By Anna Walsh

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Can there be a positive **maternal duty of care** to the **unborn** in **Australia?**

In Australia, an unborn human being has no legal rights and is not considered to be a person.

In the criminal context, debate centres on whether the foetus is legally part of its mother or whether it is a distinct legal entity, capable of being the victim of a homicide in its own right. Cases such as *R v Iby*[1] confirm that the crime of homicide will apply if the foetus is injured in the womb, and is subsequently born and dies thereafter as a result of the injury sustained in the womb. In several jurisdictions, if the foetus dies *in utero*, a person can still be charged with a crime such as grievous bodily harm.[2] Such a crime does not bestow personhood on the unborn child, but rather recognises in a limited context that the foetus and the pregnant woman are so intertwined that harm to one is considered to be harm to the other. Additionally, child destruction laws still exist in some jurisdictions, making it a crime for a person to kill a child during childbirth.[3]

ABORTION

The practice of abortion sits awkwardly as an exception to these concepts. It often surprises people to know that a complex web of case law and legislation surrounds the practice of abortion in Australia, with little consistency in approach. In NSW and Tasmania, the legality of the abortion focuses upon whether there has been a determination by a medical practitioner that abortion is necessary to preserve the pregnant woman's life or physical or mental health;[4] in Western Australia, South Australia and the Northern Territory the fact of, or a significant risk of, serious disease or disability >>

in a foetus may justify an abortion.[5]

In Victoria, abortion is available on demand up to 24 weeks without the need to satisfy any criteria up to a certain stage of the pregnancy, and thereafter lawful if two medical practitioners believe the abortion to be appropriate in all the circumstances.[6] Queensland recently enacted the *Criminal Code (Medical Treatment) Amendment Act* 2009, which allows medical practitioners to perform an abortion when they believe it is reasonable, having regard to all the circumstances. Abortion is also lawful at any stage of gestation in the ACT, so long as it is performed by a medical practitioner in an approved medical facility.[7]

CIVIL DUTY OF CARE TO THE UNBORN

Apart from the criminal context, there are a number of circumstances in which the law will recognise that a person existed prior to their birth so that monetary interests can be protected. These include a plaintiff suing for compensation arising from an injury sustained when they were a foetus in the womb,[8] or the right to inherit where the person was either a foetus in the womb or a frozen embryo and not born at the time of the deceased's death.[9]

But what happens when the pregnant woman is the tortfeasor and her acts or omissions have caused damage to the foetus *in utero*? In NSW, it has been held that a tortfeasor's liability to an unborn child in the context of a motor vehicle accident is maintained even where the tortfeasor is the pregnant woman who was negligently driving the motor vehicle.[10] In the UK, generally speaking, pregnant women have tort immunity, but an exception exists in the *Congenital Disabilities (Civil Liability) Act* 1976 for motor vehicle cases. This must be seen in the context of a mandatory requirement for motor vehicle insurance.

In the Canadian High Court decision of *Dobson v Dobson*,[11] the majority held a different view. The case involved a child severely injured *in utero* at 27 weeks gestation as a result of a motor vehicle accident. His mother was the driver of the vehicle and he brought an action against her for damages. The majority noted that the Canadian courts had recognised that the judicial personality of the foetus was a fiction utilised in certain contexts to protect future interests. In this case, it was felt that public policy considerations were paramount and outweighed any sufficiently close relationship between the parties that gave rise to a duty to take care. To impose such a duty would, in the majority's opinion, lead to an unacceptable intrusion into the bodily integrity, privacy and autonomy rights of women. It would also be impossible to articulate judicially what standard applied to any such duty to take care. Additionally, to create a motor vehicle exception to this position would sanction a legal solution based solely on access to insurance.

In the minority, Major J (with Bastarache J concurring), held that the public policy considerations, as set out by the majority, were not sufficient to negate the born child's right to sue in tort. The mother was already under a legal obligation to drive carefully, and she owed a duty of care to her passengers and other users of the road to drive carefully. Accordingly, Major J held that it would be unjustified to hold that the mother was not liable to her born alive child on the grounds that to do so would severely restrict her freedom of action, as she would not have to take any additional precautions to those she was already legally obligated to take in order to avoid liability to her born alive child. "*To grant a pregnant woman immunity from the reasonably foreseeable consequences of her acts for her born alive child would create a legal distortion as no other plaintiff carries such a one-sided burden nor any defendant such an advantage.*"

MATERNAL LIFESTYLE CHOICES AFFECTING THE UNBORN

Whether the duty of care can be extended to a child suing its mother in respect of ante-natal injuries occasioned in different contexts is controversial. What happens when the harm to the foetus is caused by the pregnant woman through either an act or omission that is negligent, or through reckless conduct on her part, or simply behaviour that would foreseeably harm the unborn? Is it lawful for a pregnant woman to do to her body what she wants, regardless of the effect it may have upon the wellbeing of the foetus? Are we morally comfortable with this position? How does this position impact upon laws already in existence?

In situations where a pregnant woman has endangered the life of the unborn she is carrying by behaviour such as drug-taking, smoking or exposure to danger, the primary intention may not be to assault the foetus but rather indifference by the pregnant woman of what harm may befall the foetus as a by-product of her conduct. This is the same intention as with negligent or careless driving resulting in an accident that harms the foetus, the difference being that the pregnant woman's behaviour affects only her and the foetus, whereas with driving, she must maintain this duty to the foetus as well as to all other users of the road.

The Canadian Supreme Court was required to consider whether a mother could be held to be negligent for sniffing glue during the pregnancy and causing harm to the foetus. The majority denied liability, as to do so would introduce '*a radically new conception to the law, the unborn child and its mother as separate juristic persons in a mutually separable and antagonistic relation*'.[12] The pregnant woman's autonomy to do as she sees fit was upheld on the basis that in one sense she is the foetus and the court may not intervene.

In the case of *In re F (in utero)*,[13] the English Court of Appeal was required to determine whether a foetus could be made a ward of the state on the grounds that the behaviour of the pregnant woman was endangering the foetus. The pregnant woman was mentally disturbed and led a nomadic existence and local authorities held fears for the safety of the child once born and wanted her found and admitted to a hospital. She was 36 years old and had another child, aged 10, who had been made a ward of the state. The court held that as a foetus at whatever stage of development has no existence independent of its mother, the court cannot exercise its rights, powers and duties of a parent over the foetus without controlling the actions of the pregnant woman. Accordingly, the court could not extend its jurisdiction over minors to a jurisdiction over a mother for

the protection of the unborn child, which had no legal rights for existence.

Some commentators[14] argue that no maternal action should justify pre- or post-birth sanctions for a pregnant woman's behaviour, as it may trample upon the woman's fundamental rights and does not further the woman's health or foetal wellbeing. Another possible consequence may be a reluctance by pregnant women to seek prenatal care or to give honest and accurate information to healthcare-providers, for fear of reprisals. Paltrow[15] notes that to recognise foetal abuse is to criminalise pregnancy, as no woman can provide the perfect womb.

Articulating a standard of care for the pregnant woman might be possible. The degree of infringement that any laws may have upon maternal rights to engage in certain behaviours would have to be justified by the extent to which foetal protection can be assured. This is the same thinking behind creating duties of care in other contexts and which is developed as cases come before the courts. Narrow laws that target specific conduct might well strike the correct balance, particularly where such behaviours are already criminal when engaged in by the non-pregnant woman, such as taking heroin, and the crime is one that imposes a special penalty against a pregnant woman. As the link between heroin abuse and foetal distress is strong, such a law might well be valid. Mainstream behaviours that are not criminal and do not result in significant harm to the foetus would be more difficult to argue against such as drinking alcohol, eating junk food or not taking medications, with the standard for a reasonable pregnant woman being difficult to set.

REFUSAL OF MEDICAL TREATMENT

The situation where a pregnant woman refuses medical treatment in the form of a caesarean section delivery at the expense of injury or death to the foetus is another example of conduct by a pregnant woman that has a direct bearing on the wellbeing of the foetus. But it differs from the glue-sniffing example because the pregnant woman is required to undergo a medical procedure against her will that affects her wellbeing and carries with it the usual medical risks of surgery. Several cases have arisen internationally regarding a pregnant woman's refusal to undergo a caesarean section delivery. In those cases, the courts have largely held that women cannot be compelled to undergo a caesarean section delivery against their wishes because a foetus has no rights until s/he is born. Accordingly, the court has no jurisdiction to intervene to protect the interests of the unborn child and a woman cannot be forced to undergo a medical procedure even when it might well have saved the life of the foetus or reduced harm to it.

In the case *In re AC*,[16] a hospital obtained a court order compelling the performance of a caesarean section delivery on a 26½ weeks pregnant woman who was terminally ill with cancer and where her membranes had been ruptured for over 60 hours. The medical evidence was that to allow the labour to proceed naturally would lead to a 50 to 75 per cent risk that the baby would suffer from infection, which could be fatal or lead to brain damage, and that caesarean section

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was the only method to avoid this risk to the foetus. The risk of adverse consequences occurring to the pregnant woman with caesarean section delivery were put at 25 per cent.

The court at first instance (making the decision at the hospital and under time constraints) held that it had a compelling interest that would override the woman's objections to undergoing the surgery. The court reasoned that the state had an important and legitimate interest in protecting the potentiality of human life and that at the point of viability, that interest becomes compelling. Given the significant risks to the foetus as compared with the pregnant woman, there was a compelling interest for the court to intervene and protect the life and safety of the foetus. The woman consented to the caesarean after she was informed of the court's decision and then withdrew that consent. The caesarean delivery took place, but both the woman and the child died.

The Court of Appeal re-heard the case a few months later on application by the estate of the deceased woman in order to determine who has the right to decide the course of medical treatment for a patient who, although near death, is pregnant with a viable foetus and how that decision is to be made where the woman cannot make the decision for herself. Here, the Court of Appeal was hampered by being unable to make findings of fact, such as whether the pregnant woman was competent or not to make a decision about her medical treatment. The majority held that the court must determine a patient's wishes by any means available and must abide by those wishes unless there are truly extraordinary or compelling reasons to override them. The majority held that the trial judge's order regarding the caesarean was presumptively valid.

Annas[17] argues that the few cases that come before the courts that involve the refusal of a woman to undergo a caesarean section are decided within hours, without time for thoughtful judicial consideration or the rights of the pregnant woman. Additionally, he argues that clinical prediction of harm is not very accurate, with investigations such as cardiotocograph monitoring being notoriously sensitive and likely to overstate the degree of damage suffered by a foetus from a delayed delivery. Given that requiring a pregnant woman to undergo a caesarean section delivery is comparable to a person being compelled to undergo surgery to save another person's life, such as donating a body part like a kidney, and with no one ever being forced to undergo surgery for another, then to be forced to undergo surgery for a foetus is ironic as it has less personhood status than the born child.

Australian courts have consistently held that there is no duty to rescue. Balanced against this, though, are exceptions where a person has a positive duty to act. In the case of >>

Lowns v Woods,[18] the court held that a doctor owed a duty to the plaintiff to attend in an emergency situation, even though the plaintiff was not his patient. This obligation is consistent with s27(2) of the *Medical Practitioners' Act* 1938 (NSW), where failure to attend in an emergency constitutes professional misconduct. Therefore, there are instances where the courts have determined that a person must and should do something to assist another, but the standard to which they are held is less than in other situations. This has been confirmed in the various *Civil Liability Acts* that contain a 'Good Samaritan' clause, whereby if a person does intervene, they have immunity from civil liability (although exceptions apply).[19]

But if the foetus has no rights until it is born, and its interests are so interwoven with its mother that it is difficult to separate them, it is difficult to see how the courts can make an exception to the principle of beneficence and force a woman to undergo any type of surgical procedure that may result in harm to her in order to avoid harm to the foetus. If this is so then, by extension, one cannot force a woman to undergo a caesarean where her refusal is based on something objectively trivial, such as a fear of needles.

If the proportionality of the harm to the pregnant woman as against the foetus was the measure of conduct, then it is arguable that the courts could intervene positively in the foetus' favour. This might well be a consistent position in those jurisdictions where it is a crime to abort the foetus capable of being born unless the life of the pregnant woman is at risk. Section 271 of the *Criminal Consolidation Act Compilation Act* 1913 (Qld) makes it an offence where a child dies in consequence of an act done or omitted to be done by any person before or during its birth; the person who did or omitted to do such an act is deemed to have killed the child. It is arguable that a woman might well be committing an offence by omitting to consent to a caesarean section delivery late in gestation. No such cases, however, appear to have been prosecuted under the Criminal Code in Queensland.

CONCLUSION

The Catholic Church will allow a pregnant woman to put her interests ahead of those of the foetus in rare circumstances. In cases of ectopic pregnancy, where the pregnancy develops outside the womb and within the fallopian tube, the Catholic Church sanctions the removal of the affected part of the woman – that is, the tube containing the foetus – in circumstances where the woman is in grave danger of haemorrhaging from the ectopic pregnancy. The surgical techniques used, however, are pertinent in that removal of all or part of the fallopian tube is permitted, but removal of only the foetus is seen as an intentional act of abortion on the foetus. This scenario, however, is clearly distinguishable from that of a pregnant woman not wanting to undergo a caesarean section to avoid harm to the foetus because she does not like needles.

To conclude, case law seems to indicate that there is no positive maternal duty of care to the unborn except in the case of motor vehicle negligence, where the pregnant woman owes the same duty to the foetus as she does to all users of the road. This lack of maternal duty of care sits consistently with the following propositions:

- that the pregnant woman and the foetus are one and the same;
- where the acts or omissions of the pregnant woman affect only the pregnant woman and the foetus, the courts do not interfere;
- that the foetus cannot be made a ward of the state so as to impinge upon the pregnant woman's freedom;
- that one cannot injunct a pregnant woman from undergoing an abortion;
- that the father of an unborn child has no say in whether an abortion should be performed; and
- that one cannot force a woman to undergo a surgical procedure, even to save the life of the foetus.

The above collection of circumstances, however, do not sit well with the recognition of the value of unborn human life that is reflected in the existence of criminal offences arising from acts or omissions that cause the death of a foetus capable of being born alive or at the time of imminent birth. As a society, we are clearly uncomfortable with pretending that a person does not exist prior to birth and cannot suffer harm. Accordingly, laws have been created so that third parties cannot escape punishment for harming the unborn human, even though they are not considered to be a person with rights. However, it would appear that if there is a contest between the pregnant woman's right to self-determination and the life of the unborn human, the pregnant woman has no duty of care towards her unborn child and may do as she chooses.

In Australia, the unborn human is subject to an array of conflicting laws that does not result in a consistent position regarding its legal status, but rather demonstrates an impressive flexibility by legislators and the courts to allow for a wide variation in viewpoint to fit the particular circumstances. ■

Notes: **1** (2005) 63 NSWLR 278. **2** *Section 5 Crimes Act* 1900 (NSW). **3** Section 42 *Crimes Act* 1900 (ACT); s313(2) *Criminal Code* 1899 (Qld); s170 *Criminal Code* (NT); s290 *Criminal Code Compilation Act* 1913 (WA); s165 *Criminal Code Act* 1924 (Tas). **4** *R v Wald* (1971) 3 DCR (NSW) 25; and s164 *Criminal Code* 1924 (Tas). **5** Sections 334(3)(a), (5)(a) and (7)(b). *Health Act* 1911 (WA); Sections 82A of the *Criminal Law Consolidation Act* 1935 (SA); Section 11 *Medical Services Act (NT)*. **6** *Abortion Law Reform Act* 2008 (Vic). **7** Section 42 *Crimes Act* 1900 (ACT). **8** *Watt v Rama* [1972] VR 353.9 *Estate of the Late K; ex part Public Trustee* (unreported, Tas. Sup Ct, 22 April 1996, Splicer J). **10** *Lynch v Lynch* (1991) 25 NSWLR 411. **11** (1999)2 SCR 753. **12** *Winnipeg Child and Services (Northwest Area) v G* [1997] 152 DLR (4th) 193 at 207 [29[. **13** [1988] 2 WLR 1288. **14** J Robertson & L Paltrow, 'Fetal abuse: should we recognise it as a crime?' (1989) 75 *ABA Journal* 38 (August). **15** *Ibid.* **16** 573 A2d 1235 (DC App 1990). **17** G Annas, 'Forced caesareans: the most unkindest cut of all; Law and Life Sciences, *The Hastings Centre report*, June 1982. **18** (1996) Aust Torts Reports 81-376 (CA (NSW)). **19** See, for example, ss56 and 57 of the *Civil Liability Act 2002* (NSW).

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