



**Whose Baby Is It Anyway?
(Legal status of the fetus and more)**

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11 January 2011**

Why is it that a woman is entitled to refuse treatment *in utero* for her unborn child but, once delivered, that child can receive treatment in the face of parental opposition if a court sanctions it? The unique legal status of the fetus is a challenging and fascinating topic.

There are two particular features of this area which distinguish it from many other medico-legal issues: first the extraordinarily rapid pace of scientific change in the field of reproductive medicine and secondly the fact that attitudes of society are reflected in the legislation covering the area.

No case better demonstrates the first proposition than that of *Natallie Evans*¹ where a woman who was very keen to start a family was diagnosed in October 2001 with borderline cancerous ovarian tumours. In November 2001 her last 11 eggs were harvested and 6 embryos created, all using the sperm of her then fiancé. She enquired at the time about the possibility of storing some of her eggs unfertilised but was advised that that was not an option at the clinic at which she was being treated and was reproductive technology in its infancy (!), relatively untested. Within 6 months of storing the embryos, her fiancé had left and sought the destruction of all of the embryos. Her attempt to prevent this culminated in a hearing before the Grand Chamber in Strasbourg in

November 2006. By then, storing unfertilised eggs was mainstream reproductive technology and many live births had been successfully achieved from material initially stored in this form. If Ms Evans had been diagnosed just 5 years later, the outcome would have been very different.

The changing attitudes in society are conspicuously demonstrated when one compares the Human Fertilisation and Embryology Act 1990 containing its original requirement for those providing treatment to have regard for the need of any child who might be born as a result of such treatment for a father, with its subsequent forms. By November 2005 the Human Fertilisation and Embryology Authority dropped that requirement from its new guidance (note timing within the Evans' litigation) and the current version of the Act includes the need for a child to have "*supportive parenting*" instead. See also how the means of acquiring parental responsibility for fathers changed between the original form of the Children Act 1989 and after the 2002 amendments, reflecting in part the increasing number of children born to unmarried parents.

Status of the embryo

One of the issues which arises as a result of assisted conception is the legal status of the embryo given that there are now tens of thousands of

¹ Evans v Amicus Healthcare (2004) Civ 727

stored embryos at clinics throughout the UK. Two obvious questions arise:

- (a) Are these property to which the concept of ownership applies?
- (b) Are they possessed of any rights themselves?

(a) Gametes as property was specifically considered in Yearworth v North Bristol NHS Trust² where sperm was stored by cancer patients and the clinic failed to store them safely. The court found that the operation of the HFEA 1990 means that ownership of the gametes did not exist, given the licensing scheme which applies to the storage and use of gametes. *A fortiori* the concept of ownership of embryos cannot be sustained. Where a commercial transaction lies behind storage arrangements, of course an action for breach of contract is potentially available.

(b) The argument we advanced in Evans in respect of the embryos' rights was as follows: "*an embryo has a qualified right to life, namely a right (i) to continue in being whilst either of the gamete providers so wishes; and (ii) to be available for implantation if the female gamete provider so wishes.*" This did not find favour with the Court of Appeal and it was one we pursued further in Strasbourg.

The finding of the Grand Chamber on this point was as follows,

“The embryos created by E and J did not have a right to life within the meaning of Art.2. As the chamber recalled, in the absence of any European consensus on the scientific and legal definition of the beginning of life, the issue of when the right to life began came within the margin of appreciation that states should enjoy in that sphere. Under English law an embryo did not have independent rights or interests and could not claim, or have claimed on its behalf, a right to life under Art.2. Accordingly, there had not been a violation of that provision.”³

Historical perspective

The status of the soul and when a human life began was extensively considered and debated by ancient philosophers. Aristotle’s view was that ensoulment occurred at 40 days after gestation in the case of the male fetus (80 in the case of the female!) This was based on his analysis of the material available to him in cases of miscarriage or termination.

The Justinian code of 6th century confirmed that a fetus of less than 40 days did not have a soul and homicide could only apply to killing a formed fetus of 40 (or 80 if female) days gestation.

² [2009] EWCA Civ 37

The modern approach that the fetus only acquires full legal rights and protection once born is found in the mid 17 century, [1680] 3Coke, Institutes 50, *“If a woman be quick with childe, and by a potion or otherwise killeth it in her wombe, or if a man beat her, whereby the childe dyeth in her body, and she is delivered of a deade child, this is ... 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 ... when it is born alive.”*

International dimension

There is a wide range of views in European member states as to the status of an embryo and fetus. For example when the European Group on Ethics and Science and New Technologies at the European Commission reported they noted that many states did not even have a definition of an embryo (Belgium, Denmark, Finland, France, Greece, Ireland, Italy, Luxembourg, Netherlands, Portugal and Sweden) whilst those which did, had widely differing approaches (Austria, Germany, Spain and the UK).

The question of the legal status of the fetus was specifically considered in the extraordinary case of Vo v France⁴ where confusion over two women with the same surname but very different medical needs led to a medical

³ 6339/05 (2007) 1FLR 1990

⁴ 53924/00 (2004) 2FCR 577

intervention causing the death of a fetus. The Grand Chamber summed up the position at paragraph 84 in this way,

“At European level, the Court observes that there is no consensus on the nature and status of the embryo and/or fetus ... although they are beginning to receive some protection in the light of scientific progress and the potential consequences of research into genetic engineering, medically assisted procreation or embryo experimentation. At best, it may be regarded as common ground between States that the embryo/fetus belongs to the human race. The potentiality of that being and its capacity to become a person – enjoying protection under the civil law, moreover, in many States, such as France, in the context of inheritance and gifts, and also in the United Kingdom ... - require protection in the name of human dignity, without making it a “person” with the “right to life” for the purposes of Article 2.”

The court declined to answer the question in the abstract of whether an unborn child was a person for the purpose of Article 2.

There has been a trend in the USA to recognise the unborn child as a person. 34 out of 50 States have laws criminalising the killing of an unborn child outside the arrangements of legal terminations, up to and including the death penalty and the California Supreme Court has ruled that *“fetal viability is not a required element”* of fetal murder under the relevant statute – People v Davis 872 .2d 591.

The 'born alive' rule has applied for centuries to the Common Law and has enabled torts inflicted on a fetus *in utero* to be compensated providing the fetus is later born alive, see below. Some States introduced the concept of personhood coinciding with viability but this is no longer mainstream jurisprudence.

In some States courts have intervened to protect the unborn fetus by requiring the mother to undergo treatment against her wishes, see for example Jefferson v Griffin Spalding County Hospital Authority 274 S.E. 2d where the Georgia Supreme Court upheld a lower court's ruling requiring a pregnant woman to have a caesarean section which would give the unborn child the best chance of surviving. It was treatment resisted by the mother on religious grounds. The court granted an injunction to the hospital permitting them to treat on this basis,

*"Because the life of the defendant and the unborn are, at the moment inseparable, **the Court deems it appropriate to infringe upon the wishes of the mother to the extent it is necessary to give the child an opportunity to live.** Accordingly, the plaintiff hospitals are hereby authorized to administer to defendant all medical procedures deemed necessary by the attending physician to preserve the life of the defendant's unborn child."*

The logical collision inherent in acknowledging rights for the unborn child as well as permitting terminations is obvious. The proposition to tackle is

this – the fetus has a right to life against everyone in the world except its mother. The only person who may, with the law’s blessing, end the life of the fetus is the mother of the fetus.

UK approach to the unborn child

Criminal law – The statutes which specifically touch on offences relating to the unborn child are limited. The principal offences are found in

(a) Infant Life (Preservation) Act 1929 which, by s.1(1) creates an offence of child destruction,

“... 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 ... child destruction ...”

There is a rebuttable presumption that ‘capable of being born alive’ means from 28 weeks gestation, and is defined as *“capable of breathing with or without the assistance of a ventilator”*⁵ or *“capable of existing as a live child, breathing and living by reason of its breathing through its own lungs alone, without deriving any of its living or power of living by or through any connection with its mother”*⁶

⁵ *C v S* [1987] 1All ER 1230

⁶ *Rance v Mid-Downs Health Authority* [1991] 1All ER 801

(b) The Offences Against the Person Act 1861, contains in s.58 the offence of procuring a miscarriage, by the mother, and in s.59 the offence by anyone supplying the means to procure a miscarriage.

(c) For completeness the relevant provisions governing the circumstances in which a pregnancy can be lawfully terminated are summarised below, taken from The Abortion Act 1967. The pregnancy must be, in the opinion of 2 registered medical practitioners,

- Not beyond 24 weeks gestation
- Termination necessary to prevent grave permanent injury to the physical or mental health of the mother
- Where the continuation of the pregnancy would involve risk to the life of the mother greater than if the pregnancy were terminated
- Where 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

Civil law

In an attempt by a father to prevent a termination of pregnancy where he joined the child 'en ventre sa mere' as a party, the Court of Appeal

held that the fetus did not have a right of action until born alive⁷. Crucially for many clinical negligence claims, the Court of Appeal has held that a child can sue for injuries that were suffered prior to his birth⁸.

A difficult question arises as to whether a fetus can be protected from the behaviour of the mother? This goes to the heart of the tension between the rights and status of the mother and those of the fetus. The Court of Appeal has held that an adult of sound mind is entitled to refuse medical treatment even if her life or that life of her unborn child depends upon it⁹. Pregnancy increases the personal responsibilities of a woman but does not diminish her entitlement to decide whether or not to undergo medical treatment. An unborn child is not a separate person from the mother and its need for medical assistance does not prevail over her rights.

Contrast, however, the outcome where Butler-Schloss P (as she then was) granted a declaration that despite a woman temporarily lacking capacity to consent to a caesarean section it would be lawful to carry one out and held that there was a certain point at which the refusal to have treatment tipped the usually competent patient over into incompetent¹⁰. See also the decision in which Johnson J authorised the treatment of a woman

⁷ C v S [1987] 1 AllER 1230

⁸ Burton v Islington Health Authority, De Martell v Merton and Sutton Health Authority [1993] QB 204

⁹ St George's Healthcare NHS Trust v S; R v Collins, ex parte S [1998] 3 All ER 673

¹⁰ Bolton Hospitals NHS Trust v O [2002] EWHC 2871 (Fam)

who was suffering no mental disorder but was unable to make a decision about treatment to deliver her baby and concluded that the court has a power at common law to authorise the use of reasonable force to do so¹¹.

The corollary of accepting that a fetus cannot bring an action against the mother for her behaviour whilst the fetus is *in utero* (save for the exception described below) is that there is no power to compel a mother to take care of herself in the interests of the fetus, whether in respect of diet, medical treatment or abstinence from substances likely to harm the fetus.

There is only one exception to the proposition that the fetus cannot claim after birth for damage caused to it *in utero* by the actions of the mother, see section 2 of the Congenital Disabilities (Civil Liability) Act 1976

“A woman driving a motor vehicle when she knows (or ought reasonably to know) herself to be pregnant is to be regarded as being under the same duty to take care for the safety of her unborn child as the law imposes on her with respect to the safety of other people; and if in consequence of her breach of that duty her child is born with disabilities which would not otherwise have been present, those disabilities are to be regarded as damage resulting from her wrongful act and actionable accordingly at the suit of the child”

¹¹ Norfolk and Norwich Healthcare (NHS) Trust v W [1996] 2FLR 613

N.B. there is also duty of care owed in respect of storage and selection of gametes/embryos under s.1A of the 1976 Act

“— (1) In any case where—

(a) a child carried by a woman as the result of the placing in her of an embryo or of sperm and eggs or her artificial insemination is born disabled,
(b) the disability results from an act or omission in the course of the selection, or the keeping or use outside the body, of the embryo carried by her or of the gametes used to bring about the creation of the embryo, and

(c) a person is under this section answerable to the child in respect of the act or omission,

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.

(2) Subject to subsection (3) below and the applied provisions of section 1 of this Act, a person (here referred to as “the defendant”) is answerable to the child if he was liable in tort to one or both of the parents (here referred to as “the parent or parents concerned”) or would, if sued in due time, have been so; and it is no answer that there could not have been such liability because the parent or parents concerned suffered no actionable injury, if there was a breach of legal duty which, accompanied by injury, would have given rise to the liability.

(3) The defendant is not under this section answerable to the child if at the time the embryo, or the sperm and eggs, are placed in the woman or the time of her insemination (as the case may be) either or both of the parents knew the risk of their child being born disabled (that is to say, the particular risk created by the act or omission).

(4) Subsections (5) to (7) of section 1 of this Act apply for the purposes of this section as they apply for the purposes of that but as if references to the parent or the parent affected were references to the parent or parents concerned.]

What if a noxious substance is taken by a pregnant woman and causes non-fatal damage to fetus? After birth, the child has no cause of action against the mother but would have against the negligent provider of the drug potentially. This general proposition is well demonstrated by the Thalidomide claims.

Another example of a rare situation in which a duty of care could be owed to a fetus is where a will creates an interest in an estate for an unborn child and an executor is dealing with the estate. He would have to have regard to the interests of that unborn fetus, as part of the group of beneficiaries potentially affected by his conduct.

A form of protection available for any child is the possibility of wardship in the High Court. That umbrella and shield is not an option in respect of a fetus, see Balcombe LJ, *"If Parliament were to think it appropriate that a pregnant woman should be subject to controls for the benefit of the unborn child, then doubtless it will stipulate the circumstances in which*

*such controls may be applied and the safeguards appropriate for the mother's protection."*¹²

Conclusion

That analysis leads to a series of propositions: a fetus has the right to protection against intentional termination of life by anyone, save abortion in circumstances permitted by the AA 1967 with the mother's consent. There is no protection available against the negligent/reckless actions of the mother and no duty of care owed by the mother to fetus (save in the exception referred to above). That means that the language of 'rights' does not fit well; the better way is to see it in terms of 'protection' against interference sustainable against everyone save under the circumstances permitted by the AA 1967.

That brings us back full circle to the conundrum mentioned at the beginning - why do we distinguish between a fetus *in utero* and that same being extracted/delivered from the mother? The full range of reasons, legal, medical, philosophical are beyond the scope of this article but must have at their foundation, it is suggested, the distinction following physical separation being achieved at birth, bringing to an end the reliance on the mother to meet all the needs of the fetus necessary to sustain life.

January 2011

¹² Re F (in utero) [1988] 2All ER 193
