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## CASE COMMENTS

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### CHRONIQUE DE JURISPRUDENCE

#### *R. v. Sullivan and Lemay*: A Case Comment

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#### Introduction

The decision of the Supreme Court of Canada in *R. v. Sullivan and Lemay*<sup>1</sup> adds yet another case to the mounting number of decisions stating that a foetus is not a person in Canadian law. Two British Columbia midwives, Mary Sullivan and Gloria Lemay, were charged with criminal negligence causing bodily harm and criminal negligence causing death to a person, following the death of a foetus during a birth they were attending. Aside from the question of whether the midwives were criminally negligent in the care they provided at the birth, the main legal issue which arose in the case was the status of the foetus in the criminal law. More specifically, the central question was whether criminal negligence leading to the death of a foetus should be characterized as negligence causing bodily harm to the pregnant woman, or as negligence causing the death of a distinct human being.

The decision in *Sullivan and Lemay* is significant in two respects. First, it constitutes another unequivocal statement by the Supreme Court of Canada that a foetus is not a person in Canadian law. On this point, the decision is significant because of what it does not do — it does not discuss the issue of the status of the foetus under the *Criminal Code*<sup>2</sup> at any length. The brevity of the Court's analysis of this issue<sup>3</sup> demonstrates that the Court believes it has already determined that the foetus is not a legal person,<sup>4</sup> and that there is no longer any room for argument on this point. Second, the Court shows an openness to considering the equality analysis put forward by the Women's Legal Education and Action Fund (L.E.A.F.),<sup>5</sup> who intervened in the case. L.E.A.F. proposed a vision of

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Revue de droit de McGill

<sup>1</sup>(1991), 63 C.C.C. (3d) 97, 3 C.R. (4th) 277 [hereinafter *Sullivan and Lemay* cited to C.C.C.].

<sup>2</sup>R.S.C. 1970, c. C-34 (now R.S.C. 1985, c. C-46) [hereinafter *Criminal Code*].

<sup>3</sup>*Supra*, note 1 at 105-107, Lamer C.J.

<sup>4</sup>See *infra*, notes 23 & 29-33 and accompanying text.

<sup>5</sup>*Supra*, note 1 at 107.

pregnancy that is more consistent with women's experiences than the way pregnancy is typically depicted in law.<sup>6</sup> After briefly reviewing the procedural history of the *Sullivan and Lemay* case, I will return to discuss each of these points in greater detail.

## I. Procedural History

### A. *The Facts*

Mary Sullivan and Gloria Lemay were hired by Jewel Voth to assist in the birth of her first child. Ms. Voth had initially intended to have a hospital birth, under the care of her family physician, Dr. Morell. During the course of her pregnancy, however, Ms. Voth had become increasingly disenchanted with the hospital at which Dr. Morell had hospital privileges, and with Dr. Morell himself. Ms. Voth continued to see Dr. Morell regularly for pre-natal care, but decided to seek out private pre-natal classes. In March 1985, she contacted Mary Sullivan, who agreed to provide the classes and to act as a coach during her labour. At their first meeting, Ms. Sullivan showed Ms. Voth pictures of both hospital and home births. At a subsequent meeting, she offered to assist Ms. Voth to find a new physician with hospital privileges at a different hospital from that of Dr. Morell. Ms. Voth refused the offer, and began instead to plan a home birth with the assistance of Ms. Sullivan. Ms. Sullivan agreed to attend the birth, but stated that she would require the back up assistance of Gloria Lemay. Neither Ms. Sullivan nor Ms. Lemay had any formal training in midwifery, although they did have some experience with home births.

At about 11:00 p.m., on the evening of May 7, 1985, Ms. Voth went into labour. From that point on, she kept in contact with Ms. Sullivan by telephone until Ms. Sullivan arrived at the Voth home at approximately 5:30 a.m. the next morning. Ms. Sullivan examined Ms. Voth, and found that by approximately 6:00 a.m. Ms. Voth's cervix was 70 to 80 percent dilated. Ms. Sullivan made two phone calls to Ms. Lemay, who arrived at the Voth home at 7:00 a.m. At the time she telephoned Ms. Lemay, Ms. Sullivan believed that the baby would be born within two to three hours, or before 10:00 a.m.

Although there was conflicting evidence on this point, the trial judge found that Ms. Voth entered into second stage labour at approximately 9:00 a.m. Five hours later, at approximately 2.00 p.m., the head of the foetus emerged. The foetus was alive at this point. The birth did not proceed further, however, as Ms. Voth's contractions had ceased. For twenty minutes the midwives attempted to remove the foetus, first by endeavouring to stimulate further contractions, and

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<sup>6</sup>Factum of the Intervener Women's Legal Education and Action Fund (L.E.A.F.). For further discussion of this point, see *infra*, note 22 and accompanying text.

subsequently by attempting to rotate the foetus' shoulders.<sup>7</sup> All efforts having proved futile, the midwives called emergency health services. Under the instructions of Ms. Lemay, the emergency attendants applied pressure to Ms. Voth's uterus, again to no avail. By all accounts the pressure applied to Ms. Voth was extreme. One of the ambulance attendants, described by the trial judge as a "power lifter,"<sup>8</sup> indicated that he was pushing as hard as he could. After attempting for ten minutes to induce further contractions, the attendants transported Ms. Voth to the hospital. Upon her arrival, an intern, Dr. Matthews, delivered the foetus within two minutes using a "basic delivery technique."<sup>9</sup> The child exhibited no signs of life, and could not be revived after half an hour of attempted resuscitation. Ms. Voth exhibited signs of extreme exhaustion — sunken eyes, a fever, and dry mucous membranes — and was placed on intravenous equipment.

As a result of the death of the foetus, the midwives were charged with criminal negligence causing death to a person contrary to s. 203 of the *Criminal Code* (now s. 220), and criminal negligence causing bodily harm contrary to s. 204 (now s. 221) of the *Criminal Code*. The midwives were charged with both offenses because of uncertainty as to whether a foetus at the stage of birth was to be viewed as a person (in which case the midwives could be convicted under s. 203 of the *Criminal Code* if they had caused its death) or as a part of the pregnant woman (in which case the midwives could only be convicted of causing bodily harm to Ms. Voth).

## **B. The Decision at Trial**

### 1. The issue of the death of the foetus

The midwives were convicted at trial before the County Court of Vancouver of criminal negligence causing the death of the foetus, but were acquitted on the charge of criminal negligence causing bodily harm to Ms. Voth.<sup>10</sup> Godfrey L.J.S.C. first considered the standard of care to which the midwives should be held in determining whether their conduct amounted to criminal negligence. She held that the midwives should be held to the standard of a competent child-birth attendant, which she defined as a person "skilled in obstetrics whether midwife or doctor."<sup>11</sup> The trial judge rejected the submission of the midwives

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<sup>7</sup>As in standard births, the foetus' head emerged in a face downward position. Had the labour continued, the next contraction would have rotated the foetus 90 degrees into a position in which its shoulders could have proceeded to be born. This was a finding of fact at trial: see *R. v. Sullivan and Lemay* (1986), 31 C.C.C. (3d) 62 at 66, 55 C.R. (3d) 48 [hereinafter *Sullivan and Lemay* (B.C.S.C.) cited to C.C.C.].

<sup>8</sup>*Ibid.* at 75.

<sup>9</sup>*Ibid.* at 66.

<sup>10</sup>*Ibid.* at 74.

<sup>11</sup>*Ibid.* at 68.

that because they had no formal training, they should be held to a lower standard.

Next, Godfrey L.J.S.C. considered whether the actions of the midwives caused the death of the foetus. The trial judge was of the view that the midwives were to be held responsible for the death for two reasons. First, she held that the foetus would have been born alive had the midwives taken Ms. Voth to the hospital at least one hour before the labour stopped. She reached this conclusion based on medical evidence presented concerning the recommended maximum duration of a second stage labour.<sup>12</sup> According to that evidence, she found that the accepted traditional medical practice is that women not remain in second stage labour longer than two hours.<sup>13</sup> The reason for this limitation is that after two hours of second stage labour, the pregnant woman is likely to be physically exhausted and continued labour becomes risky. Some midwives also accept two hours as the appropriate limit for second stage labour.<sup>14</sup> Although this limit is being extended in hospital births,<sup>15</sup> the evidence presented at trial indicated that the maximum duration of second stage labour in a home birth should be three hours. Ms. Voth had been in second stage labour for five hours and was showing clear signs of exhaustion by the time the midwives called the hospital. The trial judge found that the midwives were negligent in failing to recognize the symptoms of exhaustion, and in allowing the second stage of labour to continue to the point where Ms. Voth became so exhausted her uterus stopped contracting.<sup>16</sup>

Second, Godfrey L.J.S.C. found that the foetus would have lived if the midwives had utilized the basic delivery technique that was ultimately used at the hospital, once the foetus' head emerged. The trial judge was satisfied that either the midwives did not use the "traction" technique, or they used it ineffectively.<sup>17</sup> Instead, the midwives used a number of ineffectual methods including requiring Ms. Voth to alter her position in an attempt to stimulate contractions, and applying pressure to Ms. Voth's uterus. The failure of the midwives to use the traction method was particularly troubling since timing is crucial once a foetus' head emerges. As Godfrey L.J.S.C. noted, all experts who appeared at the trial agreed that once a foetus' head has been born there is at most five minutes in which to complete the birth before the foetus asphyxiates.<sup>18</sup> Instead of com-

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<sup>12</sup>Second-stage labour "commences when the cervix is 100% dilated and the uterus is then able to expel the child": *ibid.* at 65.

<sup>13</sup>*Ibid.* at 69.

<sup>14</sup>Filippa Lutenberg, a Dutch midwife who had been responsible for or attended over 6,000 births, testified at trial that she abided by the two hour limit.

<sup>15</sup>The reason cited by the trial judge is that women labouring under the influence of an epidural anaesthetic are less prone to exhaustion and can therefore continue in second stage labour for a longer period of time. *Sullivan and Lemay* (B.C.S.C.), *supra*, note 7 at 69.

<sup>16</sup>*Ibid.* at 73.

<sup>17</sup>*Ibid.* at 72.

<sup>18</sup>*Ibid.* at 66.

pleting the delivery quickly, the midwives spent twenty minutes employing futile techniques before deciding to call the emergency health services. Another ten minutes elapsed before the midwives agreed to allow the attendants to transport Ms. Voth to the hospital. In all, over half an hour elapsed between the time the foetus' head emerged and the time the foetus was delivered at the hospital. An effective use of the traction delivery technique would have taken approximately two minutes. Godfrey L.J.S.C. held that the midwives were negligent in wasting precious time employing ineffective delivery methods and in failing to utilize a basic delivery technique.<sup>19</sup>

Finally, Godfrey L.J.S.C. turned to a consideration of whether the foetus was a person for the purposes of the *Criminal Code*, and thus whether the midwives could be convicted of criminal negligence causing the death of a person. The trial judge noted that s. 206 (now s. 223) of the *Criminal Code* defines "human being" for the purposes of the *Criminal Code*. That section provides:

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.<sup>20</sup>

Godfrey L.J.S.C. did not find this definition conclusive of the question, however, since s. 203 of the *Criminal Code* (now s. 220) refers to "criminal negligence causing death to another *person*"<sup>21</sup> and does not use the term "human being." The issue, as she saw it, was whether the word "person" as employed in s. 203 was to be construed as having a wider meaning than the definition of human being in s. 206. The trial judge concluded that "person" was a broader term, and that a foetus in the process of being born was a person within the meaning of s. 203 even if it would not fall within the narrower definition in s. 206. She relied on the decision of the British Columbia County Court in *R. v. Marsh*,<sup>22</sup> which had reached the same result. Based on her conclusion that a foetus was a person, Godfrey L.J.S.C. convicted the midwives of criminal negligence causing the death of a person.

## 2. The issue of bodily harm to the mother

The midwives were acquitted at trial of the charge of criminal negligence causing bodily harm to Ms. Voth. Godfrey L.J.S.C. reasoned that the midwives

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<sup>19</sup>*Ibid.* at 73.

<sup>20</sup>*Criminal Code*, *supra*, note 2.

<sup>21</sup>*Ibid.*

<sup>22</sup>(1979), 2 C.C.C. (3d) 1, 31 C.R. (3d) 363.

could be found guilty of this charge in two ways: first, if they had caused Ms. Voth harm independent of the harm to the foetus, and second, if the foetus was found not to be a person but instead a part of Ms. Voth, by causing the death of the foetus. The trial judge first considered whether Ms. Voth had suffered any severe bodily harm *independent* of the harm she suffered as a result of the death of the foetus. She rejected the submissions of the Crown that Ms. Voth suffered bodily harm in the form of pain arising from the lengthy period during which she was squatting, pain due to the fundal pressure applied by the emergency services attendant, and the cut made when Ms. Lemay began to perform an episiotomy,<sup>23</sup> holding that Ms. Voth "miraculously suffered only what in effect would be bruising."<sup>24</sup> The trial judge reached this conclusion notwithstanding her finding that in light of the extreme pressure exerted by the ambulance attendant on Ms. Voth's uterus, it was "astonishing that nothing ruptured."<sup>25</sup> Thus, with respect to the issue of independent harm suffered by Ms. Voth, the trial judge held, somewhat surprisingly, that the midwives were not guilty of criminal negligence causing bodily harm.

Godfrey L.J.S.C. also dismissed the argument that the midwives could be convicted of criminal negligence causing bodily harm to Ms. Voth by virtue of having caused the death of the foetus. She stated:

I should comment that had I reached the opposite conclusion with respect to the "persons" argument above, then I would have found the accused guilty on this count because I would have concluded that the child was a part of Jewel Voth at the time of its death.<sup>26</sup>

Thus, Godfrey L.J.S.C. held that the death of the foetus could not constitute bodily harm to the pregnant woman, because the foetus was an independent person and not a part of the pregnant woman. This portion of Godfrey L.J.S.C.'s reasons becomes significant in light of the Supreme Court of Canada's discussion of this point.

### C. *The Court of Appeal*

Ms. Sullivan and Ms. Lemay appealed their convictions to the British Columbia Court of Appeal.<sup>27</sup> The Court unanimously held that the midwives should not have been convicted of criminal negligence causing death but instead should have been convicted of criminal negligence causing bodily harm. Speaking for the Court of Appeal, Nemetz C.J.B.C. reviewed the jurisprudence

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<sup>23</sup>One of Ms. Lemay's last acts before allowing Ms. Voth to be taken to the hospital was to attempt to perform an episiotomy on Ms. Voth. After creating a two to three centimetre incision, Ms. Lemay stopped, realizing that an episiotomy would not be effective. *Supra*, note 7 at 74-75.

<sup>24</sup>*Ibid.* at 75.

<sup>25</sup>*Ibid.*

<sup>26</sup>*Ibid.*

<sup>27</sup>*R. v. Sullivan* (1988), 43 C.C.C. (3d) 65, 65 C.R. (3d) 256 (B.C.C.A.).

regarding the status of the foetus in England, in the United States, and in Canada, and held that Godfrey L.J.S.C. had erred when she concluded that a foetus in the process of birth was a person. The Court noted that at common law a foetus was not considered a person until it had completely proceeded, in a living state, from the body of the pregnant woman; the *Criminal Code* definition of human being in s. 206 was consistent with this common law definition. The court held that in using the term "person" in s. 203, rather than "human being," Parliament did not intend to depart from the common law understanding of when a foetus becomes a person. The court thus concluded that a foetus is not a person within the meaning of s. 203 of the *Criminal Code*, and therefore that the midwives should not have been convicted of criminal negligence causing death.

The Court of Appeal next considered the acquittal of the midwives on the charge of criminal negligence causing bodily harm. The Court held that its decision that a foetus does not become a person until it is born alive led to the conclusion that, as a matter of law, the foetus is to be considered a part of the pregnant woman. The Crown had not appealed the acquittal on this charge; the court stated that the normal procedure would therefore be to send the issue back to the trial judge for adjudication. The court noted, however, that the trial judge had clearly stated that she would have found the midwives guilty of criminal negligence causing bodily harm had she not held that a foetus was a person. As a result, the Court of Appeal decided to acquit the midwives of criminal negligence causing death, and substitute a conviction on the charge of criminal negligence causing bodily harm.

## II. The Supreme Court of Canada Decision

Both the Crown and the midwives appealed this decision to the Supreme Court of Canada. The midwives appealed their conviction on the charge of criminal negligence causing bodily harm, arguing that the foetus is neither a person nor a part of the pregnant woman. As a result, the midwives argued, causing the death of a foetus is not a harm recognizable in law and acquittals should be entered on both charges. The Crown appealed the midwives' acquittal on the charge of criminal negligence causing death, while at the same time defending the decision of the Court of Appeal that the midwives should be convicted of criminal negligence causing bodily harm. The Crown thus took contradictory positions: it had to argue on the one hand that a foetus is not a legal person, so that the convictions for criminal negligence causing bodily harm could be sustained, and on the other that the foetus is a legal person, so that the midwives could be convicted of criminal negligence causing the death of a person. The Crown defended its position by arguing that the midwives were guilty of some offence for causing the death of the foetus, and that because the Supreme Court had never pronounced on the status of the foetus in the criminal law, it was nec-

essary to advance both arguments. The Supreme Court also heard argument from two interveners, L.E.A.F. and Realistic, Equal and Active for Life Women [R.E.A.L. Women], who offered opposing submissions on the status of the foetus. L.E.A.F. submitted that the *Criminal Code* must be interpreted in a way that is consistent with women's equality, which would mean that a foetus is not to be considered a person.<sup>28</sup> R.E.A.L. Women advanced the argument rejected by the Court of Appeal, that by using the term "person" in s. 203 of the *Criminal Code*, Parliament intended to enlarge the definition of human being in the *Criminal Code* to include a foetus.<sup>29</sup>

In an uncharacteristically brief judgment, the majority of the Supreme Court of Canada in an 8 to 1 decision acquitted the midwives of both charges. The Court first considered the charge of criminal negligence causing death. Writing for a unanimous court on this point, Lamer C.J. held that the midwives could not be convicted of criminal negligence causing death because a foetus is not a legal person.<sup>30</sup> Lamer C.J. agreed with the analysis of the Court of Appeal on this issue, holding that the term "person" in s. 203 of the *Criminal Code* is synonymous with the term "human being" as defined in s. 206.<sup>31</sup> The Court held that because of this conclusion, it did not have to consider the argument put forward by L.E.A.F. that an approach based on women's equality would also lead to the conclusion that a foetus is not a person.

The Court next turned its attention to the question of whether the Court of Appeal was correct in entering a verdict of guilty on the charge of criminal negligence causing bodily harm, after acquitting the midwives of criminal negligence causing death. This issue was problematic because the Crown had not appealed the verdict of acquittal on the charge of criminal negligence causing bodily harm, and an appellate court generally does not have jurisdiction to disturb an acquittal unless the Crown has appealed from the verdict.<sup>32</sup> There is an exception to this rule where a verdict of acquittal is entered at trial because of the operation of the *Kienapple* principle,<sup>33</sup> which applies where a person has been charged with more than one offence for what is in substance the same subject matter. If the accused is found guilty, he or she is convicted of only one of the offenses because of the principle that a person should not be punished twice for the same offence.<sup>34</sup> A conditional stay of proceedings is entered on the other charges, which for the purposes of appeal is akin to an acquittal. This is not,

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<sup>28</sup>Factum of the Intervener Women's Legal Education and Action Fund.

<sup>29</sup>Factum of the Intervener R.E.A.L. Women of Canada.

<sup>30</sup>*Supra*, note 1 at 13.

<sup>31</sup>*Ibid.*

<sup>32</sup>See *Rickard v. R.*, [1970] S.C.R. 1022, 13 D.L.R. (3d) 591; *Guillemette v. R.*, [1986] 1 S.C.R. 356, 27 D.L.R. (4th) 682.

<sup>33</sup>The principle was articulated in *Kienapple v. R.* (1974), [1975] 1 S.C.R. 729, 44 D.L.R. (3d) 351 [hereinafter *Kienapple* cited to S.C.R.].

<sup>34</sup>*Ibid.* at 745.

however, a true acquittal which involves a finding that the accused is not guilty, but an acquittal based on the policy against multiple convictions for the same delict.<sup>35</sup>

Speaking for eight members of the Court, Lamer C.J. held that the jurisdiction of an appellate court to interfere with a verdict of acquittal from which the Crown has not appealed is confined to situations in which the *Kienapple* rule arises.<sup>36</sup> He then considered whether the two offenses with which the midwives were charged gave rise to a *Kienapple* situation. In an extremely confusing passage, Lamer C.J. concluded that they did not. Lamer C.J. seems to have arrived at this conclusion for two reasons. First, he held that there was “an insufficient legal nexus between the two offences; [since] one requires proof of the death of the foetus while the other requires proof of bodily harm to the mother.”<sup>37</sup> As the two charges involved “two separate consequences,” they were not to be seen as having the same subject matter, even though they involved the “same general conduct.”<sup>38</sup> Second, Lamer C.J. rejected the contention of the Crown that the trial judge believed she could not have convicted the midwives on both counts. He noted that Godfrey L.J.S.C. had considered whether Ms. Voth had suffered bodily harm independent of the death of the foetus, and had concluded that she had not. Had the trial judge reached the opposite conclusion, “she may well have convicted Sullivan and Lemay on both counts.”<sup>39</sup> Thus, Lamer C.J. held that the trial judge had acquitted the midwives of criminal negligence causing bodily harm to Ms. Voth on the merits. In addition, Lamer C.J. held that the trial judge could have convicted the midwives of causing bodily harm to Ms. Voth *even if* she had suffered no bodily harm independent of the death of the foetus. He reasoned that

it would not have been illogical to find that bodily harm was done to Jewel Voth through the death of the foetus which was inside of and connected to her body and, at the same time, to find that the foetus was a person who could be the victim of criminal negligence causing death.<sup>40</sup>

Lamer C.J. held that on the law as she understood it, the trial judge could have convicted the midwives of both criminal negligence causing death and criminal negligence causing bodily harm: she could have viewed the foetus as being *both* a person and a part of the pregnant woman. The death of the foetus could therefore be seen as creating two offenses: an offence against the foetus as a person

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<sup>35</sup>For a clear explanation of this principle, see Wilson J.'s discussion in *R. v. Provo*, [1989] 2 S.C.R. 3 at 16-17, 49 C.C.C. (3d) 417, quoted in part in *Sullivan and Lemay* at 107-108.

<sup>36</sup>*Supra*, note 1 at 108.

<sup>37</sup>*Ibid.*

<sup>38</sup>*Ibid.*

<sup>39</sup>*Ibid.* at 108-109.

<sup>40</sup>*Ibid.* at 109.

in its own right, and an offence against the pregnant woman, of whom the foetus was a part.

L'Heureux-Dubé J. dissented on the jurisdictional point. In her view, the Court of Appeal had correctly analyzed its jurisdiction to substitute a conviction for an acquittal on the charge of criminal negligence causing bodily harm, despite the fact that the Crown had not appealed the acquittal. Under s. 613(8) (now s. 686(8)) of the *Criminal Code*, an appellate court "may make any order ... that justice requires." She would therefore have held that the midwives were guilty of criminal negligence causing bodily harm and dismissed their appeal.<sup>41</sup>

### III. Analysis

Two aspects of the Supreme Court decision are worthy of note. The first is the brevity with which the Court dealt with the claim that a foetus is a person. Lamer C.J. disposed of this argument in four short paragraphs of analysis. This should be viewed as an unambiguous statement that the status of the foetus is no longer a debatable issue in Canadian law at least outside of the *Charter*.<sup>42</sup> The Supreme Court relied on the discussion of the issue by the British Columbia Court of Appeal which was based on an analysis of the status of the foetus in Canadian, English and American common law. The Court of Appeal concluded that in all three legal systems, a foetus was not considered a person until it was born alive. The Supreme Court of Canada reached the same conclusion in 1989 in *Tremblay v. Daigle*,<sup>43</sup> a decision it rendered after the Court of Appeal decision in *Sullivan and Lemay*. In *Daigle*, the Court held that a foetus is not a legal person at common law or in the civil law.<sup>44</sup> The willingness of the Supreme Court of Canada to accept the Court of Appeal's analysis of the issue, without engaging in any further discussion or reiterating its analysis in *Daigle*, can only be interpreted as a pronouncement that the status of the foetus is no longer open to debate.

Second, although the Supreme Court did not expressly rule on L.E.A.F.'s argument based on women's equality, the judgment indicates a receptiveness to equality concerns. Although in the result, the midwives were acquitted of criminal negligence causing bodily harm to Jewel Voth, the majority of the Supreme

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<sup>41</sup>*Ibid.* at 109-10.

<sup>42</sup>I would also argue that in light of the decision of the Supreme Court in *Tremblay v. Daigle*, [1989] 2 S.C.R. 530, 62 D.L.R. (4th) 634 [hereinafter *Daigle* cited to S.C.R.], it is very unlikely that the Court will hold that a foetus is a person under the *Charter*. An exposition of this argument is beyond the scope of this comment.

<sup>43</sup>*Ibid.* The *Daigle* case arose when Jean-Guy Tremblay attempted to have his former girlfriend, Chantal Daigle, enjoined from obtaining an abortion. Mr. Tremblay was successful at trial and on appeal to the Quebec Court of Appeal, but the Supreme Court of Canada unanimously vacated the injunction.

<sup>44</sup>*Ibid.* at 570.

Court clearly recognized that harm caused to a foetus should be seen as harm caused to a pregnant woman, because the foetus is “inside of and connected to [the woman’s] body.”<sup>45</sup> This pronouncement is in complete accordance with L.E.A.F.’s submission that viewing harm caused to the foetus as harm to the pregnant woman is the only result consistent with women’s equality. In addition, the language chosen by the Court to explain why harm to a foetus is harm to the pregnant woman indicates that it considered L.E.A.F.’s equality argument seriously. A central premise of L.E.A.F.’s argument was that the ways in which the law describes pregnancy do not reflect the ways in which women experience pregnancy. L.E.A.F. attempted to present to the Court a vision of pregnancy that reflected women’s perspectives, by describing pregnancy in a way that recognized the uniqueness of the relationship between a pregnant woman and her foetus. L.E.A.F. submitted that such a concept of pregnancy required a departure from the standard approaches of either viewing the foetus as an independent person or as akin to a body part. Instead, L.E.A.F. advocated describing the foetus as being “in and of” the pregnant woman, to emphasize not only the fact that the foetus exists within the woman, but also that the foetus is uniquely interconnected with her in “intricate and intimate ways.”<sup>46</sup> The Court’s use of the words “inside of and connected to”<sup>47</sup> the pregnant woman to describe pregnancy demonstrates a willingness to consider the reformulations of the law’s treatment of pregnancy that an equality model would require.

Although the Supreme Court judgment is on the whole promising for women, it is not without its problems. These arise from Lamer C.J.’s reasoning on the *Kienapple* issue, which is confusing and not persuasive. The Chief Justice reasoned that the *Sullivan and Lemay* case did not present a *Kienapple* situation, because the trial judge could have convicted the midwives of both criminal negligence causing death and criminal negligence causing bodily harm to Ms. Voth, once they were found to have caused the death of the foetus. This assertion by Lamer C.J. is puzzling in light of the clear statement by the trial judge that she would have found the midwives guilty of criminal negligence causing bodily harm to Ms. Voth had she not held the foetus to be a person. The comments of Godfrey L.J.S.C. on this point bear repeating to illustrate just how unambiguous her views were:

I should comment that had I reached the opposite conclusion with respect to the “persons” argument above, then I would have found the accused guilty on this count because I would have concluded that the child was a part of Jewel Voth at the time of its death.<sup>48</sup>

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<sup>45</sup>*Supra*, note 1 at 109.

<sup>46</sup>*Supra*, note 6, para. 42-50.

<sup>47</sup>*Supra*, note 1 at 109.

<sup>48</sup>*Supra*, note 7 at 75.

There can be little doubt that the trial judge viewed the charges as giving rise to an either/or situation. Her approach to the case was that the legal status of the foetus would determine the charge of which the midwives could be convicted. If the foetus were a person, the midwives could be convicted of criminal negligence causing death, and not of criminal negligence causing bodily harm to Ms. Voth. If instead the foetus were not a person, the midwives could only be convicted of criminal negligence causing bodily harm to Ms. Voth, because the foetus would be considered in law to be part of the pregnant woman. Godfrey L.J.S.C. clearly did not believe that the foetus could be a person in its own right and part of the pregnant woman at the same time. It is therefore difficult to see how Lamer C.J. can claim that the trial judge could have convicted the midwives on both charges as a result of the death of the foetus, when Godfrey L.J.S.C. herself plainly believed that she could not.

The other reason which Lamer C.J. provides for his conclusion that the *Kienapple* principle does not apply is similarly problematic. The Chief Justice states that there is an insufficient legal nexus between the charge of criminal negligence causing death and criminal negligence causing bodily harm because "one requires proof of the death of the foetus while the other requires proof of bodily harm to the mother."<sup>49</sup> It is difficult to see how Lamer C.J. can reconcile this argument with his statement that causing the death of the foetus is *in itself* causing bodily harm to the pregnant woman. If the death of the foetus is harm suffered by a pregnant woman, the idea that there is an insufficient legal nexus between the death of the foetus and bodily harm to the pregnant woman is nonsensical, since proof of the death of a foetus would be proof that the woman has suffered bodily harm.

It may be correct to say that this is not a *Kienapple* situation, but not for the reasons Lamer C.J. suggests. The *Kienapple* principle arises where an accused person could be found guilty of two separate offenses for the same subject matter. In other words, if the accused performs an action which could constitute two distinct offenses, the *Kienapple* rule prevents multiple convictions for the same conduct.<sup>50</sup> For example, in the *Kienapple* case itself, the Supreme Court held that the accused could not be convicted both of rape and of unlawful sexual intercourse with a female under 14 years of age for sexually assaulting a 13 year old girl.<sup>51</sup> Since one act — the sexual assault — lay at the root of both charges, a conviction on one charge would preclude conviction on the other. To fall within the *Kienapple* rule, then, the facts must give rise to the possibility that the accused could be convicted of two offenses because he or she has done a single act which happens to fall within the ambit of two separate *Criminal Code* provisions.

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<sup>49</sup>*Supra*, note 1 at 108.

<sup>50</sup>See *supra*, note 33 and accompanying text.

<sup>51</sup>*Ibid.*

*Sullivan and Lemay* was not a case in which the two accused could have been convicted of two offenses, but were not so convicted simply because of the rule against multiple convictions. In fact, *Sullivan and Lemay* presented exactly the opposite problem. The case was legally significant precisely because it required the courts to *choose* whether the death of a foetus should be viewed in law as being the death of a person *or* as constituting bodily harm to the pregnant woman. Until the comments by Lamer C.J. at the Supreme Court in *Sullivan and Lemay*, there was never any suggestion that the death of a foetus could give rise to two legal wrongs. Rather, it was generally accepted<sup>52</sup> that causing the death of the foetus was *either* causing the death of a person *or* causing bodily harm to the pregnant woman, but that it could not be both. The reason that *Sullivan and Lemay* was not a *Kienapple* case was therefore because it required a choice between competing conceptions of the legal status of the foetus. It was not a case in which the actions of the midwives in causing the death of the foetus could have led to convictions on two distinct counts.

Despite the weaknesses in the Supreme Court's reasoning on the *Kienapple* issue, *Sullivan and Lemay* is a positive decision for women. The Supreme Court has reaffirmed its decision in *Daigle*, that a foetus is not a person in Canadian law, a conclusion which is crucially important for women. The Court has also indicated, as it did in *Brooks v. Canada Safeway Ltd.*,<sup>53</sup> that it is receptive to hearing arguments about pregnancy that are rooted in the precepts of women's equality.

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<sup>52</sup>I say "generally accepted" because Sullivan and Lemay did not accept this proposition. Instead they argued that the death of a foetus was *neither* the death of a person *nor* causing bodily harm to the pregnant woman because a foetus was *neither* a person *nor* a part of the pregnant woman.

<sup>53</sup>[1989] 1 S.C.R. 1219 at 1242-50, 59 D.L.R. (4th) 321.