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Anna Walsh MAURICE BLACKBURN LAWYERS

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Check-up
HEALTH LAW NEWS
Can there be a positive maternal duty of care to the unborn in Australia?

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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, is subsequently born, and dies after birth 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 human, 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, (often referred to as infanticide), 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 abortion focuses on whether there has been a determination by a medical practitioner that the abortion is necessary to preserve the pregnant woman’s life or physical or mental health.\(^4\) In WA, SA and the NT, 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 of pregnancy. Up to a certain stage of pregnancy, there is no need to satisfy any criteria; thereafter abortion is lawful if two medical practitioners believe that the abortion is appropriate in all the circumstances.\(^6\) Queensland recently enacted the Criminal Code (Medical Treatment) Amendment Act 2009, which allows a medical practitioner 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.\(^7\)

Tortious compensation for the unborn child

Apart from the criminal context, there are a number of circumstances where 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 (UK) for motor vehicle cases. This must be seen in the context of the UK’s mandatory requirement for motor vehicle insurance.

In the Canadian High Court decision Dobson v Dobson,\(^11\) the majority held a different view. This 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
extension, one cannot force a woman to undergo a caesarean section 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’s favour. This might well be a consistent position in those jurisdictions where it is a crime to abort a 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.

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 allows as morally licit 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 technique used, however, is 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. This scenario is clearly distinguishable from that of a pregnant woman not wanting to undergo a caesarean section that is necessary in order to avoid harm to the foetus because she does not like needles.

Conclusion

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 one cannot force a woman to undergo 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 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 the proposition 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 do not result in a consistent position regarding its legal status, but rather demonstrate an impressive flexibility by legislators and the courts to allow for a wide variation in viewpoint to fit the particular circumstances.

Anna Walsh,
Principal,
Maurice Blackburn Lawyers.

Footnotes
2. See, for example, Crimes Act 1900 (NSW) s 5; s 313(2) Criminal Code 1899 (Qld); s 15 Crimes Act 1958 (Vic); s 184A Criminal Code 1924 (Tas).
3. Section 42 Crimes Act 1900 (ACT); s 313(2) Criminal Code 1899 (Qld); s 170 Criminal Code (NT); s 290 Criminal Code Compilation Act 1913 (WA); s 165 Criminal Code Act 1924 (Tas).
4. R v Wald (1971) 3 DCR (NSW) 25; and s 164 Criminal Code 1924 (Tas).
5. Sections 334 (3)(a), (5)(a) and (7)(b) Health Act 1911 (WA); s 82A Criminal Law Consolidation Act 1935 (SA); s 11 Medical Services Act (NT).
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).
eating unhealthy food or not taking medication, would be more difficult to argue against. The standard for a reasonable pregnant woman would be difficult to set.

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. However, it differs from the Canadian example of the woman who sniffed glue while pregnant 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. A number of cases have arisen internationally regarding a pregnant woman’s refusal to undergo delivery by caesarean section. In those cases, the courts have largely held that women cannot be compelled to undergo a caesarean section against their wishes because a foetus has no rights until it 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 US case Re AC, a hospital obtained a court order compelling the performance of a caesarean section delivery on a woman who was 26 1/2 weeks pregnant and who was terminally ill with cancer. 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 50-75% risk that the baby would suffer from infection which could be fatal or lead to brain damage, and that caesarean section was the only method to avoid this risk to the foetus. The risk of adverse consequences to the pregnant woman were she to have the caesarean section delivery were put at 25%.

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 to 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 reheard 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 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.

Professor George Annas 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 of the rights of the pregnant woman. Additionally, he argues that physician prediction of harm is not very accurate, with investigations such as cardiotocograph monitoring being notoriously sensitive and possibly overstating 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 such as 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 claim to personhood status than the born child.

Position in Australia

Australian courts have consistently held that there is no duty to rescue. Balanced against this, however, there are exceptions where a person has a positive duty to act. In the case of Lowns v Woods, 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 s 27(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 which contain a “Good Samaritan” clause whereby, if a person does intervene, they have immunity from civil liability (although exceptions do apply).

However, 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, then 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
impose such a duty would, in the majority's opinion, lead to an unacceptable intrusion into the rights of women to bodily integrity, privacy and autonomy. 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 Bastai...e J concurring), held that the public policy considerations, as set out by the majority, were not sufficient to negative 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 not be 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."12

Whether the duty of care can be extended to a child suing its mother in respect of antenatal 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 reckless conduct on her part, or simply behaviour that, if in engaged in, is foreseeable able to 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 on the wellbeing of the foetus? Are we morally comfortable with this position? How does this position impact on 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 it demonstrates indifference by the pregnant woman to the possibility that harm may befall the foetus as a by-product of her conduct. This intention is the same as in negligent or careless driving resulting in an accident that harms the foetus, but the difference is that the pregnant woman's behaviour only affects her and the foetus. With driving, she must maintain this duty to the foetus as well as to all other users of the road.

The Supreme Court of Canada was required to consider whether a mother could be held to be negligent for sniffing glue during 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."13 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 Re F (in utero),14 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 ill and led a nomadic existence. 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 could not 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 commentators15 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 because a possible consequence may be a reluctance by pregnant women to seek prenatal care or to give honest and accurate information to health care providers for fear of reprisals. Paltrow16 notes that to recognise foetal abuse is to criminalise pregnancy, as no woman can provide the perfect womb.

Formulating a standard of care

Being able to articulate a standard of care for the pregnant woman could be possible. The degree of infringement that any laws may have on 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, duties which are developed on a case by case basis by 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 as against the 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, such as drinking alcohol,
12. Above.
19. Above p 17.
21. See, for example, ss 56 and 57 of the Civil Liability Act 2002 (NSW). Exceptions include voluntary intoxication, failure to show reasonable care in connection with the rescue attempt, impersonation of police or health care worker or if the person is responsible for causing the situation in which the person was injured or endangered.