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# The Legal Status of a Living Abortus

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*Les Haberfield's article, "The Transplantation of Human Fetal Tissue in Australia: Abortion, Consent and Other Legal Issues" appeared in (1996) 4 JLM 144. In that article he raised the issue of the legal status of a fetus that, although aborted, is in fact born alive. In this article I argue that any such fetus is, at law, a legal person and must be treated accordingly. This develops the suggestion made by Haberfield that such a fetus is "analogous" to a child, and has consequences for abortion practitioners, and for fetal tissue transplantation and experimentation.*

## Introduction

In his article, "The Transplantation of Human Fetal Tissue in Australia: Abortion, Consent and Other Legal Issues",<sup>1</sup> Les Haberfield discussed the use of tissue obtained from a living fetus. He refers to the National Health & Medical Research Council (NHMRC)<sup>2</sup> guidelines on the issue of fetal tissue transplantation and says:

"According to the guidelines, a pre-viable fetus may not be utilised while there is the presence of a heartbeat and a viable fetus should in effect be treated in the same manner as treatment or research on any infant. A viable fetus is thus given the status of a child for medical purposes."<sup>3</sup>

To talk of a "viable" or even "pre-viable" fetus as something distinct from a "child" is misleading. In this article, I will argue that the criterion for legal personhood is for the fetus to be "born" and to have either taken a breath or to have, or have had, an independent circulation. Once the relevant criterion has been met, then the fetus is vested with legal personality and is the holder of all rights that are

bestowed upon all persons. It is therefore misleading to say that "A viable fetus is thus given the status of a child for *medical purposes*". It is a child for *all purposes*.

If this conclusion is correct, then the creation of a live abortus will have significant legal implications for medical practitioners and researchers. Some of these implications were identified by Haberfield but they need to be explored in more detail.

## Legal personhood

Under Anglo-Australian law, a fetus has no legal personality and cannot take legal action to protect its interests.<sup>4</sup> There are, however, contingent rights; that is, rights that are contingent upon the fetus being born alive.<sup>5</sup> The killing of a fetus in utero cannot constitute murder.<sup>6</sup> As a result, the law has had to define when it should consider that a child has been born. In New South Wales, s 20 of the *Crimes Act 1900* (NSW) provides:

"On the trial of a person for the murder of a child, such child shall be held to have been born alive if it has breathed, and has been wholly

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<sup>1</sup> (1996) 4 JLM 144.

<sup>2</sup> NHMRC, *Ethics in Medical Research Involving the Human Fetus and Human Fetal Tissue* (AGPS, Canberra, 1983). The legal status of these guidelines was discussed in A Stuhmcke, "The Legal Regulation of Fetal Tissue Transplantation" (1996) 4 JLM 131.

<sup>3</sup> Haberfield, op cit n 1, at 151 (emphasis added).

<sup>4</sup> Ibid at 153.

<sup>5</sup> Ibid.

<sup>6</sup> L Waller and C R Williams, *Criminal Law Text and Cases* (7th ed, Butterworths, Sydney, 1993), p 132.

born into the world whether it has an independent circulation or not."

There is here a two-part test. The child must have taken a breath and must have been wholly born. That it does not matter "whether it has an independent circulation or not" suggests that once the child is completely removed from the body of its mother, it is "wholly born into the world" even though it is still attached via the umbilicus.

In *R v Hutty*,<sup>7</sup> Barry J said:

"legally a person is not in being until he or she is fully born in a living state. A baby is fully and completely born when it is delivered from the body of its mother and it has a separate and independent existence in the sense that it does not derive its power of living from its mother. It is not material that the child may still be attached to the mother by the umbilical cord; that does not prevent it from having a separate existence. But it is required ... that the child should have an existence separate from and independent of its mother, and that occurs when the child is fully extruded from its mother's body and is living by virtue of the functioning of its own organs."<sup>8</sup>

Generally speaking, legislation pertaining to the registration of births does not require details of the birth to be registered if the fetus was stillborn. Section 4 of the *Births, Deaths and Marriages Registration Act 1995* (NSW), for instance, provides:<sup>9</sup>

"stillborn child means a child that exhibits no sign of respiration or heartbeat, or other sign of life, after birth and that:

- (a) is of at least 20 weeks' gestation, or
- (b) if it cannot be reliably established whether the period of gestation is more or less than 20

<sup>7</sup> [1953] VR 338.

<sup>8</sup> *Ibid* at 339, cited in Waller and Williams, *op cit* n 6, p 133.

<sup>9</sup> For similar provisions, see, eg, *Registration of Births, Deaths and Marriages Act 1963* (ACT), s 5; *Births, Deaths and Marriages Registration Act 1966* (SA), s 4; *Registration of Births, Deaths and Marriages Act 1959* (Vic), s 3; *Registration of Births, Deaths and Marriages Act 1962* (Qld), s 5; *Registration of Births, Deaths and Marriages Act 1961* (WA); *Registration of Births and Deaths Act 1895* (Tas). The *Australian Health and Medical Law Reporter* (CCH, Sydney, 1991, p 39,557) says: "A child not born alive is defined as a child who is of at least 20 weeks gestation ... or least 400 grams weight at delivery ... and who has not breathed (NSW, Vic, SA) and/or whose heart has not beaten (NSW, Qld, SA, Tas) after delivery."

weeks, has a body mass of at least 400 grams at birth."

If the fetus is less than 20 weeks gestation or 400 grams, and "exhibits no sign of respiration or heartbeat or other sign of life", then its stillbirth need not be registered. It follows that if the fetus does exhibit signs of life, it is not a stillborn child but is, for the purposes of the Act, a "child" and its birth must be registered.

On any definition, statutory or common law, it is not relevant whether or not the child is "viable", that is, whether it can continue to live, nor does the length of gestation matter. If the child is fully extruded from its mother's body, and takes a breath<sup>10</sup> or is living (even if only for a minute) by virtue of the functioning of its own organs, then it has been born alive and is capable of being murdered,<sup>11</sup> and possesses all the legal rights that were contingent upon its birth. The fact that there is no need to register the birth of a pre-viable fetus that is not alive when born does not affect the conclusion that a pre-viable fetus that is alive when born is a legal person.

### Implications for medical practice

The first implication of these contentions is that any treating medical practitioner will have an independent duty toward the child and that duty, in many circumstances, would be a duty to save the child's life. In New South Wales, ss 36 and 37 of the *Medical Practice Act 1992* provide that it is an example of unsatisfactory professional conduct or professional misconduct for a medical practitioner to fail to provide emergency medical care to a person "who is in need of urgent attention by a registered medical practitioner". A similar duty has also been found in the common law, such that a medical practitioner can be liable in damages for failing to provide emergency medical care when called upon to do so.<sup>12</sup>

Accordingly, a medical practitioner who is attending upon a woman who is having an abortion would, if the fetus is born alive, have an obligation

<sup>10</sup> *Crimes Act 1900* (NSW), s 20.

<sup>11</sup> *Ibid*; see also Waller and Williams, *op cit* n 6, pp 132-133.

<sup>12</sup> *Woods v Lowms* (1995) 36 NSWLR 344 per Badgery-Parker J at first instance, affirmed by the Court of Appeal of New South Wales: (1996) Aust Torts Reports 81-376.

to treat that fetus. Exactly what treatment is required would depend on the circumstances.

### Consent and refusal of consent

Although parents are vested with the power to give or refuse consent for the medical treatment of their children,<sup>13</sup> such consent (or refusal) must be motivated by the "best interests" of the children.<sup>14</sup> If the child was a "viable fetus", then it would not usually be in the best interests of the child to allow it to die (though that is not always true and will be discussed below). A decision to withhold treatment for the convenience of the mother, because her very reason for having the abortion was to avoid having a child, would not be a decision motivated by the child's best interests and would therefore be *ultra vires*. A parent cannot arrange to have her child killed because it is convenient, or to harvest its organs for therapeutic or research purposes, and it does not matter that it was intended that the child would not be born alive. Once it is born, it is a legal person and cannot be killed or even allowed to die, except as authorised by law.

A medical practitioner may not be bound by the decision of the mother to refuse treatment. In New South Wales, s 20A of the *Children (Care and Protection) Act 1987* (NSW) provides:

"(1) A registered medical practitioner may carry out medical treatment on a child without the consent of:

- (a) the child; or
- (a) a parent or guardian of the person of the child,

if the medical practitioner is of the opinion that it is necessary, as a matter of urgency, to carry out the treatment on the child in order to save the child's life or to prevent serious damage to the child's health."

Similar legislation is applicable in the Northern Territory and South Australia.<sup>15</sup>

The effect of these provisions is that where the medical practitioner is of the view that some treatment is necessary to save a child's life, then that treatment may be administered even in the

absence of parental consent. The mother who is having the abortion may not want the child to live, but that does not prevent the treating medical practitioners from providing treatment necessary, in fact, to save that child's life.

### Withholding treatment

The fact that the abortus is a legal person does not mean that all treatment must be administered. First, a medical practitioner is not required to administer futile treatment.<sup>16</sup> Accordingly, if the child was "pre-viable", so that no treatment would in fact serve to save the child's life, then it would not be necessary to provide other than palliative care. For example, if the child's lungs were insufficiently developed so that resuscitation would not be effective, then there would be no need to embark on futile resuscitative attempts.

The NHMRC guidelines on medical research involving a human fetus and fetal tissue define a fetus as "pre-viable" if it is of less than 20 weeks gestation and weighs less than 400 grams at birth.<sup>17</sup> Assuming that these criteria are medically indicated, then there would be no need to try and save the life of a pre-viable fetus, for by definition, a pre-viable fetus does not have the capacity to "survive after separation from its mother"<sup>18</sup> and so any attempt at life-saving treatment would be futile. That does not mean that the fetus is not a person at law, only that a medical practitioner would have a lawful excuse to withhold treatment from that child where that treatment was designed to try and prolong its life. That is, the child could, lawfully, be allowed to die.

It may be that it is considered to be in the child's best interests that it not survive. The fact that it is pre-term may mean that even if its life is sustained then it would be seriously disabled, and that, all things considered, it should not be saved. The clinical factors to consider are beyond the scope of this article. Legally, however, such a decision may be justified where "the life of this child is demonstrably going to be so awful that in effect the child must be condemned to die".<sup>19</sup>

<sup>13</sup> *Secretary, Department of Health and Community Services v JWB and SMB* (1992) 175 CLR 218 (*Marion's Case*).

<sup>14</sup> *Ibid.*

<sup>15</sup> *Emergency Medical Operations Act 1973* (NT), s 3; *Consent to Medical Treatment and Palliative Care Act 1995* (SA), s 13.

<sup>16</sup> *Airedale NHS Trust v Bland* [1993] AC 789.

<sup>17</sup> NHMRC *op cit* n 2, p 8.

<sup>18</sup> *Ibid.*

<sup>19</sup> *In Re B (A Minor)* [1981] 1 WLR 1421 at 1424.

In England, at least,

"the correct approach is for the court to judge the quality of life the child would have to endure if given the treatment and decide whether in all the circumstances such a life would be so afflicted as to be intolerable to that child".<sup>20</sup>

It is only in these circumstances, that is, where the treatment is futile, or, all things considered, the child's life "would be so afflicted as to be intolerable to that child", that treatment may be withheld. In the former case, the issue is one primarily of medical judgment; in the latter case, all circumstances must be considered from the point of view of the interests of the child, not of its mother.

If a practitioner decided to withhold treatment merely to allow the baby to die, because it suited the mother or because it would make the tissue available for transplantation, then such a practitioner could be liable for murder or manslaughter.

### Implications for fetal tissue transplantation and research

If a fetus is meant to be aborted, but is born alive, then the law relating to the harvesting and donation of fetal tissue, either for therapeutic or research purposes, will apply as for any other person; it does not matter that the person died at two minutes, two days or two years old.

Tissue can only be harvested in accordance with the *Human Tissue Act* 1983 (NSW) or its equivalent in each State. Under this Act, and while the child is alive:

"A parent of a child may give consent in writing to the removal from the child's body of specified regenerative tissue for the purpose of its transplantation to the body of a parent, brother or sister of the child."<sup>21</sup>

However, it must be the case that the child "was in agreement with the proposed removal and transplantation of the tissue".<sup>22</sup> As a newborn child cannot agree to the removal and transplantation of the tissue, then such a procedure cannot be performed.

If the child is dead, then again the human tissue legislation governs the taking of tissue. In New South Wales the authorised officer of the hospital may authorise the removal of tissue provided that

- (a) the person had not, during their lifetime, objected to the removal of tissue (not relevant for a newborn child who could not have expressed such an objection); and
- (b) "a senior available next of kin of the person has not objected to the removal of tissue from the person's body."<sup>23</sup>

Given that (a) will not apply, the only requirement before the authorised officer of the hospital can authorise the removal of tissue is that the senior next of kin (in the case in issue, the parents) do not object to the removal of the tissue.

Section 4 defines "senior available next of kin", in relation to a deceased child, as:

- "(i) a parent of the child;
- (ii) where a parent of the child is not available – a brother or sister of the child, being a brother or sister who has attained the age of 18 years; or
- (iii) where no person referred to in subparagraph (i) or (ii) is available – a person who was a guardian of the child immediately before the death of the child."

Where the fetus has been born as a result of an abortion, then the relevant next of kin will be the parents of the child.

Section 23(5) provides:

"Where there are 2 or more persons having a description referred to in a subparagraph of paragraph (a) or (b) of the definition of 'senior available next of kin' in section 4(1), an objection by any one of those persons has effect for the purposes of subsection (2)(c) notwithstanding any indication to the contrary by the other or any other of those persons."

In effect, given that the senior next of kin of a child is "a parent of the child", then an objection to the donation by either parent will be sufficient to stop the tissue being taken even if the other parent consents to the procedure. It is therefore necessary for the authorised officer to make "such inquiries as

<sup>20</sup> *Re J (A Minor)* [1991] 2 WLR 140 at 158.

<sup>21</sup> *Human Tissue Act* 1983 (NSW), s 10.

<sup>22</sup> *Human Tissue Act* 1983 (NSW), s 11(c)(iv).

<sup>23</sup> *Human Tissue Act* 1983 (NSW), s 23.

are reasonable in the circumstances"<sup>24</sup> of both parents, and if either mother or father objects, then the tissue cannot be taken for transplantation or therapeutic purposes.

With respect to the harvesting of tissue from a live, pre-viable fetus, the NHMRC stipulates:

"In the case of a live but pre-viable fetus, the fetus is in a lethal situation and experimentation adds no further risk. However, there is little information available on the sensory awareness of immature fetuses and dissection of a pre-viable but live fetus cannot be assumed to be without neurological impact on the fetus. Dissection of such a fetus could therefore be justifiably regarded as unethical and offensive. Ethical propriety requires that cessation of heartbeat should have occurred before the commencement of any procedure on a pre-viable fetus not aimed at its survival, whether it is a routine pathological examination or an experiment."<sup>25</sup>

This conclusion requires further comment. The fact that a person is in a lethal situation does not allow that person to be used for research or other purposes. We would not allow the removal of organs from a person in the end stages of their terminal illness because they are dying anyway. The prohibition on the taking of human life is based on a notion of the sanctity of that life, and that is not diminished by the fact that the person is about to die anyway. A live but pre-viable fetus should no more be subject to involuntary, active euthanasia than any other person who is in a "lethal situation".

If the pre-viable but living fetus is a legal person, then the normal criteria for determining death should apply, that is, the question is: has there been an irreversible cessation of circulation of blood in the body, or an irreversible cessation of brain activity?<sup>26</sup> Certainly in a pre-viable fetus, one would imagine that the cessation of heartbeat represents a permanent cessation of circulation,

particularly if resuscitation can be withheld because it is known to be futile. The rationale, however, lies not in the fact that it will assuage the conscience of the treating practitioners and researchers, but because the law requires that the pre-viable fetus meet the same test of death as every other person. It is not (only) ethical propriety that requires the cessation of the baby's heartbeat, but legal propriety.

## Conclusion

It has been argued here that, despite suggestions in Haberfield's article that the status to be accorded to a living "fetus" is unclear, the law is clear on this issue. If a fetus is delivered, by whatever means, and is born alive (that is, it is wholly born into the world and takes a breath or has independent existence notwithstanding that it is still connected to its mother by the umbilical cord), then it is, at law, a legal person and must be treated as such. This is true whether the fetus is "viable" or "pre-viable". This analysis may not be philosophically satisfying, as the newborn may not satisfy the moral requirements of personhood,<sup>27</sup> and because it may be impossible to point to any morally significant difference between a fetus five minutes before birth, and a child five minutes after birth. The law, however, has to draw a line and has drawn that line at birth. Before birth, the fetus has no independent legal entity or rights; after birth, it is a full legal person with all the human and legal rights that that status brings.

This conclusion means that if tissue is to be taken from such a child, the requirements of the relevant legislation in each State must be met. In New South Wales, this means that tissue will not be available from the live child as the child cannot agree to the procedure. It means that if the child subsequently dies, then tissue will only be available

<sup>24</sup> *Human Tissue Act 1983* (NSW), s 23.

<sup>25</sup> NHMRC, *op cit* n 2, p 13.

<sup>26</sup> *Human Tissue Act 1983* (NSW); *Human Tissue Act 1982* (Vic); *Transplantation and Anatomy Act 1979* (Qld); *Transplantation and Anatomy Act 1983* (SA); *Human Tissue Act 1985* (Tas); *Human Tissue Transplant Act 1979* (NT), and the *Transplantation and Anatomy Act 1978* (ACT).

<sup>27</sup> See, eg, M Charlesworth, *Bioethics in a Liberal Society* (Cambridge University Press, Cambridge, 1993); M Tooley, "In Defence of Abortion and Infanticide" in M Goodman, *What is a Person?* (Humana Press, New Jersey, 1988); Frankfurt, "Freedom of the Will and the Concept of a Person" in Goodman, *ibid*; D Lamb, *Down the Slippery Slope; Arguing in Applied Ethics* (Croom Helm, New York, 1988); G Gillett, "Consciousness, the Brain and What Matters" (1990) 4 *Bioethics* 181.

provided neither parent, mother or father, objects to such a procedure.

If the abortus is born alive, decisions to withhold treatment must be made as with any other patient – by considering the best interests of the patient alone. A decision cannot, legally, be made to withhold treatment because to do so satisfies the mother's aims in having the abortion, or because it would make tissue available for transplantation or research.

The conclusions reached in this article have implications for the practice of abortion, particularly if, as Haberfield says, some 4 per cent of abortions do not kill the fetus immediately and if the use of fetal tissue transplantation will increase the demand for non-fatal abortions.<sup>28</sup> Such tissue is

not, under current law, generally available for transplantation and must be considered to be the body of a child, no matter what the period of gestation.

It is not correct to say, as the English Code of Practice does, that "the live fetus should be treated on principles broadly similar to those which apply to treatment and research conducted on children and adults".<sup>29</sup> It is not that they should be treated on "principles broadly similar" to others; it is that the law draws the line between fetus and child at birth, so that if the fetus is born alive it is, at law, a child and a legal person. The principles that apply to research on the tissue of children, alive or dead, apply to the child, no matter what its gestational age at the time of birth, provided that it was born alive.

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<sup>28</sup> Haberfield, *op cit* n 1, at 151.

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<sup>29</sup> FFMC, *Code of Practice on the Use of Fetuses and Fetal Material in Research and Treatment* (CM762, HMSO, London, 1989), cited in Haberfield, *op cit* n 1, at 151.