

What the Supreme Court has said about legal protection for preborn children

One often hears the argument—especially from pro-abortion activists—that the Supreme Court would not allow fetal rights because it has said that a fetus is not “person.” But this is a misinterpretation of what the Court said. It is the existing law which offers no rights for preborn children, and the Courts have just been applying that existing law when they have made their rulings. Parliament can change the law if it wants to.

In all the following examples, the Court is applying the existing law and concludes that there is no protection for unborn children today. The Court is not making any statement about whether or not preborn children *ought* to have rights, only about whether they *do* have rights according to existing law. And today, they do *not* have rights. The Supreme Court is clearly stating that it is up to Parliament (the legislature) to enact laws that protect preborn children. It is not the job of the Supreme Court to do that, as the Supreme Court Justices themselves state.

Chantale Daigle v. Jean-Guy Tremblay:

<http://www.canlii.org/ca/cas/scc/1989/1989scc96.html>

In 1989, the Supreme Court ruled that Tremblay had no grounds to prevent his girlfriend from obtaining an abortion because the existing law (the Quebec Charter and the Quebec Civil Code) did not grant rights to the fetus. As in the 1988 Morgentaler decision, the judges in this decision left it to Parliament to determine if and when a fetus has rights.

The Court stated:

“The respondent’s argument is that a foetus is an “être humain”, in English “human being”, and therefore has a right to life and a right to assistance when its life is in peril. In examining this argument it should be emphasized at the outset that the argument must be viewed in the context of the legislation in question. The Court is not required to enter the philosophical and theological debates about whether or not a foetus is a person, but, rather, to answer the legal question of whether the Quebec legislature has accorded the foetus personhood. Metaphysical arguments may be relevant but they are not the primary focus of inquiry. Nor are scientific arguments about the biological status of a foetus determinative in our inquiry. The task of properly classifying a foetus in law and in science are different pursuits. Ascribing personhood to a foetus in law is a fundamentally normative task. It results in the recognition of rights and duties—a matter which falls outside the concerns of scientific classification. In short, this Court’s task is a legal one. **Decisions based upon broad social, political, moral and economic choices are more appropriately left to the legislature.**” (emphasis added)

Sullivan/Lemay v. the Queen

<http://www.canlii.org/ca/cas/scc/1991/1991scc22.html>

This is the case of two midwives, Sullivan and Lemay, who were charged with criminal negligence causing death to the child of Jewel Voth. The baby was born dead.

At issue in this case was whether a living child partially born was a “person” within the meaning of Section 203 of the Criminal Code, which states:

203. 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 court ruled that the midwives could not be charged under this section, because the child was not considered a “person” for the purposes of the Criminal Code. The word “person” is not defined in the CC, but “human being” is and the Court said that there was no reason to assume that “person” should mean anything different than “human being” and since “human being” is defined as a child who is born alive, then the child before birth, if not a human being, is also not a person.

Chief Justice Lamer said:

“Accordingly, I agree with the Court of Appeal that the introduction of the criminal negligence provisions by Parliament in 1954 was not intended to change the meaning of “person” and that the term, as used in s. 203 of the Code, is synonymous with the term “human being.” 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.”

So again, the Court is just ruling based on the current law. And no where in current law did it say that a fetus is a “person” and since the current law does say that the fetus is not a “human being,” the Court interpreted this to mean that section 203 did not apply. The Court was in no way saying that the law could not be changed to redefine “human being” or “person” or to give the fetus rights.

Winnipeg Child and Family Services vs. D.F.G.

<http://www.canlii.org/ca/cas/scc/1997/1997scc98.html>

In 1996, a Manitoba court ordered a glue-sniffing pregnant woman into the protective custody of Child and Family Services. The Manitoba Court of Appeal struck down that order, and that decision was appealed to the Supreme Court. The Supreme Court agreed with the Manitoba Court of Appeal’s decision, because the existing law offers no protection for unborn children. Again, the Court said it was up to the Legislature to create laws to protect unborn children, it

was not up to the Court.

The Supreme Court said:

“The law of Canada does not recognize the unborn child as a legal person possessing rights... Once a child is born, alive and viable, the law may recognize that its existence began before birth for certain limited purposes. But the only right recognized is that of the born person. Any right or interest the fetus may have remains inchoate and incomplete until the child's birth. It follows that, under the law, the fetus on whose behalf the appellant purported to act in seeking the detention order was not a legal person and possessed no legal rights. There was thus no legal person in whose interests the appellant could act or in whose interests a court order could be made.

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“At what stage would a fetus acquire rights? Could women who choose to terminate a pregnancy face injunctive relief prohibiting termination, relief which this Court rejected in *Tremblay v. Daigle*? Alternatively, could they face an action for damages brought on behalf of the fetus for its lost life? If a pregnant woman is killed as a consequence of negligence on the highway, may a family sue not only for her death, but for that of the unborn child? If it is established that a fetus can feel discomfort, can it sue its mother (or perhaps her doctor) and claim damages for the discomfort? If the unborn child is a legal person with legal rights, arguments can be made in favour of all these propositions. Some might endorse such changes, others deplore them. **The point is that they are major changes attracting an array of consequences that would place the courts at the heart of a web of thorny moral and social issues which are better dealt with by elected legislators than by the courts.** Having broken the time-honoured rule that legal rights accrue only upon live birth, the courts would find it difficult to limit application of the new principle to particular cases. **By contrast, the legislature, should it choose to introduce a law permitting action to protect unborn children against substance abuse, could limit the law to that precise case.**”

So once again, the Court is clearly stating that it is up to the law-makers to decide how and when unborn children will be protected.