

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

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PART I - FACTS

PROCEDURAL HISTORY

1. 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).
2. 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

3. 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

4. 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

5. 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

6. 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

7. 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

8. 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

9. 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*?

10. 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

11. 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 Voth herself.

12. Jewel Voth desired a baby. She experienced pregnancy, a lengthy, painful and wasted delivery, and anguish due to the loss of that expected baby. Yet Jewel Voth 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.

13. 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.

14. 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.

15. 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.

16. In particular, this Court has recognized that woman 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

17. 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

18. 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.

19. 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

20. 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

21. 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

22. 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.

23. 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.

24. 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.

25. 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.

26. 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.

27. 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

28. 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.

29. 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.

30. 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).

31. 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

32. 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*

33. 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

34. 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

35. 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*.

36. 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

37. 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.

38. 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.

39. 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

40. 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.)

41. 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

42. 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.

43. 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.

44. 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.

45. 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.

46. 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.

47. 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.

48. 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 is 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

49. 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

50. 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

51. 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

52. "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

53. 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.

54. 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

55. 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

56. 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

57. 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.

58. 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.

59. 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

60. 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

61. 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.

62. 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

63. 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.

64. 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

65. 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

SCHEDULE "A"LIST OF CASES

1. *Robichaud v. Canada (Treasury Board)*, [1987] 2 S.C.R. 84
2. *Action Travail des Femmes v. C.N.R.*, [1987] 1 S.C.R. 114
3. *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143
4. *Brooks v. Canada Safeway*, [1989] 1 S.C.R. 1219
5. *Janzen v. Platy Enterprises*, [1989] 1 S.C.R. 1252
6. *R. v. Turpin*, [1989] 1 S.C.R. 1296, at pp. 1330-1333
7. *R. v. Morgentaler*, [1988] 1 S.C.R. 30
8. *Re Mabel P. French* (1905), 37 N.B.R. 359 (N.B.S.C.)
9. *E. (Mrs) v. Eve*, [1986] 2 S.C.R. 388
10. *R. v. Lavallee* (1990), 108 N.R. 321 (S.C.C.)
11. *Tremblay v. Daigle*, [1989] 2 S.C.R. 530
12. *In re A.C.* 573 A. 2d 1235 (D.C. App., 1990)
13. *Raleigh Fithkin-Paul Morgan Memorial Hospital v. Anderson*, 201 A. 2d 537 (N.J.S.C., 1964)
14. *Jefferson v. Griffin Spalding County Hospital Authority et al.*, 274 S.E. 2d 457 (Ga. S.C., 1981)
15. *Taft v. Taft*, 446 N.E. 2d 395 (Mass., 1983)
16. *In re Ruiz*, 500 N.E. 2d 935 (Ohio C.A., 1986)

17. *Cox v. Franklin Cty. Court of Common Pleas*, 537 N.E. 2d 721 (Ohio C.A., 1988)
18. *In re Troy D., a Minor*, 215 Cal. App. 3d 889 (Calif. C.A., 1990)
19. *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
20. *Re F (in utero)*, [1988] 2 W.L.R. 1288 (C.A.)
21. *Mack v. Brandenburg* (1988), 61 Alta L.R. 236 (Q.B.)
22. *Re Baby R.* (1988), 15 R.F.L. (3d) 225 (B.C.S.C.)
23. *Re Children's Aid Society of Belleville and T.* (1987), 59 O.R. (2d) 204 (Ont. Prov. Ct. Fam. Div.)
24. *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.)
25. *R. v. Maloney* (1976), 28 C.C.C. (2d) 323 (Ont. Co. Ct.)
26. *R. v. Martineau*, (S.C.C., September 13, 1990), Reasons of Madame Justice L'Heureux-Dubé

SCHEDULE "B"LIST OF ARTICLES & BOOKS

1. Margrit Eichler, "Unmarried Parenthood", pp. 231-241 in *Families in Canada Today*, 2d ed., Gage, Toronto, 1988
2. Catharine MacKinnon, "Rape: On Coercion and Consent", pp. 171-183; 295-299 in *Toward a Feminist Theory of the State*, Harvard University Press, 1989
3. Linda MacLeod, *Battered But Not Beaten* (Canadian Advisory Council on the Status of Women, 1987)
4. Committee on Sexual Offences Against Children and Youth, *Report: Sexual Offences Against Children*, Minister of Supply and Services Canada, 1984
5. Christine Overall, "Infertility", chapter 7 in *Ethics and Human Reproduction* (Boston, Allen & Unwin, 1987)
6. Task Force on the Implementation of Midwifery in Ontario, *Report* (Toronto, Queen's Printer, 1987), pp. 69-70; 79-82
7. 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
8. National Council of Welfare, *Report: Women and Poverty Revisited*, Minister of Supply & Services, Canada, 1990
9. Canadian Advisory Council on the Status of Women, *Women and Labour Market Poverty* (1990)
10. Margrit Eichler, "Types of Childcare Used", pp. 318-324 in *Families in Canada Today*
11. Pat Armstrong, *Labour Pains: Women's Work in Crisis*, Women's Press, 1984

12. Linda MacLeod, *Wife Battering in Canada* (Minister of Supply & Services Canada, 1990)
13. 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
14. 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
15. Isabel Grant, "Forced Obstetrical Intervention: A Charter Analysis", (1989) 39 *University of Toronto Law Journal* 217
16. Edward Keyserlingk, "Clarifying the Right to Prenatal Care", 4 *Health Law in Canada* 36
17. David R. Field, "Maternal Brain Death During Pregnancy: Medical and Ethical Issues" (1988) 260 *JAMA* 816
18. *Shorter Oxford English Dictionary*, 1973
19. 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)

SCHEDULE "C"STATUTES REFERRED TOMartin's Annual Criminal Code, 1985DUTY OF PERSONS UNDERTAKING ACTS DANGEROUS TO LIFE.

198. Every one who undertakes to administer surgical or medical treatment to another person or to do any other lawful acts that may endanger the life of another person is, except in cases of necessity, under a legal duty to have and to use reasonable knowledge, skill and care in so doing. 1953-54, c. 51, s. 187.

CRIMINAL NEGLIGENCE—"Duty".

202. (1) Every one is criminally negligent who

(a) in doing anything, or

(b) in omitting to do anything that it is his duty to do,

shows wanton or reckless disregard for the lives or safety of other persons.

(2) For the purposes of this section, "duty" means a duty imposed by law. 1953-54, c. 51, s. 191.

CAUSING DEATH BY CRIMINAL NEGLIGENCE.

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. 1953-54, c. 51, s. 192.

CAUSING BODILY HARM BY CRIMINAL NEGLIGENCE.

—204.—Every one who by criminal negligence causes bodily harm to another person is guilty of an indictable offence and is liable to imprisonment for ten years. 1953-54, c. 51, s. 193.

WHEN CHILD BECOMES HUMAN BEING—Killing child.

206. (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.

(2) A person commits homicide when he causes injury to a child before or during its birth as a result of which the child dies after becoming a human being. 1953-54, c. 51, s. 195; 1968-69, c. 38, s. 14.

Martin's Annual Criminal Code, 1991**DUTY OF PERSONS UNDERTAKING ACTS DANGEROUS TO LIFE**

216. Every one who undertakes to administer surgical or medical treatment to another person or to do any other lawful act that may endanger the life of another person is, except in cases of necessity, under a legal duty to have and to use reasonable knowledge, skill and care in so doing. R.S., c. C-34, s. 196.

CRIMINAL NEGLIGENCE — Definition of "duty".

219. (1) Every one is criminally negligent who
- (a) in doing anything, or
 - (b) in omitting to do anything that it is his duty to do,
- shows wanton or reckless disregard for the lives or safety of other persons.
- (2) For the purposes of this section, "duty" means a duty imposed by law. R.S., c. C-34, s. 202.

CAUSING DEATH BY CRIMINAL NEGLIGENCE.

220. Every one who by criminal negligence causes death to another person is guilty of an indictable offence and is liable to imprisonment for life. R.S., c. C-34, s. 203.

CAUSING BODILY HARM BY CRIMINAL NEGLIGENCE.

221. Every one who by criminal negligence causes bodily harm to another person is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years. R.S., c. C-34, s. 204.

WHEN CHILD BECOMES HUMAN BEING — KILLING child.

223. (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.
- (2) A person commits homicide when he causes injury to a child before or during its birth as a result of which the child dies after becoming a human being. R.S., c. C-34, s. 206.

ASSAULT WITH A WEAPON OR CAUSING BODILY HARM — Definition of "bodily harm".

267. (1) Every one who, in committing an assault,
- (a) carries, uses or threatens to use a weapon or an imitation thereof, or
 - (b) causes bodily harm to the complainant,
- is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years.
- (2) For the purposes of this section and sections 269 and 272, "bodily harm" means 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. 1980-81-82-83, c. 125, s. 19.