

## U.S. and Anglo-Australian Decisions on a Husband's Right to Prevent Abortion

J. Kodowo Bentil

Follow this and additional works at: <https://scholarship.law.stjohns.edu/tcl>



Part of the [Constitutional Law Commons](#), and the [International Law Commons](#)

---

This Article is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in The Catholic Lawyer by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact [selbyc@stjohns.edu](mailto:selbyc@stjohns.edu).

# U.S. AND ANGLO-AUSTRALIAN DECISIONS ON A HUSBAND'S RIGHT TO PREVENT ABORTION†

J. KODOWO BENTIL

Evidently, abortion or pregnancy termination is one of the most controversial moral, social and legal issues in contemporary Western society. Varying and opposing views on the rightness or wrongness of it abound. This has been fully acknowledged, for example, by American and Anglo-Australian courts. Thus, in delivering the judgment of the Supreme Court in *Roe v. Wade*,<sup>1</sup> Justice Blackmun had occasion to observe: "We forthwith acknowledge our awareness of the sensitive and emotional nature of the abortion controversy . . . and of the deep and seemingly absolute convictions that the subject inspires."<sup>2</sup> Equally, in his judgment in the English High Court in the case of *Paton v. British Pregnancy Advisory Service Trustees*,<sup>3</sup> Sir George Baker had this to say about the abortion issue: "Such action, of course, arouses great emotions and vigorous opposing views."<sup>4</sup> Again, in the subsequent English case of *Royal College of Nursing of the United Kingdom v. Department of Health and Social Security*,<sup>5</sup> Lords Wilberforce, Diplock, and Edmund-Davies, respectively, expressed a similar view. Nor is it to be overlooked that, in his judgment

---

† This article is republished in substantial part from No. 102/103 LAW & JUSTICE 68 (1989).

<sup>1</sup> 410 U.S. 113 (1973).

<sup>2</sup> *Id.* at 116. For a general discussion of the case see Crawford, *Abortion Law in the United States*, 42 HILARY 19-32 (1974) and Smith, *The Right to Privacy: Roe v. Wade Revisited*, 84/85 HILARY/EASTER 34-47 (1985).

<sup>3</sup> 1 Q.B. 276 (1979).

<sup>4</sup> *Id.* at 278. For a general discussion of this case see Crawford, *Abortion "Entitlement" Absolute or Qualified?* 58/59 TRINITY/MICHAELAMAS 68-80 (1978).

<sup>5</sup> 1981 App. Cas. 800, 822, 824, 829. For a general discussion of this case, see Glazebrook, *The Abortion Act: A Question of Interpretation*, 68/69 HILARY/EASTER 5-8 (1981).

in the Supreme Court of Queensland in the Australian case of *K. v. T.*,<sup>6</sup> Justice Williams made a similar observation.

Not surprisingly, therefore, legislation permitting pregnancy termination has tended to be the product of compromise, in which various social groups have sought to reconcile their views. Thus, in his speech in the House of Lords in the English case of *Royal College of Nursing*, Lord Edmund-Davies described the Abortion Act of 1967 as "the product of considerable compromise between violently opposed and emotionally charged views."<sup>7</sup> Needless to say, this tended to create problems of interpretation and application of the appropriate legislation.

Consequently, in a obvious attempt to maintain a neutral or a non-partisan stance on the abortion issue, the courts purport not to be concerned with examining and pronouncing on the ethical and social aspects of the issue. Thus, in delivering the majority opinion of the Supreme Court of the United States in the case of *Roe v. Wade*,<sup>8</sup> Justice Blackmun had occasion to observe: "Our task, of course, is to resolve the issue by constitutional measurement, free of emotion and of predilection."<sup>9</sup> Equally, writing for the English High Court in the *Paton* case,<sup>10</sup> Sir George Baker maintained:

In the discussion of human affairs and especially of abortion, controversy can rage over the moral rights, duties, interests, standards, and religious views of the parties. Moral values are in issue. I am, in fact, concerned with none of these matters. I am concerned, and concerned only, with the law of England as it applies to this claim. My task is to apply the law free of emotion or predilection.<sup>11</sup>

A similar view was expressed by Justice Williams of the Supreme Court of Queensland in the Australian case of *K. v. T.*<sup>12</sup> Whether, in actual practice, the courts are able to adhere to this view may be debatable.

Even more controversial has become in recent years the specific issue whether or not a potential father is legally entitled to prevent his pregnant wife or a woman pregnant by him from having her pregnancy terminated. Indeed, American, English, and Australian superior courts have, respectively, had occasion to reject the claim, even though some individual judges in the United States may have dissented from the general view. Consequently, it is the purpose of this article to examine and assess the relevant jurisprudence of American, English, and Australian superior

---

<sup>6</sup> 1 Q.R. 396, 396-97 (1983).

<sup>7</sup> 1981 App. Cas. at 829.

<sup>8</sup> 410 U.S. 113 (1973).

<sup>9</sup> *Id.* at 116.

<sup>10</sup> 1 Q.B. 276 (1979).

<sup>11</sup> *Id.* at 278.

<sup>12</sup> 1 Q.R. 396, 397 (1983).

courts concerning this particular issue.

#### AMERICAN JUDICIAL REACTION TO THE CLAIM

It is convenient to examine the reaction of the judiciary in the United States to the claimed right of a potential father to prevent his wife or a woman pregnant by him from having her pregnancy terminated in the context of the following issues: (1) the legal status of a fetus, and (2) the legal standing of a potential father to protect a fetus.

##### *A. The Legal Status of a Fetus*

While the question of the legal status of a fetus is governed by common law or statute or both within the respective jurisdictions of England and Australia, the question, within the jurisdiction of the United States, is governed by the federal Constitution. In particular, the fourteenth amendment of the federal Constitution is deemed to cover the issue. In general, however, the Supreme Court of the United States is not prepared to accord a fetus legal personality, even though it seems prepared to accord a fetus legal protection at an advanced stage of development. Thus, in delivering the opinion of the Court in *Roe v. Wade*,<sup>13</sup> Justice Blackmun had occasion to point out that the word "person," as used in the fourteenth amendment, did not include the unborn.<sup>14</sup> At the same time, however, he appears to have indicated that in certain circumstances, a fetus might be "entitled to fourteenth amendment protection."<sup>15</sup> Indeed, the decision in that case tended to imply that a fetus reaching a viable stage of development, generally a period of about three months after a pregnancy, could be accorded the relevant constitutional protection.

Nor is it to be overlooked that, in various American states, damages claims for injury to, or wrongful death of, a viable fetus resulting from the negligence or omission of another person have tended to be upheld by the judiciary.<sup>16</sup>

---

<sup>13</sup> 410 U.S. 113, 116 (1973).

<sup>14</sup> *Id.* at 157;.

<sup>15</sup> 410 U.S. at 159.

<sup>16</sup> See, e.g., *Simmons v. Howard Univ.*, 323 F. Supp 529, 529 (D.D.C. 1971); *Eich v. Town of Gulf Shores*, 293 Ala. 95, 300 So. 2d 354, 358 (1974); *Danos v. St. Pierre*, 402 So. 2d 633, 639 (La. 1981); *Verkennes v. Corniea*, 229 Minn. 365, 38 N.W.2d 838, (1949); *O'Grady v. Brown*, 654 S.W.2d 904, 911 (Mo. 1983)(en banc); *White v. Yup*, 85 Nev. 527, 458 P.2d 617, 623 (1969); *Salazar v. St. Vincent Hosp.*, 95 N.M. 150, 619 P.2d 826, 829-30 (Ct. App. 1980); *Presley v. Newport Hosp.*, 117 R.I. 177, 365 A.2d 748, 754 (1976); *Vaillancourt v. Medical Center Hosp. of Vt., Inc.*, 139 Vt. 138, 143, 425 A.2d 92, 94 (1980).

*B. Legal Standing of a Potential Father to Protect a Fetus*

In general, the judiciary in the United States appears to discountenance the idea of a potential father having legal standing to protect his unborn child from being legally aborted. The rationale seems to be that a married woman is a person in her own right and that her constitutional right to privacy entitles her to exercise such right independently of her husband. Consequently, since her right to undergo a pregnancy termination is a constitutional privacy right, the exercise of the right cannot be interfered with by her husband.

Thus, in *Eisenstadt v. Baird*,<sup>17</sup> the Supreme Court of the United States, on being called upon to rule on the constitutionality of state legislation restricting the distribution of contraceptives, had occasion to maintain:

[T]he marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.<sup>18</sup>

Equally, in delivering the majority judgment of the same Court in the subsequent case of *Planned Parenthood of Central Missouri v. Danforth*,<sup>19</sup> Justice Blackmun ruled that a state had no constitutional authority to grant a husband a unilateral right to prevent his pregnant wife from having the pregnancy terminated.

Yet, in some earlier cases, the same Court found it necessary to recognize as a constitutionally protected entitlement a man's right to father children and enjoy the association of his offspring.<sup>20</sup> Nor is it to be overlooked that, even though Justice Blackmun, in delivering the majority judgment in the *Danforth* case, maintained that a state had no constitutional authority to grant a husband a unilateral right to prevent his pregnant wife from having the pregnancy terminated, he recognized nevertheless "the deep and proper concern and interest that a devoted and protective husband has in his wife's pregnancy and in the growth and development of the fetus she is carrying," as well as the detrimental effect that a pregnancy termination might have on the future of the marriage.<sup>21</sup> *A fortiori*, in delivering the dissenting opinion in the same case, with

---

<sup>17</sup> 405 U.S. 438 (1972).

<sup>18</sup> *Id.* at 453.

<sup>19</sup> 428 U.S. 52 (1976).

<sup>20</sup> See, e.g., *Stanley v. Illinois* 405 U.S. 645, 649-58 (1972); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 536 (1942).

<sup>21</sup> *Danforth*, 428 U.S. at 69.

which Chief Justice Burger and Justice Rehnquist agreed, Justice White contended that a husband had an interest in the fetus he had been biologically involved in bringing into being, and that it was improper for such interest to be extinguished by a unilateral decision of his wife.<sup>22</sup> He then proceeded to observe:

It is truly surprising that the majority finds in the United States Constitution, as it must in order to justify the result it reaches, a rule that the state must assign a greater value to a mother's decision to cut off a potential human life by abortion than a father's decision to let it mature into a live child.<sup>23</sup>

Considering that the relevant jurisprudence of the Supreme Court of the United States appears to go against a woman's constitutional privacy right of having her pregnancy terminated when the pregnancy has progressed beyond six months, could a potential father of the unborn child then be entitled to prevent the termination of the pregnancy? No clear answer seems to have been given to the question by the United States Supreme Court. However, it is arguable that, in logic, the question should be answered in the affirmative. As to whether this would be so, in actual practice, is by no means certain. Incidentally, it needs to be noted that, in generally rejecting a potential father's claim to be able to prevent his pregnant wife from having the pregnancy terminated, at least within the first six months of pregnancy, the relevant jurisprudence of the United States Supreme Court does not particularly seek to distinguish between a potential father who is lawfully married to the woman concerned and one who is not so married to the woman. This seems to be so, even though, in delivering the majority judgment of that Court in the case of *Roe v. Wade*,<sup>24</sup> Justice Blackmun had occasion to allude to "additional difficulties and continuing stigma of unwed motherhood" as one of the factors which could warrant an unmarried pregnant woman being allowed to undergo a legal abortion.<sup>25</sup>

#### ENGLISH JUDICIAL REACTION TO THE CLAIM

In the English context, the issue as to whether a potential father can prevent his wife or woman pregnant by him from undergoing an abortion by seeking to ensure the enforcement of the criminal law has been added to the two other issues of the legal status of a fetus and the legal standing of a potential father to prevent such abortion. Consequently, each of the three issues needs to be considered separately.

---

<sup>22</sup> *Id.* at 93 (White, J., dissenting).

<sup>23</sup> *Id.* (White, J., dissenting).

<sup>24</sup> 410 U.S. 113 (1973).

<sup>25</sup> *Id.* at 153.

### A. *The Legal Status of a Fetus*

In contrast to the relative refusal of the judiciary in the United States to treat a fetus as having a legal personality, the English judiciary has tended to couch such denial in absolute terms. In other words, regardless of its stage of growth and development, a fetus is outrightly denied legal personality by the English judiciary.<sup>26</sup> Thus, in his judgment in the English High Court in the *Paton* case, Sir George Baker maintained: "The fetus cannot, in English law, in my view, have a right of its own at least until it is born and has a separate existence from its mother. That permeates the whole of the civil law of this country."<sup>27</sup>

In addition, unlike American law, English law has tended to refuse to recognize a claim for prenatal injury resulting from medical or other form of negligence or omission of another person. Thus, in adverting to a contention as to the possibility of a cause of action being available for prenatal injury resulting from any such negligence or omission, in his judgment in the *Paton* case, Sir George Baker maintained emphatically: "[B]ut there can be no doubt, in my view, that in England and Wales, the fetus has no right of action, no right at all, until birth."<sup>28</sup> Nor could the decision of the Civil Division of the English Court of Appeal in the subsequent case of, for example, *McKay v. Essex Area Health Authority*,<sup>29</sup> be viewed as either affirming or denying a claim for prenatal injuries resulting from medical negligence or other omission. Even then, the Court of Appeal held that a cause of action against the defendant local health authorities could not lie in respect of physical deformities suffered by a fetus as a result of rubella or German measles contracted by the mother through medical negligence, even though the mother was subsequently delivered of a live baby. Nevertheless, it should be noted that, in the latter regard, the British Parliament subsequently passed the Congenital Disabilities (Civil Liability) Act in 1976 to allow a child born disabled, as a result of injury inflicted on it while in its mother's womb, to recover damages from the persons responsible for inflicting the injury.

### B. *Legal Standing of a Potential Father to Protect a Fetus*

The English judiciary has, somehow, sought to distinguish between a de facto potential father who is not lawfully married to a woman bearing his child and a de jure potential father who is lawfully married to a wo-

---

<sup>26</sup> See, e.g., Bentil, *Rejection of Husband's Claim to Stop Wife's Abortion*, 128 SOLIC. J. 288 (1984).

<sup>27</sup> 1 Q.B. 276, 279 (1979).

<sup>28</sup> *Id.*

<sup>29</sup> 1 Q.B. 1166 (C.A. 1982). For a general look at this case see 60/61 HILARY/EASTER 59 (1979).

man for whose pregnancy he is biologically responsible. Yet, for the purpose of establishing a legal claim to protect his unborn child from being aborted, a de jure potential father would not seem to have been treated any differently than a de facto potential father by the courts. This is so, even though, in his judgment in the *Paton* case,<sup>30</sup> Sir George Baker had occasion to advert to the position of a de facto potential father, by pointing out: "[I]t seems to me that in this country the illegitimate father can have no rights whatsoever except those given to him by statute. That was clearly the common law."<sup>31</sup>

Indeed, he tended to use the general term "father" in his judgment in that case. Consequently, he was in no doubt that a potential father had no legal standing to prevent a woman bearing his child from having the pregnancy legally terminated. Thus he stressed:

The Abortion Act [of] 1967 gives no right to a father to be consulted in respect of a termination of a pregnancy. True, it gives no right to the mother either, but obviously the mother is going to be right at the heart of the matter consulting with the doctors if they are to arrive at a decision in good faith, unless, of course, she is mentally incapacitated or physically incapacitated (unable to make any decision or give any help), as, for example, in consequence of an accident.<sup>32</sup>

He stressed that, in considering the applicable law, "the first and basic principle" was that "there must be a legal right enforceable in law or in equity" before an application for an injunction to prevent a legal abortion from being performed could be sustained.<sup>33</sup> Consequently, he maintained: "The husband, therefore, in my view, has no legal right enforceable in law or in equity to stop his wife having this abortion or to stop the doctors from carrying out this abortion."<sup>34</sup>

*C. May a Potential Father Prevent Pregnancy Termination by Seeking to Enforce the Criminal Law?*

Even though, in his judgment in the English High Court in the *Paton* case, Sir George Baker sought to stress that a potential father had no legal standing or right to prevent his pregnant wife from having the pregnancy terminated, he failed to indicate whether or not the father would have legal standing or right to do so, where the pregnancy termination was illegal or criminal.<sup>35</sup> In other words, he failed to make it clear

---

<sup>30</sup> 1 Q.B. at 279-80.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 281.

<sup>33</sup> *Id.* at 278.

<sup>34</sup> *Id.* at 281.

<sup>35</sup> *See id.* at 279-81.



whether or not a potential father was capable of achieving his objective by having recourse indirectly to an enforcement of the criminal law, where the planned pregnancy termination may have been illegal.

On the other hand, in the more recent case of *C. v. S.*,<sup>36</sup> a unanimous English Court of Appeal rejected the idea of a potential father being able to prevent a lawful pregnancy termination, by seeking to ensure a proper enforcement of the criminal law. In the latter case, the plaintiff, a single man and a postgraduate student at Oxford University, sought, on his own behalf and as the next friend and father of a fetus which was eighteen to twenty-one weeks *en ventre sa mere*, an injunction to restrain the defendant, a single woman who was also a student at Oxford University and was pregnant by him, from having the pregnancy terminated. At the same time, the plaintiff sought an injunction to restrain the competent health authority from having the abortion carried out, even though all the relevant conditions of the Abortion Act of 1967 had been fulfilled. The application for an injunction was based on the ground that the fetus was "a child capable of being born alive" within the meaning by section 1(1) of the Infant Life (Preservation) Act of 1929, as specifically preserved by section 5(1) of the Abortion Act. It should be noted that the relevant legislative provisions have created the offense of child destruction. In effect, therefore, the plaintiff was seeking to bring about an enforcement of such criminal law.

At first instance, Justice Heilbron, sitting in the Queen's Bench Division of the High Court, accepted expert medical evidence as to the stage of development the fetus would normally be expected to have reached. The expert medical evidence suggested that the cardiac muscle of the fetus would be contracting, that primitive blood circulation and physical movements would be demonstrated by the fetus, but that, if delivered by hysterotomy, such a fetus would never be able to breathe either naturally or with artificial assistance. Consequently, Justice Heilbron held that the applicant potential father had no legal standing to ask for an injunction, and that she was not satisfied that a potential offense, under the Infant Life (Preservation) Act in respect to child destruction, had been proved. She then proceeded to dismiss the application of the potential father.

The latter then appealed to the Civil Division of the Court of Appeal against that decision of the High Court judge. But the Court of Appeal dismissed the appeal and held that a fetus of between eighteen to twenty-one weeks which showed signs of primitive movement and blood circulation, but which, if delivered by hysterotomy, would never be capable of breathing either naturally or artificially, was not "a child capable of being born alive" within the meaning of section 1(1) of the Infant Life (Preser-

---

<sup>36</sup> 1 Q.B. 135 (C.A. 1988).

vation) Act. Consequently, the Court of Appeal maintained that the abortion of the fetus would not constitute an offense of child destruction under the Infant Life (Preservation) Act, and that, accordingly, regardless of any question of *locus standi* or legal standing, the plaintiffs were not entitled to an injunction to prevent the abortion from being carried out. It is noteworthy that a subsequent petition by the applicants for leave to appeal to the House of Lords was dismissed by the Appeal Committee of the House of Lords.

Even then, it cannot be overlooked that the Court of Appeal did not directly address the question whether or not the applicants would have been entitled to the grant of an injunction to prevent the pregnancy termination from being carried out had such pregnancy termination been deemed illegal or criminal under the Infant Life (Preservation) Act. However, it appears that the applicants would not have been entitled to injunctive relief even in the latter situation. Presumably, it would then be for the Crown Prosecution Service to undertake appropriate investigations into any such situation with a view to prosecuting the persons seeking to carry out the unlawful termination of the pregnancy. In the absence of the intervention of the Crown Prosecution Service in the relevant situation, therefore it seems that no one else may be able to intervene to ensure a proper observance of the relevant criminal law. No doubt the civil courts are justifiably unwilling to allow their processes to be used for the purpose of enforcing the criminal law.<sup>37</sup>

#### AUSTRALIAN JUDICIAL REACTION TO THE CLAIM

Just as in the English context, so in the Australian context, the issue as to whether or not a potential father may be able to prevent his pregnant wife or a woman pregnant by him from having the pregnancy terminated by means of an enforcement of the criminal law has been added to the two other issues concerning the legal status of a fetus. Consequently, it is appropriate to examine the Australian judicial reaction to the relevant claim in terms of each of the three issues.

##### *A. The Legal Status of a Fetus*

Like English law, Australian law unequivocally refuses to accord a fetus legal personality. This is so regardless of the stage of development a fetus may have reached. Thus, in the case of *K. v. T.*,<sup>38</sup> Justice Williams stated: "I have not been able to find any reported case, nor was any cited to me by counsel, in which the court's inherent jurisdiction over infants

---

<sup>37</sup> See, e.g., *Gouriet v. Union of Post Office Workers*, 1978 App. Cas. 435, 448 (H.L. (E.)); *Attorney Gen. v. Able*, 1 Q.B. 795, 807 (1984).

<sup>38</sup> 1 Q.R. 396 (1983).

was held to include unborn children. Traditionally, personality for purposes of the law began at birth and ended at death."<sup>39</sup> This appears to have been subsequently endorsed by the full court of the Supreme Court of Queensland<sup>40</sup> and by Chief Justice Gibbs of the High Court of Australia,<sup>41</sup> when the case came before the latter respective higher courts on appeal from the decision of Justice Williams.

On the other hand, the Australian judiciary, unlike its English counterpart, appears to have recognized the appropriateness of a claim for pre-natal injury resulting from the negligence or the omission of another person or persons. Thus, in the case of *Watt v. Rama*,<sup>42</sup> for example, the full court of the Supreme Court of the State of Victoria held that a cause of action in negligence against a defendant motorist in respect to injuries suffered by a fetus as a result of the latter's negligent driving of a motor car was capable of being legally sustained *where the child was subsequently born alive*. This may be said to be somewhat closer to the legal position in most of the states in the United States, even though, in their joint opinion in the *Watt v. Rama* case,<sup>43</sup> Chief Justice Winneke and Justice Pape of the Supreme Court of Victoria professed not to have based their decision on the relevant jurisprudence of the American courts. At the same time, however, it cannot be overlooked that, even though it was assumed in the case of *Distillers Co. (Biochemicals) Ltd. v. Thompson*,<sup>44</sup> which came before the Court of Appeal of the State of New South Wales, that such a cause of action might lie in respect to injury of a fetus resulting from a mother having taken a thalidomide drug, yet, when the case came before the Judicial Committee of the Privy Council on a final appeal, the latter tribunal sought to discountenance the idea.

### *B. Legal Standing of a Potential Father to Protect a Fetus*

The attitude of the judiciary in Australia toward a potential father's right to prevent a woman pregnant by him from having the pregnancy terminated is no different from that of the judiciary in England. Indeed, the Australian judiciary has, in this respect, tended to follow the English judicial approach to the problem. Consequently, a potential father has been deemed to have no right, enforceable in law or in equity, to prevent a legal termination of a pregnancy for which he has been biologically responsible. Thus, in his judgment in the Supreme Court of Queensland in

---

<sup>39</sup> *Id.* at 400.

<sup>40</sup> Attorney Gen., *ex rel.* Kerr v. T., 1 Q.R. 404, 407 (1983).

<sup>41</sup> Attorney Gen. *ex rel.* v. T., 46 A.L.R. 275, 277 (1983).

<sup>42</sup> 1972 V.R. 353. For a general discussion of this case see Wadsworth, *Is the Unborn Child Person at Law?*, 36 TRINITY 88-92 (1972).

<sup>43</sup> 1972 V.R. at 356.

<sup>44</sup> 1971 App. Cas. 458 (P.C.).

the case of *K. v. T.*,<sup>45</sup> with which the full court of the same Court and Chief Justice Gibbs, of the High Court of Australia, respectively, subsequently agreed on appeal, Justice Williams, had occasion to maintain: "On the evidence before me in this case, I am not satisfied that this applicant has established a legal right of the nature asserted which may be protected by injunctive relief."<sup>46</sup>

Nor is it to be overlooked that, even though the Australian judiciary appears to view the relationship between a man and a woman who are lawfully married differently from that between a man and a woman who are not so lawfully married, yet, in the envisaged context, the distinction hardly seems to have much consequence. In other words, a potential father is treated as having no legal standing or right to prevent the lawful termination of a pregnancy for which he has been biologically responsible, irrespective of whether or not he may have been lawfully married to the pregnant woman involved. This means that the Australian judicial attitude is equally no different, in effect, from that of its English counterpart, in this latter regard.

It should be noted that the case of *K. v. T.*<sup>47</sup> itself involved a divorced man and an unmarried mother who became pregnant by him. Six weeks after the pregnancy, the woman informed the man of her condition and indicated to him that she was going to have the pregnancy terminated. At that time, she asked the man for financial assistance to cover the cost of the planned pregnancy termination. Indeed, she showed him a letter from her medical practitioner, which was addressed to another medical practitioner with a recommendation for an abortion. However, the man made it clear to the woman that he had "strong views about abortion." Consequently, he offered to maintain the woman throughout her pregnancy on condition that the child would be put up for adoption after its birth. That appears to have been rejected by the woman. Apparently, there was no doubt that the woman was perfectly healthy, and that the only reason she gave for the planned pregnancy termination was that "it would be the best for everybody." But the man applied to the Supreme Court of Queensland for an interlocutory injunction to restrain the woman from having the pregnancy terminated. Needless to say, the application was eventually rejected by the competent court and, on appeal, by the competent appellate courts at both the state and the federal levels.

---

<sup>45</sup> 1 Q.R. 396 (1983).

<sup>46</sup> *Id.* at 402.

<sup>47</sup> 1 Q.R. 396 (1983).

*C. May a Potential Father Prevent Pregnancy Termination by Seeking to Enforce the Criminal Law?*

Like the English civil courts, the Australian civil courts have generally been unwilling to allow a private individual or even an appropriate law officer to seek their aid for the purpose of preventing an actual or potential commission of a public wrong or for the enforcement of the criminal law.<sup>48</sup> Indeed, the Australian civil courts have tended to follow the example of their English counterparts in this regard. Consequently, Australian civil courts may not be prepared to allow a potential father to prevent the lawful termination of a pregnancy for which he has been biologically responsible, by means of an enforcement of the criminal law.

Thus, in the case of *K. v. T.*,<sup>49</sup> Justice Williams of the Supreme Court of Queensland, in response to a contention that a potential father was entitled to set the machinery of the criminal law in motion if he felt that his wife or the woman pregnant by him was planning to have an illegal abortion, maintained: "If the proposed operation is illegal (criminal), then the applicant has no special legal right to have the operation stopped. His interest is co-extensive with that of all citizens—he would be in reality enforcing not a private but a public right."<sup>50</sup> In so maintaining, he sought to rely on the authority of the decision of the House of Lords in the leading English case of *Gouriet v. Union of Post Office Workers*,<sup>51</sup> as well as on the judgment of Justice Gibbs (as he then was) of the Australian High Court in the case of *Australian Conservation Foundation Inc. v. Commonwealth*.<sup>52</sup>

Nor is it to be overlooked that, when the case of *K. v. T.*,<sup>53</sup> came before the full court of the Supreme Court of Queensland on appeal from the judgment of Justice Williams, that full court equally sought to rely on the authority of the decision of the House of Lords in the same leading English case of *Gouriet*,<sup>54</sup> and proceeded to observe:

If a criminal offence is ultimately committed, its detection will be a matter for the law enforcement agencies with the consequences which that detection entails. It seems to us that the proper exercise of the discretion of this Court in circumstances of this kind should be to refuse an application for an injunction, since the provisions of the [Queensland] Criminal Code contain stern sanctions with plainly deterrent effect [against an illegal termination

<sup>48</sup> See, e.g., *Australian Conservation Found. Inc. v. Commonwealth*, 146 C.L.R. 493 (1980); *Commonwealth v. John Fairfax & Sons, Ltd.*, 147 C.L.R. 39 (1980).

<sup>49</sup> 1 Q.R. 396 (1983).

<sup>50</sup> *Id.* at 402-03.

<sup>51</sup> 1978 App. Cas. 435 (H.L.(E)).

<sup>52</sup> 146 C.L.R. 493 (1980).

<sup>53</sup> 1 Q.R. 396 (1983).

<sup>54</sup> 1978 App. Cas. 435.

of pregnancy].<sup>55</sup>

A similar view appears to have been held by Chief Justice Gibbs in the High Court of Australia when the case came before him on appeal from the full court of the Supreme Court of Queensland.<sup>56</sup>

Besides, even though the Attorney General of Queensland was subsequently invited by Justice Williams to assume the position of an *amicus curiae* in the proceedings, and the Attorney General did so in a kind of subsequent relator action on behalf of the potential father concerned, that appears to have made little or no difference to the conclusion of the full court of the Supreme Court of Queensland. Indeed, the latter court doubted "whether in these circumstances an injunction to restrain the commission of this suspected criminal offence should be granted."<sup>57</sup> This appears to have been equally endorsed by Chief Justice Gibbs in the High Court of Australia when the case came before him on appeal from the full court of the Supreme Court of Queensland.<sup>58</sup>

#### GENERAL OVERVIEW

Even though American and Anglo-Australian courts have shown a general unwillingness to accord a fetus legal personality, nevertheless, American courts seem flexible in their attitude towards the need for protecting it at some stage in its development. For instance, the Supreme Court of the United States may be said to have ruled against a pregnant woman having a constitutional privacy right to have the pregnancy terminated during the third trimester of the pregnancy. Nor is it to be overlooked that, in delivering the majority judgment of that Court in the case of *Roe v. Wade*,<sup>59</sup> Justice Blackmun pointed out:

The Court's decisions recognizing a right of privacy also acknowledge that some state regulation in areas protected by that right is appropriate. . . . [A] State may properly assert important interests in safeguarding health, in maintaining medical standards, and in protecting potential life. At some important point in pregnancy, these respective interests become sufficiently compelling to sustain regulation of the factors that govern the abortion decision. The privacy right involved, therefore, cannot be said to be absolute.<sup>60</sup>

On the other hand, American, English and Australian courts have all tended to reject outrightly a claim by a husband or an unmarried man to prevent his pregnant wife or a woman pregnant by him from having the

---

<sup>55</sup> 1 Q.R. at 406.

<sup>56</sup> 46 A.L.R. 275, 277 (1983).

<sup>57</sup> 1978 App. Cas. at 405.

<sup>58</sup> 46 A.L.R. at 277.

<sup>59</sup> 410 U.S. 113 (1973).

<sup>60</sup> *Id.* at 153-54.

pregnancy terminated. This has been so even though some strong dissenting views have been expressed by individual justices on the United States Supreme Court in that regard. Thus, poignantly enough, in delivering the majority judgment of the United States Supreme Court in *Planned Parenthood of Cent. Mo. v. Danforth*<sup>61</sup> Justice Blackmun, had this to say about the matter:

We recognize, of course, that when a woman, with the approval of her physician but without the approval of her husband, decides to terminate her pregnancy, it could be said that she is acting unilaterally. The obvious fact is that when the wife and the husband disagree on this decision, the view of only one of the two marriage partners can prevail. Inasmuch as it is the woman who physically bears the child and who is the more directly and immediately affected by the pregnancy, as between the two, the balance weighs in her favor.<sup>62</sup>

Whether or not this would be so where the purported pregnancy termination may have been an illegal one was not made clear in that judgment.

In contrast to the majority judgment of the Supreme Court of the United States in *Danforth*,<sup>63</sup> the strong dissenting opinion of the minority of that same Court in the case delivered by Justice White, with which Chief Justice Burger and Justice Rehnquist agreed, appears to have been in favor of a potential father being accorded a right to prevent his pregnant wife from unilaterally having the pregnancy terminated.<sup>64</sup> Indeed, Justice White stressed: "A father's interest in having a child—perhaps his only child—may be unmatched by any other interest in his life."<sup>65</sup>

#### CONCLUSION

No doubt, where a woman's pregnancy threatens her very life, or there are strong reasons for protecting her physical and mental health, a termination of the pregnancy may be morally and legally justified. In any situation, it would be untenable for her husband or the man by whom she became pregnant to be allowed to interfere with or prevent the pregnancy from being terminated. On the other hand, where the woman wishes to have the pregnancy legally terminated on account of social convenience or for some less compelling medical reason, there may be a justification for the husband being able to have a say in whether or not the pregnancy termination ought to take place. Yet the courts in the United States, England and Australia seem unprepared to concede this. Consequently, the

---

<sup>61</sup> 428 U.S. 52 (1976).

<sup>62</sup> *Id.* at 71.

<sup>63</sup> 428 U.S. 52 (1976).

<sup>64</sup> *Id.* at 93. (White, J., dissenting).

<sup>65</sup> *Id.* (White, J., dissenting).

contemporary feminist movement clamor for a woman to have an absolute right to control her own body and thus to be able to decide unilaterally and without any legal hindrance to have her pregnancy terminated appears to have received a limited amount of judicial approval. Yet this may not be all that socially or morally desirable.



