Supreme Court sees no judicial role in protecting the unborn

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One of the noble overarching purposes of law is to protect the weak from the powerful. Power may manifest itself in several ways: intellectual, social, economic and physical. For example, in theory at least, we call on the highest income earners to part with more, in both absolute and relative terms, of their income for taxes than we ask of others. Some tax revenue is dedicated to improve the conditions of the poor.

Abuse of physical power is particularly discouraged by the law. The longest standing legal traditions in society seek to prevent and compensate for acts of physical violence in criminal and civil justice. Injuring someone physically, especially where it could be prevented, is almost never tolerated by the law.

With respect to children, child protective agencies of government intervene on a broad range of safety concerns for the children, such as physical, sexual, and emotional abuse. There is legislation against child labour. The parents have a legal duty under the Criminal Code to provide the necessities of life to their children. We protect children's identity when they run afoul of the law, and approach sentencing for them with the presumption that they can, and will, be rehabilitated. We have strict special rules protecting children in the event of abandonment; abduction; injury before or during birth causing death; murder; prostitution; and incest.

Parents, especially mothers, might be surprised to learn that they even have legal duties during childbirth. A Criminal Code provision requires one to obtain assistance during childbirth. All of this special attention to childbirth and children recognizes the vulnerability in the delivery of babies and children.

What about the instance of the most vulnerable developmental stage: the fetus? One exception to the intervention of the law to prevent physical injury, recently approved by the Supreme Court of Canada, is the case of the fetus. Most detectable fetuses which are not aborted are eventually born alive, and the injurious impact of alcohol and drug use on their development is well known. The question for the Court was whether any principle of common law would apply to intervene for the protection of fetal development.

Parental versus Fetal Rights?

In Winnipeg Child and Family Services v. G., the Supreme Court of Canada had occasion to consider whether a pregnant woman can be compelled to take measures designed to protect her fetus from her own self-destructive impulses. Could the child welfare agency, a provincial government organization, force a pregnant woman into substance abuse treatment for the protection of her unborn child?

At the time of the case, G was five months pregnant with her fourth child. She was addicted to glue-sniffing. This gave rise to a concern that the nervous system of the developing fetus might

be damaged. Of G's three other children, two were permanently injured by her indulgence in this addiction.

The Supreme Court of Canada curiously set out to answer this question, knowing that this case would come before it well after the subject baby was born. In the past, the same court dismissed cases because the legal questions in them were moot. That is to say, judges do not like to hear cases specifically for which their decisions will have no direct meaning and application. They are too busy to answer hypothetical questions.

Nevertheless, the Court gave leave to consider this question. People expected the Court to fashion some important new legal principle by it.

Instead the majority of the Court embraced the moot case to declare, in more than 25 printed pages of judgment, that they were not going to intervene by creating any common law principle to protect the fetus. They surveyed the law and simply found that no current judge-made principle permitted intervention for the sake of the fetus, which has no status at all in the law.

Once a fetus is delivered alive, injuries caused by others during gestation may be pursued in law and compensated. If, for example, a pregnant woman is injured in a car accident, caused by the negligence of another, the child later born alive could sue to recover against the negligent party. Yet, this right to sue must be converted from potential to actual by live birth.

Until then, the fetus has no legal rights any more than, say, a pair of sneakers has legal rights. Therefore, the fetus had no legal recognition capable of protection. There was, simply, no one to protect, the Court said.

The Court added that this law could be changed, or extended, for this kind of extraordinary circumstance. But it would not be Canadian judges who would make this change:

"Nor, given the magnitude of the changes and their potential ramifications, would it be appropriate for the courts to extend their power to make such an order. The changes to the law sought on this appeal are best left to the wisdom of the elected legislature."

The Supreme Court of Canada found itself overwhelmed with the social, biological, and legal issues that might flow from any change to the law.

Characterizing these changes as major for what are essentially lifestyle choices of pregnant women, the Court even believed that legal intervention itself might cause more harm than good to fetuses. This ignores the arbitrariness of current judge-made rules and the irrationality of a "zero care, zero public interest" policy before the moment of birth and "total care, total public interest" policy at the instant of birth.

Two of the nine judges would have intervened to protect the fetus where a reasonable probability of serious and irreparable harm exists. The mother's liberty interests, they concluded, must bend to a scenario where such devastating harm can be so easily be prevented. Justice Major writing on behalf of the dissenting justices wrote,

"I do not believe our system, whether legislative or judicial, has become so paralyzed that it will ignore a situation where the imposition required in order to prevent terrible harm is so slight. It may be preferable that the legislature act but its failure to do so is not an excuse for the judiciary to follow the same course of inaction. ... Where the harm is so great and the temporary remedy so slight, the law is compelled to act."

Conclusion

Many Canadians will wonder about the characterization of such protections as a legal revolution. Instead they might be puzzled about what legal principle brought us to the point where we cannot protect the unborn from systematic pre-natal injury. This injury is preventable and will be a debilitating lifelong condition requiring the post-natal support of many others. This, according to some Canadians, but not including the majority of Supreme Court Justices (there were two dissenting judges), takes it out of the realm of a private, lifestyle decision. Ultimately, any criminal or unlawful behaviour could be described as a lifestyle choice.

The Supreme Court knew that its passing on the opportunity to protect future generations of Canadians would mean that they would not be protected. Legislatures are notorious for avoiding politically polarized domains (e.g., abortion, physician-assisted suicides), for fear of electoral consequences. One of the arguments for an appointed judiciary is that it would not shirk acting in difficult cases; and it would unflinchingly protect the weak from abuse at the hands of the strong. Even the most vocal individual rights advocates might fear a society which has no regard, at official policy levels for the welfare of its future generations of citizens.

It might be seen as a political decision for the top court to preside over the elegant crafting of rules over the decades but suddenly draw the line and say the next extension is wholly too far. These "fetus is not a legal person" rules were themselves arguably arbitrary, line-drawing rules. The Court can anytime freely make and re-make any of its common law rules. It often does so in other contexts such as its rulings about tort, abortion, sex and gender rights.

Regardless of technical legal justifications and lines in the sand the Court wishes to draw in its analysis, the reality is that the Supreme Court of Canada has, in this case, simply chosen by default to exercise its preference for the freedoms of the mother over the interests of the fetus.

As the judges are finding out, these questions will not go away. Perhaps Canadian society as a whole must think about and decide these questions through their elected law-makers.

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