

## Should pregnant mothers owe a duty to their unborn children?

Suppose that a woman is pregnant. She drinks a lot of alcohol, knowing that it is likely to harm her foetus. Can or should the law do anything – either during or after the pregnancy?

### The mother's position

#### *ECHR arguments*

The woman has, *prima facie*, a right to do what she wants with her own body. That is a right enshrined in that most elastic of the Articles of the ECHR: Article 8. Article 8 is, of course, not an absolute right: the right conferred by Article 8(1) is subject to the wider societal considerations of 8(2) – the provisions of which read: ‘There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.’

Article 8(2) confers no right in itself: a foetus, even if it had a legal personality (of which more below) could not say that the considerations articulated in 8(2) gave it a right to be protected. It could only begin to invoke 8(2) in the course of an argument that it had itself a protected right (under Article 8, say, or Article 2 – which encompasses a right not just to life *per se*, but also to bodily integrity more generally), which competed against the mother's 8(1) right. In the course of such an argument the foetus might say that one reason why the mother's 8(1) right should be trumped by the foetus's own right is that 8(2) considerations (for instance the protection of health or morals) reduce the weight of the mother's 8(1) right.

Is it arguable, then, that the foetus has some right under the ECHR?

It is indeed arguable, but it is hard work. Article 2 would seem the most promising route. It provides that ‘Everyone's right to life shall be protected by law’. The Commission accepted in *H v Norway* (1992) 73 DR 155 that the Article was potentially applicable to foetal life: see too, and similarly *X v UK* (1980) DR 19, *Boso v Italy* (2002) No.50490/99 and *Bruggemann and Scheuten v Germany* (1981) 3 EHRR 244. In *Vo v France* [2004] 2 FCR 526 (where the issue was whether a foetus was included in the word ‘everyone’) the Grand Chamber noted that ‘[t]he Convention institutions have not...ruled out the possibility that in certain circumstances safeguards may be extended to the unborn child...’ (para 80), but that it was ‘...convinced that it is neither desirable, nor even possible as matters stand, to answer in the abstract the question whether the unborn child is a person for the purposes of Article 2...’ (para 85).

This is unsatisfactory. The court wasn't being asked to decide that matter in the abstract: it was being asked to decide it in the very concrete circumstances surrounding the puncturing of an amniotic sac in Lyons General Hospital. More objectionable, though, is the more fundamental reason given by the court for its effective refusal to answer the question raised by the litigation: ‘[T]he issue of when the right to life begins comes within the margin of appreciation which the Court generally considers that States should enjoy in this sphere....’ (para 82).

Whether one is a pro-choicer or a pro-lifer, this is hard to accept. There are no qualifications to Article 2 analogous to the 8(2) qualifications to 8(1). Surely it should either apply in all Convention countries to a being at a particular stage of gestation, or it should not apply. Its application should not depend on the local factors commonly said to be relevant to the doctrine of the margin of appreciation.

The main concern of the court in *Vo* was plainly not to disturb the ability of contracting states to legislate as they wish in relation to abortion. It did that in a jurisprudentially ham-fisted way. It would have been possible to preserve the situation re abortion by saying (as the Commission did in *Paton v United Kingdom* (1981) 3 EHRR 408) that maternal and foetal Article 2 rights might be in competition in a situation where abortion is considered, and where that is so, the maternal right should prevail; or even (though more controversially) by providing that maternal autonomy rights under Article 8 might in some circumstances prevail over a (perhaps incrementally accruing) foetal right under Article 2.

These (and other) objections mean that *Vo* is ripe for review. But for the moment it is a significant obstacle to anyone seeking to argue that Article 2 can be invoked on behalf of a foetus in any competition against its mother's Article 8 rights. And since *Vo* was framed as a case about the legal existence of a foetus, it would seem to be an obstacle to any argument that there are free-standing foetal Article 8 rights that may prevail over the maternal rights: you need to exist in order to bear rights.

#### *Domestic law arguments*

In relation to any remedy against the mother, domestic law has come to much the same conclusion as Strasbourg – using similar reasoning. That reasoning has been tested in various domains.

In relation to whether a mother can be forced to undergo Caesarean section in order to save a foetus, the answer – insofar as the question turns on a competition of foetal and maternal rights – is no: see *St George's NHS Trust v S* [1998] 3 All ER 673; but cp *Re S (Adult: Refusal of Medical Treatment)* [1993] Fam 123. The St. George's Trust case frowns on the use of the Mental Health Act in such cases, but it has to be said that the courts are very ready to find women in such circumstances incapacitous.

The orthodox view about foetal rights was set out by Butler-Sloss LJ in *Re MB (An Adult: Medical Treatment)* [1997] 2 FCR 541 at 561: '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 section operation. The court does not have the jurisdiction to declare that such medical intervention is lawful to protect the interests of the unborn child even at the point of birth'. And in *Paton v Trustees of the British Pregnancy Advisory Services* [1979] QB 276 at 279, Sir George Baker observed that: 'There can be no doubt that in England and Wales the foetus has no right of action, no right at all, until birth.' In the light of the Strasbourg jurisprudence these comments are too dogmatic: there is room for argument. But they represent what you'd need to know to pass an undergraduate examination.

The view that the foetus is simply a maternal body part was, however, roundly rejected by the House of Lords in *A-G's Reference (No. 3 of 1994)* [1998] AC 245. The relationship

between mother and foetus was, said Lord Mustill, ‘one of bond, not identity’. The foetus is not a legal person, but that does not mean it is nothing: ‘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.’ (255-256).

Turning from these general principles to the foetal alcohol syndrome type cases, we see an inflexible application of the dogma that a foetus is not a legal person. Thus in *Winnipeg Child and Family Services (Northwest Area) v G* (1997) 3 BHRC 611, the Supreme Court of Canada refused to detain for treatment a mother who was 5 months pregnant, and addicted to glue-sniffing. Two of her previous children had been born with a permanent disability as a result. ‘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....’ (620). The mother’s autonomy rights had to be protected, said the court – at (effectively) whatever cost to the foetus.

And in England, a child injured in utero by its mother’s alcohol consumption could not, when born, recover compensation from the CICA: the child did not exist legally at the time of the injury: see *CP (A child) v CICA* [2014] EWCA Civ 1554.

A mother cannot be sued for damages in tort in relation to injury she causes to her foetus: see Congenital Disabilities (Civil Liability) Act 1976 s. 1(1).

Yet, despite all this, it is not the case that foetuses are invisible to the law, or that mothers have a complete immunity in relation to injury they cause to their foetuses. It is a criminal offence to terminate a pregnancy unless one or more of the criteria in the Abortion Act 1967 applies: see OAPA 1861 ss. 58 and 59; Infant Life (Preservation) Act 1929 s. 1. A mother can be guilty of these offences.

That said, there is a striking dissonance between the liability of the mother in relation to her foetus, and the liability of third parties in relation to a foetus. We now outline the position in relation to third parties before commenting further on whether the dissonance can be justified.

### **The position of third parties**

The criminal (non) liability of third parties in relation to foetuses does parallel that of mothers – and for the same reason: the legal non-existence of the foetus. But in other areas of law and regulation third parties are held to account in a way that mothers are not. A child injured in utero by the act or default of a third party can sue for damages: Congenital Disabilities (Civil Liability) Act 1976. A clinician who knew that a mother was engaging in behaviour that endangered the foetus but failed to warn the mother accordingly would risk censure by their professional body.

### **The position once the child is born**

Then, of course, everything changes. That short journey down the birth canal results in the child being invested with all the rights under the ECHR and all the protection given by the civil and criminal law. If a mother, one second after birth, administered alcohol to her new born child, so causing it to be injured exactly as it would have been by alcohol during pregnancy (were that medically possible: it isn’t), she would be guilty of a criminal offence, could be sued by the child for damages, and would risk the child being taken

into care for its own protection. All of those consequences entail interference with maternal autonomy rights, yet we do not begin to categorise them as inappropriate.

### **Should the law be changed?**

We consider that the present inability of the law to protect the foetus from in utero damage caused by acts or defaults on the part of the mother is indefensible. Of course it is crucial to respect maternal autonomy rights. The nature and consequences of those rights have recently been exhaustively reviewed: see *Protecting future children from in utero harm*, Wilkinson D, Skene L et al, *Bioethics* (2016) 30(6); 425-32. We adopt the analysis there. To assert that those rights should always trump those of the foetus seems to us to turn a culpably blind eye to the interests of foetuses, to the children they will become, to the interests of society (including economic interests), and indeed to mothers themselves (most of whom would prefer to have a healthy child).

The common law is too sclerosed to be the best vehicle of change. ECHR law is too ponderous. But a statutory solution would be very simple.

### **Bullet points for box insert**

- The autonomy rights of pregnant mothers are hugely important, but should not always prevail over the rights of future children not to be injured by the acts or defaults of their mothers
- Legislation is needed to correct the imbalance between these rights

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