Neutral Citation Number: [2014] EWCA Civ 1554

Case No: C3/2014/0775

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)
JR1201/2011

Royal Courts of Justice
Strand, London, WC2A 2LL

Date:04/12/14

Before :

MASTER OF THE ROLLS
LORD JUSTICE TREACY
and
LADY JUSTICE ELEANOR KING

- -

Between :

CP (A Child)	**Appellant**
- and -	
First-tier Tribunal (Criminal Injuries Compensation)	**Respondent**
Criminal Injuries Compensation Authority	
	Interested Party
British Pregnancy Advisory Service/Birthrights	
	First Intervener
Pro-Life Research Unit	
	Second Intervener

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John Foy QC & Laura Begley (instructed by **GLP Solicitors**) for the **Appellant**
Ben Collins & Jamie Sharma (instructed by **The Treasury Solicitors** for the **Interested Party**
The Interveners were permitted to make written submissions

Hearing dates : 5th November 2014

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Approved Judgment

Lord Justice Treacy :

Introduction

1. The issue raised in this appeal concerns the ability of a child, (CP), to claim criminal injuries compensation from the Criminal Injuries Compensation Authority, (CICA), as a result of being born with Foetal Alcohol Spectrum Disorder (FASD) as a direct consequence of her mother's excessive drinking while pregnant in circumstances where it was asserted that the mother was aware of the danger of harm to her baby being caused by drinking to excess.

2. FASD is a recognised disorder resulting from grossly excessive drinking during pregnancy. It causes intrauterine growth retardation and limited growth potential. It can cause central nervous dysfunction; a feature of the disorder is that the brain is smaller and particularly affected. Many children with the disorder have severe learning difficulties. Whilst a diagnosis of FASD has been made in this case and is accepted as such, it has not been necessary for this court or the Tribunals preceding this hearing to consider the totality of the effects of FASD in this case. Some of the symptoms will only manifest themselves as the child develops (or fails to do so).

3. We understand that, whilst in the past applications for criminal injuries compensation for victims for FASD have been accepted under previous schemes, CICA's present policy is to refuse to pay out such claims. We were told that there are about eighty other applications for compensation which may be affected by this appeal.

4. This appeal is brought by CP against the decision of the Upper Tribunal granting CICA's application for judicial review and quashing a decision of the First Tier Tribunal dated 7th February 2011 that she was eligible for compensation. CP was born in June 2007 to her mother, a young woman with alcohol addiction. In November 2009, an application was made under the CICA scheme on behalf of CP by her local authority. CICA rejected her application on the grounds that CP had not sustained an injury directly attributable to a crime of violence within the terms of paragraph 8(a) of CICA's 2008 scheme.

5. After an unsuccessful review, CP appealed to the First Tier Tribunal which allowed her appeal. It found that she had sustained injury which was directly attributable to a crime of violence, namely an offence contrary to s23 of the Offences Against the Persons Act 1861. CICA then sought judicial review from the Upper Tribunal which issued its decision on 18th December 2013. The Upper Tribunal allowed the claim and held that the Appellant was not entitled to criminal injuries compensation. The reason underlying the decision was that CP was not "any other person" within the meaning of s23 of the Offences Against the Persons Act 1861 when she sustained injury whilst a foetus within her mother's womb. Thus the mother could not have committed a criminal offence contrary to s23 of that Act (administering poison or other destructive or noxious thing) by drinking heavily whilst CP was a foetus. The Upper Tribunal did not rule on two additional grounds advanced by CICA: firstly that the mens rea of s23 was not made out and/or that the First Tier Tribunal had failed to give adequate reasons for its findings in that respect; secondly, that even if an offence was made out it did not amount to a "crime of violence" within the meaning of the scheme.

6. The CICA administers a scheme which considers claims for compensation "from people who have been physically or mentally injured because they were the innocent victim of a violent crime…". The scheme in this appeal is the 2008 Criminal Injuries Compensation Scheme made by the Secretary of State pursuant to s1 of the Criminal Injuries Compensation Act 1995.

7. Under paragraph 6, dealing with eligibility, compensation may be paid in accordance with the Scheme to an applicant who has sustained criminal injury on or after 1st August 1964.

8. Paragraph 8 provides:

> "For the purposes of this Scheme, criminal injury means one or more personal injuries as described in paragraph 9, being an injury sustained in and directly attributable to an act occurring in Great Britain…which is:
>
> (a) a crime of violence (including arson, fire-raising or an act of poisoning); …"

9. It is undisputed for the purposes of this case that the FASD suffered by the appellant amounts to injury within the meaning of the Scheme. The CICA reserves its position in other cases as being dependent on the individual nature of the effects and symptoms caused.

10. Paragraph 10 of the Scheme provides:

> "It is not necessary for the assailant to have been convicted of a criminal offence in connection with the injury"…

11. In this case, there has never been a prosecution of CP's mother, nor, as far as we are aware, in any other case.

12. The offence that the mother is said to have committed is that set out in s23 of the Offences Against the Persons Act 1861. This provides:

> "*Maliciously administering poison, etc so as to endanger life or inflict grievous bodily harm.*
>
> Whosoever shall unlawfully administer to… any other person, any poison or destructive or noxious thing, so as thereby…to inflict upon such person any grievous bodily harm, shall be guilty of felony, and being convicted there of shall be liable…to be kept in penal servitude for any term not exceeding ten years"

13. The Appellant's submission is that her mother was in fact guilty of that offence, notwithstanding the absence of prosecution, and that it constituted a crime of violence within the meaning of paragraph 8(a) of the Scheme.

14. It is conceded for the purposes of this appeal that some of the ingredients of the offence are satisfied. There is no dispute that the mother administered to CP (whilst an embryo in the womb) a poison or other destructive or noxious thing by reason of

the excessive quantities of alcohol she consumed at the time. There is no dispute that CP has in fact sustained grievous bodily harm.

15. The first issue which arises is whether CP is "any other person", given that she was a foetus at the time the alcohol was ingested. It is the Upper Tribunal's finding in favour of the CICA's argument that CP could not in those circumstances be "any other person", that is the primary issue in this appeal. CICA as the interested party, seeks to sustain that finding, but in any event through its respondent's notice seeks to justify the Upper Tribunal's quashing of the First Tier Tribunal's decision on two additional grounds.

16. The first ground is that the First Tier Tribunal did not find that CP's mother foresaw harm to the child at the moment she was consuming alcohol and that the mens rea of s23 was not made out. Allied to this is the assertion that the First Tier Tribunal failed to give adequate reasons for its findings. The second ground is that even if an offence contrary to s23 is made out, the First Tier Tribunal was wrong to conclude that it amounted to a crime of violence for the purposes of the Scheme, and/or it failed to give adequate reasons for its findings in that respect.

17. In *Attorney General's Reference (No 3 of 1994) [1998] A.C. 245*, the House of Lords considered the case of a defendant who stabbed a woman in the stomach, knowing her to be pregnant. Shortly afterwards she went into labour and gave birth to a grossly premature child, which survived for only 121 days. The stabbing set in train events which caused the premature birth, which itself led to the child's death, its chances of survival being very significantly reduced by the fact of the premature birth. Thus, a chain of causation between the stabbing and the death of the child was established. The issue was whether in those circumstances the crimes of murder or manslaughter could be committed.

18. Their Lordships held that a foetus was an unique organism and at that stage was neither a distinct person nor an adjunct of the mother. It was held that whilst there could not be a conviction for murder, there was sufficient for a conviction for manslaughter. The defendant in stabbing, had intended to commit an act which was unlawful and which any reasonable person would recognise as creating a risk of harm to some other person. Although a foetus was not a living person, the possibility of a dangerous act directed at a pregnant woman causing harm to a child to whom she subsequently gave birth, made it permissible to regard that child as within the scope of the defendant's mens rea for the purposes of manslaughter when committing the unlawful act. Accordingly the crime of manslaughter could be committed even though the child was neither the intended victim nor could it have been foreseen as likely to suffer harm after being born alive. Thus the trial Judge should not have held that there was no case to answer on manslaughter on the basis that at the material time there was no victim capable of dying as a direct and immediate result of what was done.

19. At paragraph 15 of its decision, the Upper Tribunal referred to the fact that Lord Mustill had identified a number of established rules relating to criminal liability. It continued;

> "One of these was that in the absence of a specific statutory provision, an embryo or foetus *in utero* does not have a human personality and cannot be the victim of a crime of violence.

> Although the foetus is a unique organism it does not have the attributes that make it a person. As Lord Mustill said (at 262D, my emphasis): "The defendant intended to commit and did commit an immediate crime of violence to the mother. He committed no relevant violence to the foetus, which was not a person… "."

20. The Upper Tribunal's decision continued:

> "16. If CP was not a person whilst her mother was engaging in the relevant actions, then she was not "another person" for the purposes of s23 and as a matter of law, her mother could not have committed a criminal offence contrary to s23 in relation to her unborn child.
>
> ……
>
> 18. The point here is that the *actus reus* and the *mens rea* must coincide in time (*R v Jakeman [1982] 76 Cr App R 223; R v Miller [1982] 1 QB 532)*. If the *actus reus* is a continuing act this rule is satisfied if the defendant has *mens rea* during its continuance. (*Fagan v Metroplitan Police Commissioner [1969] 1 QB 439)*. Applying these basic rules to the present case, even if her mother had the necessary *mens rea* whilst CP was still a foetus, there was no "another person" and there was no *actus reus* at that time.
>
> ……..
>
> 23. I can see nothing in the *Attorney General's Reference No 3 of 1994* that entitles the First Tier Tribunal to link for the purposes of criminal liability the essence of the *actus reus* of the s23 offence- the administration- to the born child so as to mean that the unborn foetus in effect becomes "another person" which, as demonstrated above, it could not be*"*.

21. Since the Upper Tribunal found in favour of CICA and held that no crime had been committed, it did not go on to decide the other two questions now raised in the respondent's notice. Both those issues had been determined in favour of the Appellant by the First Tier Tribunal.

The Appellant's Argument

22. On behalf of the appellant Mr Foy QC placed heavy reliance on the Attorney General's Reference. He submitted that an offence contrary to s23 should be regarded in the same way as manslaughter was in that decision. Had s23 been before the House of Lords, it would have come to the same conclusion. The fact that CP had suffered injury rather than death because of her mother's drinking should not affect the outcome. There was no material difference between the two situations in circumstances where the mother had knowledge of the harmful effect of excessive drinking during pregnancy, and her drinking which would have otherwise been a

lawful act, was to be regarded as an unlawful act akin to that required for manslaughter. The position under s23 was stronger than in the manslaughter situation because the mens rea involved there was not directed at the victim.

23. Those general submissions were followed by specific submissions directed at the phrase "any other person" in s23. The first submission was that a foetus in utero was capable of being "any other person". The foetus should be regarded as a live being with rights and capable of having an existence separate to its mother long before it is born. That was why Parliament had legislated to protect the foetus by s58 of Offences Against the Person Act and s1 of the Infant Life (Preservation) Act 1929.

24. Recognising that the Attorney General's Reference itself did not support this argument, Mr Foy relied on an alternative. The foetus becomes a person when it is born. Since the Attorney General's Reference had analysed the actus reus of manslaughter as a continuing act running from the moment of the attack on the mother to the death of the child after birth, there was no good reason why the criminal law should not equally protect a foetus from conduct resulting from deliberate acts causing foreseeable harm and which resulted in grievous bodily harm evident after birth.

25. In support of this argument Mr Foy drew upon passages in the Attorney General's Reference.

26. Firstly, he referred to Lord Mustill's speech at page 253C, where he said:

> "The able arguments of counsel were founded on a series of rules which, whatever may be said about their justice or logic, are undeniable features of the criminal law today."

27. He then set out five rules. Rules 3, 4 and 5 are relevant to this case. They are set out at p254A-F.

> "*3. Except under statute an embryo or foetus in utero can not be the victim of a crime of violence. In particular, violence to the foetus which causes its death in utero is not a murder.*
>
> ….
>
> *4. The existence of an interval of time between the doing of an act by a defendant with the necessary wrongful intent and its impact on the victim in a manner which leads to death does not in itself prevent the intent, the act and the death from together amounting to murder, so long as there is an unbroken causal connection between the act and the death.*
>
> …
>
> *5. Violence towards a foetus which results in harm suffered after the baby has been born alive can give rise to criminal responsibility even if the harm would not have been criminal (apart from statute) if it had been suffered in utero*."

28. At p261F-G Lord Mustill commented in relation to the third rule that it was established beyond doubt in the criminal law that a child in the womb does not have a distinct human personality, whose extinguishment gives rise to any penalties or liabilities at common law. As to the fourth rule, this was an exception to the generally accepted principle that actus reus and mens rea must coincide. A continuous act or continuous chain of causation leading to death is treated by the law as if it happened when first initiated. The fifth rule links an act and intent before birth with a death happening after a live delivery.

29. Mr Foy submitted that the Upper Tribunal had overlooked the fact that the House of Lords had accepted criminal responsibility in the case of manslaughter and had failed to mention or consider rules four and five.

30. Mr Foy also drew attention to Lord Hope's speech. In particular he relied upon p268A-D:

> "I have no difficulty in finding in the facts of this case all the elements that were needed to establish the actus reus both of murder and of manslaughter. The actus reus of a crime is not confined to the initial deliberate and unlawful act which is done by the perpetrator. It includes all the consequences of that act, which may not emerge until many hours, days, or even months afterwards. In the case of murder by poisoning, for example, there is likely to be an interval between the introduction of the victim to the poison and the victims death…..What is needed in order to complete the proof of the crime is evidence of an unbroken chain of causation between the defendant's act and the victim's death….It was not disputed that injury to a foetus before death which results in harm to the child when it is born can give rise to criminal responsibility for that injury. So the fact that the child is not yet born when the stabbing took place does not prevent the requirements for the actus reus from being satisfied in this case, both for murder and for manslaughter, in regard to her subsequent death."

31. Lord Hope continued at p270F:

> "It is enough that the original unlawful and dangerous act, to which the required mental state is related, and the eventual death of the victim are both part of the same sequence of events".

32. Mr Foy submitted that the Upper Tribunal had been wrong in stating at paragraph 18 of its decision that the actus reus and the mens rea must coincide in time. Moreover it was in error at paragraph 23 in holding that there was an absence of link between the administration of alcohol and the child when born. The passages cited above established the necessary link. Thus the Upper Tribunal was incorrect to hold that the actus reus of the s23 offence stopped at the point when the foetus was not "any other person". The decision and reasoning in the Attorney General's Reference in relation to manslaughter concerned an analogous situation which should lead to a finding of entitlement to compensation.

CICA's Response

33. Mr Collins for CICA sought to uphold the Upper Tribunal's conclusion that the mother did not administer poison to "any other person", so that the actus reus of the s23 offence was not made out. He argued that the Attorney General's Reference shows that, except under statute, an embryo or foetus in utero cannot be the victim of a crime of violence. CP did not have legal personality until she was born. Thus a foetus in utero was incapable of being "any other person". Accordingly, the mother did not administer poison to "any other person" because the administration occurred only *in utero*. The general rule is that *actus reus* and mens rea must coincide: see *R v Miller [1982] QB 532.*

34. Regard should be had to the fact that in the Attorney General's Reference their Lordships were considering crimes with different ingredients to the s23 offence. In relation to the actus reus of murder and manslaughter, the killing of another person includes not only the act of violence but its consequences. Under s23 the administration of toxic substance to "any other person" is an essential ingredient of the actus reus, so that the position is different. In particular, there is a contrast to unlawful act manslaughter which includes in its ingredients an intention to do an unlawful act likely to cause harm to another person, resulting in death. Accordingly, the Upper Tribunal rightly concluded at paragraph 16 of its decision that:

> "If CP was not a person whilst her mother was engaging in the relevant actions, then she was not another person for the purposes of s23 and as a matter of law her mother could not have committed a criminal offence contrary to s23 in relation to her unborn child."

35. Mr Collins submitted that the flaw in the appellant's argument was that it failed to address the terms of s23 in detail and had taken instead a broad approach to the Attorney General's Reference, which was concerned with crimes of homicide where there might be a gap between the initial act causing injury and the resultant death. In those circumstances, there was justification for treating the actus reus as a continuum culminating with death. There was no warrant for taking a similar approach with the s23 offence.

Conclusion on the primary issue

36. In *R (Jones) v The First Tier Tribunal (Social Entitlement Chamber) (2013) 2 AC 48* Lord Hope, giving the judgment, said that in a criminal injuries compensation case there were two questions for a tribunal to consider. The first was whether, having regard to the established facts, a criminal offence had been committed. The second was whether, having regard to the nature of the criminal act, the offence committed was a crime of violence. The assessment of the first question, once facts are established, is clearly a question of law involving construction of the statute. It is on this aspect of the case that the answer to the primary question turns. The section requires administration of the noxious substance to "any other person". As set out above, Mr Foy sought to bring himself within that phrase by reference to two alternative arguments.

37. As to the first, he acknowledged its apparent weakness, and conceded that he was unable to produce authority in support of it. It is clear to me that the decision in the Attorney General's Reference itself is fatal to this limb of the argument. Both Lord Mustill and Lord Hope were in agreement that a foetus is not to be regarded as another person. It was neither a distinct person nor a adjunct of the mother but was a unique organism. As Lord Hope said at page 267F:

> "…an embryo is in reality a separate organism from the mother from the moment of its conception. This individual reality is contained by it throughout its development until it achieves independent existence on being born. So the foetus cannot be regarded as an integral part of the mother…notwithstanding its dependence upon the mother for its survival until birth."

38. Additionally, the first sentence of rule three cited by Lord Mustill - "Except under statute an embryo or foetus in utero cannot be the victim of a crime of violence"- is again inconsistent with Mr Foy's contention.

39. I refer also to the decision of the Court of Appeal Criminal Division in *Tait [1990] 1 QB 290*. That was a constitution over which Mustill LJ (as he then was) presided. The case involved making a threat to kill contrary to s16 of the Offences against the Person Act. The ingredients of the offence include a threat to kill either the person threatened or "a third person". The court had to consider whether a foetus was capable of being a third person against whom a threat could be made. The court said in terms that a foetus was not "another person" distinct from its mother to whom the threatening words had been uttered. It therefore seems to me that the first part of Mr Foy's argument as to the status of the foetus cannot be sustained.

40. I turn then to the alternative proposition which relies substantially on the decision in the Attorney General's Reference. In my judgment the attempt to equate the s23 offence with their Lordships' decision as to manslaughter cannot succeed. It is clear that the decision as to manslaughter is primarily based on an exception to the normal rule that actus reus and mens rea should coincide. The analysis of the actus reus of manslaughter or indeed murder, is such that it is not complete until death takes place. However, there may be a gap in time between the infliction of the fatal injury and the fact of death. In those circumstances it is wholly unsurprising that their Lordships found an exception to the general rule and were prepared to regard the actus reus in those cases as being of a continuing nature as long as a chain of causation existed between the initial act and the death of the victim. Thus in the case of a foetus, it was legitimate to find a chain of causation extending from the initial insult to the foetus which triggered its premature birth through to the point of death some time after birth, by which stage the child had undoubtedly achieved legal personality. A close examination of the language used by Lords Mustill and Hope shows clearly firstly that it has to be seen in the context of homicide, and secondly that it was used in the context of a foetus which suffered injury and which subsequently died after birth. It was common ground that violence done to a foetus resulting in a still birth could not found criminal liability. In cases where the child is born alive, the actus reus cannot crystallise until the time of death.

41. I consider that the situation is rather different in relation to the s23 offence. If the foetus is not another person at the time of the administration of the noxious substance

then the offence cannot be complete at that point. The situation is distinct from the crime of manslaughter which requires death in order to complete the crime. This, no doubt, is why Mr Foy albeit with some hesitation, sought to rely on the first limb of his argument as it would avoid this difficulty which arises under the second limb. He sought to meet the objection to the second limb by arguing that where FASD occurs, the foetus is damaged before birth, but that after birth there is continuing damage by reason of retardation. To the observation that what occurred after birth was simply the consequences of damage caused before birth, he submitted that these are continuing and that the court should be slow to distinguish between damage done and subsequent consequences or symptoms.

42. I cannot accept this analysis. The reality is that the harm has been done to the child whilst it is in utero. The fact that if the child is born alive it will suffer the consequences of the insult to it whilst in the womb does not mean that after birth it has sustained damage by reason of the administration of the noxious substance. One only has to cast one's mind back to the Thalidomide tragedy. The injury was done to the affected children by the administration of the drug whilst they were still in the womb. Those children who were born affected were born with missing or ill-developed limbs. Whilst they suffered the consequences on a lifetime basis after birth, they did not sustain any additional damage after birth by virtue of administration of the drug.

43. Reference to the expert evidence of Dr Kathryn Ward, an experienced consultant paediatrician, whose very detailed report was before the First Tier Tribunal, (and which was not disputed), shows that the harm which is done by ingestion of excessive alcohol in pregnancy is done whilst the child is in the womb. The child would then, when born, show damage demonstrated by growth deficiency, physical anomalies and dysfunction of the central nervous system. Very often, as in this case, the full extent of retardation and damage will not become evident until the child reaches milestones in its development, at which point matters can be assessed. The fact that such deficits cannot be identified until that stage does not constitute fresh damage. It merely means that the damage was already done but has only then become apparent.

44. It seems to me that this is fatal to the appellant's contention. The time at which harm, acknowledged in this case to amount to grievous bodily harm, occurred was whilst CP was in the womb. At that stage the child did not have legal personality so as to constitute "any other person" within the meaning of s23. The basis upon which the actus reus is extended in a manslaughter case cannot apply here since nothing equivalent to death occurred to CP after her birth.

45. I therefore consider that the Upper Tribunal was correct to conclude at paragraph 23 of its decision that there was no link between the administration of the alcohol and the born child for the purposes of s23. It was no doubt for that reason that at paragraph 18 it referred to the normal rule requiring coincidence in time between actus reus and mens rea. It was no doubt for that reason that it did not refer to rule 4 which was plainly concerned with a situation where a death occurs as opposed to a still birth. As to rule 5, the reference to "harm suffered after the baby has been born alive" is referable to the homicide situation, but not to one such as the present.

46. In my judgment the passages relied on by Mr Foy in the Attorney General's Reference have to be read in the context of homicide rather than the present context. Moreover, it seems to me that Lord Mustill was not encouraging a broad approach when he commented towards the end of his speech about the number of potential permutations arising from the referred point of law. He said at p265F:

> " it would, I believe be most imprudent to enter upon any of them without resolving to pursue them in depth, and I would wish to proceed with particular care in relation to allegations of murder stemming from an injury to the foetus unaccompanied by any causative injury to the mother".

47. It seems to me that the legislation in the interests of the unborn child represented by s58 and s59 of the 1861 Act and s1 of the Infant Life (Preservation) Act 1929 tends to assist CICA rather than the appellant. These are offences committed where there is an intention to kill the foetus in utero, an act which but for statute would not be criminal. In addition, the focus of s.58 is on the administration of drugs or the use of instruments upon the woman rather than the child. The result reached provides a conclusion consistent with the approach of Parliament in the Congenital Disabilities (Civil Liabilities) Act 1976. At s.1 it restricts the ability of a child born disabled to sue its mother in tort in circumstances such as these. Whilst of course there are different public interests in play as between tort and criminal law, and whilst our primary task is to construe s.23, the conclusion to which I have come has at least the merit of providing coherence between the civil and criminal law.

Respondent's Notice

48. In the light of my conclusion on the primary issue, the issues raised by the respondent's notice become moot. I shall therefore limit myself to the following observations. If a Tribunal finds that a crime has been committed, it has to go on to consider whether that was a crime of violence in accordance with paragraph 8(a) of the Scheme, and the approach set out in *Jones (supra).*

49. In the present case the Upper Tribunal did not need to deal with the issue. The First Tier Tribunal at paragraph 55 gave its decision that CP's injury was "directly attributable to a crime of violence within the terms of paragraph 8(a) of the Scheme and eligibility is therefore established".

50. The Tribunal's reasoning in support of this was sparse in the extreme. It stated at paragraph 63:

> "The essentials of an offence under s23 of the Offences Against the Persons Act 1861 have been made out. Such an offence is a specified 'violent' offence within Schedule 15 to the Criminal Justice Act 2003."

51. In *Jones (supra),* Lord Hope (at paragraph 14) approved the observations of Lawton LJ in *R v Criminal Injuries Compensation Board, Ex p Webb [1987] QB 74.* Lawton LJ said that what mattered was the nature of the crime, not the likely consequences –

> "It is for the Board to decide whether unlawful conduct, because of its nature, not its consequence, amounts to a crime of violence".

He continued at pp79-80:

> "Most crimes of violence will involve the infliction or threat of force, but some may not. I do not think it prudent to attempt a definition of words of ordinary usage in English which the Board, as a fact finding body may have to apply to the case before them. They will recognise a crime of violence when they hear about it, even though as a matter of semantics, it may be difficult to produce a definition which is not too narrow or so wide as to produce absurd consequences…"

In the present case there was insufficient consideration demonstrated by the First Tier Tribunal. In particular the reference to Schedule 15 of the 2003 Act does not seem to me to be sufficient; firstly, because the inclusion of the s.23 offence as a specified violent offence within schedule 15 was done for a wholly different legislative purpose. Secondly, the mere fact that the s.23 offence was included in a list of offences for the purposes of the Schedule does not amount to a sufficiently close focus on the facts of the offence. For my part, I saw force in Mr Collins' submission that the mere reference to poisoning and arson in paragraph 8(a) of the Scheme would not of itself suffice without further analysis. Both are offences which may be committed intentionally or recklessly. It may well be that those differing states of mind have a bearing on the question on whether the crime committed is a crime of violence. There is, however, in the circumstances no purpose in our seeking to determine the matter for ourselves or to remit the issue for further consideration.

52. The second matter raised relates to the assertion that the First Tier Tribunal did not properly find the mens rea of the s.23 offence proven and/or failed to give sufficient reasons for his finding. The mens rea of the offence is contained in the phrase "unlawfully or maliciously". It was common ground that, in a s.23 offence, "unlawfully" merely provides for an absence of lawful excuse, and that on the facts of this case if the other ingredients of the offence were proven, what was done was done unlawfully. As to "maliciously", it would be sufficient if the person accused under s.23 had foreseen that physical harm to another person, albeit of a minor character, might result from his action, and yet had gone on to take the risk of it. – see *R v Savage; DPP v Parmenter [1992] 1 AC 699*. I have considered the decision of the First Tier Tribunal and am satisfied that there were sufficient findings made to demonstrate the necessary mens rea and that sufficient reasons were given. Paragraph 52 of the decision states:

> "On the balance of probabilities, the mother was through her general knowledge; by engaging with her General Practitioner and the maternity services during her two pregnancies; and by attending at the Thomas Project, aware of the dangers to her baby of the excessive consumption of alcohol during pregnancy. "

53. This paragraph follows others in which relevant history and findings of fact had been set out. My view is fortified by the observations in *Jones (supra)* that a benevolent approach should be taken by the appellate court in considering the reasoning of the Tribunal below. See Lord Hope at paragraph 25:

> "It is well established, as an aspect of tribunal law and conduct, that judicial constraint should be exercised when the reasons a tribunal gives for its decision are being examined. The appellate court should not assume too readily that the Tribunal misdirected itself just because not every step in its reasoning is fully set out in it. "

54. Accordingly, I would reject this part of the Respondent's notice.

Interveners

55. Before leaving the matter, I should record that the court has received written submissions from the first and second interveners. The former is concerned to promote women's rights in pregnancy and childbirth. The latter seeks to promote human life at all its stages including the foetal stage. Each set of submissions focused strongly on policy matters, adopting a different standpoint according to those whose interests they sought to advance. Whilst of interest and thought-provoking, those submissions have not informed this judgment since the appeal was concerned with the correct construction of the statute and the interpretation of the Attorney General's Reference. Insofar as either intervener referred to matters of law, they did not materially add to the submissions received from the principal parties. Whilst the second intervener made reference to the decision of the ECtHR in Vo v France [2004] 2 FCR 577, it is clear from that decision that European learning on Article 2 cannot assist in determination of the matter before this court. This is an issue for individual states to determine and one which will be governed by domestic law.

Conclusion

56. The appeal is dismissed.

Lady Justice King

57. I agree

Master of the Rolls

58. I agree that this appeal should be dismissed essentially for the reasons given by Treacy LJ. I add a few words of my own because there has been a difference of view as to the issue raised by this case between the First Tier Tribunal (Criminal Injuries) ("the FTT") and the Upper Tribunal (Administrative Appeals Chamber) ("the UT") and the issue is one of considerable public interest and importance.

59. The facts have been sufficiently stated by Treacy LJ. The child CP claimed compensation from the Criminal Injuries Compensation Authority ("the CICA") for the criminal injury that is said to have been caused to her by her mother ("EQ"). The FTT found that (i) she was born with Foetal Alcohol Spectrum Disorder ("FASD") as a result of grossly excessive consumption of alcohol by EQ during her pregnancy; (ii)

FASD was an "injury" within the meaning of para 9 of the Scheme made pursuant to the Criminal Injuries Compensation Act 1995 ("the 1995 Act"); (iii) CP was the victim of an offence contrary to section 23 of the Offences Against the Person Act 1861 ("the 1861 Act") in that EQ, by consuming excessive quantities of alcohol, had administered poison to her foetus so as to inflict grievous bodily harm for the purposes of section 23 of the 1861 Act; (iv) this was a "crime of violence" within the meaning of the Criminal Injuries Compensation Scheme; and (v) EQ had the requisite mens rea at the time of the consumption of alcohol.

60. The CICA sought judicial review of the decision of the FTT that CP was eligible for compensation. The UT granted judicial review. It decided that EQ did not administer poison to "any other person" and that the actus reus of an offence contrary to section 23 of the 1861 Act was therefore not established. That was fatal to the claim for compensation and the UT did not consider any of the other issues that had been raised.

61. The UT dealt with the central issue with commendable succinctness at para 23:

> "I can see nothing in *Attorney-General's Reference No 3 of 1994* that entitles the First-tier Tribunal to link for the purposes of criminal liability the essence of the actus reus of the section 23 offence—the administration—to the born child so as to mean that the unborn foetus in effect becomes 'another person' which, as demonstrated above, it could not be."

62. Mr Foy QC makes two points in support of the appeal. First, he says that a foetus is capable of being "any other person" within the meaning of section 23. Mr Foy was right not to press this submission with much enthusiasm. As Treacy LJ has explained, it is well established that a foetus is not a "person"; rather it is a sui generis organism: see, for example, Rule 3 set out in the opinion of Lord Mustill in *The Attorney-General's Reference (No 3 of 1994)* [1998] AC 245 at page 254A-E.

63. Alternatively, Mr Foy submits that a foetus becomes a "person" when it is born and there is no good reason why the criminal law should not protect it before birth or criminalise conduct which results in grievous bodily harm to a child after it is born. He relies by analogy on the decision in the *Attorney-General's Reference Case.* But the analogy is flawed. The elements of the offence of manslaughter where there is an assault on the foetus which causes the death of the child after it has been born are (i) an unlawful and dangerous act, (ii) a death and (iii) a causal link between the act and the death. All three elements are required to complete the actus reus of the offence. The actus reus of an offence contrary to section 23 requires (i) the administering of a poison to a person, (ii) the infliction on such person of grievous bodily harm and (iii) a causal link between (i) and (ii). An essential ingredient of the offence, therefore, is the infliction of grievous bodily harm *on a person*. Grievous bodily harm to a foetus will not suffice. On the facts of this case, the harm caused to CP by reason of EQ's excessive consumption of alcohol was caused *before* her birth. Tragically, the harm was the brain damage with which CP was born. She was born with limited growth potential as she had symmetrical intrauterine growth retardation. All the suffering that CP has endured and will continue to endure during her life is the consequence of

the harm that was inflicted on her when she was in her mother's womb. The distinction between (i) harm or injury caused by an act and (ii) the consequences of the harm or injury is critical. An offence contrary to section 23 is complete if D, with the requisite mens rea, inflicts grievous bodily harm on V. If V suffers further harm *as a result of* the grievous bodily harm, that does not give rise to a further offence. The further harm is simply a consequence of the grievous bodily harm. It may well be relevant to an assessment of the gravity of the offence that has been committed, but it is not part of the actus reus of the offence itself.

64. If section 23 had expressly included a foetus as well as "any other person", EQ would have committed the actus reus of the offence during her pregnancy. But that is not what Parliament has provided. Accordingly, it is because a foetus does not come within the ambit of section 23 that Mr Foy's argument breaks down.

65. I am fortified in the conclusion that I have reached by a number of other considerations. First, the approach to section 23 that I have adopted is consistent with the established structure of the criminal law as it relates to the foetus. Parliament has identified certain circumstances where criminal liability arises if a mother causes injury to her foetus. Thus the offence of a pregnant woman using poison, with intent to procure her own miscarriage (section 58 of the Offences Against the Person Act 1861) specifically provides for circumstances in which a woman administers poison or a noxious thing to herself. This offence does not apply to the circumstances of the present case because it requires intent. Section 1 of the Infant Life (Preservation) Act 1929 provides that it is an offence to destroy the life of a child capable of being born alive before it is born. Parliament could have legislated to criminalise the excessive drinking of a pregnant woman, but it has not done so outside these offences. Since the relationship between a pregnant woman and her foetus is an area in which Parliament has made a (limited) intervention, I consider that the court should be slow to interpret general criminal legislation as applying to it.

66. Secondly, in English law women do not owe a duty of care in tort to their unborn child. A competent woman cannot be forced to have a caesarean section or other medical treatment to prevent potential risk to the foetus during childbirth. The negligent acts of a third party tortfeasor, which inflict harm on an unborn child, are actionable by the child on birth if the child is born with disabilities under section 1(1) of the Congenital Disabilities (Civil Liability) Act 1976. But claims cannot be brought under this Act against the child's mother unless (section 2) the harm is caused by her when she is driving a motor vehicle. The law would be incoherent if a child were unable to claim compensation from her mother for breach of a duty of care owed during pregnancy, but the mother was criminally liable for causing the harm which gave rise to damage and a right to compensation under the 1995 Act.

67. It is true that tort and crime are conceptually distinct. But the policy reasons underlying the state's view that a child should not be able to claim compensation from her mother for what is done (or not done) during pregnancy should rationally also lead to the conclusion that, save in the exceptional circumstances expressly recognised by Parliament, there should be no criminal liability for what a mother does (or does not do) during pregnancy. It would be all the more incoherent if the sole or even principal reason for treating what a mother does (or fails to do) during her pregnancy as attracting criminal liability is to enable the child to claim compensation from the CICA. It makes no sense to say that a child who has been harmed by her mother's

conduct during pregnancy can claim compensation from the CICA, but cannot claim compensation from the person who caused the harm. In my view, the role of the state in these circumstances should be to provide care and support for the child who has suffered harm to the extent that this is necessary. It should not be to pay compensation on the basis that the child is the victim of a crime by her mother.

68. This case has attracted much public interest. We have been assisted by detailed submissions on behalf of the appellant and CICA as well as by the British Pregnancy Advisory Service and Birthrights ("the first interveners") and the Pro-Life Research Unit ("the second interveners"). The first interveners are committed to supporting women's reproductive autonomy and advocates for women's choices across their reproductive lifetime. They contend that the legal question raised by this appeal is of profound social significance. They say that, if the appeal were to be allowed, this would be a radical development in the criminal law. In short, they say that there is a compelling public interest in safeguarding pregnant women and their foetuses from the detrimental effects of criminalisation.

69. The second interveners seek to promote respects for human life at all its stages. They say that children affected by FASD need a remedy and that to provide a remedy under the CICA Scheme is just, does not interfere inappropriately with maternal autonomy interests and would not open the floodgates to a large number of claims or to inappropriate prosecutions.

70. I respect the strength of the convictions which underpin the submissions of the interveners. But ultimately, the question we have to answer involves interpreting section 23 of the 1861 Act. For the reasons I have given, I conclude that EQ did not commit an offence contrary to section 23 of the 1861 Act. I am fortified in this conclusion by the wider considerations to which I have referred.

71. I would dismiss this appeal.