ISSN 2704-8012

European Journal of Privacy Law & Technologies

2020/1



G. Giappichelli Editore

European Journal of Privacy Law & Technologies

Directed by Lucilla Gatt

2020/1

G. Giappichelli Editore

European Journal of Privacy Law & Technologies
On line journal
Italian R.O.C. n. 25223

G. GIAPPICHELLI EDITORE - TORINO
VIA PO, 21 - TEL. 011-81.53.111 - FAX 011-81.25.100
http://www.giappichelli.it



The Journal is one of the results of the European project TAtoDPR (Training Activities to Implement the Data Protection Reform) that has received funding from the European Union's within the REC (Rights, Equality and Citizenship) Programme, under Grant Agreement No. 769191.

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Published Online by G. Giappichelli in June 2020
www.ejplt.tatodpr.eu

THE SCIENTIFIC INNOVATIONS OF FETAL SURGERY AND ARTIFICIAL WOMB COULD INNOVATE ALSO THE CONCEPT OF LEGAL PERSONHOOD

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Abstract:

In English law, the foetus has no legal personality and it is deemed to have a separate existence from its mother until it is born. This rule may need to be revised, in light of technological advances in foetal surgery and artificial womb technology designed to preserve foetal viability pre-birth. Thus, the technological intervention for the preservation of foetal viability may seem incompatible with traditional legal conception that denies legal personality to the foetus. However, affording the foetus a legal personality may have a huge impact on the fundamental rights of pregnant women over their bodies.

Key-words: Artificial Womb Technology; fetal surgery; legal personhood.

Summary: 1. Introduction. – 2. Legal personality and the "born alive" approach. – 3. Fetal surgery: problems for women and fetuses. – 4. The risks of affording legal personality to the fetus in the artificial womb. – 5. The only possible solution is creating a third status.

1. Introduction

According to English law, the foetus has no separate legal rights from its mother, and legal personality is assigned at birth [1]. This principle of law was reaffirmed by the European Court of Human Rights' decisions in *Paton v United*

[1] Paton v British Pregnancy Advisory Service Trustees [1979] QB 276 (https://www.bpas.org/media/1182/gjo_uk_patonvbritishpregnancyadvisoryservicetrustees_en.pdf).

Kingdom; [2] and *Vo v France;* [3] in which the European Court of Human Rights ruled that the unborn child had no rights under Article 2 of the Convention of Human Rights. Therefore, there has always been a clear distinction between a foetus, who has no legal personality, and a person born alive, who is afforded all the rights and protection of a child. However, this born/unborn legal dichotomy between the foetus and the child is at risk because of recent medical technological advances in pre-birth treatments of foetuses in the uterus.

In her article, "Challenging the born alive threshold: fetal surgery, artificial wombs, and the English approach to legal personhood ". [4] Elizabeth Chloe Romanis refers to the English legal system, but her reflections are valid for all legal systems in Europe, in light of the European Court of Human Rights judgements in *Paton v United Kingdom* and *Vo v France.* The author points out that the emerging medical advances give cause to question whether the legal concepts of births and born alive in Europe can still be considered a valid approach to assigning personhood in light of new medical technological advances.

These new medical technological advances is exemplified in 2016, when an innovative surgical team succeeded in extracting a pre-viability foetus almost entirely from the uterine environment, removing a life-threatening tumour, and placing the foetus back into the uterus to continue gestating. The baby was then delivered healthy at the end of the normal gestational period, making the headlines as "the baby born twice". [5]

Another technological challenge to the born/unborn dichotomy between the foetus and the child is evidenced by the development of the Artificial Womb Technology (AWT), in which a foetus is outside the mother's body but in a primordial stage of its human development. The complete ectogenesis, in which human beings are created in a laboratory by in vitro fertilization and grown in an AW until 36 weeks from conception, remains a remote possibility. However, the same cannot be said for partial ectongenesis, which involves the pregnant woman, and in which the foetus is either delivered prematurely or extracted by C-section. For example, in 2017, a team of scientists and foetal surgeons announced the development of an artificial womb prototype that had supported lamb foetuses on the viability threshold for four weeks [6]. All test subjects survived the experiment

[2] (1980) 3 EHRR 409.

[3] [2004] ECHR 53924/00.

[4] Elizabeth Chloe Romanis, "Challenging the 'Born Alive' Threshold: Fetal Surgery, Artificial Wombs, and the English Approach to Legal Personhood", *Medical Law Review* (Volume 28, Issue 1, Winter 2020), Pages 93–123, https://doi.org/10.1093/medlaw/fwz014.

[5] "Baby Lynlee 'born twice' after life-saving tumour surgery" BBC 24 October 2016 (https://www.bbc.com/news/world-us-canada-37750038).

[6] "An artificial womb successfully grew baby sheep – and humans could be next" The Verge Apr

without experiencing any of the common complications associated with lamb preterm birth. These results are encouraging because it is hoped that this technology will also have the capacity to overcome the present limitations of neonatal intensive care and improve patterns of morbidity and poor prognoses in human preterm. The artificial wombs could represent an alternative to neonatal intensive care because it treats the foetus as if it had not been removed from the uterus by closely mimicking uterine conditions to effectively prolong gestation.

2. Legal personality and the "born alive" approach

Before we can address the issue of the risks of scientific progress on legal personality, it appears necessary to clarify what is meant by birth. According to English law, the birth corresponds to the separation of gestator and gestational subject [7]. Thus, in order to acquire legal personality, the child must be not only be "born", but also be "born alive", which means it must demonstrate any of the recognisable signs of life (a typical example is autonomous breathing) [8]. Therefore, the vitality of the new-born was fundamental in times when this was the only way to evidence a human being's development and birth. The English law, in fact, has always recognized the existence of "stillbirth", which occurs when a child is born in the twenty-fourth week without having demonstrated any signs of life. [9] The law, however, maintains that a stillbirth child cannot be the victim of a homicide, unlike in the United States, where pregnant women have been criminalised for still-births in some states. [10] Nowadays the "born alive" rule to determining legal personality in English law, and by extrapolation in Europe, may appear an outdated approach, because new technological developments in foetal monitoring, have enabled medical practitioners to determine that developing human beings exist and exhibit signs of supported life pre-birth. This invariably leads to the question: if a foetus is medically ascertained to be alive in uterus, why not ascribe the foetus a legal personality?

25, 2017 (https://www.theverge.com/2017/4/25/15421734/artificial-womb-fetus-biobag-uterus-lamb-sheep-birth-premie-preterm-infant).

[7] Paton (n 1) per Sir George Baker at 279. "The foetus cannot, in English law, in my view, have any rights of its own at least until it is born and has a separate existence from the mother".

[8] Births and Deaths Registration Act 1953 s 41, as amended by Still-Birth Definition Act 1992 s 1 (http://www.legislation.gov.uk/ukpga/Eliz2/1-2/20/section/41).

[9] Section 1(1) Still-Birth (Definition) Act 1992, Chapter 29. (England & Wales).

[10] Ava B. "When Miscarriage is a crime", Plant Parenthood of Arizona, (July 29, 2019), https://www.plannedparenthoodaction.org/planned-parenthood-advocates-arizona/blog/when-miscarriage-is-a-crime.

3. Foetal surgery: problems for women and foetuses

Foetal surgery poses another legal challenge to the concept legal personality. For example, if being born is literally only a matter of not being inside another person anymore, it might be argued that during a surgery the foetus, who is extracted from the pregnant woman's body to be operated upon, remaining attached only by the umbilical cord, is born and has, therefore, a legal personality. However, recognizing the foetus's legal capacity during the operation is not a trivial choice. During the surgery, whatever is done to the foetus physically affects the pregnant woman and the law chooses to consider her the only patient for the purposes of the procedure, therefore, it is only her consent that is significant for the surgery.

In literal terms, in the unlikely event that the foetus is considered born at the time of the surgery conducted outside of the uterus, its rights to personhood should be recognised and protected as such. However, in the circumstances, the legal personhood afforded to the foetus during the surgery must be reversed as soon as the foetus is returned to the uterus. However, there is no legal precedent for reversing the personhood of a human being. The only way to remove legal personality is death, and it is counter-intuitive to imagine that the reinsertion of a foetus into the womb is equivalent to its death.

On the other hand, even the argument that considers a foetus as legally born during an operation outside of the uterus is beset with clear problems. Without personhood during the operation, liability for grossly negligent surgeries causing death in utero and subsequent stillbirth of foetuses might be precluded because gross negligence manslaughter could only be established if a baby was born alive with injuries sustained from negligent surgery that later caused death. Furthermore, the offence of "child destruction" (recognized in England and Wales in the case of killing of "viable foetus", which means a foetus potentially suitable for extra-uterine life [11)] or of procuring miscarriage could not be established because there would be no *mens rea.*

There may be no civil recourse following the stillbirth of a foetus that died in utero as a result of negligent foetal surgery because if the foetus is not born alive, it is not an entity that can bring an action in tort. There could be only a course of action in negligence for the baby born alive but injured by negligent surgery [12].

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[11] "Any person who by wilful act intentionally destroys such a foetus is guilty of child destruction" Infant Life Preservation Act 1929.

[12] In these circumstances, the baby "born alive" would be able to pursue an action in negligence for damage caused during the surgery because at birth they achieve legal personality and inherit the damaged body for which the foetal surgeon is responsible (Burton v Islington HA (n 59) per Dillon LJ at 219).

4. The risks of affording legal personality to the foetus in the artificial womb

In order to be afforded legal capacity, it is not sufficient to be separated from the uterus, but there must be also proofs that the new-born is alive. The English law states that a child is born alive if it breathes after birth [13]. It has not been specified, however, whether breathing must be demonstrated only immediately after birth or also for some continuing time after. Even in the case of assisted ventilation, the child still uses his lungs to breathe. Instead, a foetus placed inside an artificial womb does not "breathe", acquiring the oxygen not using its lungs but by placental gas exchange through cannulae in the amniotic fluid, just like the foetus in utero [14].

Moreover, the acquisition of oxygen by placental gas exchange rather than ventilation is one of the greatest advantages of the artificial womb, which allows the lungs to continue to develop ensuring they are inactive. It has also been highlighted, however, that breathing is certainly a valid indicator to establish that the subject is "born alive", it cannot be the only vital sign of life taken into consideration [15]. However, it is difficult to identify what the others signs of life may be, since there is no uniformity of views about the sufficiency of primitive circulation or growing movements.

Another possible approach is the one called “forced symmetry”, which states that if a defining characteristic can be isolated that makes a person legally dead, the emergence of that characteristic identifies when a person becomes legally alive. A typical sign of the occurrence of death is the irreversible loss of consciousness [16]. There is no doubt that in the artificial womb the foetus lacks any consciousness and therefore could not be considered alive. It is also evident, however, that this lack of knowledge is not irreversible or permanent because

[13] Births and Deaths Registration Act 1953 s 41, as amended by Still-Birth Definition Act 1992 s 1 (http://www.legislation.gov.uk/ukpga/Eliz2/1-2/20/section/41).

[14] “An extra-uterine system to physiologically support the extreme premature lamb” Nature Communications, 25 April 2017 (https://www.nature.com/articles/ncomms15112).

[15] In R v Brain it was observed that many children are born alive but do not breathe for some time after their birth; in R v Sellis it was suggested breathing is not decisive proof of being born alive because a foetus could breathe and yet have died before birth is complete. The jury were told they must be satisfied that ‘the child was wholly born into the world in a living state’ at the time that it was decapitated, the implication being that a living state encompasses more than breathing.

[16] Academy of Medical Royal Colleges, A Code of Practice for the Diagnosis and Confirmation of Death (2008) http://aomrc.org.uk/wp-content/uploads/2016/04/Code_Practice_Confirmation_Diagnosis_Death_1008-4.pdf.

the foetus will at some point be capable of exercising an independent life and if undisturbed will be removed from the artificial womb. Therefore, it is easy to see that the foetus is not legally alive but also not dead. Considering the foetus in the artificial womb "born alive" could also change the conception of viability because the technology has the potential to change what "capable of being born alive" means.

Viability marks the point from which the foetuses are granted a limited right not to be aborted. Currently, the limit set by the 1967 Abortion Act is 24 weeks [17], after which the foetus is presumed capable of being born alive. Affording legal personality to the foetus in an artificial womb could lead to the contention that a foetus in utero capable of surviving in an artificial womb should be considered "capable of being born alive". The technology of the artificial uterus could therefore considerably reduce the point at which a foetus can survive outside the uterus, since there is no definition of "capable of being born alive only if supported by an artificial uterus". Arguably, Artificial Womb Technology also threatens access to abortion, by empowering the anti-abortion lobby, who could claim AWT in order to advocate for a reduction of the time allowed for abortion.

5. The only possible solution is creating a third status

The current binary structure of personhood, where there is only the possibility of having legal personality or not, appears too restrictive. Therefore, the author suggests the creation of a third status, a "partially born" category, for entities like the foetuses in the artificial womb or the foetuses who undergo a surgery outside the maternal uterus. This third status could be used to identify these subjects accurately, avoiding the creation of a ripple effect in other areas of law and solving relevant discrepancies appropriately.

The English law already affords some protection to foetuses in utero [18], to the embryos created as part of the In Vitro Fertilization process [19] and even to

[17] Abortion Act 1967 s 1, as amended by Human Fertilisation and Embryology Act 1990 (http://www.legislation.gov.uk/ukpga/1967/87/contents).

[18] A foetus is protected by the Infant Life Preservation Act, which criminalises child destruction and the Offences Against the Person Act 1861 criminalising the procurement of miscarriage.
(http://www.legislation.gov.uk/ukpga/Geo5/19-20/34/section/1).
(http://www.legislation.gov.uk/ukpga/Vict/24-25/100/contents).

[19] The Human Fertilisation and Embryology Act 1990, as amended by the Human Fertilisation and Embryology Act 2008 renders it unlawful to experiment with embryos after 14 days from conception (http://www.legislation.gov.uk/ukpga/2008/22/contents).

the animals [20]. All these entities are not valued to the same degree as a legal person but have their legal existence protected. The creation of different categories of human beings could, however, carry some normative concern and risks of abuse.

[20] The Animal Welfare Act 2006 contains provisions criminalising behaviour that causes excessive suffering to an animal (http://www.legislation.gov.uk/ukpga/2006/45/contents).