 1 (N.C. 1989).

insistence on consistency may indicate that a court regards the legislative statement of what counts as a 'person' not merely as signifying the subject of rights and duties, but rather as expressing some notion of what it means to be a person in an a priori sense that should remain expressively stable.⁶⁰

Interestingly, in the case of *State v. Merrill*,⁶¹ the Supreme Court of Minnesota held that the relevant foeticide statutes did not raise the issue of when life as a human person begins or ends. The statutes defined first degree murder of the unborn child as the causing of the death of an unborn child with premeditation and with intent to effect the death of the unborn child or of another; second degree murder of the unborn child was defined as the causing of the death of an unborn child with the intent to effect the death of that unborn child or another, but without premeditation.⁶² There was no requirement on the part of the state to prove that the unborn child was a person in any sense; it was sufficient that it once was living and now had life no longer. Parsi remarks that "The court's opinion looks only to the biological status of the fetus. It ignores issues of consciousness and rationality that encumber the personhood debate in the bioethics literature. Rather, the court adopts an approach that could easily be written by John Noonan....In short, the court determined that the statute protects human life and not personhood."⁶³

Not everyone is enthusiastic about considering the issue of the personhood of the foetus. R. M. Hare remarks that this question "leads straight to a dead end, and we would best avoid it....most of the disputes about this allegedly crucial question of whether the foetus is a person are going to be a waste of time and can never get anywhere."⁶⁴ Despite this seemingly outright rejection of the question of the foetus's status, Hare's point turns out to be methodological rather than substantive: "My

⁶⁰ 114 *Harvard Law Review* 1745 at 1758.

⁶¹ *State v. Merrill*, 450 N.W.2d (Minn. 1990), 318; cert. denied, 496 U.S. 931.

⁶² See Minn. Stat. Ann. sect. 609.2661 (1) & (2) (1988).

⁶³ Parsi, 780-721.

advice is that we forget about the word ‘person’, and ask instead about the properties of the foetus that might be reasons why we ought not to kill it – properties in the ordinary factual sense in which we can *determine* whether or not it has them.”⁶⁵ Having said this much, Hare then goes on to admit that “if we can isolate a set of ordinary properties of the foetus which together constitute a reason why we ought not to let it be killed, we might sum up this set of properties by saying that the foetus is a person.”⁶⁶

Charles M. Kester⁶⁷ identifies the current paradigm for the attribution of legal standing to human beings; this is the biological paradigm: “Traditionally, the law has conferred legal standing upon any human body capable of independent integrated functioning.”⁶⁸ Originally, live birth provided a clear criterion of such independent integrated functioning [IIF] but, with the development of technology, it was discovered that foetuses became capable of IIF well before birth, at the point of viability. However, even though the clear line may have shifted, the criterion of legal standing according to the biological paradigm is still IIF. Making use of Thomas Kuhn’s⁶⁹ notion of paradigm, anomalies, and paradigm shift, Kester argues that the existing paradigm for the conferring of legal status upon human beings leads to anomalies⁷⁰ that are unresolvable within that paradigm and which therefore demand the acceptance of a new paradigm that is free of those anomalies. Such anomalies include the standard problems and debates over *in vitro* fertilisation, the use of the

⁶⁴ R. M. Hare, “A Kantian Approach to Abortion” *Social Theory and Practice*, Vol. 15, No. 1 Spring 1989, 1, 2.

⁶⁵ Hare, 3-4.

⁶⁶ Hare, 4.

⁶⁷ Charles M. Kester, “Is there a Person in that Body?: An Argument for the Priority of Persons and the Need for a New Legal Paradigm”, *Georgetown Law Journal*, April 1994 82 Geo.L.J. 1643.

⁶⁸ Kester, 1646.

⁶⁹ Thomas S. Kuhn, *The Structure of Scientific Revolutions*. 2nd ed. (Chicago, 1970). (Original edition 1962).

⁷⁰ Kester deals with anomalies centring on both the beginning and end of life. Given my concerns in this thesis, I focus only on the material dealing with the beginning of life.

foetus in research and whether or not pregnant women should be compelled to submit to surgery in order that their unborn children may be protected from harm. The key problem, however is the point at which foetuses are taken to have legal standing. The biological paradigm admits two plausible contenders for such a point; conception and viability. Conception, the point at which a foetus has a unique genetic code, could be taken to be such a point; however, Kester believes that the possession of a unique genetic code is not sufficient for human life, since corpses have a genetic code but are demonstrably not alive. Additionally, he takes the problems associated with twinning and cloning to demonstrate “the irrelevance of a genetic code to the presence of human life. A single zygote may develop into no living humans at all, or into numerous live humans.”⁷¹ On the other hand viability, as we have seen above in our review of the case law, leads to the anomalous treatment of foetuses *in utero*, and the same biological entity *extra utero*, a difference of treatment that is inconsistent with the biological paradigm.

Generally, the biological paradigm, even in the sophisticated form in which it is presented by Derek Lamb,⁷² leads to its own internal anomalies and, in Kester’s judgement, conflicts with the most plausible philosophical theory of personal identity. There are philosophers who adopt a criterion of personal identity that is bodily based, among them Bernard Williams,⁷³ Derek Parfit,⁷⁴ and Terence Penelhum.⁷⁵ Kester argues against Williams that bodies are not necessary to preserve the distinction between identity and exact similarity, against Williams and Parfit that their argument from individual self-interest itself assumes psychological connectedness; and against

⁷¹ Kester, 1657.

⁷² See David Lamb, *Brain Death and Ethics* (New York, 1985).

⁷³ Bernard Williams, ‘Personal Identity and Individuation’ in Bernard Williams (ed) *Problems of the Self* (Cambridge, 1973), 1-18.

⁷⁴ Derek Parfit, *Reasons and Persons* (Oxford, 1986).

⁷⁵ Terence Penelhum, *Survival and Bodily Existence* (London: 1970); new ed. 1980.

Penelhum that bodies are necessary neither for individuation nor for unity of consciousness and that embodiment is not necessary for psychological continuity. He concludes that

the biological paradigm may rely upon either of two theories for justification, both of which create anomalies. First, the biological paradigm may simply focus upon biology in an attempt to exclude philosophical argument concerning personal identity. Focusing upon biological life creates anomalies because such a focus is inconclusive and no meta-biological principles are admitted to guide the choice among competing biological positions, thereby making arbitrary any position chosen. Second, the biological paradigm may be based upon a philosophical theory that personal identity is defined by functioning human bodies. However, the arguments against the psychological criterion theory are unpersuasive and do not support the bodily criterion theory.⁷⁶

Finally, Kester attacks the competing person-based legal paradigms of Daniel Dennett⁷⁷ and Michael Tooley.⁷⁸ To take just one example, Kester argues that Dennett's contention that persons must be rational beings simply cannot be a necessary condition of personal identity since "Hamlet, were he truly insane and irrational, would remain a person in spite of that fact".⁷⁹ Likewise Tooley's person-based account, which incorporates Feinberg's 'interest principle' (which is that only those who have (or can have) interests can have rights) is unsuccessful in that "[A]ny being with consciousness is capable of having desires and therefore satisfies Tooley's interest principle."⁸⁰

To eliminate the anomalies created by the biological paradigm, Kester presents a new person-based paradigm built upon the psychological criterion of identity.

1. An individual whose body sustains the functions necessary for consciousness is a 'person'....An individual whose body is irreversibly incapable of sustaining the functions necessary for consciousness is not a person.

⁷⁶ Kester, 1667.

⁷⁷ Daniel C. Dennett, "Conditions of Personhood" in Michael F. Goodman (ed) *What is a Person?* (London, 1988).

⁷⁸ Michael Tooley, "In Defense of Abortion and Infanticide" in Michael F. Goodman (ed) *What is a Person?* (London: 1988).

⁷⁹ Kester, 1674.

⁸⁰ Kester, 1676.

2. If an individual whose body is irreversibly incapable of sustaining the functions necessary for consciousness at one time was an individual whose body sustained the functions necessary for consciousness, that individual is a dead person.
3. Bodily functions necessary for consciousness shall be defined by accepted medical theories.
4. The presence or absence of bodily functions necessary for consciousness shall be determined in accordance with accepted medical standards.
5. Membership by an individual in a genetic species whose constituents possess bodies that sustain functions necessary for self-consciousness creates a rebuttable presumption that the individual is a person.
6. A biological organism is an individual for purposes of [paras.] 1 to 5 if and only if that organism possesses a complete genetic code. All non-biological objects are individuals for purposes of [paras.] 1 to 4.⁸¹

From the perspective of the psychological school, Kester's paradigm is not unreasonable. Even from a more general perspective it has distinct advantages over competing models. For example, article 5 "Membership by an individual in a genetic species whose constituents possess bodies that sustain functions necessary for self-consciousness creates a rebuttable presumption that the individual is a person" has a refreshingly robust commonsense air about it, as do articles 3 & 4. In the end, however, Kester's paradigm attracts the standard criticism that all psychologically based criteria do, namely, that the criteria specified arbitrarily selects from the entire class of human beings a proper subset for consideration, while equally arbitrarily excluding certain marginal groups. The criticism cannot be that it selects—that, after all is its purpose—the criticism is that it selects arbitrarily.

Mamta K. Shah⁸² makes the point that what he calls 'the cipher metaphor' (what I called above the 'attributive' account of human personality) is applied to the foetus in U.S.A. law. Treating the foetus as a legal cipher means that it has no intrinsic status independent of that which the law recognises, but that it has whatever legal status it

⁸¹ Kester, 1668.

⁸² Mamta K. Shah, "Inconsistencies in the Legal Status of an Unborn Child: Recognition of a Fetus as Potential Life" *Hofstra Law Review*, Spring 2001, 931. [29HOFLR931]

has simply because of what the law confers upon it. As we saw above, this is the position adopted by Michelmann & Hinney.

This view is apparent in the attempt by courts to determine the legal status of a fetus within the context of wrongful death statutes and homicide statutes without resolving whether a fetus possesses the intrinsic qualities necessary for attaining personhood. Instead, courts have relied on legislative intent, the rules of statutory construction, the purpose of wrongful death liability and homicide conviction, logic, precedent, and changes in medical science to ascertain the degree of legal protection that should be granted to a fetus.⁸³

Kayhan Parsi recognises that the foetus has been treated differently in different legal contexts: “[T]he legalization of abortion in 1973 was based in part on the unborn’s never having been recognized in law as a full legal person. At the same time, fetuses have been considered as persons for the purposes of insurance coverage, wrongful-death suits and vehicular homicide statutes.” It is therefore clear that the legal status of the unborn “appears to vary from jurisdiction to jurisdiction, from context to context, according to our purposes. The law rarely treats the unborn in a univocal fashion.”⁸⁴

The point to focus on here is that one and the same court will, for example, in respect of wrongful death statutes, treat the foetus as if it were a person but the same court, in the context of criminal statutes, will refuse to do so. The reasons given are that the civil law is compensatory and should be liberally interpreted whereas criminal law is punitive and should be strictly interpreted; or it is said that the courts have no power to create new crimes—that function being reserved for the legislature, and so on. So, for example, the West Virginia Supreme Court of Appeals in *State ex*

⁸³ Shah, 939.

⁸⁴ Parsi, 708.

*rel. Atkinson v. Wilson*⁸⁵ refused to extend protection to an unborn viable foetus under its murder statute while the same court, in *Baldwin v. Butcher*⁸⁶ allowed a wrongful death action for a similar unborn viable foetus. Similarly, the Arizona Supreme Court, in *Summerfield v. Superior Court*,⁸⁷ permitted a tort action for wrongful death for a viable unborn foetus while the Arizona Court of Appeals, in *Vo v. Superior Court*,⁸⁸ excluded a similarly situated foetus from the definition of ‘person’ in the context of a criminal homicide.

As we have seen, a number of states have passed specific criminal law statutes to protect the foetus. These so-called foeticide statutes, however, accord protection—and thus legal status—to the foetus without necessarily determining whether the foetus so protected is considered to be a person. “[W]hile feticide statutes protect an unborn child from the moment of fertilization, they protect a fetus only as a ‘potential life’ and not as a ‘person’. Because feticide statutes are intended to protect an unborn child as a ‘potential life’ they do not provide a fetus the same protection afforded to a person under criminal law”⁸⁹ Shah adds that “The treatment of a fetus under wrongful death statutes and homicide statutes of varying states reveals that courts confer legal standing on a fetus *independent of its personhood*.”⁹⁰

In his overall conclusion, Shah comments that “At first glance, the debate regarding the legal status of a fetus for purposes of wrongful death statutes and homicide statutes seems to center on whether a fetus is a ‘person’ and at what stage of development a fetus becomes a ‘person.’” That is, it appears that being a person is

⁸⁵ *State ex rel. Atkinson v. Wilson* 332 SE 2d 807 (W. Va. 1984)

⁸⁶ *Baldwin v. Butcher* 184 SE 2d 428 (W. Va. 1971)

⁸⁷ *Summerfield v. Superior Court* 698 P.2d 712 (Ariz. 1985)

⁸⁸ *Vo v. Superior Court* 836 P.2d. 408 (Ariz. Ct. App. 1992)

⁸⁹ Shah, 964. Emphasis added.

⁹⁰ Shah, 965. Emphasis added.

something that is recognised by the court, recognition involving an acknowledgement of what is present and cannot be denied.

However, closer scrutiny reveals that the status of a fetus in society is evaluated within a socially constructed framework without regard to whether a fetus possesses the intrinsic qualities necessary for personhood. The use of a subjective criterion created by society, rather than an objective standard based on the elements of personhood, has allowed the courts to deal with cases where the conduct of a third party causes the death of a fetus without addressing the difficult issue of whether a fetus is a 'person.' Moreover, such a standard has resulted in the diverging treatment of a fetus under wrongful death statutes and homicide statutes. [969]

This is a kind of non-recognitive attribution based on society's needs, desire and interests or, what is more likely, the needs, desires and interests of the dominant group in society.

Is consistency among the different branches of law a desideratum? One tendency has been to keep the areas of law separate, so that what happens in succession law, tort law, and criminal law do not necessarily impinge on each other. I would argue that, making due allowances for the different purposes of different kinds of law and for the different evidential standards demanded in each of these different areas, consistency is a desideratum. Differences in usage and application of the same terms and concepts require justification; sameness in usage and application requires no justification.

The foetus—person or property?

Could the foetus be considered not as a person but as property? On this question Parsi writes: "if one labels an entity a person, it suggests that the entity has certain intrinsic rights, independent of one's relationship with it. On the other hand, if one frames something as 'property,' a wholly different way of thinking arises." What are these differences? "Property does not have any intrinsic rights of its own; the notion of

property suggests the bundle of rights and duties a person has with regard to the property (whether it is a physical object or something more intangible such as intellectual property).” This seems correct. Abstractly, it is easy to distinguish person from property and even concretely most things are fairly easily fitted into one category or the other.

Planes, trains and automobiles typically fall under the category of property. They have no intrinsic value independent of someone’s property interests in them (they may, however, have a certain aesthetic value). A healthy, competent, adult human being is another example of an easy case. Such a creature is not property, but rather a person. This suggests that such a human being qua person cannot be treated in merely an instrumental fashion, as Kant would argue, but must be treated as an end in itself. Harder cases involve such beings as animals, the severely mentally disabled, PVS patients and, of course, fetuses and embryos.⁹¹

Parsi’s general point is acceptable. There are clear and unambiguous instances of property, and clear and unambiguous instances of persons. But there are fault lines that lie between the apparently obvious equation of person and human being, for the law has, at times, recognised categories of human being that it refused to treat as persons, such as slaves and foetuses while it also recognised classes of non-human beings that it treated as persons, for example, corporations. As Lord McCluskey said in *Hamilton v Fife Health Board*, “Legal personality is a construct of the law...there are many examples in history of adult, sentient human beings being denied human status and legal personality and of limited liability companies and even of non-human animals being accorded rights and responsibilities normally appropriate only to human beings.”⁹²

The authors of the *Harvard Law Review Note* ask, pertinently “If slaves are regarded as persons, how can one reconcile this fact with their treatment as a form of

⁹¹ Parsi, 710-11. For a recent discussion of the person/property relation, see Margaret Davies and Ngaire Naffine, *Are Persons Property?: Legal Debates about Property and Personality*, (Aldershot, Hampshire, 2001).

⁹² *Hamilton v Fife Health Board* Extra Division, 24 March 1993, 1993 SLT, 629.

property?”⁹³ The law in this area witnessed the distressing spectacle of judges moving between a personal (broad) and a nonpersonal (narrow) approach to slaves, depending upon what purpose such an approach would serve. So, for example, slaves would be treated as persons when it came to their commission of crimes but as non-persons when it came to their being treated as objects of assault. “For the most part, judges read laws proscribing the killing of persons to prohibit the killing of slaves....The law also treated slaves as persons by holding them as publicly accountable for their crimes as nonslaves.”⁹⁴ In the civil law context, the narrow reading prevailed so that slaves were not considered persons for civil, social or political purposes. The justification for the ascription of personality, or the withholding of personality appears to have been ad hoc in the extreme. When holding that slaves were persons, appeal was made to their obvious humanity;⁹⁵ when holding that slaves were not persons, emphasis was placed on the metaphorical nature of the notion of legal personality and its lack of necessary connection to whether or not the entity so described was human.⁹⁶ This approach is clearly attributive rather than recognitive, that is, it is obviously based on the satisfaction of the needs, interests and desires of some particular group rather than being an attempt objectively to recognise what is there.

There are a number of interesting modern cases regarding the treatment of the embryo as a kind of property.⁹⁷ One of the earliest and still one of the most significant

⁹³ 114 *Harvard Law Review* 1745 at 1747.

⁹⁴ 114 *Harvard Law Review* 1745 at 1748.

⁹⁵ See *State v. Jones* 1 Miss. (1 Walker) 83 (1820)

⁹⁶ See *Jarman v. Patterson* 23 Ky. (7 T.B. Mon.) 644 (1828)

⁹⁷ Some philosophers, for example, H. Tristram Engelhardt frankly regard the foetus as so much property. H. Tristram Engelhardt, *Foundations of Bioethics* (Oxford, 1996). In *Del Zio v. Presbyterian Hospital*, 978 U.S. Dist. LEXIS 14450 (S.D.N.Y.1978) the plaintiffs had undergone IVF treatment. The results of the procedure were ordered to be destroyed. The Del Zio's sued for conversion of property.

cases to raise the property status of the unborn is *Davis v. Davis*.⁹⁸ This case concerned the fate of seven frozen embryos. The litigants, Mary Sue Davis and Junior Davis, changed their minds as to the ultimate disposition of these embryos during the various hearings. Originally, the trial court ruled in favour of Mary Sue Davis, holding that the embryos were human beings from the moment of conception. The Tennessee Court of Appeal reversed, holding that this violated Junior Davis's right not to procreate where no pregnancy had taken place. By the time the case reached the Supreme Court of Tennessee, Mary Sue Davis wished to donate the embryos, while Junior Davis wished to discard them. The Tennessee Supreme Court seemed to be willing to entertain an assignment of variable status depending on the stage of development of the embryos.

A recent case relevant to the issue of whether the embryo/foetus can be considered as property is *Kass v. Kass*.⁹⁹ The Kassess had executed a cryopreservation agreement, which laid out that, in the event of a divorce, the legal ownership of the zygotes would be determined in a property settlement. The trial court, in awarding Mrs Kass the custody of the pre-embryos, held that while not mere property they were still not persons. The New York Court of Appeals, reviewing the case, held that the progenitors of the pre-embryos held a bundle of rights over the pre-embryos, which rights could be exercised via the use of disposition agreements. The court denied that the zygotes were persons for constitutional purposes.

Divisibility and the Moral Status of the Foetus

An assumption apparently common to all sides in the debate on whether the foetus is a person is that whatever a person is, it must be an individual. On this basis, an

⁹⁸ *Davis v. Davis* 842 SW 2d 588 (Tenn. 1992).

argument is sometimes mounted against the possibility of a pre-14 day old embryo's being a person on the grounds of its potential divisibility. In *Davis*, the Tennessee Court, made a distinction between pre-embryo and embryo in respect of their possession or lack of pluripotency. The difference appears to be that the loss of pluripotency turns a pre-embryo into an embryo and the *Davis* Court refused to grant the same status to the entity at these different stages of development precisely because of the pre-embryo's possibility of divisibility.

What, then, is the significance of divisibility for our assessment of the moral status of the embryo? Christian Munthe presents the following argument from divisibility:

1. Only indivisible entities can have moral status
2. Twinning means that an embryo divides into several embryos, each one a separate entity.
3. *Therefore*, as long as twinning is possible, the embryo is not an indivisible entity.
4. Twinning is possible up to the point when the formation of the primitive streak has been completed.
5. *Therefore*, embryos are not indivisible until after the formation of the primitive streak has been completed.
6. *Therefore*, embryos cannot have moral status until after the formation of the primitive streak has been completed.¹⁰⁰

This argument (or rather, collection of arguments) appears to be valid. The most controversial of the premises is the very first one "only indivisible entities can have moral status." Munthe bluntly denies the truth of this premise. "My basic argument against the requirement of indivisibility is straightforward: even if normal adult human beings were to be divisible, they would nevertheless have moral status." [387] Munthe presents a number of thought experiments to ground his claim, the most plausible one of which is this: imagine that human beings had evolved in such a way that they reproduced by division rather than by sexual methods. Would we then be entitled to treat human beings prior to their division as being without moral status?

⁹⁹ *Kass v. Kass* 235 AD 2d 150 (N.Y. App. Div. 1997), aff'd 696 NE 2d 174 (N.Y. 1998).

Munthe believes not, and I agree. The supporters of the indivisibility argument could accept the results of the thought experiment but still claim that divisibility *in the case of embryos* deprives them of moral status. But why accept *this* claim? Is it anything other than a form of special pleading?

Let us describe the fully developed human being possessed of whatever property is considered essential, for example, consciousness, as being a *paradigm person* [PP]. To be a paradigm person is *ipso facto* to possess the appropriate moral status of a person. If, as per Munthe's thought experiment, such a paradigm person were to be divisible, that divisibility would not detract from its moral status. Embryos and foetuses, whatever they are, are clearly not paradigm persons. They do not possess whatever essential properties such paradigm persons are required to possess. They can, however, be considered *potential paradigm persons* [PPP]. If such PPP are devoid of all moral status, then the question of the effect of divisibility on them is otiose. Suppose, however, for the sake of argument, that a PPP were to be ascribed some measure of moral status, call it S, because of its potential to develop into a PP—would the argument from divisibility have any effect on this status? The precise nature of this moral status does not need to be determined for the sake of the immediate argument; all that is required for the argument to have traction is for S to be greater than zero. Munthe provides a way of expressing this point but I find it unclear; I therefore propose my own.

Argument from embryonic divisibility

A foetus F has moral status S iff

- (i) it has the potential to develop into a paradigm person (i.e. iff it is a PPP) AND
- (ii) it does *not* have the potential to develop into more than one PP.

¹⁰⁰ Christian Munthe, "Divisibility and the Moral Status of Embryos" *Bioethics*, Vol. 15, Nos. 5/6, 382, 385.

A(i) is granted ex hypothesi. What is the status of A(ii)? One could argue against A(ii) that just as the moral status of the fission-reproducing adult-of-the-future is unaffected by its fissionability, so the moral status, S, of the foetus is unaffected by its divisibility. The acceptability of this counter argument depends on the general persuasiveness of the thought experiment and on an implicit denial of there being any substantive difference between adult and embryo in respect of the impact of divisibility on their moral status. I find Munthe's thought experiment to be persuasive, so much so that the 'divisibility' argument ceases to have any effective purchase on me. However, not everyone will necessarily be persuaded by such thought experiments so to obtain another perspective on the significance of divisibility, let us turn to Christopher Tollefsen.¹⁰¹

In his discussion of the moral legitimacy of embryo creation and research Tollefsen reviews the 1994 *Report of the Human Embryo Research Panel* of the National Institute for Health. The decisive reason underlying the Panel's recommendation that embryos could (and in some cases should) be created for research purposes was its claim that it is impossible for an early embryo to be a person. That claim in turn was grounded on the contention that a minimal necessary condition for an entity to be a person was that it be an individual. In the Panel's judgement, this condition of individuality could not be met by the embryo before the development of the primitive streak at around 14 days after conception.

Tollefsen identifies very clearly the two sides in what he calls the "debate that has been so intransigent for the past 30 years" on whether or not an early embryo can be a person. The first side identifies personhood either as an achievement or as something conferred on an entity by society [the attributive thesis], while the second side

¹⁰¹ Christopher Tollefsen, "Embryos, Individuals, and Persons: An Argument Against Embryo

identifies personhood as a status “which individuals have in virtue of their capacity to achieve rational agency, a capacity identified on the basis of species membership.”¹⁰²

[the recognitive thesis] According to Tollefsen, both sides can and do agree that only an individual can be a person. The consequences of establishing that an embryo is or is not an individual has an asymmetric effect on the “intransigent debate”. If it should turn out that embryos are not or cannot be individuals then, on the continued acceptance of the common proposition that only individuals can be persons, the recognitive side will lose by default. Should it turn out that embryos can be individuals, the dialectical status quo between the two sides remains the same, save that the achievement/conferral side has lost one string to its bow.

So, what is it for an entity to be an individual? The etymology of the word suggests that to be an individual is to be resistant to division without loss. It is on some such point that the puzzles arise in relation to biological entities. The possibility of a biological entity’s splitting would, on the face of it, seem to raise doubts about its status as an individual prior to the split. Tollefsen puts it as follows:

Take the single-celled zygote. Its first mitotic division can result in twins, genetically identical daughter-cells that will themselves develop into ontologically independent individuals. But this possibility of twinning is rooted in a biological aspect of the zygote that is present even when twinning does not in fact take place, namely, that the daughter cells of the zygote will both be genetically identical and totipotent, i.e. each capable of developing into an individual human organism.

Now apparently, in the case in which twinning does occur, what was a single individual organism, the zygote, in dividing, has generated two distinct individuals. There is not one entity composed of two twins, and many claim that it is unreasonable, because arbitrary, to see one of the twins as the original zygote, only smaller, and the other as a new organism. So we have two individuals, where before there was one. But, so the argument continues, how are the two totipotent genetically identical daughter cells that are the result of the first cell division different in principle in the case in which twinning does not result? Both cells could in fact become twins, and indeed, in the laboratory,

Creation and Research” *Journal of Applied Philosophy*, Vol. 18, No. 1, 2001, 65.

¹⁰² Tollefsen, 69.

it seems possible to separate the cells from the first cleavage, and gain twin embryos in consequence.¹⁰³

It is important to understand that being an individual is conceptually related to the notion of divisibility *without loss*. Any biological entity is divisible which ability if actualised, usually, though not always, results in its death. The divisibility we are interested in is not an externally imposed dividing but an internal organised division, which does not result in the death of the organism. The question, then, as Tollefsen puts it, is “how can something be a multicellular individual organism when it still has the potential to become more than one individual organism?”¹⁰⁴

Following Mark Johnson, Tollefsen notes that in those cases of embryonic development where twinning does not occur, all the evidence points in the direction of an internally controlled, unified and purposive development from the embryonic stage to the uncontested much later stage of full human maturity.

Under the influence of the zygotic nucleus, which is not merely the container of the genetic program, or ‘blueprint’ of the organism, but which is also an agent that effects differentiation by directing the production of proteins that cause cleavage, this organism possesses homeostasis, and, because of its immaturity relative to its mature form, immediately sets about the business of producing organs necessary for its survival inside, and eventually outside, of the mother.¹⁰⁵

In addition to Johnson’s material, Tollefsen himself notes that the boundaries of the developing embryo are both stable and internally determined and that, moreover, the cells of the early stage embryo are in communication with each other, which of course would not be the case if the cells were merely adventitiously contiguous.

This is not the only problem. The difficulty caused by the possibility of twinning gives rise to another problem that is more metaphysical than biological. When we have a single-celled zygote we appear to have an individual (call it A*) with one part

¹⁰³ Tollefsen, 70.

¹⁰⁴ Tollefsen, 70. Cf. the discussion of different kinds of divisibility in Munthe, 385-87.

¹⁰⁵ Mark Johnson, “Delayed Hominization: Reflections on some Recent Catholic Claims for Delayed Hominization” *Theological Studies*, 56.

that is identical to itself. When the single-celled zygote divides we have an individual (A**) with two parts, neither part of A** being identical to A*. Is A** the same individual as A*? “How,” Tollefsen asks, “can an individual persist when none of its parts persist?”¹⁰⁶ Tollefsen sees this metaphysical problem as arising from a misunderstanding about single-celled individuals. The problem resides in the assumption that the single-celled individual does not have any parts other than itself. In the transition from single-celled entity to dual-celled entity, the same matter is present throughout the change, the change being a re-organisation of that matter directed by the zygotic nucleus. Those of an Aristotelian bent will clearly recognise this as a case of hylomorphic dynamism: “[T]he organism is engaged in the task of its own development into a vastly more complex organism – the organism we think of as the mature human being.”¹⁰⁷

The question of whether or not the foetus has legal personality is a complex and disputed one. At different times and in different places the law in its various branches has sometimes attributed legal personality to the unborn child, at other times and in other places it has refused to make or allow that attribution. Consistency in this matter, however desirable, is hard to find. I have argued that a defensible legal position must in the end be recognitive rather than merely attributive, that is, that the appropriate legal treatment of an entity ultimately depends on a clear and unambiguous recognition of what that entity is.

A foetus may be *sui generis*, an appendage, a person, mere property, or a human being. I have attempted to show that it cannot be regarded as an appendage or property or as something *sui generis*. On an understanding of ‘person’ which distinguishes sharply between person and human being on the basis of the possession

¹⁰⁶ Tollefsen, 70.

of certain psychological attributes, it does not seem that the foetus can be a person either. If persons and human beings are considered to be equivalent there remains the possibility that the unborn child is simply a human being, a small, undeveloped human being it is true, but a human being none the less. If such is the case, the unborn child deserves parity of treatment with all other human beings.

¹⁰⁷ Tollefsen, 73.

CONCLUSION

Is the rationale of the foeticide laws a right that subsists in the foetus not to be harmed or have its life taken? If so, it is difficult to see why the law should differentiate among its assailants. What does it matter to the foetus who harms it or takes its life? Normally in the criminal law, if I have a right not to have something done to me, then *no one* is allowed to do it. Klasing notes that the Missouri Supreme Court overturned the case of *Rambo v. Lawson* in which the Missouri Court of Appeals had found that a foetus was a ‘person’ at conception saying “Only the unique relationship between a mother and her fetus requires the striking of this balance between the woman’s fundamental right to privacy and the state’s interest in protecting fetal life. That unique relationship explains the imposition of the concept of viability in governing abortion rights”.¹ Klasing remarks acidly that “apparently, because of the unique relationship between a mother and her fetus, a woman is allowed to perform a harmful action that would not be allowed by others.”²

If, however, the ground of the foeticide laws does not reside in the foetus itself, where does it reside? Is it that the foetus is the property of the mother so that while she can destroy it if she will no other can do so without her consent, much as I can destroy my briefcase if I wish but no other person, without my permission, can lawfully assume any of the rights of an owner towards it?³ Since the early middle

¹ *Rambo v. Lawson* 799 S.W.2d 62 (Mo. 1990) (en banc).

² Klasing, 971.

³ This argument must not be confused with the argument sometimes deployed that the pregnant woman has property rights in her own body which entitle her to have removed from it those who are using it without her permission. “[T]he woman’s property right to her body, a right that includes essentially the right to exclude others from its use, gives her the right to have the unapproved users removed...”

ages, a significant trend in Western law (both civil and common) has been the ‘personalisation’ of human relations, the gradual but seemingly inexorable removal of property and quasi-property characteristics from persons: witness the abolition of slavery, peonage and serfdom. As W.T. Murphy and Simon Roberts⁴ remark “in most Western societies the inappropriateness of the property model is widely recognised for conceptualising these relationships” though recent developments in biotechnology together with the widespread legalisation of abortion predicated on the assumption of a woman’s ownership of her own body suggests that the trend of personalisation is not as inexorable as it might once have seemed.

There is yet another problem that arises if the foetus is categorised as property – while the mother’s body is (arguably) her own property, the foetus would appear to belong materially 50% to the mother and 50% to the father!

The status quo regarding the legal protection of second party foeticide is reminiscent of the Roman law of *patria potestas*, under which the father of a family had unlimited power over the members of his household, including the power of life and death over his children and which, as we saw above, was rejected as early as the time of the Visigoths—all that is needed to bring Washington into line with ancient Rome is to change *patria* to *matria*. The conceptual tension between the *Roe* regime and the state foeticide provisions is such that if the thin constitutional thread holding up *Roe v Wade* should ever snap it is difficult to see how the then non-federally supported abortion laws could stand in the face of the factors that underlie the foeticide laws.

Paul A. Roth, ‘Personhood, Property Rights, and the Permissibility of Abortion’, *Law and Philosophy*, Vol. 2, 1983, 163 at 180. For the expression and defence of the counter-intuitive view that what is protected by abortion laws are the property rights of the father, see Judith Roof, ‘The Ideology of Fair Use: Xeroxing and Reproductive Rights’ in *Hypatia*, Vol. 7, No. 2, Spring 1992.

⁴ W. T. Murphy and Simon Roberts, *Understanding Property Law* (London, 1998), 34.

The attempt to drive a wedge between human beings and human persons has had a long and undistinguished history. At various times women, non-whites, Native Americans, Jews, have all been denied the dignity of human personhood and treated accordingly. Today human personhood is widely denied to the unborn child, and, increasingly, to the old, the infirm and the handicapped. Klasing notes that John Noonan has written of “‘masks of the law’—ways of classifying individual human beings so that their humanity is hidden and disavowed”. Forsythe notes that “In its origin, the born alive rule was not a mask of the law. It was not a way of classifying the unborn to deny their humanity.”⁵ Whatever the theoretical viability of the distinction between being a human being and being a human person may be, the history of its practical application should be enough to cause any holder of liberal principles to reconsider it. Klasing notes that

State courts in our country have been struggling for years, especially in the last twenty years, with the definition of ‘person.’ To one who has never attended a law school class, the concept that the word ‘person’ could assume different meanings in different contexts must be disturbing. The only other time in American history that this author recalls the United States having different legal meanings for the word ‘person,’ other than when referring to unborn children, is in the context of slavery, and it took this country hundreds of years to realize the outright falsity and immorality of that distinction.⁶

Given that the ‘born alive’ rule is in essence a rule of evidence and, *pace Commonwealth v. Booth*, not one of substance; given the findings of embryology, foetology and obstetrics, given the development of administrative, property, tort and criminal law in relation to the unborn child, it is difficult to see what positive justification there can be for the continued maintenance of the ‘born alive’ rule.

⁵ Forsythe, “Homicide of the Unborn Child”, 625. The reference to Noonan is to his *Persons and Masks of the Law* (1976), 19.

⁶ Klasing, 977.

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