

# An Equality Approach to Reproductive Choice: *R. v. Sullivan*

Lynn Smith<sup>†</sup>

## I. INTRODUCTION

*The regulation of women's sexuality and reproduction is best approached as a fundamental arena of gender conflict in which women and men have competed for the control of women's bodies.*<sup>1</sup>

Reproduction of the species has traditionally been seen as women's primary function, to be exercised for the benefit of men or for society as a whole, as defined by men. The legal treatment of women with respect to reproductive issues has both reflected and perpetuated that traditional view. One approach that challenges the hegemony of the traditional view is based on an individual woman's "right to choose," whether the choice relates to termination of pregnancy or to medical treatment and personal habits during pregnancy. This approach is founded upon considerations of liberty and privacy. Another approach is based on women's right to equality, founded on considerations of the economic, political, social and overarching cultural contexts in which women become pregnant, are pregnant, require termination of pregnancies, carry pregnancies to term, give birth and raise children. This approach may challenge the hegemony of the traditional view in more fundamental ways than does the liberty approach, and therefore may be more effective. For the same reason, it may be more difficult to argue successfully in a society which places strong emphasis on individual liberty and less emphasis on social equality.

In Canadian Supreme Court reproductive rights cases, arguments based on equality have been presented with some measure of success. *R. v. Sullivan*<sup>2</sup> is one such case. The issue in *Sullivan* was whether two women who were

---

<sup>†</sup> Lynn Smith is Dean of the Faculty of Law at the University of British Columbia. She is a founder and former President of the Women's Legal Education and Action Fund (LEAF), a national organization devoted to litigation and law reform initiatives to promote equality for women. She has published extensively on the impact of the Canadian constitutional guarantee of "equality rights" for women. At the Conference *Feminism in the 90s: Bridging the Gap Between Theory and Practice*, Ms. Smith spoke on the *Reproductive Issues* panel about the equality argument for reproductive choice in Canada. The equality argument is articulated in the "factum" LEAF filed in the Canadian Supreme Court case *R. v. Sullivan*, reprinted here with a comment by Ms. Smith.

1. Sheila L. Martin, *The Control of Women through Gender-Biased Laws on Human Reproduction*, in *CANADIAN PERSPECTIVES ON LEGAL THEORY* 291, 293 (Richard F. Devlin ed., 1991).

2. 63 C.C.C.3d 97 (1991) (Can.).

acting as midwives for a woman whose foetus died during the birth process, in a manner found to be clearly negligent, should have been convicted of criminal negligence causing death to a person, criminal negligence causing bodily harm to the pregnant woman, or neither charge. Although the case has implications for legalized midwifery, it is most significant in its implications for the legal (and perhaps constitutional) status of the foetus, and for women's constitutional rights.

The Women's Legal Education and Action Fund (LEAF)<sup>3</sup> intervened<sup>4</sup> in *Sullivan* in the Supreme Court of Canada. The *Sullivan* argument, because it illustrates the strong relationship between feminist theory and practice, formed the core of my presentation at the conference *Feminism in the 90s: Bridging the Gap Between Theory and Practice*. The written argument ("factum") in *Sullivan* forms the core of this article.

In Parts II and III of this article, I will give some background to the *Sullivan* argument, including a description of the process LEAF followed in developing the argument in consultation with women across the country. The factum itself is reproduced in Part IV and is followed by a brief comment on the Supreme Court's eventual decision in the case in Part V.

## II. SOME GENERAL HISTORY AND BACKGROUND

The Canadian Charter of Rights and Freedoms<sup>5</sup> came into effect in 1982, with the implementation of the equality provisions delayed until 1985. The Charter is both similar to and different from the United States Constitution and Bill of Rights. It is premised on liberalism and guarantees individual rights as against the state, but unlike the U.S. documents it also recognizes collective rights and interests—linguistic, religious, and those of First Nations people.<sup>6</sup> Although in some respects the wording is similar to that of the U.S. Bill of Rights, in others it is very different. Even where the wording is similar (such as the phrase "equal protection of the law"<sup>7</sup>) the context may change its

3. LEAF was founded in 1985, at the same time that the equality provisions of the new Canadian Charter of Rights and Freedoms came into effect.

4. Intervention means that LEAF filed a written brief (a factum) and presented oral argument at the hearing. The Supreme Court of Canada has discretion to permit interventions and does permit them where they may bring to bear a perspective not otherwise available and where they may assist the Court in resolving the issues before it.

5. CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms).

6. See *id.* §§ 16-23, 29, 25, 27.

7. Section 15 reads:

(1) Every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

*Id.* § 15.

meaning considerably. Further, the Charter gives explicit permission to the courts to find that legislation or government practice that/ violates rights nevertheless constitutes a reasonable limit justifiable in a free and democratic society.<sup>8</sup> Finally, governments may legislatively restrict or violate most rights (including liberty and equality) by invoking a special provision in the Charter.<sup>9</sup>

Sections 7, 15 and 28 of the Charter are of central relevance in the area of reproductive rights. Section 15 guarantees equality "before and under the law" and the "equal protection and equal benefit of the law without discrimination" based on a number of grounds including race, sex, disability, age and religion.<sup>10</sup> Sex equality with respect to all Charter rights is explicitly guaranteed in section 28.<sup>11</sup> Section 7 guarantees "everyone" the right not to be deprived of life, liberty or security of the person except in accordance with the principles of fundamental justice.<sup>12</sup>

Prior to the *Sullivan* case, the Supreme Court had made three decisions affecting reproductive rights in the post-Charter era. In the first, *R. v. Morgentaler*,<sup>13</sup> the Court struck down section 251 of the Criminal Code,<sup>14</sup> which prohibited abortion unless it was performed in an approved hospital with the prior approval of a Therapeutic Abortion Committee, based upon the criterion that the continuation of the pregnancy would be likely to endanger the life or health of the pregnant woman. This case involved prosecution against Dr. Henry Morgentaler, a medical practitioner and longtime advocate of choice on abortion, who had opened abortion clinics in defiance of the law. On several occasions he had been acquitted by juries of charges under section 251. He argued that the legislation, by greatly restricting access to abortion, violated women's section 7 guarantee of the right to life, liberty and security of the person. In its decision in *Morgentaler*, the Supreme Court struck down the legislation. The common element in all of the majority Reasons was that women's right to security of the person was violated by the increased risk to health from abortions delayed by the legislated constrictions on access.<sup>15</sup> Some majority judges' Reasons also held that women's rights to security of the person or to liberty are violated by legislative interference with decision-making about a matter as intimate and important as continuing a pregnancy to

---

8. Section 1 reads: "The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." *Id.* § 1.

9. Section 33 reads: "(1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter." *Id.* § 33.

10. *Id.* § 15.

11. Section 28 reads: "Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons." *Id.* § 28.

12. Section 7 reads: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." *Id.* § 7.

13. [1988] 1 S.C.R. 30.

14. R.S.C. ch. C-34, § 251 (1970) (Can.). Criminal legislation is federal in Canada, under the division of powers. CAN. CONST. (Constitution Act, 1867) § 91(27).

15. *Morgentaler*, [1988] 1 S.C.R. at 60-70, 105-106, 114-121, 173-175.

term.<sup>16</sup>

At the time the *Morgentaler* case was decided, there was only one woman on the Supreme Court of Canada (the first ever to serve), Madame Justice Bertha Wilson.<sup>17</sup> When she articulated, in the *Morgentaler* case, a feminist approach to the issue of abortion, it marked a milestone in Canadian law.<sup>18</sup> Alone among the judges, she rested her conclusion mainly on the violation of women's right to liberty, saying:

I would conclude, therefore, that the right to liberty contained in s. 7 guarantees to every individual a degree of personal autonomy over important decisions intimately affecting their private lives.

The question then becomes whether the decision of a woman to terminate her pregnancy falls within this class of protected decisions. I have no doubt that it does. This decision is one that will have profound psychological, economic and social consequences for the pregnant woman. The circumstances giving rise to it can be complex and varied and there may be, and usually are, powerful considerations militating in opposite directions. It is a decision that deeply reflects the way the woman thinks about herself and her relationship to others and to society at large. It is not just a medical decision; it is a profound social and ethical one as well. Her response to it will be the response of the whole person.

It is probably impossible for a man to respond, even imaginatively, to such a dilemma not just because it is outside the realm of his personal experience (although this is, of course, the case) but because he can relate to it only by objectifying it, thereby eliminating the subjective

---

16. See *id.* Reasons of Dickson C.J. at 56-57 and Reasons of Wilson J., particularly at 170-172.

17. For a time there were three women on the Court: Justices Bertha Wilson, Claire L'Heureux-Dubé, and Beverley McLachlin. With Madame Justice Wilson's retirement and replacement by Mr. Justice Frank Iacobucci, there remain only two.

18. The emerging feminism of Madame Justice Wilson had an enormous impact in creating a debate about feminist approaches in the legal profession—not just in the academic world. Although Canadian courts have not participated in task forces on gender bias as has been done in the United States, beginning with (and I would say to a considerable extent as a result of) Justice Wilson's Reasons in *Morgentaler* and her subsequent public lecture *Will Women Judges Really Make a Difference?*, 28 OSGOODE HALL L.J. 507 (1990), there has been a significant amount of activity around issues of gender equality in the legal profession and the legal system. At the time of this writing, the Canadian Bar Association has set up a national committee on the issue, with former Justice Wilson as Chair.

Unfortunately, however, out of the Wilson lecture referred to above grew a debate more or less centered around the question she posed: "Will women judges make a difference?" The question is important, but perhaps not the one which either Wilson J. herself or many feminist scholars would have chosen as central. It may be seen as assuming a monolithic view of "women," and it focuses attention on the identity of individual decision-makers and their thought processes rather than on the contexts in which their decisions are made and the people who are subject to the conclusions that they reach. For a more detailed discussion of issues concerning gender representation in the judiciary, see Isabel Grant and Lynn Smith, *Gender Representation in the Canadian Judiciary*, in APPOINTING JUDGES: PHILOSOPHY, POLITICS AND PRACTICE 57 (Ontario Law Reform Commission, 1991).

elements of the female psyche which are at the heart of the dilemma. As Noreen Burrows . . . has pointed out . . . the history of the struggle for human rights from the 18th century on has been the history of men struggling to assert their dignity and common humanity against an overbearing state apparatus. The more recent struggle for women's rights has been a struggle to eliminate discrimination, to achieve a place for women in a man's world, to develop a set of legislative reforms in order to place women in the same position as men. It has *not* been a struggle to define the rights of women in relation to their special place in the societal structure and in relation to the biological distinction between the two sexes. Thus, women's needs and aspirations are only now being translated into protected rights. The right to reproduce or not to reproduce which is in issue in this case is one such right and is properly perceived as an integral part of modern woman's struggle to assert *her* dignity and worth as a human being.<sup>19</sup>

The then Chief Justice, Brian Dickson, came to similar conclusions in his Reasons, but in the context of the security of the person guarantee. He said:

Forcing a woman, by threat of criminal sanction, to carry a foetus to term unless she meets certain criteria unrelated to her own priorities and aspirations, is a profound interference with a woman's body and thus a violation of security of the person. Section 251, therefore, is required by the Charter to comport with the principles of fundamental justice.<sup>20</sup>

The parties did not argue *Morgentaler* on the basis of an equality approach and LEAF did not file a brief or make oral submissions at any level of the courts. Indeed, the Ontario Court of Appeal, from which the *Morgentaler* appeal to the Supreme Court of Canada came, had concluded that because access to abortion is a matter that only affects women, it does not raise an equality issue under section 15 of the Charter.<sup>21</sup> This is obviously devastating to an equality approach in the reproductive rights area and beyond because it views the equality guarantee as mandating, at most, access for women to what men want or need. Fortunately, this aspect of the case was not confirmed, nor was it discussed in the Supreme Court of Canada.<sup>22</sup>

---

19. *Morgentaler*, [1988] 1 S.C.R. at 171-72 (citing Noreen Burrows, *International Law and Human Rights: the Case of Women's Rights*, in HUMAN RIGHTS: FROM RHETORIC TO REALITY 80, 81-82 (Tom Campbell et al. eds., 1986)). For a discussion of the transformative possibilities of feminism with respect to "liberty," see Hester Lessard, *Relationship, Particularity, and Change: Reflections on R. v. Morgentaler and Feminist Approaches to Liberty*, 36 MCGILL L.J. 263 (1991).

20. *Id.* at 56-57.

21. See *R. v. Morgentaler*, 22 D.L.R. 4th 641, 680-85 (Ont. C.A. 1985).

22. However, it must be noted that in a later case, *R. v. Hess*, [1990] 2 S.C.R. 906, Wilson, J., writing the majority Reasons, considered the constitutionality of the former Criminal Code statutory rape

At the same time that the *Morgentaler* case was working its way through the judicial system, challenging the Criminal Code legislation on the basis that it interfered with the section 7 rights of women, the *Borowski* case<sup>23</sup> was following a parallel track, challenging the same legislation on the basis that it violated section 7 rights of foetuses. In its Reasons in *Morgentaler*, the Supreme Court refrained from deciding whether foetuses might have rights under section 7 to life, liberty and security of the person, but did hold that there may be a legitimate governmental interest in protecting foetal life (with Wilson, J. indicating some attraction to the United States Supreme Court's trimester approach) such that some legislation limiting abortion rights could be constitutional.<sup>24</sup> When *Borowski* reached the Supreme Court, however, it was dismissed as moot because the legislation in question had been struck down in *Morgentaler* and had not been replaced. *Borowski* was the first Supreme Court of Canada case in which the equality approach to reproductive rights was argued (in the LEAF intervention).

The equality approach was next argued in *Tremblay v. Daigle*.<sup>25</sup> The facts of the case perfectly illustrate the connection between abortion and control of women's bodies by men. The evidence indicated that Jean-Guy Tremblay, Chantal Daigle's boyfriend, had insisted that she go off the pill, impregnated her, battered her during the pregnancy, and then sought an injunction from the court when she left him and declared her intention to obtain an abortion.<sup>26</sup> Mr. Tremblay based his claim on an alleged violation of the rights of the foetus under the Quebec Charter of Human Rights and Freedoms,<sup>27</sup> asserting the foetus's rights as its putative father.<sup>28</sup> He was successful in obtaining and

---

section. It provided that it was an indictable offense punishable by imprisonment for life for a man (himself over the age of fourteen years) to have sexual intercourse with a female person who was not his wife and under the age of fourteen years, whatever he believed about her age. Wilson, J. concluded the section did not violate the guarantee of equality in section 15 of the Charter. She wrote:

Nevertheless, there are certain biological realities that one cannot ignore and that may legitimately shape the definition of particular offences. In my view, the fact that the legislature has defined an offence in relation to these realities will not necessarily trigger s. 15(1) of the *Charter*. I think few would venture to suggest that a provision proscribing self-induced abortion could be characterized as discriminatory because it does not apply to men. Such an argument would be absurd. In my view, s. 15(1) does not prevent the creation of an offence which, as a matter of biological fact, can only be committed by one of the sexes because of the unique nature of the acts that are proscribed.

R. v. Hess, [1990] 2 S.C.R. 906, 929. Given the Supreme Court's decisions in cases about the meaning of equality and sex discrimination (in particular, *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219, 59 D.L.R.4th 321, and *Janzen v. Platy Enterprises Ltd.*, [1989] 1 S.C.R. 1252, 59 D.L.R.4th 352, holding that, respectively, pregnancy discrimination and sexual harassment constitute sex discrimination), Wilson, J. cannot have meant that all sex-specific provisions necessarily pass constitutional muster. The *Hess* decision must be understood as saying that an offence directed at only one sex does not *automatically* violate s. 15, leaving open the possibility that it *may* do so if it affects adversely the situation of the disadvantaged group within the meaning of the s. 15 jurisprudence. For more detailed discussion of this issue, see William Black and Isabel Grant, *Equality and Biological Difference*, 79 *Crim. Rep.* 3d 372 (1990).

23. *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342.

24. *Morgentaler*, [1988] 1 S.C.R. at 182-184.

25. 62 D.L.R.4th 634, 646 (1989)(Can.).

26. *Id.* at 636-37.

27. R.S.Q. ch. C-12 (1977) (Can.).

28. *Daigle*, 62 D.L.R.4th at 645-46.

maintaining the injunction up to the Supreme Court of Canada, which reconvened on an emergency basis during the summer recess to hear Ms. Daigle's appeal. In the course of the Supreme Court hearing, it was announced that Ms. Daigle had already obtained an abortion. The Supreme Court completed its hearing of the case, allowed Ms. Daigle's appeal and dissolved the injunction that had been issued. The decision rested upon a relatively narrow doctrinal point: there was no basis in Quebec law for such an injunction to be issued since the foetus does not have a right to life under Quebec law, including the Quebec Charter.<sup>29</sup> The broader policy orientation of the case, however, is revealed in the following statement of the court:

While Anglo-Canadian law is not determinative in establishing the meaning to be given to general terms in the Quebec Charter it is instructive to consider the legal status of a foetus in that body of jurisprudence. It is useful to do so as well to avoid the repetition of the appellant's experience in the common law provinces.<sup>30</sup>

*Sullivan*, then, was argued against this doctrinal backdrop: abortion unrestricted by criminal law,<sup>31</sup> affirmation of the Anglo-Canadian common law and Quebec civil law principles that legal personhood begins at birth,<sup>32</sup> and silence as to the constitutional status of the foetus.<sup>33</sup> With respect to the meaning of "equality" under the Charter, the Court had concluded that the purpose of the equality rights is connected with the alleviation of comparative disadvantage as between persons on the basis of the personal characteristics enumerated in section 15 (sex, race, age, disability, religion, and others) and other analogous characteristics.<sup>34</sup> It had also held that the "larger social,

---

29. *Id.* at 651.

30. *Id.* at 659-60. For an insightful comment, see Donna Greschner, *Abortion and Democracy for Women: A Critique of Tremblay v. Daigle*, 35 MCGILL L.J. 633 (1990).

31. Two years after *Morgentaler*, however, there had been an attempt to recriminalize abortion defeated only by the narrowest of margins. Bill C-43, *An Act Respecting Abortion*, 2nd. sess., 34th Parl., was defeated by a tie vote in the Senate at the Third Reading, January 31, 1991 (*Debates of the Senate*, 2nd. sess., 34th Parl., at 5307). It is most unusual for the Canadian Senate, an appointed body, to defeat legislation sent forward by the House of Commons, the only federal elected body.

The current federal Progressive Conservative government has stated that it will not attempt to introduce further criminal legislation. Interestingly, the defeat of Bill C-43 resulted from opposition from both pro-choice and anti-choice forces. Although the federal government tried to present it as a compromise, pro-choice advocates did not view *prima facie* criminalization of all abortions with exceptions at physicians' discretion as a compromise, and anti-choice advocates would not accept potentially permitting abortions in a wide range of cases unrelated to the "innocence" of the woman—that is, beyond rape and incest victims. While the defeat of Bill C-43 might be viewed as a victory for women, it was also a victory for members of the medical profession whose strong opposition was a crucial factor in the Bill's defeat. This opposition was expressed not only by the medical organizations, but by the large numbers of individual practitioners presently performing abortions who stated that they would cease to do so because of the risk of harassment and criminal prosecution flowing from the proposed legislation.

32. *Daigle*, 62 D.L.R.4th at 663.

33. The Court refrained from deciding the issue, though it was asked to do so in *Borowski* and in *Daigle*.

34. *Andrews v. Law Society of British Columbia*, 56 D.L.R.4th 1, 18 (1988) (Can.).

political and legal context"<sup>35</sup> must be considered in assessing claims of discrimination, saying:

Accordingly, it is only by examining the larger context that a court can determine whether differential treatment results in inequality or whether, contrariwise, it would be identical treatment which would in the particular context result in inequality or foster disadvantage. A finding that there is discrimination will, I think, in most but perhaps not all cases, necessarily entail a search for disadvantage that exists apart from and independent of the particular legal distinction being challenged.<sup>36</sup>

The socio-political backdrop was also significant in four particular respects. First, women in British Columbia, the province in which the *Sullivan* case arose, were (and still are) unable to use the services of registered and licensed midwives. Those who assist in home births, such as the one that went wrong in *Sullivan*, may be accused of violating the Medical Practitioners Act.<sup>37</sup> Home births assisted by midwives, therefore, exist outside the law and attract some social disapproval. This, of course, creates a disincentive for attendants at home births to seek outside assistance if they run into difficulty.

Second, there had been efforts by state agencies, although perhaps not to the same extent as in the United States, to use legal means to control the conduct of women during pregnancy, including forcing women to submit to obstetrical intervention. In British Columbia, child welfare authorities had attempted (unsuccessfully) to establish through the test case of "*Baby R.*" (*Re*)<sup>38</sup> that they could "apprehend" a foetus before birth when the pregnant woman carrying the foetus did not consent to undergo a Caesarian section surgical procedure.<sup>39</sup> Although cases like *Baby R.* implicate women's individual and autonomous decision-making in ways very similar to abortion cases, it may be easier to see them systemically—that is, as reflecting and determining women's status and condition in society. These cases appear to arise most frequently with respect to women of color or women who are economically or socially disadvantaged,<sup>40</sup> while the abortion issue in the abstract is more easily (though inaccurately) characterized as involving already privileged women who simply want to "have it all." Further, cases such as

35. *R. v. Turpin*, [1989] 1 S.C.R. 1296, 1331.

36. *Id.* at 1331-32.

37. The Medical Practitioners Act, R.S.B.C. ch. 254, § 72(2)(d) (1979) defines the performance of midwifery as the practice of medicine. It is an offense to practice medicine if not registered under the Act. *Id.* § 72(1).

38. 53 D.L.R.4th 69 (B.C.S.C. 1988).

39. While the judge determined that pre-birth "apprehension" is invalid, the woman in the case had "consented" to the Caesarian after being told that her foetus was apprehended.

40. Veronika E.B. Kolder, Janet Gallagher & Michael Parsons, *Court-Ordered Obstetrical Interventions*, 316 NEW ENG. J. MED. 1192 (1987). For an analysis of the Canadian jurisprudence, see Isabel Grant, *Forced Obstetrical Intervention: A Charter Analysis*, 39 U. TORONTO L.J. 217 (1989).

*Baby R.* involve something that *could* happen to men (forcible surgery, being locked up, being refused food or intoxicants) whereas abortion cases do not. It requires a greater act of imagination for a man to put himself in the position of a woman who is pregnant and does not wish to be, than for a man to put himself in the position of, say, a patient in a hospital who is forced to undergo medical treatment without consent. Therefore, in the case of forced obstetrical intervention it is easier to see not only that there is a violation of individual rights, but also that a class of persons who lack these rights is a dominated and devalued class.

Third, there are issues about access to abortions and to other reproductive health services. The existence in Canada of publicly funded universal medical and hospital care schemes is a relevant factor. Because abortion is a medical procedure, there is in effect a presumption that abortions, at least when performed within the context of the ordinary practice of hospital-based medicine, should be state funded.<sup>41</sup> But there are systemic access issues arising from actions by the medical profession, hospitals, and provincial governments. Some reproductive rights litigation is aimed at improving access to reproductive health care, and to meaningful choice about reproduction, both in the public and private spheres. For example, there are moves to compel governments to fund abortions in free-standing clinics rather than in hospitals alone.<sup>42</sup>

Fourth, there has been some success in obtaining legislative remedies for pregnant women who suffer discrimination in employment, for example, through exclusion from coverage under employee disability plans. The Supreme Court of Canada decision in *Brooks v. Canada Safeway Ltd.*,<sup>43</sup> establishing that pregnancy discrimination is sex discrimination, supports the proposition that women should not be penalized for being pregnant. The Court pointed out that society as a whole benefits from women's child-bearing

---

41. Legislation removing coverage for abortions from the provincial health care scheme was struck down in *British Columbia* (although on a narrow procedural ground). See *British Columbia Civil Liberties Ass'n. v. British Columbia (Attorney General)*, 49 D.L.R.4th 493 (B.C.S.C. 1988). For a fuller discussion of the effect of the Canadian health care scheme on this issue, see SHEILAH L. MARTIN, *CANADIAN ADVISORY COUNCIL ON THE STATUS OF WOMEN, WOMEN'S REPRODUCTIVE HEALTH, THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS AND THE CANADA HEALTH ACT* (1989).

42. See *R. v. Morgentaler*, 83 D.L.R.4th 8 (N.S.C.A. 1991) (leave granted to appeal to S.C.C. October 7, 1991, No. 22578), in which Dr. Henry Morgentaler was charged with 14 counts of performing unauthorized abortions contrary to provincial legislation which restricted the performance of abortions (and certain other medical procedures) to approved hospitals and prohibited payment for such procedures under the Health Services and Insurance Act unless performed in approved hospitals. The legislation was held to be *ultra vires* the province since in pith and substance its purpose was criminal law (a matter for the federal Parliament). See also *Everywoman's Health Centre Society* (1988) v. Minister of National Revenue, Federal Court of Appeal, A-129-90, 26 November 1991, Décaré, J.A. (as yet unreported), in which the Court ordered the federal Minister to reconsider his deemed refusal of charitable tax status to a free-standing abortion clinic, since the Court held the clinic met the definition of "charitable organization" required by law.

43. [1989] 1 S.C.R. 1219, overruling the Court's own earlier decision in *Bliss v. Attorney General of Canada*, [1979] 1 S.C.R. 183.

activities, yet women are customarily expected to bear the entire burden.<sup>44</sup> Viewing women's reproductive work in this way could have far-reaching effects. The Court's Reasons were consistent with LEAF's intervention in the case, which highlighted the circumstances of all women who, in their own communities, face struggles at every stage in reproduction beginning with control over sexual access to their bodies, through pregnancy, childbirth, and childrearing.

### III. BACKGROUND TO THE *SULLIVAN* CASE

#### A. *The Facts*

Jewel Voth hired Mary Sullivan and Gloria Lemay to assist her with her pregnancy and home birth. Neither Ms. Sullivan nor Ms. Lemay had formal training in midwifery or any formal medical qualifications, although both had some experience with home births and had done background reading on the subject.

The Supreme Court of Canada Reasons in the case summarize Ms. Voth's birth experience this way:

After five hours of second-stage labour, the child's head emerged and no further contractions occurred. Sullivan and Lemay attempted to stimulate further contractions but were unsuccessful. Direct pressure was applied to the uterus, causing soreness to the mother's stomach and back and some bruising. Approximately 20 minutes later, emergency services were called and the mother was transported to the hospital. Within two minutes of arrival, an intern delivered the baby using what the trial judge characterized as "a basic delivery technique." The child showed no signs of life and resuscitation attempts were unsuccessful.<sup>45</sup>

Those concise words do not, of course, capture the horror conveyed by the transcript evidence of the parents and the two birth attendants describing the emergence of the face and part of the head of the full term-foetus;<sup>46</sup> the attendants' efforts to change Ms. Voth's position and to do everything they could to complete the birth; the recognition that the face was losing its pink colour and turning blue; the call to Emergency Services and the arrival of an ambulance with an attendant of considerable upper-body strength who was

---

44. *Id.* at 1243.

45. *Sullivan*, 63 C.C.C.3d 97, 100 (1991).

46. In developing the argument in the case, LEAF struggled with terminology and concluded that the terms "baby" and "child" for an entity not yet born were problematic in some ways, while "foetus" was equally problematic at the stage of full-term birth. The term selected as the least problematic was "full-term foetus."

asked to press down on Ms. Voth's abdomen in an attempt to dislodge the full-term foetus; the trip to the hospital; the delivery by the intern and the unsuccessful attempts to resuscitate the still-born child.

Sullivan and Lemay were jointly charged with criminal negligence causing death to the child of Jewel Voth.<sup>47</sup> They were also jointly charged with criminal negligence causing bodily harm to Jewel Voth.<sup>48</sup>

They were convicted at trial by Judge Jane Godfrey of criminal negligence causing death to the child on the premise that a full-term foetus in the process of being born is a "person" within the meaning of section 203 of the Criminal Code.<sup>49</sup> Judge Godfrey based the finding of criminal negligence on the following conclusions:

First, had this child and mother been transported to hospital even as late as one o'clock, the child would have lived; secondly, had the accused possessed the skills of the intern at St. Paul's Hospital, the child would have lived.<sup>50</sup>

Judge Godfrey acquitted Sullivan and Lemay on the charge of criminal negligence causing bodily harm since in her view there was no bodily harm.

In the British Columbia Court of Appeal, the conviction for criminal negligence causing death to the child of Jewel Voth was quashed. However, the acquittal for criminal negligence causing bodily harm was set aside and a conviction on that charge was entered. The court of appeal held that there was bodily harm to Ms. Voth since "the child when it is in the birth canal remains part of the mother, as a matter of law."<sup>51</sup>

The two women sought leave to appeal to the Supreme Court of Canada, arguing that the case would provide an important opportunity for the Court to

---

47. They were charged with this offence under then § 203 of the Criminal Code, which provided that "Every one who by criminal negligence causes death to another person is guilty of an indictable offence and is liable to imprisonment for life." The definition of "person" in the Criminal Code in § 2 was as follows:

"every one", "person", "owner" and similar expressions include Her Majesty and public bodies, bodies corporate, societies, companies and inhabitants of counties, parishes, municipalities or other districts in relation to the acts and things that they are capable of doing and owning respectively.

R.S.C. ch. C-34, § 203 (1970)(Can.).

48. They were charged with this offence under the Criminal Code § 204, which provided that "Every one who by criminal negligence causes bodily harm to another person is guilty of an indictable offence and liable to imprisonment for ten years." *Id.* § 204.

49. For text of § 203, see *supra* note 47. Still, the foetus would not have been a "human being" for the purpose of a different Criminal Code section, § 206, which read:

(1) A child becomes a human being within the meaning of this Act when it has completely proceeded, in a living state, from the body of its mother whether or not

- (a) it has breathed,
- (b) it has an independent circulation, or
- (c) the navel string is severed.

*Id.* § 206.

50. *R. v. Sullivan*, 31 C.C.C.3d 62, 68 (B.C.S.C. 1986).

51. *R. v. Sullivan*, 43 C.C.C.3d 65, 80 (B.C.C.A. 1988).

clarify the law with respect to the status of the foetus. Leave to appeal was granted, and LEAF was given permission to intervene. Subsequently REAL (Realistic, Effective and Active for Life) Women, a right-wing, anti-choice group, applied for and was granted permission to intervene. LEAF was aware, when considering its position, that the appellants would be arguing that the foetus is neither a person (so there could be no conviction of criminal negligence causing death) nor part of the pregnant woman's body (so there could be no conviction of criminal negligence causing bodily harm). REAL Women would be arguing that the foetus is a person with a right to life from the moment of conception. The Attorney General of British Columbia, the respondent to the appeal, was unlikely to argue a position inconsistent with that of REAL Women, since the British Columbia government of the day was headed by a strong opponent of abortion. Indeed, the Attorney General launched an appeal from the court of appeal's acquittal on the charge of criminal negligence causing death to the child of Jewel Voth, thereby enabling the "foetus as person" arguments to be made.<sup>52</sup> LEAF therefore considered it would be the only participant arguing from a feminist perspective of any kind, and was likely to be the only participant to be arguing forcefully for a position consistent with choice on abortion and reproductive health care.

### *B. The Development of LEAF's Argument*

LEAF's work on Supreme Court of Canada interventions has traditionally been done by a collective of academics and practitioners. This tradition continued in *Sullivan* with a working group that included legal academics Christine Boyle, Nitya Duclos, Isabel Grant, Catharine MacKinnon and myself, practitioner and Chair of LEAF's Legal Committee Mary Eberts, and LEAF's Director of Litigation Helena Orton. The National Legal Committee selected Mary Eberts and myself to argue the case.<sup>53</sup>

The *Sullivan* case was particularly challenging for LEAF for the following reasons:

(1) Support for midwifery is consistent with women's empowerment and with access to high-quality health care; yet so is support for a legal system that imposes criminal sanctions upon *negligent* assistance with childbirth, whether by midwives, medical practitioners or anyone else. There was a risk that taking any position other than that of opposition to conviction in the case would be construed as lack of support for midwifery, rather than lack of support for two individual, non-accredited "midwives" who were found, on a solid evidentiary basis, to have been negligent.

---

52. The stated reason for bringing this appeal was that a method of convicting the two accused should be available if the court decided against the Crown on the main appeal. However, the appellants suggested in argument that the appeal was brought in order to accommodate REAL Women. The Supreme Court in its Reasons rejected that argument. *Sullivan*, 63 C.C.C.3d at 105-6.

53. Helena Orton also appeared in the Supreme Court at the hearing.

(2) The story told in this case was heart-rending, carrying with it the image of the full-term foetus, partially born but slowly suffocating. The case could hardly have provided a more difficult platform upon which to argue a pro-choice position (both with respect to abortion and with respect to reproductive health care). Yet a conclusion that the foetus is a person for the purposes of the criminal negligence causing death charge would severely undermine the pro-choice position.

(3) There has been a tendency for the pro-choice position to be subsumed in a privacy-autonomy analysis that refuses to talk about the foetus, although perhaps to a lesser extent in Canada than in the United States. The foetus in this analysis is sometimes characterized as no more than a part of the woman's body, no matter what its stage of development. On the other hand, many women's experiences of pregnancy and childbirth indicate the "part-of-the-body" characterization is inaccurate and incomplete.

(4) The appellants' position that the foetus is neither a person nor part of the woman's body but instead an "independent entity" seemed creative, yet it was highly dangerous to the pro-choice position on abortion and reproductive health care. The interest of the state or of others in protecting the foetus-as-independent-entity could be used against the pregnant woman in the same way as the state's or others' interest in protecting the foetus-as-person.

(5) There was not a great deal of analysis anywhere, and none to be found in the legal discourse, of the relationships between fetuses and pregnant women. In other words, pregnant women's experiences of pregnancy had not informed the development of legal doctrine or theory. Yet the *Sullivan* case required resolution of issues presupposing such doctrine and theory.

Before deciding upon the position to take in the argument, the working group widely circulated a "Consultation Document" in the women's community, including individual women and organizations involved with reproductive health issues, feminist academics in law, philosophy and the social sciences, community organizations and national women's groups. This document described the issues in the case, set out the kinds of dilemmas described above and suggested some possible positions LEAF could take in the case. After circulation of the document, there were meetings with various groups and individuals, and a consensus was achieved among the working group as to the position LEAF should take, based upon these consultations. There were several collective drafting sessions and input from a large number of persons.

#### IV. THE FACTUM

The Factum is set out here verbatim.<sup>54</sup> Although signed by the writer and Mary Eberts as counsel, it is very much a product of a collective drafting process involving all members of the working group.

---

54. The factum is presented in its original form; citations conform to Canadian citation style.

SUPREME COURT OF CANADA  
(On Appeal from the Court of Appeal  
of British Columbia)

B E T W E E N:

MARY CHARLOTTE SULLIVAN  
and GLORIA JEAN LEMAY

Appellants

- and -

REGINA

Respondent

A N D B E T W E E N:

REGINA

Appeal  
(Crown)

- and -

MARY CHARLOTTE SULLIVAN  
and GLORIA JEAN LEMAY

Respondents  
(Accused)

FACTUM OF THE INTERVENER  
WOMEN'S LEGAL EDUCATION  
AND ACTION FUND

PART I - FACTS

*PROCEDURAL HISTORY*

I. The Appellants were charged with criminal negligence causing death to a person, namely, "the baby of Jewel Voth" (first count), and criminal negligence causing bodily harm to a person, namely Jewel Voth (second count), contrary to sections 203 and 204 respectively of the *Criminal Code* (now sections 220 and 221).

II. The criminal proceedings arose from the attendance of the Appellants in the home of Jewel Voth to assist in the birth of her first child. The precise event giving rise to the charge was described by the trial judge as "the death

of a child in the course of a home birth where contractions ceased after the head was delivered and the two accused were unable to deliver the rest of the child". She found that "the head was born alive and that the child died when the accused were unable to complete this delivery".

Reasons for Judgment of Her Honour Judge Godfrey  
("Reasons"), *Appeal Case*, p. 18 and p. 29

III. Her Honour Judge Godfrey found the accused guilty on the first count, holding that the definition of "person" in section 203 is broad enough to cover the situation where "the child was alive when the head was born and died because the accused were unable to complete the birth". She declined to convict the accused of causing bodily harm to Jewel Voth, who, she says "miraculously suffered only what in effect would be bruising". However she states that had she reached the opposite conclusion with respect to the "person" argument, she would have found the accused guilty of criminal negligence causing bodily harm to Jewel Voth "because I would have concluded that the child was a part of Jewel Voth at the time of its death".

Reasons, *Appeal Case*, pp. 31-32

IV. The Court of Appeal concluded that the trial judge erred in interpreting the term "person" so as to produce a conviction on the first count. It entered a conviction on the second count, reasoning that "from the conclusion that the line of demarcation as a matter of law is live birth, in our opinion, for the purposes of count 2, the child when it is in the birth canal remains part of the mother, as a matter of law".

Reasons for Judgment of the British Columbia Court of Appeal,  
*Appeal Case*, p. 58

V. The Appellants appeal their conviction on the second count and seek to convince this Honourable Court that neither the trial judge nor the Court of Appeal was correct. They refer to the foetus in this case as "baby Voth" and argue that it was neither a person (as found by the trial judge) nor part of the mother (as concluded by the Court of Appeal). Rather, they argue that "baby Voth" was "an entity separate and apart from its mother", and had a "separate existence, in law, in the womb". Accordingly, they argue, they cannot be convicted of either of the offences with which they are charged.

*Appellants' Factum*, paras. 2, 13, 24, 29, 35

VI. Responding to the appeal, the Crown argues that the interpretation of the word "person" by the Court of Appeal is entirely consistent with all the leading authorities on the point, and states that the Appellants' position that the common law recognizes the foetus as an entity separate and apart from the mother is incorrect. However, the Crown also brings its own appeal against the decision of the Court of Appeal, raising the issue of whether the Court erred in holding that a foetus is not a "person" within the meaning of section 203 of the *Criminal Code*.

*Respondent's (Crown's) Factum*, paras. 25-26, pp. 13-14

*Appellant's (Crown's) Factum*, para. 16, p. 5

VII. LEAF has been granted status to intervene in the appeals of both the Appellants and the Crown. This factum responds to issues raised by both appeals.

### *THE FACTS*

VIII. In addition to the facts set out by the Appellants and the clarifications and additions of the Crown, LEAF highlights the following facts:

- (a) The trial judge found Ms. Voth to be "an astonishingly precise and careful witness" and "very reliable in terms of describing what was going on in her own body...". Ms. Voth made considerable efforts to provide herself with adequate and sensitive care during her pregnancy. Mr. Voth's evidence was that if the baby had been delivered safely, Jewel Voth "would have been happy".

Reasons, *Appeal Case*, pp. 18-20 and p. 28

- (b) Dr. Morrell, the family physician seen by Jewel Voth, noted in the initial physical examination that she had a narrow sub-pubic arch, but the trial judge accepted Ms. Voth's evidence that this was never communicated to her.

Reasons, *Appeal Case*, p. 19

- (c) The trial judge found that during the pregnancy, the Voths became “disenchanted” with both Dr. Morrell and the hospital where he had his privileges. They first decided to stay with the hospital, in spite of this, so that they could have Dr. Morrell attend the birth. Later, Jewel Voth tried to discuss the option of a home birth with Dr. Morrell. He attempted to dissuade her with “a graphic description” of a woman who had haemorrhaged very badly after delivery and had been saved only because she was in hospital. The reasons of the trial judge contain no reference to any other advice on the advantages and disadvantages of home birth being received from Dr. Morrell. Eventually, Ms. Voth decided not to have Dr. Morrell attend the birth. The trial judge attributed this decision to Ms. Voth’s reaction to his policy on episiotomies.

Reasons, *Appeal Case*, pp. 18-19

- (d) The trial judge agreed that the skills offered by a competent midwife would certainly seem to enhance the birth process for women.

Reasons, *Appeal Case*, p. 24

- (e) The Voths initially hired Mary Sullivan for private pre-natal classes and as a labour coach for their hospital delivery. While continuing to see Dr. Morrell for pre-natal visits, Jewel Voth eventually made plans with Ms. Sullivan to have a home birth.

Reasons, *Appeal Case*, pp. 18-19

- (f) Gloria LeMay was Ms. Sullivan’s “teacher” and the two of them generally operated as a team. The Appellants had no formal training, and sought therefore to be assessed by the trial judge on a more lenient standard than that which would be applied to persons with such training.

Reasons, *Appeal Case*, p. 30 and p. 23

- (g) The Crown at trial advanced three types of “bodily harm” that had been done to Jewel Voth: pain in the legs from a lengthy period of squatting, the pain and irritation to her stomach and back from fundal pressure exerted in an ambulance attendant’s attempt to expel the baby, and a cut made when an episiotomy was started.

Reasons, *Appeal Case*, p. 31

- (h) The trial judge noted that the ambulance attendant was a “power lifter”, who was pushing as hard as he could on the fundus, and observed, “It is astonishing that nothing ruptured”. Ms. Voth’s labour began at 11:00 p.m. in the evening and the baby’s head emerged at 2:00 p.m. the next day. When she was admitted to hospital at least half an hour after that she was showing “symptoms of exhaustion ... fever ... sunken eyes... volume depletion”.

Reasons, *Appeal Case*, pp. 32 and pp. 12, 21, 30

## PART II - ISSUES

IX. In this factum, LEAF deals with the following issues which are argued by the parties to these appeals:

- (a) Does criminal negligence during the process of childbirth causing the full-term foetus not to be born alive constitute the death of a person within the meaning of section 203 (now 220) of the *Criminal Code*?
- (b) Does criminal negligence during the process of childbirth causing the full-term foetus not to be born alive constitute bodily harm to the woman giving birth, within the meaning of section 204 (now 221) of the *Criminal Code*?

X. LEAF will argue, using sections 7, 15, 28 and 1 of the *Charter*, that:

- (a) the foetus is not a “person” within the meaning of section 203 of the *Criminal Code*, or any other kind of entity separate from the woman in whose body it is;
- (b) the foetus is in and of the woman for the purposes of section 204 of the *Criminal Code*; LEAF thus states that it is a mischaracterization of the Court of Appeal’s reasons to say that it held that the foetus is “simply a disposable part of the woman’s body”, as do the Appellants in paragraph 29 of their factum, and urges this Honourable Court to reject such mischaracterization; and
- (c) Jewel Voth suffered “bodily harm” within the meaning of section 204 of the *Criminal Code*:

- (i) through the death of her full term foetus; and
- (ii) through the physical consequences of unduly prolonged labour and the Appellants' failed attempts to complete the birth.

### PART III - ARGUMENT

#### A. INTERPRETATION OF SECTIONS 203 AND 204 OF THE CRIMINAL CODE MUST BE GUIDED BY THE CHARTER'S GUARANTEES OF SEX EQUALITY

- (i) The Interpretation of the Legal Status of the Foetus and Legal Treatment of Pregnant Women Raise Constitutional Sex Equality *Issues*

XI. LEAF invokes the *Charter's* sex equality guarantees in order that they might shape the interpretation by this Honourable Court of the language of sections 203 and 204 of the *Criminal Code*. Entailed in this focus on the sex equality guarantees is a restoration of the pregnant woman to a central place in the legal analysis. Resulting from such a focus, in LEAF's submission, will be an interpretation of the *Code*, consistent with the *Charter*, that furthers women's equality rather than entrenching inequality. Why such an approach is necessary can be appreciated by considering what has happened in this case to Jewel Voht herself.

XII. Jewel Voht desired a baby. She experienced pregnancy, a lengthy, painful and wasted delivery, and anguish due to the loss of that expected baby. Yet Jewel Voht has receded into the background of this case as legal issues relating to the characterization of the foetus are defined and then debated. The issues have been structured in a way that fails to place the pregnant woman, in whose body a foetus is, at the centre of the legal analysis.

XIII. The legal status of the foetus—even of a full-term foetus—cannot be addressed without addressing the legal status of the woman in whose body it is. Similarly, analysis of bodily harm to a woman in the circumstances of this case should not focus on what happened to the foetus disconnected from the woman seeking to give birth.

XIV. The *Canadian Charter of Rights and Freedoms* addresses the legal status of women in the following sections, among others:

- 7. Everyone has the right to life, liberty and security of the person and

the right not to be deprived thereof except in accordance with the principles of fundamental justice.

15.(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

28. Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

XV. This Honourable Court has given a purposive interpretation to section 15, describing its purpose as the promotion of the equality of socially disadvantaged groups. Through its use of examples, and its post-*Charter* interpretation of human rights legislation, it has also recognized that women are a group disadvantaged on the basis of sex.

*Robichaud v. Canada (Treasury Board)*, [1987] 2 S.C.R. 84, at pp. 89-92 *per* LaForest, J.

*Action Travail des Femmes v. C.N.R.*, [1987] 1 S.C.R. 114, at pp. 1142-1145, *per* Dickson, C.J.C.

*Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, at pp. 170-175, *per* McIntyre, J.

*Brooks v. Canada Safeway*, [1989] 1 S.C.R. 1219, at pp. 1237-1238; 1241-1250 *per* Dickson, C.J.C.

*Janzen v. Platy Enterprises*, [1989] 1 S.C.R. 1252, at pp. 1276-1282; 1284-1285 *per* Dickson, C.J.C.

*R. v. Turpin*, [1989] 1 S.C.R. 1296, at pp. 1330-1333, *per* Wilson, J.

XVI. In particular, this Court has recognized that women have been socially disadvantaged because they bear children. In the context of human rights legislation, it has held that disadvantaging women on the basis of pregnancy constitutes discrimination on the basis of sex.

*Brooks*, supra, paragraph 15

XVII. The Court's section 7 jurisprudence has supported a woman's security of the person and liberty in the context of decisions about procreation.

*R. v. Morgentaler*, [1988] 1 S.C.R. 30, at pp. 56-63; 73 per Dickson, C.J.C. and pp. 171-173 per Wilson, J.

(ii) Development of Doctrine Concerning the Legal Relations of Woman and Foetus Must Not Further Entrench Sex Inequality

XVIII. LEAF's approach to interpretation of sections 203 and 204 proceeds from the recognition that pregnancies occur within a context of sex inequality, an inequality which encompasses women's experiences of fertility and infertility, conception and contraception, pregnancy and the end of pregnancy, whether through miscarriage, abortion, or birth and child-rearing. The point is not just the obvious one that only women directly experience pregnancy and birth, but that it is women who because of their sex are subjected to social inequality as a result of the whole range of experiences around procreation.

XIX. Although reproduction has major consequences for both women and men, its impact on women and men is not the same, because of the conditions of social inequality within which women live and experience pregnancy and childbirth. Women often do not control the social conditions under which they become pregnant. The social context of sex inequality between men and women often denies women control over the reproductive uses of their bodies because it denies women control over sexual access to their bodies. Sexual access is often forced or pressured. Frequently, contraception is inadequate or unsafe and sex education misleading or unavailable. Poverty and enforced economic dependence often undermine women's physical integrity and sexual self-determination. It is not realistic to rely on the individual woman's sense of self-respect as a bulwark against these life circumstances; social supports for that self-respect are simply too frail.

Margrit Eichler, "Unmarried Parenthood", pp. 231-241 in *Families in Canada Today*, 2d ed., Gage, Toronto, 1988

Catharine MacKinnon, "Rape: On Coercion and Consent", pp. 171-183; 295-299 in *Toward a Feminist Theory of the State*, Harvard University Press, 1989

Linda MacLeod, *Battered But Not Beaten* (Canadian Advisory Council on the Status of Women, 1987), pp. 3-7;19-30

Committee on Sexual Offences Against Children and Youth, *Report: Sexual Offences Against Children* (Minister of Supply & Services Canada, 1984), pp. 195-233

XX. Further, the social consequences both of being pregnant and of not being pregnant are not controlled by women, whatever their age or social station. Historically, women's role in childbearing has provided an occasion for women's social disadvantage. Women's autonomy in making fertility decisions has been affected by a number of outside influences, ranging from government enforced sterilization to availability and management of programs ostensibly intended to benefit the infertile. Decision-makers in health care and government have left women little choice about the type of care they will receive during pregnancy, who will attend them in childbirth and whether the birth will be in hospital or not; social and economic supports for pregnant women are often seriously inadequate.

*Re Mabel P. French* (1905), 37 N.B.R. 359, *per* Barker, J. at p. 366 (N.B.S.C.)

*E. (Mrs) v. Eve*, [1986] 2 S.C.R. 388, at pp. 400-401; 418-424; 427-430; 434, *per* LaForest, J.

*Walker et al. v. Pierce*, 560 F 2d. 609 (U.S.C.A., 4th Cir., 1977)

Christine Overall, "Infertility", chapter 7 in *Ethics and Human Reproduction* (Boston, Allen & Unwin, 1987), pp. 137-165

Task Force on the Implementation of Midwifery in Ontario, *Report* (Toronto, Queen's Printer, 1987), pp. 69-70; 79-82

Murray Enkin et al., "Social, financial and psychological support during pregnancy and childbirth", pp. 11-15 in *A Guide to Effective Care in Pregnancy and Childbirth*, Oxford University Press, 1989

XXI. After birth, women are traditionally allocated primary responsibility for the intimate care of children. However, women often do not control the circumstances under which they rear children, because of poverty, inadequate housing, lack of day care, and the structuring of the world of paid work on the assumption that everyone in it—women included—has a life cycle like the male's and the same freedom from child care responsibilities that has long characterized male workers. In these circumstances, women certainly do not, and cannot, control the impact which childrearing will have in their own lives.

Canadian Advisory Council on the Status of Women, *Women and Labour Market Poverty* (1990), pp. 7-35

National Council of Welfare, *Report: Women and Poverty Revisited* (Minister of Supply & Services, Canada, 1990), pp. 38-83; 128-129

Margrit Eichler, "Types of Childcare Used", pp. 318-324 in *Families in Canada Today*, supra, paragraph 19

Pat Armstrong, *Labour Pains: Women's Work in Crisis* (Women's Press, 1984), pp. 19-21, 47

Linda MacLeod, *Wife Battering in Canada* (Minister of Supply & Services Canada, 1980), pp. 29-31

XXII. By contrast, men are not comparably disempowered by society through their reproductive capacities. No one forces them to impregnate women or to bear children. They are not generally required by society to spend their lives caring for children to the comparative preclusion of other life pursuits.

XXIII. Thus, it is women who are caught, in varying degrees, between the reproductive consequences of sexual use and aggression on the one side and the economic and other consequences of the sex role allocations of labour in the market and family on the other. Women are prevented from having children they do want and forced to have children they do not want and cannot want because they cannot responsibly care for them. LEAF submits that this reality is best described as one of sex inequality.

XXIV. To say that women face sex inequality as a result of—and in—their procreative functions is to acknowledge that in our society procreation

is socially gendered. That is, differences between men and women exist, in spite of the camouflaging effects of gender neutral language, and those differences are socially constructed, not biologically determined. When a teenager gets pregnant because of the negative social connotations associated with contraception, it is a young woman who is pregnant. When miscarriage results from physical assault it is a woman who was beaten. When there is not enough money for another child, and no access to abortion, it is a woman who is forced to have a child she cannot responsibly care for. When there is no choice between a home and a hospital delivery, it is the labouring woman who is forced to take risks she has not chosen either in hospital or at home. When someone must care for the children, it is almost always women who do it, without their work being valued either in terms of money or cultural status.

XXV. Establishing equality between the sexes in the reproductive sphere would require reciprocity of respect, parity of regard for physical dignity and personal integrity, shared work, and a mutuality of sexual initiative and control over intimacy. To be able to realize these values, women need at least full citizenship, nonimpoverishment, racial and cultural equality, and sexual self-determination.

XXVI. A legal system committed to equality for women in the reproductive sphere might well contain laws ensuring that pregnant women are entitled to full information in order to enable them to make an informed choice about a home or hospital birth. It might ensure that fully-trained midwives with adequate support services are available, and that appropriate measures, short of the criminal law, exist to ensure the professional competence of such midwives. It is the result of the continued inequality of women in our society that Jewel Voth had to make her decisions in this case without the benefit of any such measures.

XXVII. Although paid considerable lip service, these values and goals are not lived as social norms and only unevenly inform law. LEAF submits that to be consistent with the *Charter's* mandate of sex equality in the reproductive area, legal interpretation must be guided by these values and goals, and may not further entrench social realities to the contrary. Accordingly, LEAF urges that this Honourable Court adopt an interpretation of the *Criminal Code* sections at issue here that will enhance women's equality (rather than further entrench their inequality) by ensuring that the status of the foetus is not considered apart from the woman who carries it.

- (iii) Development of Doctrine Concerning the Legal Relations of Woman and Foetus, To Be Consistent with Charter Sex Equality Guarantees, Must Take into Account the Experiences of Pregnant Women

XXVIII. Because our legal system has been developed historically almost entirely by men, without the presence of women as equal participants, and in a society characterized by the subjection of women, it has tended to view pregnancy from the standpoint of the outsider or observer rather than the participant. While some of the approaches of that legal system, like the conclusion that the foetus does not become a person until fully emerged in a living state from the body of the woman, may coincide with the approaches that might characterize a legal system and a society where women are equal partners, the "outsider" perspective of our legal system has produced two phenomena which are particularly troublesome in the context of this case. One of these phenomena relates to our method of legal reasoning—particularly reasoning by analogy—and its ability fully to encompass the experience of pregnancy. The second of these phenomena concerns the substantive treatment of pregnancy and the foetus in our law. In this case, these two phenomena intersect, providing a difficult challenge to our legal system and a serious potential threat to women's equality rights.

XXIX. To describe the first of these phenomena, LEAF points out that traditionally, legal method proceeds by analogy and distinction, making it tempting to compare the relationship between a pregnant woman and her foetus to relations already mapped by law. However, there are no adequate legal analogies to pregnancy and childbirth and attempts to find them distort reality. Had women not been excluded from participation in the legal system, the unique relationship between the woman and her foetus and the experience of pregnancy in the life of a woman—hardly new facts—might have engendered their own fundamental legal concepts and doctrines, as elaborate as, for example, the doctrines dealing with the legal relationship between partners in a commercial venture or between employer and employee.

XXX. Recognizing these shortcomings in our method of conceptualizing the legal relations of woman and foetus produces a method of analysis that seeks to incorporate the perspective of women in the development of legal doctrine relating to reproductive issues. Such a method is an analytical approach consistent with equality as a goal of the legal system because it expands the point of view informing development of legal doctrine beyond the outsider's perspective to include the perspective from the experience of women (distinguished from the subjective perceptions of all women or any individual

woman).

XXXI. This Court recognized the validity of approaching the elaboration of legal doctrine in a manner that recognizes the realities of women's lives in *R. v. Lavallee*. That decision was based upon a recognition that it is predominantly women who experience spousal abuse and that, in the interests of equality, legal doctrine had to be made to respond to women's experience of threats to life or health within the context of an abusive relationship. It was not necessary to assume that all women shared these experiences to conclude that the adaptation of legal doctrine was appropriate.

*R. v. Lavallee* (1990), 108 N.R. 321, at pp. 342-347 *per* Wilson, J.

*Tremblay v. Daigle*, [1989] 2 S.C.R. 530 at pp. 536-537

XXXII. Turning now to explore the impact of the outsider's perspective on substantive law in this area, LEAF notes that the outsider standpoint has led, especially in recent times, to a tendency to focus on observing and controlling the pregnant woman in the interest—and the name—of her foetus. Those sharing this focus have striven to give it legal shape, by urging that courts intervene, on behalf of the foetus, in pregnancy and childbirth—and even in the lives of non-pregnant, but fertile, women. Recent technological innovations have fuelled the development of this phenomenon. For example, ultrasound viewing of the foetus has provided the basis for seeing the foetus as a free-floating independent entity, rather than situated within and interconnected with the pregnant woman. Seeing a foetus from an outside perspective, often opposed to the woman, rather than in terms of its relationship with the pregnant woman, clearly poses grave risks to women's equality and ultimately to the welfare of the foetus as well. It ignores the fact that throughout history women have been the primary guardians of the welfare of the foetus.

Anne Oakley "Getting to Know the Foetus", pp. 155-186 in *The Captured Womb: A History of the Medical Care of Pregnant Women*, Basil Blackwell, 1984, 1986

Rosalind Pollack Petchesky, "Foetal Images: the Power of Visual Culture in the Politics of Reproduction", pp. 57-80 in Michelle Stanworth, ed., *Reproductive Technologies: Gender, Motherhood and Medicine*, U. of Minnesota Press 1987

Isabel Grant, "Forced Obstetrical Intervention: A Charter Analysis", (1989) 39 *University of Toronto Law Journal* 217

Edward Keyserlingk, "Clarifying the Right to Prenatal Care", 4 *Health Law in Canada* 36

Paragraph 40, *infra*

XXXIII. Positions adopted by others in this case reveal the influence of both these results of the "outsider" perspective. The arguments of the Appellants and the Intervener, R.E.A.L. Women, that the foetus is a separate entity or a person, see the foetus as an entity independent of the pregnant woman. At the other end of the continuum, to characterize the essence of Court of Appeal's conclusion as a holding that the foetus is "simply a disposable part of the woman's body", reveals the shortcomings of argument by analogy in this area of the law, ignores the complexity and uniqueness of the relations between a woman and her foetus, and submerges the woman's experience of pregnancy.

*Appellants' Factum*, paras. 15, 29

XXXIV. By contrast, LEAF's argument focuses on the relationship between a pregnant woman and her foetus, aims to grasp its uniqueness, and situates pregnancy in the legal and social context of sex inequality in a way that makes clear the relationship of this case to women's equality rights in the reproductive area. To do so is essential because while the issues in this case focus on the *Criminal Code*, the submissions of the parties to the two appeals make it clear that any decision on whether the term "person" includes the child in the process of birth, or whether a full-term foetus being born is part of the woman giving birth, will have potentially far reaching implications for women, both in jurisprudence under the *Canadian Charter of Rights and Freedoms* and in the law generally.

#### B. INTERPRETATION OF SECTIONS 203 AND 204 OF THE CRIMINAL CODE

##### (a) *The Foetus is Not a Person*

XXXV. The foetus is not a person or any other kind of separate entity, as has been recognized in our legal system. This conclusion is the only one consistent with the equality of women as guaranteed by the *Charter*.

XXXVI. The position in the case law that a foetus becomes a “person” when it has fully emerged in a living state from the body of its mother is consistent with adopting the perspective of the pregnant woman and with the facts that the pregnancy is the woman’s and the foetus stays in her body until the point of completed live birth.

Reasons of the Court of Appeal, *Appeal Case*, pp. 54-56

*Tremblay v. Daigle*, supra, paragraph 31, at pp. 552-565; 567-570

XXXVII. The selection of complete live birth as the time and place to establish rights as a “person” is consistent with women’s experience of pregnancy and birth. While pregnant women may have different attitudes toward the personhood of the embryo or foetus, depending on the particular woman’s religious beliefs, stage of the pregnancy, desire for the child, and many other factors, and these views may change over the course of pregnancy, the empirical reality of the fully emerged live child is something around which all of these experiences can converge. As well, both the pregnant woman, who has experienced the pregnancy as a process interior to her, and her partner, for whom it has been an exterior process, begin at birth to share an exterior perspective on the newborn child.

XXXVIII. Moreover, establishing the full emergence of the live child as the beginning of personhood takes account of the fact that live birth, even of the full-term foetus, is not inevitable. As Jewel Voth found to her sorrow, the perils of the birth process, while now diminished through improved maternal health, and availability of professional help, have not been removed altogether.

XXXIX. LEAF adopts the submissions of the Crown as respondent in its factum at paragraphs 25 to 27, and urges that this Honourable Court decline to accept the positions advanced by R.E.A.L. Women and the Appellants, which separate foetus and woman and could endow the foetus with an identity and rights of its own.

*Respondent’s (Crown’s) Factum*, pp. 13-15

XL. A foetus so independently endowed is potentially capable, if only through the interventions of others, of having legal relations with persons other

than the pregnant woman (e.g. the father or a curator). The definition of its interests by those others almost invariably brings them into conflict with the rights and interest of the woman.

*In re A.C.* 573 A. 2d 1235 (D.C. App., 1990)

*Raleigh Fitkin-Paul Morgan Memorial Hospital v. Anderson*,  
201 A. 2d 537 (N.J.S.C., 1964)

*Jefferson v. Griffin Spalding County Hospital Authority et al.*,  
274 S.E. 2d 457 (Ga. S.C., 1981)

*Taft v. Taft*, 446 N.E. 2d 395 (Mass., 1983)

*In re Ruiz*, 500 N.E. 2d 935 (Ohio C.A., 1986)

*Cox v. Franklin Cty. Court of Common Pleas*, 537 N.E. 2d 721  
(Ohio C.A., 1988)

*In re Troy D., a Minor*, 215 Cal. App. 3d 889 (Calif. C.A.,  
1990)

*Paton v. British Pregnancy Advisory Service Trustees*, [1979]  
Q.B. 276, aff'd at [1987] 1 All E.R. 1230 (sub. nom. *C. v. S.*)  
and *Paton v. United Kingdom* (1980), 3 E.H.R.R. 408

*Re F (in utero)*, [1988] 2 W.L.R. 1288 (C.A.)

*Tremblay v. Daigle*, supra, paragraph 31

*Mack v. Brandenburg* (1988), 61 Alta L.R. 236 (Q.B.)

*Re Baby R.* (1988), 15 R.F.L. (3d) 225 (B.C.S.C.)

*Re Children's Aid Society of Belleville and T.* (1987), 59 O.R.  
(2d) 204 (Ont. Prov. Ct. Fam. Div.)

*Re Children's Aid Society for the District of Kenora and J.L.*  
(1981), 134 D.L.R. (3d) 249 (Ont. Prov. Ct. Fam. Div.)

XLI. Clothing the foetus with independent legal and constitutional rights

may lead to the foetus having a right to the use of a woman's body, or a right to medical treatment that overrides the welfare of the pregnant woman—rights to be asserted over the woman by the putative father, a doctor, a self-appointed foetal curator or an arm of the State. The approaches of both the Appellants and the Intervener R.E.A.L. Women could lead to a legal analysis in which the pregnant woman is treated as either not present at all (the “born in the imagination” approach promoted by technological imaging of the foetus) or simply present as a breeding container. Neither is consistent with equality for women.

David R. Field, “Maternal Brain Death During Pregnancy: Medical and Ethical Issues” (1988) 260 JAMA 816

(b) *The Foetus Is In and Of the Pregnant Woman*

XLII. For the purposes of section 204 of the *Code*, what is important is that the foetus is in the woman's body. This is the case right up to the point where the child has fully emerged in a living state from her body, as recognized by section 206 (now 223) of the *Code*. Even a full-term foetus whose head has been (in the words of the trial judge) “born”, is still largely in the woman's body.

XLIII. Not only is a foetus in the woman but it is also “of” her in that it is interconnected with her in many intricate and intimate ways.

XLIV. While in and of the pregnant woman, the foetus is not just another body part, as the Appellants characterize the Court of Appeal decision. It is not analogous to an appendix, which is the Appellants' suggested comparison. The foetus and the pregnancy are not even analogous to those parts of the woman's body, like her breasts and vagina, which have specific gender connotations. A sex equality perspective lets us see that what is a foetus to others is lived by the pregnant woman through her pregnancy. Pregnancy is not, in fact or in social meaning, like a “body part”, even a female body part. Pregnancy has many cultural meanings which have significant consequences for women. It can be an emblem of female inferiority or adulation, of elevation or denigration, of heightened or lowered social status. It can bring pain or joy, fear or hope, dreams or dread of the future, and closeness or estrangement between women and between women and men. It can give a new sense of the meaning of life and new depth to the experience of family. It can attract violence against the woman, sentimentality towards her, and attempts to control her, and it can give rise to financial cost and

disadvantage and the need for difficult decisions. Women have lost jobs and have been stigmatized and excluded from public life because they are pregnant, jobs and access they had in spite of being biological females. No body part, not even one evidently emblematic of gender (like a breast), has the profound and distinct effect on women's social destiny that pregnancy and the possibility of pregnancy can have.

XLV. The intimate and complex connections between the pregnant woman and her foetus are unique, and feature many ways in which the foetus is quite unlike a body part. The foetus is ordinarily created through intercourse, a social relation which has impregnation as a consequence. During pregnancy, a woman experiences wide-ranging physiological changes that only the pregnancy initiates; without the foetus, they will not occur. From its outset, the connection between the pregnant woman and her foetus is expected to end and it inevitably does end, whether through spontaneous or planned abortion or through birth. Further, the foetus carried to term involves the commitment of almost one year of a woman's life to the creation of a child.

XLVI. Yet the foetus is deep within the body of a pregnant woman, connected to many of her body's systems. The two are jointly nourished. There is no access to the foetus except through the pregnant woman; whatever happens to the foetus happens to the pregnant woman but not always in the same way, and whatever happens to the pregnant woman happens to the foetus but not always in the same way. Through her body, the pregnant woman perceives and experiences the foetus in ways that no one else can duplicate; she alone can witness the foetus and its development through her own senses without the intermediation of technology.

XLVII. Viewing the foetus, either as a person or as a person-like separate entity, or alternatively as just another body part of the pregnant woman, does not capture the unique reality of pregnancy. These views illustrate the limitations of attempting to conceptualize the foetus from an outside perspective, which abstracts the foetus from its context, namely the woman.

XLVIII. The reasons of the British Columbia Court of Appeal on this point do not turn on a conclusion that the foetus is "simply a disposable part of the woman's body". The Court of Appeal first concluded that the learned trial judge had erred in holding that the foetus in the process of birth was a "person" for the purposes of section 203 of the *Criminal Code*, given the clear line of demarcation at live birth that had been established for centuries at common law.

Reasons of the Court of Appeal, *Appeal Case*, pp. 54-55

XLIX. The Court of Appeal said:

From the conclusion that the line of demarcation as a matter of law is live birth, in our opinion, for the purposes of count 2, the child when it is in the birth canal remains part of the mother, as a matter of law.

*Appeal Case*, p. 58

L. The conclusion of the Court of Appeal on this point is consistent with the position argued by LEAF, although conceptually reached through a different route. The Court held that as a matter of law, when there is harm to a foetus which has not yet fully proceeded in a living state from a woman's body there is bodily harm to the pregnant woman. On the facts of this case, the Court of Appeal concluded that there was bodily harm to Jewel Voth. LEAF submits that that conclusion was correct. Recognizing that the foetus is in the woman's body and central to her pregnancy reveals that harm to a full-term foetus in the process of birth is harm to the woman giving birth. The interpretation of section 204 given by the Court of Appeal furthers the purposes of sections 15, 7 and 28 of the *Charter*. The opposite interpretation (namely, that when third party negligence harms a full-term foetus in the process of birth there is not bodily harm to the pregnant woman) would work against the purposes of those sections.

(c) *Jewel Voth Suffered Bodily Harm*

LI. LEAF submits that the issue of bodily harm to Jewel Voth should be considered in light of this Honourable Court's observation that "The importance of maintaining the physical integrity of a human being ranks high in our scale of values, particularly as it affects the privilege of giving life". Although stated in the context of a proposed involuntary sterilization, this expression of values is quite appropriate in the context of the treatment during labour of a pregnant woman.

E. (*Mrs.*) v. *Eve*, *supra*, paragraph 20, p. 434

LII. "Bodily harm" is not defined in the *Criminal Code* within the context of causing bodily harm by criminal negligence (s.204), but rather in the context of the assault offences. In that context it is defined as any hurt or

injury to the complainant that interferes with the health or comfort of the complainant and that is more than merely transient or trifling in nature.

*Criminal Code*, 1990, s. 267(2) as enacted by 1980-81-82-83, c. 125, s. 19

LIII. This definition appears to have been adopted from the common law definition of bodily harm:

Bodily harm has its ordinary meaning, and includes any hurt or injury that interferes with the health or comfort of the person. It is also referred to as such, (sic) hurt or injury need not be permanent but must be more than merely transient and trifling....

*R. v. Maloney* (1976), 28 C.C.C. (2d) 323, at p. 326, per Lesage, Co.Ct.J.

LIV. Because the definition set out in s.267(2) evolved from the common law, LEAF submits that it should not be confined to the assault offences, but should also be used for purposes of determining criminal negligence causing bodily harm within the meaning of s. 204.

*R. v. Martineau*, (S.C.C., September 13, 1990), Reasons of Madame Justice L'Heureux-Dubé, p. 18

LV. The dictionary definition of "hurt" includes "damage", "harm", "wrong", or "detriment". The definition of "injury" includes "hurt or loss caused to or sustained by a person", as well as "harm", "detriment" and "damage". "Bodily" is defined as including "of the nature of body", "corporeal", "physical", "in the manner of, or with regard to, the body".

*Shorter Oxford English Dictionary*, 1973, pp. 211, 999, 1075

LVI. LEAF submits that Jewel Voth sustained a hurt, harm or loss that interfered with her health and comfort and was not merely transient and trifling, within the meaning of section 204 of the *Code*.

(i) *Through the Death of Her Foetus Because it was In Her and of Her*

LVII. Seeing harm to the full term foetus in the process of birth as bodily harm to the birthing woman emphasizes the interconnected experience of the woman and her foetus, and the high degree to which she remains physically implicated especially at this late stage of pregnancy.

LVIII. The process of birth itself, like pregnancy, is something that happens in and to the body of the woman. Each woman experiences it profoundly and uniquely, her body systems functioning in complex ways to deliver a baby into the world. Harm to the child being born is harm to the woman in her experience of birth, and of birthing the foetus; it is harm to something in her and of her in complex physiological and psychological senses. As such it is harm to the woman, well within the definition of “bodily harm” set out above at paragraphs 51 to 56.

LIX. Death of a foetus during birth is something that is uniquely experienced by a pregnant woman. Failure of the state to recognize it as harm is failure to recognize harm in a situation specific to women, and as such, is a violation of women’s equality rights.

Gillian Forrest, “Care of the Bereaved After Perinatal Death”, chapter 85 in Murray Enkin et al., eds., *Effective Care in Pregnancy and Childbirth* (Oxford University Press, 1989), p. 1422

LX. Recognizing the woman as the harmed party for the purposes of section 204 of the *Code* is consistent both with this Court’s respect for bodily integrity as it relates to procreation and with the *Charter’s* sex equality guarantees. It is also consistent with the right in section 7 of the *Charter* to security of the person, a right extended equally to females and males by section 28. Such recognition is, moreover, in keeping with section 1 of the *Charter*. Section 1 in and of itself does not create rights in the foetus. Moreover, the section requires that the purpose and effect of legislation be tested against fundamental democratic values, including equality. The interpretation of the *Code* put forward by LEAF in this case advances the equality of women and is therefore consistent with section 1 of the *Charter*.

(ii) *Physical Consequences of Prolonged Labour*

LXI. A focus on the pregnant woman reveals another kind of bodily harm within the meaning of section 204 of the *Criminal Code*. Jewel Voth suffered bodily harm through the physical consequences of unduly prolonged labour and the Appellants' failed attempts to complete the birth.

LXII. One of the bases for the trial judge's holding that the midwives were guilty of criminal negligence causing death (of the foetus) was her finding that in undertaking this birth, the midwives both failed to have and to use reasonable knowledge, skill and care. She further found that the midwives showed reckless disregard for the life and safety of the child in failing to recognize the symptoms of exhaustion in the mother, the fever, the sunken eyes, the volume depletion; and in "wasting precious time applying fundal pressure to the mother's uterus, with the knowledge of potential harm to the mother...".

Reasons, *Appeal Case*, pp. 29-30

LXIII. To acknowledge the suffering of Jewel Voth only in the context of the harm to the full-term foetus, and not in the context of allegations that bodily harm was caused to her, fails to recognize the significance to a woman of that woman's suffering. Such an analysis is inconsistent with women's right to equality before the law.

LXIV. Registering the fact that the injury and suffering of the woman during a negligently conducted childbirth (both because of what happens to her body during the process and because of its unhappy results) are the *woman's* injury and suffering is to place the woman at the centre of the legal analysis, where she belongs. It is also a fitting recognition of the fact that labour and childbirth are, even now, perilous for the woman. Injury, and even death, have not been banished from late twentieth century obstetrics.

**PART IV - NATURE OF ORDER REQUESTED**

**LXV.** For the foregoing reasons, LEAF asks that this Honourable Court uphold the judgment of the Court of Appeal

**ALL OF WHICH IS RESPECTFULLY SUBMITTED.**

---

Mary Eberts

---

Lynn Smith

Of counsel for the intervener  
Women's Legal Education and Action Fund

#### V. THE SUPREME COURT OF CANADA DECISION IN *R. v. SULLIVAN*

Giving brief Reasons, the Court allowed the appellants' appeal from their conviction of criminal negligence causing bodily harm and dismissed the Crown's appeal from the acquittal of criminal negligence causing death to a person.<sup>55</sup> Thus, Mary Sullivan and Gloria Lemay were discharged on all counts.

The appellants' success in their appeal had nothing to do with the status of the foetus nor with the legality of midwifery. Rather, their appeal succeeded because the court of appeal had lacked jurisdiction to enter a conviction for criminal negligence causing bodily harm when there had been an acquittal at trial and no Crown appeal from that acquittal. Thus, procedurally there had been no valid conviction on that count.

As for the Crown appeal from the court of appeal's acquittal on the charge of criminal negligence causing death to a person, the Court held, on the basis of textual analysis, that the long-established meaning of the word "person" was not intended to be altered by the introduction of the criminal negligence provisions. "Person," as used in section 203 of the Criminal Code, was synonymous with the term "human being" defined in section 206 of the Criminal Code.<sup>56</sup> Lamer, C.J. for the majority of the Court concluded:

Therefore, according to s.206, the child of Jewel Voth was not a "person" within the meaning of s.203 and Sullivan and Lemay cannot be convicted of criminal negligence causing death to another person.

The intervener LEAF encouraged this court to find that a foetus is not a "person" within the meaning of s.203 on the basis that such a result would be inconsistent with the goal of sexual equality in the law which has been recognized by this court in both Charter and non-Charter cases. . . . Such an approach to statutory interpretation may have arisen if an examination of the legislative history of the criminal negligence provision had revealed that Parliament had intended that the term "person" would include a foetus, whereas "human being" would not. However, this was not the case. The result reached above is consistent with the "equality approach" taken by LEAF, but it is unnecessary to consider this point in further detail.<sup>57</sup>

---

55. *R. v. Sullivan*, 63 C.C.C.3d 97 (1991) (Can.). Madam Justice Claire L'Heureux-Dubé dissented in part, stating that she would have dismissed the appellant's appeal. *Id.* at 109.

56. *Id.* at 106.

57. *Id.* at 106-7 (citations omitted).

An issue arose during the hearing that tested the equality approach from a different angle and led to an interesting passage in the Court's Reasons. It was the question of liability in tort for causing a pregnant woman to lose her foetus. In Canadian law, unless the foetus is born alive there is no cause of action for what might have happened to it *in utero*. Harm to the foetus *in utero* is not even seen as harm to the pregnant woman. However, if a child is born alive, a cause of action may be maintained on its behalf for personal injuries suffered before birth.<sup>58</sup> Thus, when a question came up at the hearing about tort law and harm to the foetus *in utero*, exploration of the issue revealed how the law (both criminal and civil) fails to recognize the harm to a woman resulting from such injuries and fails to allow compensation for these injuries. Yet why should the law not recognize the loss of a foetus as harm to a pregnant woman?

In developing the *Sullivan* argument, the LEAF working group spent much time thinking about whether or not what happened to Jewel Voth was bodily harm within the Criminal Code definition. Even leaving aside Ms. Voth's greatly prolonged labour and bruising, there was the loss of her full-term foetus. That looked a lot like bodily harm—yet it was not seen as such in law. As a result, LEAF's position was that, assuming the trial judge was correct in finding clear negligence on part of the accused, the conviction for criminal negligence causing bodily harm to Ms. Voth was correct. Similarly, harm to a pregnant woman's foetus should be recognized as a civil wrong. Such recognition need not stem from any primitive view of the foetus as a body part, nor from the conferral of legal personhood on the foetus, but from a view that women who are pregnant and injured by another such that they lose their foetuses suffer an actual, real and compensable loss.<sup>59</sup>

The Reasons of the Supreme Court on this issue are somewhat oblique. In discussing why the court of appeal could not substitute a conviction for an acquittal on the criminal negligence causing bodily harm charge, the Court said the following:

I respectfully disagree with the Crown's assertion that Sullivan and Lemay could not have been convicted on both counts in this case. The

---

58. See *Duval v. Seguin*, 26 D.L.R.3d 418 (Ont. H.C. 1972), *aff'd*, 40 D.L.R.3d 666 (Ont. C.A. 1973); *Wipfli v. Britten*, 13 D.L.R.4th 169 (B.C.C.A. 1984), leave to appeal to S.C.C. granted January 31, 1985, notice of discontinuance filed August 13, 1987.

59. In effect, just as the Supreme Court of Canada had corrected for male bias in the law in some previous cases, so it could correct for such bias in the law relating to bodily harm. Previous examples of such cases include *R. v. Lavallee*, [1990] 1 S.C.R. 852 (law of self defence re-evaluated, permitting a woman charged with the murder of her common-law spouse to present evidence that she had lived in an abusive relationship such that she had acted in self defence despite the fact that she was not at imminent risk of harm at the moment she pulled the trigger) and *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219 (prohibition against "sex discrimination" in employment held to include discrimination based on pregnancy).

trial judge explicitly considered whether Jewel Voth had suffered bodily harm (independent of the death of the foetus) and concluded that she had not. Had the trial judge made a different finding of fact, she may well have convicted Sullivan and Lemay on both counts. Furthermore, even if no independent bodily harm was found to have occurred, it would still not be *impossible* for Sullivan and Lemay to have been convicted on both counts. It would not have been illogical to find that bodily harm was done to Jewel Voth through the death of the foetus which was inside of and connected to her body and, at the same time, to find that the foetus was a person who could be the victim of criminal negligence causing death.<sup>60</sup>

As may be seen, some language with echoes of the LEAF factum ("bodily harm was done to Jewel Voth through the death of the foetus which was inside of and connected to her body"<sup>61</sup>) found its way into the judgment in this context. The Court clearly leaves open the possibility, without deciding, that harm to a pregnant woman's foetus is harm to her.

In addition, the Court's confirmation that personhood begins at live birth was important since *Tremblay v. Daigle*<sup>62</sup> had not involved interpretation of the Criminal Code sections at issue here. The decision makes it much more unlikely that attempts such as those in "*Baby R*" (*Re*)<sup>63</sup> to control pregnant women's conduct will be successful. And the Court's reference to LEAF's equality approach, although it does not amount to an endorsement, treats the approach as a credible possibility. It is for those well-versed in the United States jurisprudence, and not myself, to consider whether a comparable approach might be worthwhile in the context of a very different set of constitutional guarantees and socio-political circumstances.<sup>64</sup>

In short, what the Court says about the reproductive rights issues in *Sullivan* is consistent with the direction to which an equality approach points, even though other directions are not yet foreclosed. The LEAF intervention, and the process that led to it, were clearly worthwhile for that reason. In addition, the work on the case undoubtedly changed our own views and advanced our analysis in ways no academic exercise could ever have done.

---

60. *Sullivan*, 63 C.C.C.3d at 108-9.

61. *Id.*

62. 62 D.L.R.4th 634 (1989).

63. 53 D.L.R.4th 69 (B.C.S.C. 1988), *supra* note 38 and accompanying text.

64. See Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281 (1991); Ruth Colker, *An Equal Protection Analysis of United States Reproductive Health Policy: Gender, Race, Age and Class*, 1991 DUKE L.J. 324; Fran Olsen, *Comment: Unraveling Compromise (The Supreme Court 1988 Term)*, 103 HARV L. REV. 105 (1989).