

IN THE COURT OF APPEAL
(CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
BETWEEN

Appeal No: C3/2014/0775

CP

Appellant

v

THE CRIMINAL INJURIES COMPENSATION AUTHORITY

Defendant

BRITISH PREGNANCY ADVISORY SERVICE AND BIRTHRIGHTS

First Interveners

PRO-LIFE RESEARCH UNIT

Second Intervener

INTERVENTION ON BEHALF OF THE BRITISH PREGNANCY
ADVISORY SERVICE AND BIRTHRIGHTS

A. Introduction

1. This written submission is made on behalf of the British Pregnancy Advisory Service ('BPAS') and Birthrights ('the first interveners') pursuant to permission granted by Lord Justice Underhill and notified to the first interveners by letter dated 16 September 2014. The first interveners are grateful for the opportunity to make this intervention.
2. Lord Justice Underhill invited the Court to decide whether to permit oral submissions after it had received the written intervention. The first interveners seek permission to make oral submissions limited to 45 minutes.

B. The first interveners

3. BPAS is a charity which provides reproductive health services, primarily on behalf of the NHS in England, Wales and Scotland. Each year it counsels more than 60,000 women with unplanned pregnancy or a pregnancy they feel they cannot continue with, and provides abortion treatment if they choose to end that pregnancy within the statutory limitations. It is committed to supporting women's reproductive autonomy and as part of its charitable remit it advocates for women's choices across their reproductive lifetime, from the contraception they use to how they give birth.
4. Birthrights is a charity established in 2013 led by lawyers and health professionals which promotes women's rights in pregnancy and childbirth in the UK. It provides advice to women and health professionals on legal rights and obligations relating to maternity care.

C. The significance of the issue

5. The legal question raised by this appeal is of profound social significance: does a woman commit a crime when she consumes alcohol during pregnancy?
6. To date, no woman has been prosecuted under English law for harm she has caused to her child *in utero* if the child has subsequently been born alive. A declaration by the Court that s23 of the Offences Against the Person Act 1861 can be interpreted to protect the foetus would amount to a novel extension of the criminal law that would pose a grave and discriminatory threat to pregnant women's right to autonomy. It would also have a serious detrimental effect on the health of women and their babies by discouraging pregnant women from seeking help with alcohol abuse issues.
7. While the first interveners of course accept that the legal effect of the declaration would be limited to determining the scope of the criminal injuries compensation scheme, the Court's decision would serve as a precedent that would inevitably guide any future decision to prosecute by the Crown Prosecution Service and inform an assessment by the criminal courts about

the scope of s23. Such a radical development in the criminal law is properly a matter for democratic debate and legislation.

8. The suggestion in the submissions by the Pro-life Research Unit ('PRU') that prosecutions '*will not usually be in the public interest*'¹ does not detract from the overwhelming importance of the principle that the application of the criminal law should be clear and foreseeable; the discretion of the CPS cannot be relied upon as a safeguard against such a significant expansion of the criminal law.
9. PRU's submission tellingly illustrates that there is no public interest in criminalising the conduct of pregnant women. Rather, there is a compelling public interest in safeguarding pregnant women and their foetuses from the detrimental effects of criminalisation.
10. In addition to the influence on the criminal law, a finding that alcohol consumption in pregnancy could constitute a crime would attract considerable public attention,² and affect attitudes amongst health professionals and social workers, as well amongst pregnant women themselves.
11. The intervention seeks to bring the court's attention to issues that are relevant to the Court's interpretation of the meaning and scope of s23 of the Offences Against the Person Act 1861 ('the 1861 Act'). The intervention addresses the following topics:
 - (i) Nature of the relationship between women and foetus;
 - (ii) Scope of the offence;
 - (iii) Women's autonomy;
 - (iv) Public policy.

¹ PRU Intervention, §4.3.

² This case has already been the subject of widespread media comment, which has emphasised the far-reaching implications of the appeal. See, e.g., The Guardian, '*Court of Appeal to decide whether heavy drinking while pregnant is a crime*', 4 March 2014, available at <<http://www.theguardian.com/lifeandstyle/2014/mar/04/drinking-pregnant-crime-court>>.

D. Nature of the relationship between woman and foetus

12. The relationship between a pregnant woman and her foetus is unique amongst human relations. The woman and foetus are separate but symbiotic organisms; they are 'bonded in a union separable only by birth' and to conceive of them in an antagonistic relationship belies the physical reality of pregnancy.³ The nourishment and sustenance that a woman gives to the foetus, through her own body, at risk to her own health and life, is an involuntary, biological process that is not apt to analogy with any other human relationship. The suggestion by PRU that '*identical public policy considerations*'⁴ apply to women as they do to public bodies is a profound misunderstanding of the relationship between woman and foetus, which is characterised by biological imperatives and inherent self-sacrifice.

13. The law has long recognised that traditional legal principles are ill-suited to pregnancy. As Lord Mustill said in *A-G's Reference (No 3 of 1994)* [1998] AC 245, 255-6: '*To apply to such an organism the principles of a law evolved in relation to autonomous beings is bound to mislead.*' Accordingly, neither the common law nor the legislature has imposed a duty of care in negligence on pregnant women to safeguard the foetus. The sole concern of the law is that pregnant women do not terminate their pregnancy unless the termination is authorised under the Abortion Act 1967. The law has not extended any further to regulate a woman's actions in pregnancy for sound and compelling reasons of principle and practicality that are considered further below.

E. Scope of the offence

14. The Offences Against the People Act 1861, s23 makes it a crime to maliciously administer a '*poison or other destructive or noxious thing*' to another person so as to endanger life or cause grievous bodily harm.

³ See *Winnipeg Child and Family Services (Northwest Area) v G (DF)* [1997] 3 SCR 925, at §29.

⁴ At §8.17.

15. Section 23 has never been applied to women who have given birth to a live baby but who are suspected of having caused harm to the foetus during pregnancy.⁵ Parliament has never enacted any other law that purposefully criminalises the conduct of pregnant women.
16. The terms of s23 are adequately clear for the purposes of the criminal law as it applies to circumstances in which a person poisons another person with the intention to cause them harm.⁶ However, if s23 is applied to pregnant women, the scope of the *actus reus* is unworkably imprecise. The following questions arise:
- (i) How does a pregnant woman 'administer' a poison to the foetus? The means by which the placenta sustains a foetus during pregnancy is an involuntary, biological and biochemical process. Nothing in the symbiotic relationship between woman and foetus can be characterised as 'administration' under the criminal law.
 - (ii) What constitutes a poison or other destructive or dangerous thing? Pregnant women are warned of the dangers of a very wide variety of substances that may cause harm to their unborn baby. These include alcohol, drugs (lawful and unlawful), and certain food products. Most recently, the Royal College of Obstetricians and Gynaecologists published research warning women against using a host of household products, including plastics and make up, on the basis that there was potential for harm to the foetus.⁷ The concept of a poison, or other destructive or dangerous thing is unworkable in the context of pregnancy when such a variety of products consumed by the mother might cause the foetus harm.⁸
 - (iii) What quantity of 'poison' must the mother consume to attract criminal liability? In this case, the mother was said to have consumed 'grossly

⁵ Prosecutions have been brought for use of a poison to procure a miscarriage under s.58 OAPA 1861: *R v Catt* [2013] EWCA Crim 1187, (2014) 1 Cr App Rep (S) 210.

⁶ The offence is regularly prosecuted. See the CPS guidance on drug offences, available at http://www.cps.gov.uk/legal/d_to_g/drug_offences/.

⁷ RCOG, 'Chemical Exposures During Pregnancy', Scientific Impact Paper No 37, May 2013.

⁸ The Canadian Supreme Court recognised that the imposition of a tortious duty of care would mean that every choice made by a mother might attract liability: *Winnipeg Child and Family Services (Northwest Area) v G (DF)* [1997] 3 SCR 925, §37.

excessive quantities of alcohol' during pregnancy.⁹ When a person consumes a lawful product such as alcohol, by whose standard would 'excessive' consumption be judged? Medical evidence would need to be adduced on the question at trial; healthcare professionals, with a primary responsibility to their patients, cannot be expected to become the arbiters of 'excessive' drinking for the purposes of the criminal law.

- (iv) Can the foetus be considered 'another person' for the purposes of s23? This question is the focus of submissions by the parties to this appeal, which we do not seek to repeat. In the first interveners' view, in the absence of specific statutory provision that includes the foetus within the terms of the offence, the Appellant and PRU's concept of 'otherness' should not be read into the law. If the foetus is a person under s23, it would also be a person under the other provisions of the 1861 Act. If the foetus is protected under the Act, is the mother the only person who can be criminally responsible for foetal harm? Could a man be criminally liable for smoking near to his pregnant partner? The consequences of for the law generally, including the law on abortion, would be unpredictable and far-reaching.
- (v) The specific provisions of the 1861 Act and the Infant Life Preservation Act 1929 to which PRU refers¹⁰ illustrate that specific statutory provision is required to apply statutory offences against the person to a foetus. There is no such statutory authority in relation to causing harm to a foetus, by poison or otherwise.

17. Causation raises additional difficulties for the application of the offence to pregnant women. There is continuing uncertainty in the medical community over the relationship between alcohol and drug consumption and harm to the foetus. Medical science finds it very difficult to attribute a newborn's condition – including a diagnosis of foetal alcohol syndrome – to any one cause.¹¹ In the case of alcohol use, much remains unknown about the specific effects, if any, that a woman's pattern of alcohol use may have in any particular pregnancy. No scientific basis exists for concluding that exposure to alcohol

⁹ Upper Tribunal decision, §3. She was also said to have 'reduced her consumption of alcohol' during pregnancy.

¹⁰ At §8.17.

¹¹ See Elizabeth M. Armstrong, *Conceiving Risk, Bearing Responsibility: Fetal Alcohol Syndrome and the Diagnosis of Moral Disorder*, (The Johns Hopkins University Press, 2003).

will inevitably cause harm or that any harm is so unique and destructive as to justify the radical extension of the criminal law to sanction women for drinking in pregnancy.

18. The scope of the criminal law must be clear enough to enable individuals to regulate their behaviour. The development of s23 in these circumstances would risk offending the principle of foreseeability enshrined in the prohibition on retrospective punishment in Article 7 of the European Convention on Human Rights. In cases of prosecution for foetal harm caused by substance misuse in the United States, the courts have recognised that criminalisation, in the absence of specific statutory provision, offends the principle of 'fair warning'.¹²
19. The assertion in PRU's submissions that: 'Children injured by FAS need a [legal] remedy'¹³ is a political statement. All disabled children, whatever the cause of that disability, need care and support, but by what mechanism that support is provided is a legislative choice. The legislature has recognised the particular symbiotic relationship between mother and foetus by expressly excluding the possibility of a remedy in tort which is available against others under the Congenital Disabilities (Civil Liability) Act 1976 ('the 1976 Act'). It has imposed criminal liability for poisoning in pregnancy only in circumstances where it leads to miscarriage.¹⁴ It would be extraordinary if criminal liability were to be imposed on a pregnant woman (in circumstances where it is not imposed on others) as an implied corollary of a legislative choice to exclude tort liability.

F. Women's autonomy

20. Pregnant women, like all other members of society, are free in law to make autonomous choices about their lifestyle and bodies unimpeded by their pregnancy. In English law, women do not owe a duty of care to their unborn child. A competent woman cannot be forced to have a caesarean section or other medical treatment to prevent potential risk to the foetus during childbirth. The negligent acts of a third party tortfeasor, which inflict harm on an unborn child, are actionable by the child upon birth under the 1976 Act.

¹² *State v Luster* 419 S.E.2d 32 (Ga. Ct. App. 1992), p.33.

¹³ At §2.1.

¹⁴ Section 58 OAPA 1861.

Claims under the Act cannot be brought against the child's mother.¹⁵ The Law Commission considered and rejected the imposition of a duty of care on pregnant women in its *Report on Injuries to Unborn Children*.¹⁶

21. In the absence of a tortious duty, the law would be rendered incoherent by the imposition of criminal liability. Furthermore, such a step, in circumstances in which Parliament has legislated against a duty of care, would significantly exceed the boundaries of judicial power.
22. The courts have traditionally guarded pregnant women from incursions into their autonomy on the grounds of risk to the foetus. In *Re MB (An Adult: Medical Treatment)* (1997) 2 FCR 541 the Court of Appeal considered an application by an NHS Trust for an order authorising the administration of anaesthetic to a woman with needle phobia in order to perform a caesarean section to which she had consented. The Court held that it did not have jurisdiction to take into account the interests of the foetus in its decision and expressed its strong aversion to the notion that pregnant women could be compelled to accept medical treatment by reason of potential harm to the foetus. In the words of Lady Justice Butler-Sloss:

‘A competent woman who has the capacity to decide may, for religious reasons, other reasons, for rational or irrational reasons or for no reason at all, choose not to have medical intervention, even though the consequence may be the death or serious handicap of the child she bears, or her own death.’¹⁷

23. PRU misrepresent the decision in *Re MB*, suggesting that the incursion on the woman's autonomy must be ‘gross’ in order to override foetal rights.¹⁸ In fact, the Court of Appeal considered that the incursion on the woman's autonomy was relatively slight.¹⁹ She had consented to the operation but refused the injection of the anaesthetic. Nonetheless, the Court found that the woman's right to make decisions about her care for herself, even in the relatively minor case of an injection, overwhelmed any foetal interest.

¹⁵ Section 2(2). Claims against a mother can only be brought where the harm is caused by a road accident.

¹⁶ Law Commission, *Report on Injuries to Unborn Children*, Report No. 60, Cmnd 5709 (1979) 5, [55].

¹⁷ At p.553.

¹⁸ At §§8.6-8.8.

¹⁹ *Re MB* (above) pp. 547, 561.

24. The Court of Appeal reiterated the principles in *Re MB* in *St George's Healthcare NHS Trust v S* (1998) 40 BMLR 160, in which the NHS Trust sought a declaration ordering a competent woman to undergo a caesarean section against her will. The Court stated:

'In our judgment, while pregnancy increases the personal responsibilities of a woman, it does not diminish her entitlement to decide whether or not to undergo medical treatment. Although human, and protected by the law in a number of different ways set out in the judgment in *Re MB*, an unborn child is not a separate person from its mother. Its need for medical assistance does not prevail over her rights. She is entitled not to be forced to submit to an invasion of her body against her will, whether her own life or that of her unborn child depends on it. Her right is not reduced or diminished merely because her decision to exercise it may appear morally repugnant. The declaration in this case involved the removal of the baby from within the body of her mother under physical compulsion. Unless lawfully justified, this constituted an infringement of the mother's autonomy. Of themselves, the perceived needs of the foetus did not provide the necessary justification.'²⁰

25. The common law thus fiercely protects pregnant women's autonomy on the basis that the rights of the foetus cannot prevail over the fundamental human right to make life choices for oneself. It would be wholly inconsistent with this long-standing approach to interpret s23 to protect the foetus from harm by its mother.

26. The decision of the Supreme Court of Canada in *Winnipeg Child and Family Services (Northwest Area) v G (DF)* [1997] 3 SCR 925 strongly supports this conclusion. The Court considered an application by Winnipeg social services for an order authorising the detention of a pregnant woman addicted to glue-sniffing. The Court also considered legal recognition of a mother's tortious duty of care to her foetus. The Court held:

'The proposed changes to the law of tort are major, affecting the rights and remedies available in many other areas of tort law. They involve moral choices and would create conflicts between fundamental interests and rights. They would have an immediate and drastic impact on the lives of women as well as men who might find themselves incarcerated and treated against their will for conduct alleged to harm others. And, they possess complex ramifications impossible for this Court to fully assess, giving rise to the danger that

²⁰ At p.180.

the proposed order might impede the goal of healthy infants more than it would promote it. In short, these are not the sort of changes which common law courts can or should make. These are the sort of changes which should be left to the legislature.”²¹

27. The fundamental question of criminal liability raised in this case is indistinguishable from that carefully considered by Canadian Supreme Court. The first interveners urge the Court to heed the reasoning in *Winnipeg*, as it did in *St George’s Healthcare NHS Trust v S*.²²

G. Public policy

28. There is a strong public interest in promoting the good health of pregnant women and babies. As long-standing government policy recognises, that interest is best served by treating addiction and substance abuse in pregnancy as a public health issue that should be addressed with healthcare professionals and social services intervention as appropriate. Imposition of criminal liability as a result of knowledge inferred from engagement with medical professionals would inevitably deter some of those who needed support with addiction from disclosing their condition or contacting health professionals during pregnancy.²³ (It is telling that the First-tier Tribunal in the present case inferred awareness on the part of EQ from the fact that she had engaged with her GP and other medical practitioners). If the appeal succeeds, women with substance addictions may avoid engaging with health services or feel compelled to terminate their pregnancy rather than continue and face potential sanctions.
29. In view of these overwhelming reasons of principle and policy, the first interveners submit that s23 should not be interpreted to criminalise the consumption of alcohol during pregnancy.

Helen Mountfield QC
Elizabeth Prochaska
Matrix, 10 October 2014

²¹ At §20.

²² The Court in *S* cited *Winnipeg* at length and with approval, pp.705-706.

²³ As recognised by the American College of Obstetricians and Gynecologists, *Committee Opinion 473 Substance Abuse Reporting and Pregnancy: The Role of the Obstetrician-Gynecologist*, 117 *Obstetrics & Gynecology* 200 (2011).

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ADVISORY SERVICE AND BIRTHRIGHTS

BPAS
20 Timothys Bridge Road,
Stratford Enterprise Park,
Stratford-upon-Avon CV37 9BF

Birthrights
C/O White Ribbon Alliance
Portobello Road
London W11 2DZ