

THE LEGAL SIGNIFICANCE OF BIRTH

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I INTRODUCTION

In two recent decisions, the NSW Court of Criminal Appeal had occasion to consider the ‘born-alive’ rule in the context of assaults by third parties on pregnant women. In the first of these cases, *R v King*,¹ the assault caused the death of the foetus *in utero* and in the second, *R v Iby*,² the assault caused the death of the subsequently born child. Together these cases traverse the birth threshold and, to this extent, provide an opportunity to reflect on the contemporary legal significance of birth and the attribution of legal personhood. The significance of these matters extends well beyond the particular context of third party assaults on pregnant women, with implications for obstetric practice and reproductive decision-making more generally.

II *R V KING*

In *R v King* the accused was charged under section 33 of the *Crimes Act 1900* (NSW) (*‘Crimes Act’*) with the offence of maliciously causing grievous bodily harm against a person and, in the alternative, under section 83 with the offence of procuring a miscarriage. The evidence was that the complainant had become pregnant after a sexual encounter with the accused. The accused tried to persuade her to terminate the pregnancy and even offered money to others to assault her with a view to causing her to miscarry. When the complainant’s pregnancy was between 23 and 24 weeks gestation, King punched and stomped on her stomach with his foot, with the intention of causing the death of the foetus. The assault caused an abruption of the placenta and the foetus died as a result. The complainant gave birth a day or so later to a stillborn child.

The death of the foetus could not support a charge of homicide, because the foetus is not regarded as a person until born alive. Instead, the Crown relied upon the death of the foetus as constituting grievous bodily harm to the mother. At trial, the defence argued that the foetus was not a part of the mother, such that harm to it or the placenta could amount to grievous bodily harm of the pregnant

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1 (2003) 59 NSWLR 472.

2 (2005) 63 NSWLR 278.

mother. The trial judge, adopting the approach taken by the House of Lords in *Attorney General's Reference (No 3 of 1994)*,³ found that, as a matter of law, the foetus was a 'unique organism'⁴ and not part of the mother. The result was that the death of a foetus alone could not amount to grievous bodily harm of the mother, and a permanent stay of the first count of the indictment was granted. The basic premise of trial judge's reasoning was that the maternal body was divisible, at least for the purposes of quantifying harm, so that the question of the nature and level of harm to the foetus could be considered separately from harm to the pregnant woman.

The Court of Criminal Appeal reversed the decision. A review of the authorities from Canada, New Zealand and the United Kingdom showed that courts have adopted different approaches to the configuration of the maternal body for the purposes of homicide, assault and the civil law. The foetus has been regarded as a part of its mother, as a separate entity and also as a unique organism both distinct from, and connected to, its mother. The Court of Criminal Appeal seemed to resist attempts to provide closure on this question. But, at least for the purposes of section 33, it rejected the 'separate genetic bundle' analysis advanced by the House of Lords in *Attorney General's Reference (No 3 of 1994)*. For the law of assault, the Court preferred the approach adopted by the New Zealand Court of Appeal in *Harrild v Director of Proceedings*⁵ which emphasised the close physical bond between the mother and the foetus so that 'the foetus, even if a separate entity for some purposes, was "human tissue connected to and inside" the body of the mother'.⁶ In short, 'the close physical bond between the mother and the foetus is of such a character that, for the purposes of offences such as this, the foetus should be regarded as part of the mother'.⁷ The Court was careful to confine its 'connected tissue' configuration of the maternal body to an interpretation of section 33 of the *Crimes Act*. It expressly left open the question of whether a different configuration might be applied to the common law of homicide⁸ and, presumably, other contexts as well.⁹

III *R V IBY*

R v Iby concerned criminal responsibility for causing the death of a child from injuries inflicted whilst *in utero*. It thus raised the different question of what is to count as evidence that a newly born child 'lived' for the purposes of the common law rule that a child must be born alive before its death can amount to homicide.

3 [1997] 3 All ER 936.

4 *R v King* (2003) 59 NSWLR 472, 475.

5 [2003] 3 NZLR 289.

6 *R v King* (2003) 59 NSWLR 472, 491.

7 *Ibid.*

8 *Ibid.*

9 It is noteworthy that Parliament has since amended the definition of grievous bodily harm in section 4 of the *Crimes Act* to include 'the destruction (other than in the course of a medical procedure) of the foetus of a pregnant woman, whether or not the woman suffers any other harm'. Thus, the definition now applies to any relevant offence under the Act.

The accused was driving at excessive speed and erratically when his stolen vehicle collided head-on with a vehicle being driven by a woman who was 38 weeks pregnant. As a result of the impact, a caesarean section was performed and the child placed on a respirator to assist his breathing. He died a short time later. The undisputed medical evidence was that the child possessed a heartbeat and blood circulation. The evidence of brain activity was more equivocal, and there was a paucity of evidence that the child ever breathed unassisted by mechanical support. Taking this evidence into account, the trial judge found that the child lived independently of its mother for a period of around two hours and, accordingly, the accused was convicted of dangerous driving causing death and manslaughter.

On appeal, the defence argued that since there was insufficient proof that the child had ever breathed unassisted, he was not 'alive' for the purposes of the law of homicide. This argument was ultimately rejected and the Court held that the presence of a heartbeat was sufficient to satisfy the rule. A review of the authorities established that there is no 'common law definition of what constitutes "life" for the purposes of the born alive rule'¹⁰ though a number of different criteria have been accepted as indicating life: crying, breathing, the presence of a heartbeat and an independent circulation.¹¹ Whilst it was accepted that the authorities were 'not necessarily reconcilable',¹² it was suggested that this was because the rule has functioned as an evidentiary rather than a substantive rule. Consequently, 'the observations made by judges, including directions to the jury, in each case must be understood in the context of the particular evidence in the case'.¹³ Although the Court was unable to discern any clear definition of 'alive', it was nonetheless persuaded that the authorities favoured a minimalist interpretation. In keeping with this approach, the Court found that any indicia of independent life would satisfy the rule.¹⁴ However, it was clearly a matter of significance that the foetus was at 38 weeks gestation and viable when injured by the accused. It was in this context that the Court held that the 'born-alive' rule 'should now be applied consistently with contemporary conditions by affirming that any sign of life after delivery is sufficient'.¹⁵

The relationship between the viability of the foetus and the scope of the 'born-alive' rule is of some importance. The Court used the term 'viable' in two senses. In the first sense, the term viability was used to describe the likelihood of the foetus surviving birth at the time of the injury. In the second sense, it was used to describe the likelihood that the newly born child would 'survive as a functioning being'¹⁶ after such injury had occurred. The Court was clear that viability in the latter sense is not a requirement of the 'born-alive' rule.¹⁷ In the instant case,

10 *R v Iby* (2005) 63 NSWLR 278, 284.

11 *Ibid* 285.

12 *Ibid*.

13 *Ibid*.

14 *Ibid* 287.

15 *Ibid* 288.

16 *Ibid* 286.

17 *Ibid*.

there was no need to explore the full implications of viability in the former sense because the foetus was 'fully developed in perfect condition and within a week or two of actual birth'.¹⁸ In short, it was a clearly viable foetus which, but for the conduct of the accused, would have been born and lived. Thus, the question of whether the rule would apply in the case of a child that, due to its gestational age was not viable at the time of injury but, nonetheless, showed some sign of life after delivery, was not specifically addressed.

IV A CONTEXTUAL APPROACH TO THE MATERNAL BODY

What do these cases tell us about the ways in which the maternal body is configured by the criminal law? Firstly, it seems that there is no single configuration that will apply universally. It is a striking feature of both cases that the Court acknowledged the diversity of judicial approaches previously taken to the questions before them. Thus, courts have held that the foetus may be a part of its mother and distinct from its mother. In *R v King* Spigelman CJ observed:

My review of the authorities indicates that there is no clear rule, applicable in all situations, as to whether the mother and foetus must be considered as one or separate. The answer will turn on the incidents of the particular legal situation under consideration including, where relevant, the scope, purpose and object of a particular statutory scheme.¹⁹

Importantly, the Court preferred the interpretation that would support the attribution of criminal responsibility for the most serious offence charged in the indictment. In *R v King*, this meant privileging the close physical bond between mother and foetus, over the genetic distinctiveness of the foetus. In *R v Iby*, it meant ascribing a minimalist vision of what constitutes 'life' in a severely injured newly born child that was almost certainly viable when injured *in utero*. In both cases, the Court suggested that the particular interpretation chosen best served the interests of justice. Thus, in *R v King*, the Court adverted to the fact that the result served the purposes of the law of assault and in turn addressed heightened community concern about aggravated forms of inter-personal violence.²⁰ Similarly, in *R v Iby*, the Court declared its approach to be that which 'best conforms with contemporary conditions'²¹ given that it is, with modern technology, 'virtually certain that a newborn baby which shows any sign of life would have lived but for the conduct ... inflicted on the baby late in the mother's pregnancy'.²²

This contextual approach to configuring the maternal body, despite its potential incoherence, resonates in part because the 'connected' and 'distinctive' configurations both contain plausible elements. The foetus *is* connected to, and a part of, the body of its mother until it is born and achieves an independent

18 Ibid 288.

19 *R v King* (2003) 59 NSWLR 472, 490.

20 Ibid 491.

21 *R v Iby* (2005) 63 NSWLR 278, 288.

22 Ibid.

existence. At the same time, and especially as birth approaches, the foetus does seem to possess elements of distinctiveness. The apparent conundrum was articulated well by the UK Court of Appeal in *St Georges Healthcare NHS Trust v S* which, whilst affirming that the foetus was not a person for the purposes of overriding the competent treatment refusal of its mother, added that ‘whatever else it may be a 36 week old foetus is not nothing: if viable, it is not lifeless and it is certainly human’.²³ *R v Sullivan*²⁴ provides another example of the conundrum, though on this occasion the Supreme Court of Canada could find no apparent contradiction. There, the majority observed that it would not have been illogical to find that bodily harm could be done to a mother through the death of a full term foetus in the process of being born (on the basis that the foetus is part of her) *and* that such a foetus is also a person who could be the victim of homicide.²⁵

V THE ENDURING SIGNIFICANCE OF THE ‘BORN-ALIVE’ RULE

The Court’s reluctance to determine the maternal-foetal relationship for all purposes in *R v King* gave way, in *R v Iby*, to altogether new possibilities by calling into question the enduring significance of the ‘born-alive’ rule. Although the rule remains the law in NSW, the Court accepted that it was developed in circumstances where live birth was statistically less common and could not be taken for granted.²⁶ Consequently, the law required proof that a child was born alive before it would ascribe criminal responsibility for conduct causing its death. According to the Court, the purpose of the ‘born-alive’ rule was not to articulate the conditions of personhood in any substantive sense. It was, rather, to establish as a matter of evidence that the child was ‘alive at the time of the alleged criminal conduct and that the child would have lived but for the act’.²⁷ This no longer produces the evidentiary difficulties once experienced by courts. Chief Justice Spigelman noted that ‘[t]he viability of a foetus can now be both established and ensured in a manner which was beyond the realms of contemplation when the ‘born-alive’ rule was adopted’.²⁸ Thus, having regard to the evidentiary basis for the rule and improvements to medical knowledge and technology, Spigelman CJ observed that ‘[t]here is a strong case for abandoning the ‘born-alive’ rule completely, as has occurred by statute in many states of the United States and by judicial decision in Massachusetts, South Carolina and Oklahoma’.²⁹

Accepting the indeterminacy of the maternal-foetal relationship for the purposes of ascribing criminal responsibility to third party assailants may appear

23 [1998] 3 All ER 673, 687.

24 [1992] 1 SCR 489.

25 Ibid 506 (Lamer CJ) cited in *R v King* (2003) 59 NSWLR 472, 480.

26 *R v Iby* (2005) 63 NSWLR 278, 284.

27 Ibid.

28 Ibid 288.

29 Ibid.

to further the interests of justice. But how, if at all, might these analyses impact on the legal responsibilities of pregnant women and their health care providers? A number of questions arise: if the 'born-alive' rule was to be abandoned, what criteria would the law recognise as evidence that a foetus was the sort of being that could be the victim of homicide? Would legal liability for the death of a foetus extend beyond third party assailants to include doctors performing late terminations of pregnancy and even pregnant women themselves? Could abandonment of the rule be confined to the criminal law or would it inevitably extend to the civil law as well? If so, could we see wardship jurisdiction exercised over a foetus, as was suggested by the dissenting judges in *Winnipeg Child and Family Services (Northwest Area) v G*?³⁰ It is, no doubt, due in large measure to the difficulties raised by these questions that, as the Court noted in *R v Iby*, the rule 'has been regarded by some courts as too well entrenched to overrule'.³¹

The difficulties raised by these questions suggest that there may be very good reason to be cautious about abandoning the 'born-alive' rule, notwithstanding the 'anachronistic, indeed antiquated, factors'³² upon which the rule was originally based. The legal significance of birth remains a crucial factor in safeguarding the autonomy of women in decisions concerning pregnancy termination and obstetric treatment³³ and offers a measure of protection against oppressive state supervision in the interests of the foetus.³⁴ It is arguable, in light of contemporary attitudes to autonomy, that there are substantive reasons for continuing to recognise birth as legally significant, even if the historical basis for the 'born-alive' rule no longer seems appropriate. Accordingly, any modification of the rule should be carefully circumscribed and confined to the purpose of attributing criminal responsibility to third party assailants. The Court of Appeal's contextual approach to configuring the maternal body suggests that this would be possible.

VI CONCLUSION

The problem of how to characterise the foetus in law has perplexed courts across a range of contexts and jurisdictions. On the one hand, the foetus is not a person until born alive, but on the other, it seems inappropriate to simply ignore it altogether. The NSW Court of Criminal Appeal has provided a sense of the nature and scope of this conundrum in its consideration of the common law authorities regarding the foetus as 'connected' and 'distinct' from its mother for the purposes of the criminal law. It has also gestured toward a rather nuanced approach to the ultimate question of how to configure the maternal body within the framework imposed by the criminal law of NSW. Furthermore, the Court has given consideration to the historical roots and enduring significance of the

30 [1997] 3 SCR 925.

31 *R v Iby* (2005) 63 NSWLR 278, 288.

32 *Ibid* 284.

33 See, eg, *St Georges Healthcare Trust v S* [1998] 3 All ER 673.

34 See, eg, the majority judgment in *Winnipeg Child and Family Services (Northwest Area) v G* (1997) [1997] 3 SCR 925; see also *Re F (in utero)* [1988] 2 All ER 193.

common law 'born-alive' rule, which has been criticised for being anachronistic. This rule has entrenched the legal significance of birth, both in the context of the criminal and the civil law. Whilst there is a sense in which discussions about whether the rule should persist seem to dovetail with community concerns about the protection of viable fetuses, courts and legislators should be alive to the broader implications of dispensing with the rule.