Should a woman be able to refuse consent to treatment that will benefit her foetus or behave in ways that may harm her foetus? Discuss with reference to case law and commentary.

THE DIVIDED SELF

1.Introduction

Until fairly recently the foetus was an entirely unseen entity, hidden within the womb until birth, its under developed primal form only revealed in the event of tragedy. Now in addition to standard ultrasonic imaging techniques, 3D and even 4D images of the unborn are available, thereby humanising and personalising the foetus in a previously unthought-of of manner. It can be argued that our seeing the previously unseen has wrongly elevated the social status of the foetus to unrealistic and more importantly undeserved legal heights to the ultimate detriment of women.[1] The ever-increasing availability of dedicated, daring foetal technological and surgical techniques have seduced the courts into sanctioning unwanted medical intervention, and, as a corollary, disengaging the due legal process of autonomy - all in the belief that they are protecting the well being of the foetus. Often presented by medics with a rushed and apparent life or death ultimatum, the courts, lacking any specialist medical expertise, have ordered antenatal medical intervention with the very best of intentions[2]. Ordinarily the actions are raised to enforce surgical birth or blood transfusion although lifestyle diktats have also been the subject of medico-legal action.

I will explore the appropriateness of legal intervention being utilised by medics in this manner by first examining the extent to which the law consistently recognises the foetus and the extent of its legal standing and rights. I will examine consent in relationship to a woman who is not pregnant, looking at capacity and capability. Then I will consider how these rights have been juxtaposed with the perceived legal right and entitlements of the pregnant woman, and consider if the very nature of her pregnancy essentially disturbs her expected legal entitlement to have her autonomy respected and honoured. Lastly I will consider if it is desirable for our 21st century society to coerce women into medical procedures in order to ensure the safe birth of a healthy or, as is equally likely, a healthier baby.

In the UK today, the contemporary pregnant woman enjoys regular meetings and consultation with a variety of health care professionals working within their own specialities to ensure a usually safe and uncomplicated gestational period culminating in an anticipated safe and healthy live birth. Antenatal care consists of teams of dedicated specialists providing education, information and monitoring roles, continually reassuring the woman of her wellbeing or professionally addressing at an early stage any health problems. I will discuss the potential power imbalance inherent in this relationship, with the medics providing and controlling the information that the woman receives regarding her condition. This is in direct contrast to the situation only three generations ago, when the medical profession relied entirely on the woman to report the same information regarding pregnancy progression[3].

[1] McLean, S.A.M., Old Law New Medicine, London, Pandora, 1999, Chapter 3 'Women and Foetuses: Whose Rights?' p48
[2] Re S (Adult: Refusal of Medical Treatment) [1992] 4 All ER 671 Tameside and Glossop Acute Services Trust v CH [1996] 1 Family Law Report 762. Norfolk and Norwich Health Care (NHS) Trust v W [1997] 1 FCR 269, 272 Rochdale Healthcare (NHS) Trust v C [1997] 1 FCR 274 Re L (December 1996, unreported) Pattinson, Medical Law and Ethics, Thomson, 2006 p 149
[3] McLean, S.A.M., Old Law New Medicine, London, Pandora, 1999, Chapter 3 'Women and Foetuses: Whose Rights?' p51

The downside to the recent developments in foetal medicine, surgery and imaging techniques may be what many consider to be the "medicalisation" of pregnancy. This can result in the unintentional patholgising of the condition into that of an illness, ultimately disempowering the woman, leaving the medics to controlling her progression through pregnancy[4]. When control is resisted, medics don't desist instead they reason that it is appropriate for them to approach the courts pleading the existence of a legally non existent entity whilst derailing the prevailing and statutory legal rights of their patient. Often with little or no legal expertise they presume to deny competent female patients their intrinsic rights to autonomy. Paternalistic medicine may be – materialistic it is not.

2. The Foetus and The Law.

Medically and theologically life can be said to begin at the instant of conception[5], legally life begins at the second of birth.[6] Legal personality lives until death[7] and in either form[8] is fundamental to the operations of the common law legal system. Only legal persons[9] have *locus standi* in courts and access to the legal processes of holding and enforcing their rights and prerogatives against others[10]. One of the prerogatives being that a (legally recognised) person has the right to look to the courts to award reparation[11], compensation for harm suffered as a result of another's' intentional intrusion[12] upon a right or a interest of his which is recognised as being reparable in the eyes of the law.[13] The wrongdoer is in fact obligated to make reparation to compensate for the loss suffered by another as a direct result of his culpa with the obligation being legally obediential.

This does not mean that the foetus[14] lacking full legal personality has routinely been denied either legal recognition or protection. Since the thirteenth century the criminal law had guarded the foetus[15] whilst it simultaneously refused to extend full legal status[16] to the unborn child thus

---

[44] Herring, Medical Law and Ethics, Oxford University Press, 2006 p 270

[5] "but causes of action do not" Wallace v. Wallace, 421 A.2d 134, 136 (1980)

[6] subject to provisos forementioned, Buton v Islington HA [1993] QB 204

[7] Following years of legal debate over when the foetus is born, legally, rather than medically, in order to gain a legal personality, (Paton v BPAS, Re F (in utero)(1988) 2 All E.R. 193). Medical and scientific advancements have now led to similar and newer debates over when exactly we die in the eyes of the law and lose our legal personality and associated rights and obligations Mail Newspapers plc -v- Express Newspapers Plc. When a "ventilated corpse" was treated as being undead and still holding legal personality and rights.

[8] Juristic or natural

[9] "the law has selected birth as the point at which the foetus becomes a person with full and independent rights." Dehler v. Ottawa Civic Hospital (1979).25 O.R. (2d) 748 at 761, 101 D.L.R. (3d) 686 (Ont. H.C.) aff'd (1980), 29 O.R. (2d) 677, 117 D.L.R. (3d) 512 (Ont. C.A.)

[10] Edwards and Griffiths p2

[11] Damages or compensation paid by the wrongdoer to the victim.

[12] Which is recognised by the law as being wrongous conduct - damnum injuria datum

[13] Thomson p2

[14] medically the unborn child is termed as being an embryo from conception to three months in utero, and a foetus from three months until birth. Stewart at 23-23.

[15] Bracton: De Legibus Et Consuetudinibus Angliæ

[16] If a woman be quick with child and by a potion or otherwise killeth it in her womb, or if a man beat her, whereby the child dieth in her body and she is delivered of a dead child, this is ... no murder, but if the child be born alive and dieth of the potion, battery, or other cause, this is murder; for in law it is accounted as a reasonable creature, in rerum natura when it is born alive.
Sir E. Coke. The Third Part of the Institute ot the Laws of England: Concerning High Treason. and other Pleas of the Crown, and Criminal Causes. 4th ed. (London: A. Crooke,1669) at 50.

denying him the right to maintain an action for prenatal injuries.[17] The born child was incapable of asserting its legal personality gained rights retrospectively to its previous conceived, but unborn existence[18] in respect of claims for injuries sustained pre-birth[19]. In 1933 the first ever successful application of the nasciturus[20] principle to the claim in delict regarding a child born with clubfeet resulted in the present day accepted premis whereby the facilitation of the tort or delict crystallising on the now born child's first breath allows delictual claims in respect of third party damages to the previously unborn foetus[21]. But a foetus does not have legal personality and is not a person,[2223] although it is not entirely without rights[24] and interests,[25] it certainly is more than a biological appendice to the mother's body.[26] However, it is legally impossible to bring forward an action based "in the name of the foetus"[27] and similarly a foetus cannot legally be made a ward of court.[28]

The foetal entity has been described as an "infant[29]", with this compassionate but misguided use of terminology being designed to provide a timescale in reference to the concept of "foetal viability[30]" as the automatic earning of particular legal rights by the attainment of a certain period of time in the womb. This reference replaced the traditional often-blurry image in our minds of the neonate with the more familiar and imaginable swaddled babe. The relatively advanced gestational period of a foetus has provided the court with the ability to "truly liken"[31] a foetus to a person, a person with associated rights, but crucially not to rule that the foetus *is* a person.[32] Finding it impossible to clearly define the viability of the foetus, depending as it does on a number of unforeseeable variables, uncontrollable by even the medical profession themselves[33] the English, Canadian and Australian courts have not followed the United States Court in pursuing this measuring of the foetus as an attempted aid to establishing personhood. This is an example of the definitional approach of foetal categorisation, that establishing specific characteristics or defining attributes will naturally lead then to a clear identification of the legal standing and rights to which the foetus is entitled[34].

The contrary approach cleverly avoids all questions of a definitive and timeous nature and instead employs consideration of the direct effect and consequences of applying a certain law or precedent. By studying its specific content and its intended intention it can then be determined if

---

[17] Montreal tramways co v leveille [1933] 4 D.L.R. 337 (S.C.C.)
[18] The legal Fiction Of Nasciturus Had Been Partially Adopted By The Court Of Chancery, And Fully By The Ecclesiastical And Admirality Courts, But The Common Law Courts Had Not Adopted The Approach To Facilitate A Claim For Damaged For Prenatal Injuries By A Child.
[19] Walker v. G.T.N. Rly. Co. of Ireland [(1891) 28 L.R. (Ir.) 69.] Allaire v. St. Luke's Hospital [(1898) 76 Ill. App. 441, affirmed 184 Ill. App. 359.]; Gorman v. Budlong [(1901) 49 Atl. 704.]; Nugent v. Brooklyn Heights Rly. Co. [(1913) 154 App. Div. (N.Y.), 667.]; Drobner v. Peters [(1921) 232 N.Y., 220.]; Stanford v. St. Louis-San Francisco Rly. [(1926) 108 S.O. 566.].
[20] Nasciturus Pro Jam Nato Habetur Quando Agitur De Ejus Commmodo – An Unborn Child Is Considered Born When His Interests Are Taken Into Account
[21] Hamilton -v- Fife Health Board 1993 SC 369
[22] Roe v Wade 35 L. Ed. 2d 147; 1973 U.S.
[23] "The foetus cannot, in English law, in my view, have any right of its own at least until its born and has a separate existence from the mother" Paton v BPAS [1978] 2 All ER 987, 989
[24] it is not "nothing":it is not lifeless and is certainly human" Judge LJ St George's Healthcare Trust v S (1998) 44 BMLR 160
[25] St George's Healthcare Trust v S (1998) 44 BMLR, R v Gibson [1990] QB 619
[26] Attorney General's reference (no 3 of 1994) [1998] AC 245 at 256 - 7
[27] Paton v BPAS [1979] QB 276
[28] Re F (in utero) [1988] Fam 122 CA Staughton LJ "The court cannot care for a child, or order that others should do so, until the child is born; only the mother can"
[29] Re Madyun (1990) 573 A 2d 1235, 1262 (DC App. 1990)
[30] Re T [1992] 4 All ER 649 at 652-653, (1992) 9 BMLR 46 at 50
[31] Re A (in utero) (1990) 72 DLR (4th) 722, 723
[32] Winnipeg Child and Family Services (Northwest Area) v. G. (D.F.) (1997), 152 D.L.R (4th) 193 202-3
[33] McLean, S.A.M., Old Law New Medicine, London, Pandora, 1999, Chapter 3 'Women and Foetuses: Whose Rights?' p49
[34] US Stillbirth Cases Mainly Employ This Approach On The Basis Of Wrongful Death Statute.

it would be appropriate for foetus to be legally recognised. This relational approach considers not the developmental stage of the foetus, but the foetus in relation to its mother and any third party involved in the case. It realistically recognises the constraints of the law in relation to the protection of the foetus and the limitations of its rights to intervene.[35]

More fluid than the definitional method, this approach has been used to substantiate the law's differing attitude to foetal harm in permitting a woman the legal right to abort and concomitantly prosecuting those whose violent actions result in the destruction[36] of a foetus[37]allowing the court to promote the saving of potential life in the one instance and allowing the destruction of potential life in the other. The certainty required by the "scientific classification"[38] of the definitional approach is fundamentally unavailable given the normative nature of the law when considering the application of personhood to the foetus.[39] The relationalship approach fosters flexibility, providing for the differences in which the lawmakers will approach the problem and allowing for factors such as context, the relationship between the various actors and the specific purpose of the law being evoked to be taken into consideration. This can be viewed either as strength or as an avoidance of legally addressing the true nature of the foetus.

The difficult conclusion is that although the foetus is not a legal person, its intrinsic value is earned by its potential life and the law does not consider it to have value to be uniform, instead it chooses to view each case on its individual merits. There are no certainties in its approach.

3. Women and Consent To Medical Treatment.

Consent is a precondition of the autonomous based decision-making process and is required to be given by any woman before medical treatment can be lawfully administered. It is a crime to medically enforce treatment on a woman who has full capacity against her will (without her consent). It is an offence in delict or tort to do so leading to the actions of negligence, battery or assault. This applies even if the non-consenting patient dies as a result[40] Having medieval origins in the law in trespass to the body and being developed in part to regulate sword fights[41] and essentially an internal state of mind[42] medical consent may not be completed even where there is a completed consent form, this only provides evidence of consent.[43]

There is no technical need for a consent form to be signed as patient actions and behaviour can be taken to represent a valid consent, such as holding an arm out to be vaccinated.[44] Before proceeding with a medical procedure or treatment the woman must give valid consent. This

[35] Seymour, J. Childbirth and the Law, Oxford, Oxford University Press, 2000, p185
[36] in law a foetus can only be destroyed, not killed.
[37] Gentry v. Gilmore, 613 So.2d 1241 (Ala. 1993)
[38] Tremblay v. Daigle 62 DLR (4th) 634, 650
[39] ibid
[40] Re T [1992] 4 All ER
[41] Collins v Willcock (1984) 3 All ER 374
[42] "a state of mind personal to the victim" Sidaway v. Governors of Bethlem Royal Hospital (1985) AC, 871
[43] Chatterton v Gerson [1981] 1 ALL ER 257
[44] O'Brien v. Cunard S.S. Co. Citation: 28 N.E. 266 (1891)

consent must be given voluntarily by a woman who has capacity to consent and who understands the nature of the procedure being proposed. Competence presupposes a cognitive ability to logically and rationally able to decide on issues of limited complexity. Capacity in relation to consent for medical purposes requires more than basic competence with the three stage test for determining adult capacity being determined as being as a requirement for the patient to understand the treatment information, the patient believing the information and the ability of the patient to weigh it sufficiently to reach a reasoned choice[45].

4. The Pregnant Woman and Autonomy

The difference between a woman and a pregnant woman patient is that the latter, for a limited period of time, carries within her a foetus. This foetus may or may not have legal rights. If the foetus does have legal rights, these rights are unusual in that they can only be vindicated by someone intruding the host, its mother.[46] If she, like her non-pregnant counterpart, withholds her consent for medical treatment, even if she has capacity and is competent, she may none the less be forced to undergo the procedure. This would not legally happen to a woman who was not pregnant and is often termed the maternal/foetal conflict.

There are three different manners of viewing the legal relationship between a woman and her foetus. If they are both being viewed as being a single entity[47] then the only proponent of conflict, the hostility, can be the woman[48] as the foetus is "flesh of her flesh, part of her"[49], whilst this is undeniably true for the most part, the uniqueness of a foetus in having a potential for independent life has earned it the right to be legally determined as being more than just another part of a woman's body.[50] The courts no longer accept this approach.

At the other extreme is the viewpoint that the woman and her foetus are entirely separate entities[51], often taken to be the views of most medics[52] this professional viewpoint may have been reinforced by the developments in foetal imaging and in utero therapy and surgery. This model allocates both woman and foetus legal rights and potential autonomy, leaving the women open to suffering a denial of her rights in favour of granting the foetus its perceived legal due.

The middle ground is occupied by the model that views the pregnant woman not as being a single entity, not as behind entirely separate entities but somewhere in between, not a single entity, but not two separate entities either[53]. Recognising that the foetus has the potential to acquire legal rights, but is not actually in possession of those rights, denies its complete separateness from the woman and so provides a buffer to the possible conflict that may arise between them.

---

[45] Re C (Adult: Refusal of Treatment) [1994] 1 WLR 290; [1994] 1 All ER 819.
[46] Attorney General's reference (no 3 of 1994) [1998] AC 245 at 256 - 7
[47] Winnipeg Child and Family Services (Northwest Area) v. G. (D.F.) (1997), 152 D.L.R (4th) 193 202-3
[48] McLean, S.A.M., Old Law New Medicine, London, Pandora, 1999, Chapter 3 'Women and Foetuses: Whose Rights?' p52
[49] Rothman, Recreating Motherhood: Ideology and Technology in a Patriarchal Society (New York, 1989) p161, Seymour, J. Childbirth and the Law, Oxford, Oxford University Press, 2000, p189
[50] re A.C., 533 A.2d 611 (D.C. 1987)
[51] Stallman v. Youngquist, 125 Ill. 2d 267, 531 N.E.2d 355 (I988)
[52] "when an obstetrician agrees to take on a pregnant woman as a patient, he actually acquires two patient; other and baby" "Developments in the Law, Medical technology and The Law" (1990) 103 Harvard Law Review 1519, 1556.
[53] Attorney General's reference (no 3 of 1994) [1998] AC 245 at 255-256

Only a matter of weeks following the caveat expressed by Lord Donaldson in 1993, quoting the danger to a "viable foetus" as being the only exception to an adults' absolute right to refuse medical treatment[54], medics were capable of legally enforcing their patients to undergo caesarean sections against their express wishes. (The potential life of a previable foetus had already gained court protection).[55] A six-day labour was presented to the courts as a medical emergency, with both lives depending on immediate caesarean operation[56]. The President bizarrely granted the health authority permission to proceed, despite their patients' religious objections and unexplored competency. Citing a combination of Lord Donaldson's rationale and the absence of any directly relevant precedent or authority as providing justification of the ruling. This raised a number of issues including the obvious medical biased of the judgement – only the medical authorities had the chance to present their case, the woman's competency was not assessed[57]. "Re S was not only based on unsound authority, it also runs counter to the accepted principles of law" [58]A competent adult has the right to refuse medical treatment without the need to prove the rationality of the reasoning.[59] There was little legal analysis, the still unanswerable question of determining the much-quoted "viability" of the foetus and the already legally established principle that the foetus is without legal personality[60]. It can only be surmised that the President[61] in reaching this decision was under great strain being presented literally with a life or death situation against the clock, and lacking specialist medical expertise himself this bad decision was reached in less than twenty minutes. Conversely in acknowledging the lack of previous authority and precedent, this case provided the precedent for a number of rushed hearings over the next months, which resulted in women's express wishes been overruled, with tenuous evidence for incapacity under the Re C test or equivalent being accepted by the court.[62] One case equated the routine trials and pains of labour with a women being rendered temporarily emotionally incompetent to decide on her treatment.[63]

The foetal relationship with the mother was fully revaluated a short time later[64], with a woman's right to refuse medical treatment being fully reinstated (with the caveat that she demonstrates full capacity and competency), reiterating that this decision should stand even if the woman's rationale is irrational. However Re MB was not quite so groundbreaking as it might first have had appeared. With its emphasis on the competency of women who decides to refuse medical treatment, it preserved the intrinsic power of the medical profession to decide if the woman had the legal right to refuse their recommendations. It did however stress that even in the case of the woman lacking capacity; the rights of the foetus cannot be relied upon as being separate from those of its mother.

This deference to the medical professions professed rights to determine a pregnant patients competency was continued by an appeal court ruling two years later. The decision to admit S to a

[54] Re T [1992] 4 All ER 649 at 652-653, (1992) 9 BMLR 46 at 50
[55] Taft v. Taft, 388 Mass. 331, 446 N.E.2d 395 at 397
[56] Re S (Adult: Refusal of Medical Treatment) [1992] 4 All ER 671
[57] as per Re: C (Adult: Refusal of treatment) (1994) I, WLR, 290
[58] Thomson, M., 'After Re S' (1994) 2(2) Medical Law Review 127 p2
[59] Sidaway v. Governors of Bethlem Royal Hospital (1985) AC, 871
[60] Mason J.K., Medico-legal Aspects of Reproduction and Parenthood, Ashgate, Dartmouth, 2nd ed, 1988, Chapter 10 Consent to Treatment p379
[61] Sir Stephen Brown
[62] Tameside and Glossop Acute Services Trust v CH [1996] 1 Family Law Report 762. Norfolk and Norwich Health Care (NHS) Trust v W [1997] 1 FCR 269, 272 Rochdale Healthcare (NHS) Trust v C [1997] 1 FCR 274 Re L (December 1996, unreported) Pattinson, medical law and ethics, Thomson, 2006 p 149
[63] Rochdale Healthcare (NHS) Trust v C [1997] 1 FCR 274, 275
[64] Re MB (Adult: Medical Treatment) [1997] 8 Med. L.R. 217 at 224

mental hospital under a Mental Health Act section, for refusing hospital based treatment, precluded her eventual hospital admission. [65] Later her wishes to have a non-surgical birth were easily dispensed with by the granting of a declaration, and the operation proceeded. Following the birth of her baby S discharged herself and appealed. It was ruled that she had suffered an inappropriate use of the Mental Health Act. What was established were guidelines for other professionals finding themselves in the same situation.

In summary the pregnant woman's right to self determination in medical matters has been clearly adopted by the majority of courts[66], overriding the premise that the state has the right to intervene on behalf of the foetus, by promoting foetal rights. This provides legal parity with the rulings regarding the various attempts to impose on one person various covert sociological and psychological pressures to save another by organ or body part donation[67]. None of us is ever obliged to do so.

4 A Conflict of Interests.

Medical involvement in childbirth is nothing new[68]. There is a case for suggesting that despite the popular assumption that falling perinatal and maternal mortality rates are entirely due to the increases in medical technology, it in fact owes more to the increase in the average western woman's nutrition and standard of living. That said there exist situations which place mother and foetus in undoubted and well recognised obstetric risk, where medical intervention is essential to preserve life for example severe haemolytic disease and major placental pathology.[69] Certainly the courts attitude to obstetric malpractice would back this assertion, whereby a woman or foetus suffering harm can take action in negligence against the failure of the medical team to carry out antenatal or perinatal intervention. The medics' failure to advise of this risk could possibly compound their negligence.[70]

It is known that a significant proportion of the medical profession view the foetus as being a patient separate to the mother, but this leads to an irresolvable problem. The only way to operate or to treat this "patient" is through another separate patient, the mother and for these procedures to proceed authority is required, from the mother. The reason for the crystallisation of tort on live birth is that before birth, there was not legally a person to harm.[71] Recognising the foetus in these terms runs the risk of impinging on the woman's legal rights for privacy and autonomy[72] and there in lies the doctors' dilemma and the source of what is frequently referred to as the maternal/foetal conflict[73].

Some would argue that a woman's right to autonomy is overridden by societies rights to curtail an individual's actions in order to prevent harm to another person in this case the foetus comparing to the situation where we would invade an individuals free will in order to prevent her shooting

[65] St George's Healthcare Trust v S (1998) 44 BMLR 160
[66] Fosmire V. Nicoleau, 75 N.Y.2d 218 (1990)
[67] McFall v Shrimp (1978 10 PaD. & C. 3d 90)
[68] First description of surgical birth 1305, Bernard of Gordon's Lilium, (Blumfield Kosinski, 1990 p61) Jackson, E., Regulating Reproduction: Law, Technology and Autonomy, Oxford, Portland and Oregon, Hart Publishing, 2001, Chapter 4, p 119
[69] Seymour, J. Childbirth and the Law, Oxford, Oxford University Press, 2000 p 208
[70] ibid p209
[71] McLean, S.A.M., Old Law New Medicine, London, Pandora, 1999, Chapter 3 'Women and Foetuses: Whose Rights?' p55
[72] Steinbock, B. 'Maternal-fetal Conflict and in utero Fetal Therapy' (1994) 57 Albany Law Review, 793
[73] Knopoff, K.A., 'Can a Pregnant Woman Morally Refuse Fetal Surgery?' (1991) 79 California Law Review 499 p503

someone.[74] Except of course that it has been proven that although like a person, a foetus is not a person. Equally comparing the mother to a shopkeeper[75], claiming that as a dominant person in a special relationship she has a duty to forgo her own wishes in order to aid her foetus is an unworkable route round maternal autonomy, as the shopkeeper although obliged to stop an escalator in favour of a customer, is not obliged to risk his life to save another. None of us are, there is not duty to rescue. The major surgery involved in surgical birth, with its incumbent risk of sepsis, haemorrhage and shock involves exactly that, risking a life.

As for placing an interdict on the mother to legally compel her to perform or abstain from certain duties or treatments this is would be an outrageous infringement of her legal rights, and is legally impossible. This is entirely unrelated to the natural legal right to have a similar interdict placed on third parties with the two situations not being at odds with each other, but rather making perfect legal sense. *Ex hypothesi,* the foetus seeking protection does not have legal personality[76], the women does, any external, third party threat against the foetus also affects the woman, who has legal personality and an associated right to prevent the eventuation of the threat.

4. Conclusion

"Self determination as a shield is valued for the freedom from outside control it is intended to provide. It manifests the wish to be an instrument of one's own and "not of other men's acts of will""[77] As individuals most of us deeply value our autonomy. With its Greek origins, literally meaning to give oneself his own law[78], autonomy is our legal heritage as patients, male and female, so long as adults we remain legaly competent, we have every right to determine which medical treatment to accept or refuse.

I believe that every woman should have, within the standard legal parameters, the right to refuse medical treatment, no matter how irrational or unconcventional the reason, pregnant or not. To sanction otherwise would be to propose that a women who chooses not to abort should automaticaly have this right truncated, with this transient state of diminshed legal personality being restored on the ocassion of her either suffering a miscarriage or giving birth.

Cited as an existing example of post conception pre birth State interventionism[79] is the provision of specific medical support and education in the antenatal period[80]. This is naivety. The State has been historically concerned with population, generation and regeneration to ensure maximum

[74] ibid p518
[75] ibid page 524
[76] "None of the decisions to which we were referred appear to us to provide support for the view that the foetus has a legal persona, or is otherwise recognised as being vested in personal rights for the protection of which the remedy of interdict may be invoked" : Kelly v Kelly 1997 SLT 896 at 901C Wilkinson, Norrie The Law Relating To Parent And Child In Scotland Scottish Universities Law Institute, Green 1999 p59
[77] Knopoff, K.A., 'Can A Pregnant Woman Morally Refuse Fetal Surgery?' (1991) 79 California Law Review 499 P516presidents Commission For The Study Of The Ethical Problems In Medicine And Biomedical And Behavioral Research, 1. Making Health Care Decisions: The Ethical And Legal Implications Of Informed Consent In The Patient Practitioner Relationship 45-46 1982
[78] Auto-Nomos
[79] Sutherland E, 'Regulation of Pregnancy', in Sutherland E. and McCall Smith R.A. (eds) Family Rights: Family Law and Medical Advance, Edinburgh: Edinburgh University Press, 1990, Chapter 6. p109
[80] Prescription charges exemption, obstetric services and specialised educational classes

status, productivity and wealth. Natural eceonomic benefits derive from providing pregnant women with screening and health care - it is ultimately an attempt to develop as healthy a populous as possible, reducing health care costs on unnecessarily sick infants and new mothers, whilst, engendering female political loyalty by demonstrated paternalism. Euphemistically referring to a woman who is as pregnant as being in the midst of a "maternal/foetal conflict" is similarly inaccurate. This concomitant transposing of a woman into a mother and the foetus into a person of equal standing to the women belies the legal truth. The woman when pregnant is still legally superior to her foetus in that she has achieved legal personality, whilst the foetus only has the potential to do same[81]. The medics moral meandering around what has traditionally been a clear cut legal situation has forced the law to unnecessarily revisit and unbelievably to modify this legal relationship,which had already been clearly defined by the institutional writers, common law and precedent. Technically conflict is impossible between a women and her body with the real dispute lying between medics and their patient daring to disagree.

[81] McLean, S.A.M., Old Law New Medicine, London, Pandora, 1999, Chapter 3 'Women and Foetuses: Whose Rights?' p52

BIBLIOGRAPHY

Books, Texts, Cases and Academic Research Papers Sourced and Studied.

- R.Scott, Rights, Duties and the Body: Law and ethics of the maternal-fetal conflict, 2002, Hart Publishing.
- Bennett, B. 'Pregnant Women and the Duty to Rescue: a Feminist Response to the Fetal Rights Discourse', Law in Context (1991); 9(1): 70
- Chatterton v Gerson [1981] 1 ALL ER 257
- Fortin, J.E.S. 'Legal Protection For The Unborn Child', Modern Law Review (1988); 51
- Jackson, E., Regulating Reproduction: Law, Technology and Autonomy, Oxford, Portland and Oregon, Hart Publishing, 2001, Chapter 4,
- Kluge, E.H. 'When Caesarean Section Operations Imposed By A Court Are Justified', (1988) 14 Journal of Medical Ethics 206
- Knopoff, K.A., 'Can a Pregnant Woman Morally Refuse Fetal Surgery?' (1991) 79 California Law Review 499
- St George's Healthcare Trust v S (1998) 44 BMLR 160
- Mair J., 'Maternal/Foetal Conflict: Defined or Defused', in McLean S.A.M. (ed) Contemporary Issues in Law, Medicine and Ethics, Aldershot, Dartmouth, 1996, Chapter 5
- Mason J.K., Medico-legal Aspects of Reproduction and Parenthood, Ashgate, Dartmouth, 2nd ed, 1988, Chapter 6 'Protection of the Foetus' Chapter 10 "Consent to Treatment"
- Mattingley, S.S. 'Maternal-Fetal Dyad: Exploring the Two-patient Obstetric Model', (1992) Jan-Feb, The Hastings Center Report, 13
- Edwards and Griffiths, Family Law, Edinburgh W. Green, 2006.
- Seymour, J., 'A Pregnant Woman's Decision to Decline Treatment: How Should the Law Respond?', (1994) 2 Journal of Law and Medicine 27
- Buton v Islington HA [1993] QB 204
- Jackson, Emily Regulating Reproduction Law Technology And Autonomy Oxford Hart, 2001
- Seymour, J. Childbirth and the Law, Oxford, Oxford University Press, 2000, Chapters 1, 8 & 9
- Steinbock, B. 'Maternal-fetal Conflict and in utero Fetal Therapy' (1994) 57 Albany Law Review, 781
- Sutherland, Elaine E. Child and family law Edinburgh T. & T. Clark, 1999.
- Sutherland E, 'Regulation of Pregnancy', in Sutherland E. and McCall Smith R.A. (eds) Family Rights: Family Law and Medical Advance, Edinburgh: Edinburgh University Press, 1990,
- Mason, J. K .Medico Legal Aspects Of Reproduction And Parenthood, Aldershot Dartmouth, 1990
- Stallman v. Youngquist, 125 Ill. 2d 267, 531 N.E.2d 355 (I988)
- Tameside and Glossop Acute Services Trust v CH [1996] 1 Family Law Report 762.
- R v Gibson [1990] QB 619
- Winnipeg Child and Family Services (Northwest Area) v. G. (D.F.) (1997), 152 D.L.R (4^{th}) 193 202-3
- Fosmire V. Nicoleau, 75 N.Y.2d 218 (1990)
- Re L (December 1996, unreported)
- Bracton: De Legibus Et Consuetudinibus Angliæ
- Norfolk and Norwich Health Care (NHS) Trust v W [1997] 1 FCR 269
- Dehler v. Ottawa Civic Hospital (1979).25 O.R. (2d) 748 at 761, 101 D.L.R. (3d) 686 (Ont. H.C.) aff'd (1980), 29 O.R. (2d) 677, 117 D.L.R. (3d) 512 (Ont. C.A.)
- Thomson, M., 'After Re S' (1994) 2(2) Medical Law Review 127
- Sidaway v. Governors of Bethlem Royal Hospital (1985) AC, 871
- Collins v Willcock (1984) 3 All ER 374
- Re C (Adult: Refusal of Treatment) [1994] 1 WLR 290; [1994] 1 All ER 819
- Rosamund Scott "The pregnant woman and the Good Samaritan: can a woman have a duty to undergo a Caesarean section?" (2000) 20(3) OJLS 407-436.
- Michalowski, S. 'Court-Authorised Caesarean Sections - The End of a Trend' (1999) 62 Modern Law Review 115.
- Re A (in utero) (1990) 72 DLR (4th) 722, 723
- Rochdale Healthcare (NHS) Trust v C [1997] 1 FCR 274, 275
- Hyde, A., Bodies of Law (1997) Princeton, Princeton University Press.
- Royal College of Obstetricians and Gynaecologists, 'A Consideration of the Law and Ethics in Relation to Court-Authorised Obstetrical Intervention', RCOPG Guidelines Ethics No. 1 April 1994.
- Gentry v. Gilmore, 613 So.2d 1241 (Ala. 1993)
- Bernard of Gordon's Lilium, (Blumfield Kosinski, 1990)
- Grubb A., 'Commentary on Re S' (1993) 1 Medical Law Review 92
- McLean, S.A.M., Old Law New Medicine, London, Pandora, 1999, Chapter 3 'Women and Foetuses: Whose Rights?'
- Tremblay v. Daigle 62 DLR (4^{th}) 634, 650
- Schmall, L., 'Addicted Pregnancy as a Sex Crime', (1993) 13 Northern Illinois University Law Review 262-334
- "Developments in the Law, Medical technology and The Law" (1990) 103 Harvard Law Review 1519, 1556
- Wilkinson, Norrie The Law Relating To Parent And Child In Scotland Scottish Universities Law Institute, Green 1999
- O'Brien v. Cunard S.S. Co. Citation: 28 N.E. 266 (1891)
- Re Madyun (1990) 573 A 2d 1235, 1262 (DC App. 1990)

- Herring, Medical Law and Ethics, Oxford University Press, 2006
- Paton v BPAS, Re F (in utero)(1988) 2 All E.R. 193
- Johnson, D.E., 'The Creation of Fetal Rights: Conflicts with Women's Constitutional Rights to Liberty, Privacy and Equal Protection', (1986) 95 Yale Law Journal 599.