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HOUSE OF LORDS

Lord Goff of Chieveley Lord Mustill Lord Slynn of Hadley
Lord Hope of Craighead Lord Clyde

OPINIONS OF THE LORDS OF APPEAL FOR JUDGMENT IN THE CAUSE

ATTORNEY GENERAL'S REFERENCE NO. 3 OF 1994

ON 24 JULY 1997

LORD GOFF OF CHIEVELEY

My Lords,

I have had the advantage of reading in draft the speeches prepared by my noble and learned friends, Lord Mustill and Lord Hope of Craighead. For the reasons which they both give I would answer the questions as they propose.

LORD MUSTILL

My Lords,

Murder is widely thought to be the gravest of crimes. One could expect a developed system to embody a law of murder clear enough to yield an unequivocal result on a given set of facts, a result which conforms with apparent justice and has a sound intellectual base. This is not so in England, where the law of homicide is permeated by anomaly, fiction, misnomer and obsolete reasoning. One conspicuous anomaly is the rule which identifies the "malice aforethought" (a doubly misleading expression) required for the crime of murder not only with a conscious intention to kill but also with an intention to cause grievous bodily harm. It is, therefore, possible to commit a murder not only without wishing the death of the victim but without the least thought that this might be the result of the assault. Many would doubt the justice of this rule, which is not the popular conception of murder and (as I shall suggest) no longer rests on any intellectual foundation. The law of Scotland does very well without it, and England could perhaps do the same. It would, however, be fruitless to debate this here, since the rule has been established beyond doubt by *R. v. Cunningham* [1982] A.C. 566. This rule, which I will call the "grievous harm" rule, is the starting point of the present appeal.

As will appear, the events which founder the appeal were never conclusively proved at the trial, but are assumed to have been as follows. At the time in question a young woman M was pregnant, with between 22 and 24 weeks of gestation. According to the present state of medical knowledge if her baby had been born after 22 weeks it would not have had any significant of prospect of survival. Two further weeks would have increased the chance to about 10 per cent. The pregnancy was, however, proceeding normally, and the risk that it would fail to continue to full term and be followed by an uneventful birth was very small indeed. Sadly, however, the natural father B quarrelled with M and stabbed her in the face, back and abdomen with a long-bladed kitchen knife in circumstances raising a prima facie inference that he intended to do her grievous bodily harm. M was admitted to hospital for surgical treatment and was later discharged in an apparently satisfactory state, still carrying the baby. Unfortunately, some 17 days after the incident M went into premature labour. The baby, named S, was born alive. The birth was still grossly premature, although by that time the chance that the baby would survive had increased to 50 per cent. Thereafter S lived for 121 days, when she succumbed to broncho-pulmonary dysplasia from the effects of premature birth. After her birth it was discovered that one of the knife cuts had penetrated her lower abdomen. The wound needed surgical repair, but it is agreed that this "made no provable contribution to her death".

The case for the Crown at the trial of B was that the wounding of M by B had set in train the events which caused the premature birth of S and hence her failure to achieve the normal prospect of survival which she would have had if the pregnancy had proceeded to full term. In this sense, therefore, we must assume that the wounding of M, at a time when S was a barely viable foetus, was the reason why she later died when she did.

Meanwhile, B had been prosecuted for an offence of wounding the mother with intent to cause her grievous bodily harm, had pleaded guilty and had been sentenced to a term of four years' imprisonment. After S died he was charged again, this time with the murder of S, to which he pleaded not guilty. At his

trial a submission was advanced that on the evidence no criminal offence relating to S was proved. In a considered ruling the trial judge upheld that submission, as regards the offences of both murder and manslaughter. I leave aside the first submission for the defence, to the effect that causation between the wounding of the mother, the premature birth and the subsequent death of S had not been established on the evidence. This failed before the judge and has not been renewed. The gist of the ruling lay in the law, and was to the effect that both the physical and the mental elements of murder were absent. There was no relevant actus reus, for the foetus was not a live person; and the cause of the death was the wounding of the mother, not of S. As to mens rea again there was none. When B stabbed the mother he had no intent to kill or do serious harm to any live person other than the mother, or to do any harm at all to the foetus. The Crown could not make good this deficiency by reliance on the concept of "transferred malice", for this operates only where the mens rea of one crime causes the actus reus of the same crime, albeit the result is in some respects unintended. Here, the intent to stab the mother (a live person) could not be transferred to the foetus (not a live person), an organism which could not be the victim of a crime of murder.

As to the alternative verdict of manslaughter the judge was at first exercised by the possibility that since the stabbing of M was an unlawful and dangerous act which led to the death of S a conviction could be sustained even though the act was not aimed at the ultimate victim: see *R. v. Mitchell* [1983] Q.B. 741. In the end, however, he was persuaded that this approach could not be sustained where there was at the material time no victim capable of dying as a direct and immediate result.

Accordingly, the trial judge directed the jury to acquit the defendant.

Considering that this ruling should be reviewed the Attorney-General referred the matter to the opinion of the Court of Appeal under section 36 of the Criminal Justice Act 1972. The point of law referred was as follows:

> "1.1 Subject to the proof by the prosecution of the requisite intent in either case: whether the crimes of murder or manslaughter can be committed where unlawful injury is deliberately inflicted:
>
> (i) to a child in utero
>
> (ii) to a mother carrying a child in utero
>
> where the child is subsequently born alive, enjoys an existence independent of the mother, thereafter dies and the injuries inflicted while in utero either caused or made a substantial contribution to the death.
>
> "1.2 Whether the fact that the death of the child is caused solely as a consequence of injury to the mother rather than as a consequence of direct injury to the foetus can negative any liability for murder or manslaughter in the circumstances set out in question 1.1."

The Court of Appeal [1996] Q.B. 581 saw the matter differently from the judge. Having first rejected the concept that an intent directed at the foetus as "a child capable of becoming a person in being" was sufficient to found a conviction for murder the judgment continued, at p. 593:

> "That is not to say that we think if an intention is directed towards the foetus a charge of murder must fail. In the eyes of the law the foetus is taken to be a part of the mother until it has an existence independent of the mother. Thus an intention to cause serious bodily injury to the foetus is an intention to cause serious bodily injury to a part of the mother just as an intention to injure her arm or her leg would be so viewed. Thus consideration of whether a charge of murder can arise

> where the focus of the defendant's intention is exclusively the foetus falls to be considered under the head of transferred malice as is the case where the intention is focused exclusively or partially upon the mother herself."

From this starting-point the court went on to hold that it made no difference whether the death resulted from prematurity or from a stab-wound suffered by the foetus itself, for the element of causation was present in each case; and also that no degree of negligence was required for the operation of transferred malice. A conviction for murder would therefore be justified on the assumed facts.

Turning to manslaughter, the court dealt with the question very briefly, seeing no reason for a difference in approach from the case of murder, although the intention required would be less.

In the result, the court answered the first of the referred questions in the affirmative, adding, at p. 598:

> "The requisite intent to be proved in the case of murder is an intention to kill or cause really serious bodily injury to the mother, the foetus before birth being viewed as an integral part of the mother. Such intention is appropriately modified in the case of manslaughter."

The court answered the second question in the negative, provided the jury is satisfied that causation is proved. The accused person now brings the matter before this House, and maintains that the answers given to both questions were wrong, and that the ruling of the trial judge was right.

I. Murder

The first of the questions referred involves a number of alternative assumptions of fact concerning both the act of the defendant and the intent with which it was done. For the moment I will concentrate entirely on the hypothesis that the unlawful injury was directed to the mother alone, with the intention of hurting the mother alone. On these assumed facts I will begin by considering the issue of murder. At this stage I will leave out of account the subsidiary question whether a person who causes the mother to deliver a child prematurely so that it dies in the natural course can be said to kill the child, so as to bring the law of homicide into play.

A. Established Rules

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. I will begin by stating them. Next, I shall describe two different ways in which the arguments for the Crown build on these rules, and will follow with reasons for rejecting one of these quite summarily. Closer examination is needed for the other, to see whether its historical origins are sound. Finally, an attempt will be made to see whether a principled answer can be given to the questions posed by the Attorney-General. I perceive the established rules to be as follows.

1. It is sufficient to raise a prima facie case of murder (subject to entire or partial excuses such as self-defence or provocation) for it to be proved that the defendant did the act which caused the death intending to kill the victim or to cause him at least grievous bodily harm.

Although it will be necessary to look at the reasoning which founded this rule, it is undeniably a part of English law. (See *R. v. Vickers* [1957] 2 Q.B. 664; *Hyam v. D.P.P.* [1975] A.C. 55; *R. v. Cunningham* [1982] A.C. 566. Thus, if M had died as a result of the injuries received B would have been guilty of murdering her, even though in the everyday sense he did not intend her death.

2. *If the defendant does an act with the intention of causing a particular kind of harm to B, and unintentionally does that kind of harm to V, then the intent to harm B may be added to the harm actually done to V in deciding whether the defendant has committed a crime towards V.*

This rule is usually referred to as the doctrine of "transferred malice", a misleading label but one which is too firmly entrenched to be discarded. Nor would it possible now to question the rule itself, for although the same handful of authorities are called up repeatedly in the texts they are constantly cited without disapproval. See especially *R. v. Pembliton* (1874) 2 L.R.2 C.C.R. 119 and *R. v. Latimer* (1886) 17 Q.B.D. 359. Counsel rightly did not seek to deny the existence of the rule although, here again, it will be necessary to examine its rationale.

3. *Except under statute an embryo or foetus in utero cannot be the victim of a crime of violence. In particular, violence to the foetus which causes its death in utero is not a murder.*

The foundation authority is the definition by Sir Edward Coke of murder by reference to the killing of "a reasonable creature, in rerum natura:" Co. Inst., Pt. III, ch.7, p. 50. The proposition was developed by the same writer into examples of prenatal injuries as follows:

> "If a woman be quick with child, and by a potion or otherwise killeth it in her womb; or if a man beat her, whereby the child dieth in her body, and she is delivered of a dead child; this is a great misprision, and no murder . . .".

It is unnecessary to look behind this statement to the earlier authorities, for its correctness as a general principle, as distinct from its application to babies expiring in the course of delivery or very shortly thereafter, has never been controverted.

It can, for example, be found in *Blackstone's Commentaries on the Laws of England*, 17th ed. (1830), vol. 4, p. 198, *Stephen; Digest of the Criminal Law (1877)*, p. 138, *Smith & Hogan; Criminal Law*, 8th ed. (1996), p. 338 and in many other places over the years.

4. *The existence of an interval of time between the doing of an act by the 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.*

If authority is needed for this obvious proposition it may be found in *R. v. Church* [1966]

1 Q.B. 59 and *R. v. Le Brun* [1992] Q.B. 61.

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.*

Once again, the rule founds on a statement of Coke, following immediately after the passage above quoted:

> ". . . if the child be born alive, and dieth of the potion, battery, or other cause, this is murder; for in law it is accounted a reasonable creature, in rerum natura, when it is born alive." (Co. Inst., Pt. III, ch. 7, p. 50).

This view did not at first command universal acceptance, largely on the practical ground that medical science did not then permit a clear proof of causal connection, but it was adopted in early Victorian times by the First and Second Criminal Law Commissioners (B.P.P., 1839, 19, 266 and B.P.P., 1846, 24, 127) and never substantially doubted since. In *R. v. West* (1848) 2 Car. & K., a case to which I must briefly return, the rule was extended to a situation such as the present where the assault caused the death, not through injury to the child, but by causing the child to be born prematurely. In *R. v. Senior* (1832) 1 Mood. C.C. 346 the principle was applied to manslaughter, where death resulted from gross negligence by a midwife before the child had been fully born. Since the principle is not disputed I will not cite the numerous references to it by institutional writers during the past three centuries.

B. Two Arguments for the Crown

1. *The First Argument: the Foetus identified with the Mother.*

The decision of the Court of Appeal founded on the proposition that the foetus is part of the mother, so that an intention to cause really serious bodily injury to the mother is equivalent to the same intent directed towards the foetus. This intent could be added to the actus reus, constituted (as I understand it) by the creation of such a change in the environment of the foetus through the injury to the mother that the baby would be born at a time when, as events proved, it would not survive. I must dissent from this proposition for I believe it to be wholly unfounded in fact. Obviously, nobody would assert that once the mother had been delivered of S, the baby and her mother were in any sense "the same". Not only were they physically separate, but they were each unique human beings, though no doubt with many features of resemblance. The reason for the uniqueness of S was that the development of her own special characteristics had been enabled and bounded by the collection of genes handed down not only by M but also by the natural father. This collection was different from the genes which had enabled and bounded the development of M, for these had been handed down by her

own mother and natural father. S and her mother were closely related but, even apart from differing environmental influences, they were not, had not been, and in the future never would be "the same." There was, of course, an intimate bond between the foetus and the mother, created by the total dependence of the foetus on the protective physical environment furnished by the mother, and on the supply by the mother through the physical linkage between them of the nutriments, oxygen and other substances essential to foetal life and development. The emotional bond between the mother and her unborn child was also of a very special kind. But the relationship was one of bond, not of identity. The mother and the foetus were two distinct organisms living symbiotically, not a single organism with two aspects. The mother's leg was part of the mother; the foetus was not.

The only other ground for identifying the foetus with the mother that I can envisage is a chain of reasoning on the following lines. All the case law shows that the child does not attain a sufficient human personality to be the subject of a crime of violence, and in particular of a crime of murder, until it enjoys an existence separate from its mother; hence, whilst it is in the womb it does not have a human personality; hence it must share a human personality with its mother. This seems to me an entire non sequitur, for it omits the possibility that the foetus does not (for the purposes of the law of homicide and violent crime) have any relevant type of personality but is an organism sui generis lacking at this stage the entire range of characteristics both of the mother to which it is physically linked and of the complete human being which it will later become. The argument involves one fiction too far, and I would reject it.

2. *The Second Argument: The foetus as a separate organism*

I would, therefore, reject the reasoning which assumes that since (in the eyes of English law) the foetus does not have the attributes which make it a "person" it must be an adjunct of the mother. Eschewing all religious and political debate I would say that the foetus is neither. It is a unique organism. To apply to such an organism the principles of a law evolved in relation to autonomous beings is bound to mislead. I prefer, so far as binding authority permits, to start afresh, and to do so by reference to the second of the arguments advanced by the Attorney-General. This builds on the rules stated above by the following stages. If D struck X intending to cause her serious harm, and the blow, in fact, caused her death, that would be murder (Rule 1). If she had been nursing a baby Y which was accidentally struck by the blow and consequently died, that would also be murder (Rules 1 and 2). So, also, if an evil-doer had intended to cause harm but not death to X by giving her a poisoned substance and the substance was, in fact, passed on by X to the baby, which consumed it and died as a result (Rules 1, 2, and 3). Again, it would have been murder if the foetus had been injured in utero and had succumbed to the wound after being born alive (Rules 1, 2, 4 and 5). It is only a short step to make a new rule, adding together the malice towards the mother, the contemporaneous starting of a train of events, and the coming to fruition of those events in the death of the baby after being born alive.

My Lords, the attractions of this argument are plain, not least its simplicity. But for my part I find it too dependent on the piling up of old fictions, and too little on the reasons why the law takes its present shape. To look for these reasons is not, to use an expression sometimes met, "legal archaeology" for its own sake. Except in those cases, of which the present is not one, where the rationale of the existing law is plain on its face, the common law must build for the future with materials from the past. One cannot see where a principle should go without an

idea of where it has come from.

Unfortunately these materials are in short supply in the English law of homicide, as Lord Diplock pointed out in *Hyam v. D.P.P.* [1975] A.C. 55, 89. If one looks at the sources from which the institutional writers drew their law (Bracton, Fleta and a handful of cases from the Year Books and late medieval manuscripts) they offer an interesting picture of contemporary morals and modes of thought, but are too terse to convey any developed course of reasoning. It is not until the writers beginning with Lord Coke that exposition recognisable to a modern reader begins to emerge, and even in the Institutes we find opinions founded, or ostensibly founded, on the ancient fragments. The later writers were of great authority, but on the present topic were mainly content to reproduce what their predecessors had to say, and to call up the same ancient materials as before. Even the more extended discourse of Blackstone carried the subject little further. Moreover, in contrast with the civil law, when the reporting of criminal cases first began on any scale the absence of a systematic process of criminal appeal meant that the reporters were largely confined to dicta and directions to juries gleaned from cases on Assize or at the Guildhall. Sir James Stephen exclaimed that:

> "It is a matter for regret that decisions, necessarily given with little consideration, and under great pressure should be reported at all." (*Digest of the Criminal Law* (1877) xv.)

He was particularly severe on *Cox's Criminal Cases* from which many of the decisions are drawn. It was not until much later that the practical and theoretical workings of the criminal law were exposed to view; and by then many of the principles had become so firmly established as to escape critical analysis.

The materials for scrutinising the existing rules to see how they could be built upon to answer a problem like the present are therefore quite meagre. But an attempt must at least be made. I begin with the first rule. Three lines of thought, not identical but intertwined, seem to have gone to make it up. First there was a presumption that when one person killed another this was culpable homicide unless, in the words of *East: Pleas of the Crown*, (1803) Vol. I, cap. V, section 12), the defendant proved that there were circumstances of accident, necessity or infirmity; or in a later formulation, unless justified, excused or alleviated (*Blackstone: Commentaries on the Laws of England*, 17th ed. (1830), pp. 200-201); and, later still (according to *Stephen's Digest of Criminal Law* (1877), art. 230) unless there existed excuse, justification or extenuation. This rule survived, perhaps only in terms of an evidential burden of proof, until surprisingly late. It was not until *Woolmington v. D.P.P.* [1935] A.C. 462 that it was finally expunged. For so long as it was current there was no chance of saying that an intent to cause really serious injury was insufficient to found an indictment for murder, for that high degree of wrongful intent took away the possibility of establishing a recognised excuse for the death which actually ensued.

The second theme was the obverse of the first. The wrongful intent was a demonstration of a general wickedness of mind which expressed itself in whatever specific intent was necessary to give the act in question a criminal character. In short, the wicked intent showed that the defendant was a bad man with a "depraved inclination to mischief" (*Russell on Crime* 4th ed., (1865), p. 740, citing *Hale, History of the Pleas of the Crown* (1736) Vol. I, p. 475 and *East, Pleas of the Crown* (1803), Cap. V, section 18); and this inclination, if resulting in death, should not go unpunished.

Finally, there was a concept of risk. The doer of a wicked act took the chance that the consequences would be greater than he could foresee. His narrower subjective intent was not an answer to his responsibility for the unintended wider consequences. As *Hawkins, Pleas of the Crown*, 7th ed. (1795) Vol. I, section 51, put the matter in relation to deaths happening in the course of tumultuous assemblies, "They must at their peril abide the event of their actions who wilfully engage in such bold disturbances of the public peace." Again, at a later date *Russell on Crime* 4th ed. p. 742 explains Coke's pronouncement that a beating in anger which causes death is murder by the fact that "what he did was malum in se and he must be answerable for all its consequences."

It was, I believe, the coalescence of these three concepts which founded a doctrine more extreme than the grievous harm rule, under which an unintended death resulting from the commission or attempted commission of an offence of any kind or degree was treated as murder. This had its most notorious expression in the pronouncement of Coke (Inst., Pt. III, ch. 8, p. 56):

> "If the act be unlawful it is murder. As if A meaning to steal a deer in the park of B, shooteth at the deer, and by the glance of the arrow killeth a boy that is hidden in a bush: this is murder, for that the act was unlawful, although A had no intent to hurt the boy, nor knew not of him . . . [so also if one] had shot at a cock or hen, or any tame fowl of another man's, and the arrow by mischance had killed a man, this had been murder, for the act was unlawful."

As Sir James Stephen would much later show (*History of the Criminal Law* (1883) vol. 3, pp. 57-58), this doctrine was never securely founded on the authorities, but it left its mark for more than two centuries. The controversy over it in the institutional writers need not be resumed here. It is sufficient to say that it came to be perceived as morally odious, and subsided without any close analysis into the concept of felony/murder, not perhaps very different from a form of "general malice", where the evil intent required was of a high degree. In this form it survived into modern times, although narrowed still further by confinement to crimes of violence *D.P.P. v. Beard* [1920] A.C. 479. It is indeed still part of the law in some common law jurisdictions. Finally, it was abolished in England by section 1 of the Homicide Act 1957.

My Lords, since the original concepts are no longer available to explain why an intent to cause grievous bodily harm will found a conviction for murder the reason must be sought elsewhere: for reason, in regard to such a grave crime, there must surely be. The obvious recourse is to ascribe this doctrine to the last vestiges of the murder/felony rule, and to see in it a strong example of that rule, for unlike the more extravagant early manifestations it offers at least some resemblance in nature and degree between the intended act and its unintended consequences. It would follow, therefore, that when the murder/felony rule was expressly abolished by section 1 of the Homicide Act 1957 the only surviving justification for the "grievous harm" rule fell away, with nothing left. This proposition was indeed advanced soon after the 1957 Act in *R. v. Vickers* [1957] 2 Q.B. 664, where it was dismissed out-of-hand. The same concept was developed in *Hyam v. D.P.P.* [1975] A.C. 55, where after close analysis it was adopted by Lord Diplock, and in a concurring speech by Lord Kilbrandon. The majority in the House did not agree. The question was raised again in *Rex v. Cunningham* [1982] A.C. 566, and this time a decisive answer was given. The "grievous harm" rule had survived the abolition of the murder/felony principle. The speeches show that it

did so because a solid and long-lasting line of authority had decreed that this was the law, and the House saw no need to change a rule which answered practical needs.

My Lords, in a system based on binding precedent there could be no ground for doubting a long course of existing law, and certainly none which could now permit this House even to contemplate such a fundamental change as to abolish the grievous harm rule: and counsel rightly hinted at no such idea. But when asked to strike out into new territory it is, I think, right to recognise that the grievous harm rule is an outcropping of old law from which the surrounding strata of rationalisations have weathered away. It survives but exemplifies no principle which can be applied to a new situation.

I turn to the second rule, of "transferred malice." For present purposes this is more important and more difficult. Again, one must look at its origins to see whether they provide a theme which can be applied today. Three of them are familiar. Taking Lord Coke's example of the glancing arrow we have seen how one explanation of the poacher's responsibility founded on the notion of risk. The person who committed a crime took the chance that the outcome would be worse than he expected. Amongst many sources one can find the idea in *Russell on Crime*, 4th ed. (1845), p. 739:

> "If an action, unlawful in itself, be done deliberately, and with the intention of mischief or great bodily harm to particular individuals, or of mischief indiscriminately, fall where it may, and death ensue or beside the original intention of the party, it will be murder."

In a later edition (1855: p. 759) this was exemplified by cases of particular malice to one individual falling by mistake upon another. In support are cited *R. v. Saunders* (1573) 2 Plowd 473 (a poisoned apple intended for the mother but given to the child) and *Gore* 9 Co. Rep. 81 (medicine poisoned by the wife to kill her husband and consumed by the apothecary to prove his innocence); also 1 Hawkins P.C., c. 31, 545 and 1 Hale 436. As already suggested, this doctrine does survive in some small degree today, but as the foundation of a modern doctrine of transferred malice broad enough to encompass the present case it seems to me quite unsupportable.

Secondly, there is the reversed burden of proof whereby the causing of death is prima facie murder, unless it falls within one of the extenuating categories recognised by the institutional writers. Again, this concept is long out-of-date. Nobody could seriously think of using it to make new law.

Third, there was the idea of "general malice", of an evil disposition existing in the general and manifesting itself in the particular, uniting the aim of the offender and the result which his deeds actually produced. According to this theory, there was no need to "transfer" the wrongful intent from the intended to the actual victim; for since the offender was (in the words of *Blackstone*, supra, pp. 198-200) "an enemy to all mankind in general", the actual victim was the direct object of the offender's enmity. Plainly, this will no longer do, for the last vestiges of the idea disappeared with the abolition of the murder/felony doctrine.

What explanation is left: for explanation there must be, since the "transferred malice" concept is agreed on both sides to be sound law today? The sources in more recent centuries are few. Of the two most frequently cited the earlier is *R. v. Pembliton* (1874) L.R. 2 C.C.R. 119. In the course of a fight the defendant threw a stone at others which missed and broke a window. He was indicted for that he "unlawfully and maliciously did commit damage, injury,

and spoil upon a window . . . " The jury found that he did not intend to break the window. On a case stated to the Court for Crown Cases Reserved it was argued for the prosecution that "directly it is proved that he threw the stone . . . without just cause, the offence is established." The ancient origins of this argument need no elaboration, and indeed the report of the argument as it developed showed that it was based on a conception of general malice. The interventions in argument are instructive. After the prosecutor had relied on the fact that the prisoner was actuated by malice, Blackburn J. responded: "But only of a particular kind, and not against the person injured." Later, in reply to a reliance on a passage from Hale the same judge said:

> "Lord Coke, 3 Inst., p. 56, puts the case of a man stealing deer in a park, shooting at the deer, and by the glance of the arrow killing a boy that is hidden in a bush, and calls this murder; but can anyone say that ruling would be adopted now?"

This most learned of judges continued:

> "I should have told the jury that if the prisoner knew there were windows behind, and that the probable consequence of his act would be to break one of them, that would be evidence for them of malice.".

The conviction was quashed. It is sufficient to quote briefly from the judgment of Blackburn J.:

> "We have not now to consider what would be malice aforethought to bring a given case within the common law definition of murder; here the statute says that the act must be unlawful and malicious . . . the jury might perhaps have found on this evidence that the act was malicious, because they might have found that the prisoner knew that the natural consequence of his act would be to break the glass, and although that was not his wish, yet he was reckless whether he did it or not; but the jury have not so found . . . "

This decision was distinguished in *R. v. Latimer* (1886) 17 Q.B.D. 359. Two men quarrelled in a public house. One of them struck at the other with his belt. The glancing blow bounced off and struck the prosecutrix, wounding her severely. The assailant was prosecuted and convicted for having unlawfully and maliciously wounded her, contrary to section 20 of the Offences Against the Person Act 1861. Counsel for the defendant relied on *Pembliton*.

In his judgment Lord Coleridge C.J. said, at p. 361,

> "It is common knowledge that a man who has an unlawful and malicious intent against another, and, in attempting to carry it out, injures a third person, is guilty of what the law deems malice against the person injured, because the person is doing an unlawful act, and has that which the judges call general malice, and that is enough."

A similar theme is found in the brief judgments of the other members of the court, who were able to distinguish *Pembliton* which, as Bowen L.J. put the matter: "was founded not upon malice in general but on a particular form of malice, viz., malicious injury to property." The Lord Justice put the case thus:

> "It is quite clear that the act was done by the prisoner with malice in his mind. I use the

> word 'malice' in the common law sense of the term, viz., a person is deemed malicious when he does an act which he knows will injure either the person or property of another."

My Lords, I find it hard to base a modern law of murder on these two cases. The court in *Latimer* was, I believe, entirely justified in finding a distinction between their statutory backgrounds and one can well accept that the answers given, one for acquittal, the other for conviction, would be the same today. But the harking back to a concept of general malice, which amounts to no more than this, that a wrongful act displays a malevolence which can be attached to any adverse consequence, has long been out of date. And to speak of a particular malice which is "transferred" simply disguises the problem by idiomatic language. The defendant's malice is directed at one objective, and when after the event the court treats it as directed at another object it is not recognising a "transfer" but creating a new malice which never existed before. As Dr. Glanville Williams pointed out (*Criminal Law*, the General Part 2nd Ed. (1961), p. 184) the doctrine is "rather an arbitrary exception to general principles." Like many of its kind this is useful enough to yield rough justice, in particular cases, and it can sensibly be retained notwithstanding its lack of any sound intellectual basis. But it is another matter to build a new rule upon it.

I pause to distinguish the case of indiscriminate malice from those already discussed, although even now it is sometimes confused with them. The terrorist who hides a bomb in an aircraft provides an example. This is not a case of "general malice" where under the old law any wrongful act sufficed to prove the evil disposition which was taken to supply the necessary intent for homicide. Nor is it transferred malice, for there is no need of a transfer. The intention is already aimed directly at the class of potential victims of which the actual victim forms part. The intent and the actus reus completed by the explosion are joined from the start, even though the identity of the ultimate victim is not yet fixed. So also with the shots fired indiscriminately into a crowd. No ancient fictions are needed to make these cases of murder.

I turn to deal more briefly with the remaining rules. The third rule, it will be recalled, is that a foetus cannot be the victim of murder. I see no profit in an attempt to treat the medieval origins of this rule. It is sufficient to say that is established beyond doubt for the criminal law, as for the civil law (*Burton v. Islington Health Authority* [1993] Q.B. 204) that the child *en ventre sa mère* does not have a distinct human personality, whose extinguishment gives rise to any penalties or liabilities at common law.

The fourth rule is an exception to the generally accepted principle that actus reus and mens rea must coincide. A continuous act or continuous chain of causes leading to death is treated by the law as if it happened when first initiated. The development of this into the fifth rule, which links an act and intent before birth with a death happening after a live delivery, causes a little more strain, given the incapacity of the foetus to be the object of homicide. If, however, it is possible to interpret the situation as one where the mental element is directed, not to the foetus but to the human being when and if it comes into existence, no fiction is required.

My Lords, the purpose of this enquiry has been to see whether the existing rules are based on principles sound enough to justify their extension to a case where the defendant acts without an intent to injure either the foetus or the child which it will become. In my opinion they are not. To give an affirmative answer requires a double "transfer" of intent: first from the mother to the foetus and then from the foetus to the child as yet unborn. Then one would have

to deploy the fiction (or at least the doctrine) which converts an intention to commit serious harm into the mens rea of murder. For me, this is too much. If one could find any logic in the rules I would follow it from one fiction to another, but whatever grounds there may once have been have long since disappeared. I am willing to follow old laws until they are overturned, but not to make a new law on a basis for which there is no principle.

Moreover, even on a narrower approach the argument breaks down. The effect of transferred malice, as I understand it, is that the intended victim and the actual victim are treated as if they were one, so that what was intended to happen to the first person (but did not happen) is added to what actually did happen to the second person (but was not intended to happen), with the result that what was intended and what happened are married to make a notionally intended and actually consummated crime. The cases are treated as if the actual victim had been the intended victim from the start. To make any sense of this process there must, as it seems to me, be some compatibility between the original intention and the actual occurrence, and this is, indeed, what one finds in the cases. There is no such compatibility here. 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, either at the time or in the future, and intended no harm to the foetus or to the human person which it would become. If fictions are useful, as they can be, they are only damaged by straining them beyond their limits. I would not overstrain the idea of transferred malice by trying to make it fit the present case.

Accordingly, I would differ from the thoughtful judgments delivered in *R. v. Kwok Chak Ming* (1963) H.K.L.R. 226 and 349, and hold that on the presumed facts the judge was right to direct an acquittal on the count of murder.

Before leaving this part of the appeal I would acknowledge the extensive citation by counsel of passages from learned writers, present and past. There is no space to name them all here, or to recognise the further sources consulted after the close of the hearing. All have proved valuable, even if not all of the opinions expressed have been adopted. Notwithstanding the strong practical character of the criminal law it has over the years gained immeasurably from systematic analysis by scholars who have had an opportunity for research and reflection denied to those immersed in the daily life of the courts. I hope that the practice of drawing on these materials will be continued and enlarged.

II. Manslaughter

I turn to the question of manslaughter. This has caused me great anxiety. Until I read the speech of my noble and learned friend, Lord Hope of Craighead I had reasoned as follows. The brief discussion by the Court of Appeal assumed that a conviction of manslaughter would be appropriate, and appropriate only, in a case where the defendant intended to cause harm to the mother short of grievous bodily harm. The reasoning was the same as in the case of murder, apart from the difference in intent. Since I have differed from this reasoning in the case of murder I must also reject it for manslaughter. There is, however, another possibility which takes account of the fact that the offence of manslaughter unites a group of crimes which have nothing in common except their name. Two members of this group, often called "unlawful act" and "gross negligence" manslaughter, respectively, share the feature that it is possible to commit them without any violent intent towards the victim. It is obvious that with

this type of offence the problems of transferred malice cannot arise. The Court of Appeal had no occasion to consider whether one of these, namely, the "unlawful act" variety, might furnish an alternative route to a verdict of manslaughter, but the trial judge did so and concluded, evidently with some hesitation, that it would not. His reasoning, as I understand it, was that the authorities require that the act in question, before it can be characterised as unlawful for this purpose, must be one which is likely to injure another person; and since the foetus is not a person, the danger to its continued existence could not make the act unlawful.

My Lords, whilst recognising the logic of this approach I had felt that the learned judge had stopped short of carrying it through, for there was the possibility that the unlawful attack on the mother was a threat not only to the foetus before birth but also to the live child when ultimately born. It appeared to me, therefore, that a defendant in the position of B could in theory be convicted of manslaughter, if the jury was satisfied that a sober and reasonable person would have realised that the attack could harm the child if afterwards born alive, and if causation was proved. I add the qualification "in theory" because the formulation of a direction along these lines in terms which a jury could understand would be difficult, and the prospect that a competently represented defendant would, in fact, be convicted would be small indeed. Nevertheless, that is where the authorities seemed to point, so that a highly qualified affirmative answer should be given to Question 1.1.(ii)(b).

Study of the speech to be delivered by Lord Hope has, however, persuaded me that this perspective may be too narrow, in directing attention to the foreseeability on the part of the accused that his act would create a risk to the person at whom it was aimed and to a wider class of persons falling within the area of potential danger. My noble and learned friend proposes, however, that the search for this wider class is misconceived. All that it is needed, once causation is established, is an act creating a risk *to anyone*; and such a risk is obviously established in the case of any violent assault by the risk to the person of the victim herself (or himself). In a case such as the present, therefore, responsibility for manslaughter would automatically be established, once causation has been shown, simply by proving a violent attack even if (which cannot have been the case here) the attacker had no idea that the woman was pregnant. On a broader canvas, the proposition involves that manslaughter can be established against someone who does any wrongful act leading to death, in circumstances where it was foreseeable that it might hurt anyone at all; and that this is so even if the victim does not fall into any category of persons whom a reasonable person in the position of the defendant might have envisaged as being within the area of potential risk. This is strong doctrine, the more so since it might be said with some force that it recognises a concept of general malice (that those who do wrong must suffer the consequences of a resulting death, whether or not the death was intended or could have been foreseen) uncomfortably similar to the one rejected more than 150 years ago by the courts and commentators in the context of murder; and one which, it is proper to add, I have proposed in the first part of this speech, should be rejected once again in that context.

It is this feature which has caused me to hesitate long in joining the remainder of your Lordships to hold that a verdict of manslaughter can be available in circumstances as broad as this. I am, however, entirely convinced by the speech of Lord Hope that this is the present state of English law. To look for consistency between and within the very different crimes of murder and manslaughter is, I believe, hoping for too much. One can, however, look for a result which does substantial justice, and this is what I believe verdicts that B was not guilty of murder and guilty of manslaughter would have achieved.

I would, therefore, answer the questions of law in the sense proposed by my noble and learned friend, Lord Hope of Craighead.

III. Premature death

I now turn to a subsidiary issue left over at an early stage which has caused me some concern. It arises from the fact that the life of S came to an end because her constitution was unable to withstand the ordinary perils of infancy. In a narrow perspective, she died of natural causes. This fact is not easily accommodated within the traditional definitions, or indeed the common understanding, of murder as a crime where the victim is killed. Nor is the problem entirely solved by pointing to a situation where a baby is deliberately exposed in bad weather, for there the evil-doer's act causes the child to die, whereas here S's life simply came to an end without anything having been done whilst she was living to shorten its span. Nor is there any useful analogy with the setting of a time-bomb before a birth which explodes afterwards and kills the newborn child, cf. *Rex v. Shephard* [1919] 2 K.B. 125, at p. 126: for there was in that case an intention that the living child should be killed, which S was not.

My Lords, if I had thought that the agreed facts could otherwise have founded an indictment for murder I would have wished to look more closely at this problem, although I suspect that in the end it might well have proved to be simply a matter of vocabulary, and that the word "kills" in the traditional definition is wide enough to mean "causing the death of a person by an act or omission but for which the person killed would not have died when he did": Stephen, *Digest of the Criminal Law* (1877) 138. S. would have lived a longer life but for what happened before she was born.

In any event, however, this feature does not in my opinion stand in the way of a conviction for manslaughter. The unlawful and dangerous act of B changed the maternal environment of the foetus in such a way that when born the child died when she would otherwise have lived. The requirements of causation and death were thus satisfied, and the four attributes of "unlawful act" manslaughter were complete.

IV. Remaining Issues

My Lords, it will not be overlooked that this long opinion has so far given answers for only two of the numerous questions raised by the point of law referred: numerous because the point of law depends on three alternative presumptions as to the nature and circumstances of the injury and three presumptions as to B's intention. This makes it apposite to recall section 36(1) of the Criminal Justice Act 1972, by virtue of which the matter is now before the House:

> "36(1) Where a person tried on indictment has been acquitted . . . the Attorney-General may, if he desires the opinion of the Court of Appeal on *a point of law which has arisen in the case*, refer *that point* to the court, and the court shall, in accordance with this section, consider the point and give their opinion on it."

I have emphasised certain words which impose an essential restriction on this valuable power. The courts have always firmly resisted attempts to obtain the answer to academic questions, however useful this might appear to be. Normally, where an appeal is brought in the context of an issue between parties, the identification of questions which the court should answer can be performed by considering whether a particular answer to the question of law might affect

the outcome of the dispute. The peculiarity of a reference under the Act of 1972 is that it is not a step in a dispute, so that in one sense the questions referred are invariably academic. This peculiarity might, unless limits are observed, enable the Attorney-General, for the best of motives, to use an acquittal on a point of law to set in train a judicial roving commission on a particular branch of the law, with the aim of providing clear, practical and systematic solutions for problems of current interest. This is not the function of the court, and the words emphasised in section 36(1) were in my view designed to keep the proceedings in Attorney-General's references within proper bounds.

My Lords, I have to say that the present reference oversteps these bounds. To deal in proper depth with every one of the permutations resulting from the alternative facts contained in the point of law referred would be the function of a text book, not a judgment. It would, I believe, be most imprudent to enter upon any of them without resolving to pursue them in depth, and I should 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. A modern law of murder would have to take into account (a) the disappearance of the felony/murder rule, and its possible effect on cases such as *R. v. West* (1848) 2 Car. & K. 784, long treated as authoritative but in my view open to question; and (b) the long history of statutory intervention in the interests of the unborn child, beginning with Lord Ellenborough's Act 1803, and continuing through the Offences Against the Person Act 1823, sections 58 and 59 of the Offences Against the Person Act 1861 (as amended), the Infant Life (Preservation) Act 1929 and the Abortion Act 1967 (as amended). Close analysis would be required for this purpose. Counsel did not engage this topic in depth, preferring to concentrate on the issues which were the subject of the ruling at the trial. In my opinion they were right, and I suggest that your Lordships should confine themselves to discussing the issues which arose at the trial, leaving the remainder to a time when they call for decision in practice.

V. Conclusions

I would respond to the points of law in the manner proposed by my noble and learned friend Lord Hope of Craighead.

LORD SLYNN OF HADLEY

My Lords,

I have had the advantage of reading in draft the speeches prepared by my noble and learned friends Lord Mustill and Lord Hope of Craighead. For the reasons given by Lord Mustill I agree that the learned judge in the case was right to direct an acquittal on the count of murder. Like him I began by thinking that a narrower definition of mens rea was called for in relation to the charge of manslaughter but I am persuaded by the opinion of Lord Hope that on the facts presumed the offence of manslaughter was made out and that the questions of law should be answered as he proposes.

LORD HOPE OF CRAIGHEAD

My Lords,

This case came before the Court of Appeal on a reference by the Attorney General under section 36 of the Criminal Justice Act 1972. The point of law was formulated in general terms, without reference to the particular facts which were before the trial judge. But, as the power which is given by section 36 of the Act of 1972 to refer a point of law to the court is restricted to a point of law which has arisen in the case in which the person who was tried on indictment was acquitted, it may be helpful to summarise again briefly the facts in the light of which the point of law requires to be answered. It is possible to envisage a variety of circumstances in which this point may arise, but I do not think that we can provide answers which will cover every case in which a child is born alive and then dies as a result of a criminal act which was committed while it was still in utero. We must stick to the facts which are before us in this case.

The child's mother was pregnant when she was stabbed by the defendant. He knew that she was pregnant when he stabbed her, and he was the father of the child. There were several stab wounds, one of which was to the left lower abdomen. It punctured the uterus and entered the abdomen of the foetus, but the injury which the foetus sustained was not the cause of the child&!!;s death. The mother made a good recovery from her injuries. But about two weeks after the stabbing, and without further injury, she went into labour and gave birth to the child. The child was grossly premature when she was born. The medical evidence was that the period of gestation was likely to have been 26 weeks, and that she had only a 50% chance of survival. In the event she survived, after spending her entire life in intensive care, for only 121 days. The cause of death was the failure of her lungs to perform satisfactorily due to her premature birth. The injuries to her abdomen had been repaired under general anaesthetic, and the evidence was that they made no direct contribution to her death. Her premature birth was caused by the injuries which her mother received when she was stabbed by the defendant.

Whilst the child was still alive the defendant pleaded guilty to wounding with intent to cause her grievous bodily harm. Although he knew that she was pregnant, there was no evidence that he intended to destroy the foetus or to cause injury either to the mother or to the foetus which would result in harm to the child after she was born. At the time when the injuries were inflicted the period of gestation was likely, according to the medical evidence, to have been 24 weeks. The child would have had only a remote chance of survival if she had been born on that date, but the embryo had clearly reached the stage of development when it had become a foetus within the mother&!!;s uterus. There is no doubt that the defendant would have been guilty of the murder of the mother if she had died as a result of her injuries. On his own admission he intended to cause her grievous bodily harm. So the mens rea for murder was present, if the death of the mother had been the result of his act: see *Regina v. Cunningham* [1982] A.C. 566. There is no doubt also that he would not have been guilty either of the murder or of the manslaughter of the child if the child had been stillborn. Until she had been born alive and acquired a separate existence she could not be the victim of homicide: 3

Co.Inst. (1680) 50.

The Court of Appeal held that a foetus before birth must be taken to be an integral part of the mother, in the same way as her arm or her leg. It was for this reason that they said that the requisite intent to be proved in the case of murder, if the child was subsequently born alive and then died, was an intention to kill or to cause really serious bodily injury to the mother. I am not satisfied that this is the correct approach. The creation of an embryo from which a foetus is developed requires the bringing together of genetic material from the father as well as from the mother. The science of human fertilisation and embryology has now been developed to the point where the embryo may be created outside the mother and then placed inside her as a live embryo. This practice, not now uncommon in cases of infertility, has already attracted the attention of Parliament: see the Human Fertilisation and Embryology Act 1990. It serves to remind us that an embryo is in reality a separate organism from the mother from the moment of its conception. This individuality is retained by it throughout its development until it achieves an independent existence on being born. So the foetus cannot be regarded as an integral part of the mother in the sense indicated by the Court of Appeal, notwithstanding its dependence upon the mother for its survival until birth. The problem which has arisen in this case is due to the fact, which is not disputed, that at the time of the stabbing the child had not yet been born alive.

The abolition of constructive malice by section 1(1) of the Homicide Act 1957 has had the result that we must approach this problem without the guidance of previous authority. In this situation I think that it may be helpful to examine the actus reus and the mens rea separately in order to see whether, on the facts of this case, the defendant was guilty of murder or of manslaughter or of neither of these two crimes.

The actus reus

I have no difficulty in finding in the facts of this case all the elements which 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 victim&!!;s death. There may be various stages in the process, between each of which time will elapse. The length of the interval is not now important: Law Reform (Year and A Day Rule) Act 1996. What is needed in order to complete the proof of the crime is evidence of an unbroken chain of causation between the accused&!!;s act and the victim&!!;s death. Although we cannot now know, as the Court of Appeal have pointed out, whether the jury would have been satisfied on the issue of causation, there was clearly a sufficient case to go to the jury on this matter. There was a respectable body of medical evidence that the child was born prematurely as a result of the stabbing, and that it was as a result of the prematurity of her birth that she died. It was not disputed that injury to a foetus before birth 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 was 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.

The mens rea

The difficult issues all relate to the question whether the defendant had the mens rea which would be required for him to be guilty of the child&!!;s murder or manslaughter. The point of law as framed by the Attorney General does not look for separate answers to be given as between the two crimes. But I think that, at least on the facts of this case, they require to be examined separately. The mental element which is required to establish the crime of manslaughter is different from that which is required for murder. The difference may be regarded as one of degree where there is only one victim of the criminal act done by the accused, and he intended to cause harm to the victim. In that case the only issue is whether the crime is that of murder or of manslaughter. But in the present case, where there were two alleged victims--the mother who was stabbed, to whom the defendant intended to cause harm, and the child who was born later and then died, to whom no harm was intended--the question is not simply one of degree. An analysis is needed of the nature of the intention which requires to be established in the case of each of these two crimes.

Murder

I have had the advantage of reading in draft the speech which has been prepared by my noble and learned friend, Lord Mustill. I gratefully adopt his analysis of the rules for the crime of murder and of their historical origin, and I agree entirely with the conclusion which he has reached that the mens rea for murder was not present in this case. I wish in particular to express my agreement with him in the conclusions which he has reached that the concept of general malice must be rejected as being long out of date, and that it would be straining transferred malice too far to apply it to the circumstances of this case as this would require the malice to be transferred not once but twice to achieve the result contended for on behalf of the Attorney General. As Lord Mustill has pointed out, however, the crime of murder is an entirely different crime from that of manslaughter, and in turning--as I now do--to consider the crime of manslaughter I shall endeavour to approach that subject without any preconceptions as to what the solution should be based on what the law tells us is required for a conviction for murder.

Manslaughter

Criminal homicide is divided by the common law into the two separate crimes of murder and manslaughter. Manslaughter itself can be divided into various categories, depending on the context for the exercise. In regard to mens rea it is usually convenient to distinguish between (1) cases where the accused intended to injure the deceased and (2) cases where the accused had no such intention. Within the first category there are the cases (a) where he intended to cause grievous bodily harm to his victim but his criminal responsibility is reduced on the ground of provocation at the time of the act, and (b) where he intended to cause only minor harm to the victim but death ensues as a result of his act unexpectedly. Within the second category there are the cases (a) where the accused's act was not unlawful but the death of the victim was the result of negligence of such a gross nature as to be categorised as criminal, and (b) where the accused's act was both unlawful and dangerous because it was likely to cause harm to some person. The present case is an example of unlawful act manslaughter. But the placing of it into this category does no more than touch the surface of the problem where the ultimate victim of that act was not the intended victim and, moreover, was not even alive when the unlawful act was perpetrated.

Let me begin by distinguishing the Scottish case of *McCluskey v. H.M. Advocate,* 1989 S.L.T. 175, to which reference was made in the Court of Appeal, as that was a case of

statutory homicide. The appellant was convicted of causing death by reckless driving contrary to section 1 of the Road Traffic Act 1972. As Lord Justice General Emslie said in the opinion of the Court at p. 176, only three elements were needed in order to establish the charge under that section: (1) the death of another person, (2) reckless driving by the accused and (3) a causal connection between the reckless driving and the death. The statutory offence does not depend upon proof of an intention to commit the crime, so it was not necessary for the court to examine the issue of mens rea. The Lord Justice General&!!;s observation that there was no authority in the law of Scotland to the effect that a relevant charge of culpable homicide would not lie in such circumstances seems to me to be directed only to the question as to the actus reus of homicide. It was to that question that counsel for the appellant had directed his argument that section 1 of the Act of 1972 was concerned only with the death of a person who was in life at the time of the reckless driving.

So far as mens rea for the common law crime of manslaughter is concerned, I consider that it is sufficient that at the time of the stabbing the defendant had the mens rea which was needed to convict him of an assault on the child's mother. That was an unlawful act, and it was also an act which was dangerous in the sense indicated by Humphreys J. in *Rex v. Larkin* (1942) 29 Cr.App.R. 18, 23 in the passage which was quoted with approval by Lord Salmon in *D.P.P. v. Newbury* [1977] A.C. 500, 506-7. Dangerousness in this context is not a high standard. All it requires is that it was an act which was likely to injure another person. As "injury" in this sense means 'harm", the other person must also be a living person. A person who is already dead cannot be harmed any longer, so injury of the kind which is required is no longer possible. That is why it was held in *Regina v. Church* [1966] 1 Q.B. 59 that it was a misdirection for the jury to be told simply that it was irrelevant to manslaughter whether or not the appellant believed that the woman whom he threw into the river was already dead. But in this case injury to another living person-- the child&!!;s mother--was the inevitable result of the defendant&!!;s deliberate and unlawful act. Such was the character of the mens rea which the defendant possessed when he committed the initial act in the series of events which resulted in the death of the child.

There was plainly, in this case, a long interval between the initial act and the child's death and, as I have already said, there was no evidence that the defendant intended to cause injury either to the mother or to the foetus which would result in the child's death after it was born. But I do not see either of these features of this case as giving rise to difficulty. As Lord Lane C.J. observed in *Regina v. Le Brun* [1992] Q.B. 61, 68E-F, following *Regina v. Church* [1966] 1 Q.B.59, the act which caused the death and the mental state which is needed to constitute manslaughter need not coincide in point of time. So to this extent as least it may be said to be immaterial that the child was not alive when the defendant stabbed the mother with the intention which was needed to show that he was committing an unlawful act. 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.

Nor is it necessary, in order to constitute manslaughter, that the death resulted from an unlawful and dangerous act which was done with the intention to cause the victim to sustain harm. This is because it is clear from the authorities that, although the accused must be proved to have intended to do what he did, it is not necessary to prove that he knew that his act was unlawful or dangerous. So it must follow that it is unnecessary to prove that he knew that his act was likely to injure the person who died as a result of it. All that need be proved is that he intentionally did what he did, that the death was caused by it and that, applying an objective

test, all sober and reasonable people would recognise the risk that some harm would result. The case of *Regina v. Mitchell* [1983] Q.B. 741 is a good example of this point. During an altercation in a queue at a busy post office the appellant hit a man who fell against an old lady, causing her to fall to the ground. Her leg was broken, with the result that she died later as a result of a pulmonary embolism. The Court of Appeal held that he was rightly convicted of manslaughter, although he had aimed no blow at the lady and had had no other physical contact with her. As Lord Salmon put it in *D.P.P. v. Newbury* [1977] A.C. 500, 509C, manslaughter is one of those crimes in which only what is called a basic intention need be proved--that is, an intention to do the act which constitutes the crime.

It was submitted that, since the foetus was not at the time of the unlawful act a living person, the offence of manslaughter could not be committed; and that, in any event, what constitutes a "dangerous act" for the purposes of the law of manslaughter has always been defined by reference to what all sober and reasonable people would recognise was dangerous towards persons who were alive when the danger manifests itself. These submissions were based on the response, of which the discussion in *Regina v. Church* [1965] 1 Q.B. 59 is a good example, which the law has adopted where the victim was already dead at the time of the unlawful act. If the person is already dead, his life is over and no further harm can be done. No act which is done to him now or in the future can be dangerous. The mens rea which a person has when doing an unlawful act to a person who is dead is not that which is required for manslaughter. So also a person who is already dead cannot be within the scope of the mens rea which the accused has when he does an unlawful and dangerous act to someone who is alive. But the case of the foetus presents a different problem. For the foetus, life lies in the future, not the past. It is not sensible to say that it cannot ever be harmed, or that nothing can be done to it which can ever be dangerous. Once it is born it is exposed, like all other living persons, to the risk of injury. It may also carry with it the effects of things done to it before birth which, after birth, may prove to be harmful. It would seem not to be unreasonable therefore, on public policy grounds, to regard the child in this case, when she became a living person, as within the scope of the mens rea which the defendant had when he stabbed her mother before she was born.

Then there is the question whether it is necessary for manslaughter that all sober and reasonable people would inevitably recognise that the accused&!!;s act must subject the child to the risk of injury at least some time after being born. I put the question in this way because it seems to be the logical way of expressing it if the definition by Edmund Davies J. in *Regina v. Church* [1966] 1 Q.B. 59, which was endorsed in *D.P.P. v. Newbury* [1977] A.C. 500 at p. 507A, is to be applied. What he said at p. 70 was:

> '"For such a verdict' (guilty of manslaughter) 'inexorably to follow, the unlawful act must be such as all sober and reasonable people would inevitably recognise must subject *the other person* to, at least, the risk of some harm resulting therefrom, albeit not serious harm'" (emphasis added)

I have emphasised the words "the other person" because these words, which lie at the heart of the question in this case, are not the same as those used by Humphreys J. in his passage to which Lord Salmon also referred with approval as an admirably clear statement of the law. The words which Humphreys J. used were *"another person:"* see the quotation from Lord Salmon's speech which I have set out later in this opinion, in which Lord Salmon also used

words which appear to differ from those used by Edmund Davies J. on this point. I think that it is unlikely that any of these distinguished judges had in mind the unusual circumstances of this case when they were stating the principles to be applied in the case of unlawful act manslaughter. But if the test which Edmund Davies J. described is the right one, this would suggest that foreseeability of the risk of injury to the person who died as a result of the unlawful act is always an essential element for a conviction of manslaughter. It would also suggest that the accused cannot be found guilty of this crime unless his unlawful and dangerous act was directed at the person who was the ultimate victim of it.

I am not persuaded that either of these propositions is borne out by the authorities. In *Regina v. Mitchell* [1983] Q.B. 741 they were rejected, in the light of what Lord Salmon had said in *Newbury*. I have no doubt that that case was correctly decided on its own facts. But in my opinion the highly unusual circumstances of the present case require a more careful examination of the essential elements of this crime than was needed in *Mitchell* or in cases where there was only one victim of the accused&!!;s unlawful and dangerous act.

The first point to be made here is that to require the prosecutor to prove beyond reasonable doubt that it was reasonably foreseeable that an unlawful act such as that which was committed in this case would result in the risk of injury to the child some time after being born would make it very difficult in practice for him to obtain a conviction. It is one thing for him to be required to lead evidence to establish the chain of causation, in order to link the premature birth and the death due to the effects of that prematurity to the stabbing of the mother by the defendant. It is quite another for him to be required to lead evidence to prove that all sober and reasonable people would have foreseen that the defendant&!!;s act must subject the foetus to the risk that this would occur. The leading of the evidence is only part of the problem, because it would then have to be considered by the jury, and dealt with by the trial judge in the summing up. Trial by jury, which lies at the heart of our system of criminal justice, is a process which needs to be kept as simple as possible. The concepts which jurors are required to apply must be intelligible to ordinary people, which means that they need to be capable of being explained in a few words which ordinary people will understand and can apply without undue difficulty. The difficulty of proving that the act was likely to result in a live and not a still premature birth is in itself likely to make the requirement unworkable. On purely practical grounds therefore it is necessary to consider whether such a test is appropriate in these circumstances.

In *Regina v. Dalby* [1982] 1 W.L.R. 425, 428H Waller L.J. said that, in all the cases of manslaughter by an unlawful and dangerous act, the researches of counsel had failed to find any case where the act which led to the death of the victim was not a direct act. In that case the appellant had supplied to the deceased a number of tablets of a class A controlled drug. A substantial cause of his death was the intravenous consumption of the drug with which he had injected himself on receipt of it from the appellant. The appellant&!!;s conviction of manslaughter was quashed on the ground that, where a charge of manslaughter was based on an unlawful and dangerous act, the act must be directed at the victim and likely to cause immediate injury, however slight. In the judgment of the court, the unlawful act of supplying drugs was not an act directed to the person of the deceased, and the supply did not cause any direct injury to him. Waller L.J. summarised the effect of the cases to which the court was referred in this way at p. 429C:

> "The kind of harm envisaged in all the reported cases of involuntary manslaughter was

> physical injury of some kind as an immediate and inevitable result of the unlawful act, e.g. a blow on the chin which knocks the victim against a wall causing a fractured skull and death, or threatening with a loaded gun which accidentally fires, or dropping a large stone on a train (*Director of Public Prosecutions v. Newbury* [1977] A.C. 500) or threatening another with an open razor and stumbling with death resulting: *Rex v. Larkin,* 29 Cr.App.R. 18."

But none of the examples which were discussed in *Regina v. Dalby*, which raised a different issue in view of the nature of the unlawful act of supplying the controlled drug, was concerned with the problem which arises here. In each of the cases which were cited as examples of an unlawful and dangerous act causing death which was held to be manslaughter the act was directed at the person who died as a result of it. In *Regina v. Church* [1966] 1 Q.B. 59 the victim was a woman whom the appellant believed to be already dead when, after knocking her semi-conscious, he threw her into a river when she was still alive. In *Director of Public Prosecutions v. Newbury* [1977] A.C. 500 the victim was a train guard who was sitting next to the driver in the front cab when the appellants pushed a paving stone over the parapet of a bridge in the path of the oncoming train. It is important to notice that it was not suggested in that case that it was an essential element, in finding the appellants guilty of manslaughter, that their act was directed at the train guard in particular. It was enough that their act was dangerous because it was likely to injure some person on the train. This can be seen from the words used by the trial judge, Watkins J., who said at p. 502D:

> "If that is your conclusion you then proceed to consider whether the next ingredient, as it is called, of this offence of manslaughter has been established. It is this: that the unlawful act was such as all sober and reasonable people would be bound to realise must expose someone such as the guard on this train or, . . . the driver on this train to, at least, the risk of some harm although not serious."

Lord Salmon, in rejecting the argument that the trial judge should have told the jury that they should acquit unless they were satisfied that the appellants had foreseen that they might cause harm to someone by pushing the paving stone off the parapet into the path of the train, said at p. 506G that his direction was completely in accordance with established law. He went on to add this, at p. 506H:

> "In *Rex v. Larkin* (1942) 29 Cr.App.R. 18, Humphreys J. said, at p. 23:
>
> 'Where the act which a person is engaged in performing is unlawful, then if at the same time it is a dangerous act, that is, an act which is likely to injure another person, and quite inadvertently the doer of the act causes the death of that other person by that act, then he is guilty of manslaughter.'
>
> I agree entirely with Lawton L.J. that that is an admirably clear statement of the law which has been applied many times. It makes it plain (*a*) that an accused is guilty of manslaughter if it is proved that he intentionally did an act which was unlawful and dangerous and that that act inadvertently caused death and (*b*) that it is unnecessary to prove that the accused knew that the act was unlawful or dangerous."

Although the passage which Lord Salmon quoted from what was said by Humphreys J. might be taken as suggesting that the accused&!!;s act must have been directed against the other person who dies as a result of it, the circumstances of that case and Lord Salmon&!!;s

own statement of the law both show that this is not an essential element of the offence. The only questions which need to be addressed are (1) whether the act was done intentionally, (2) whether it was unlawful, (3) whether it was also dangerous because it was likely to cause harm to somebody and (4) whether that unlawful and dangerous act caused the death.

I think, then, that the position can be summarised in this way. The intention which must be discovered is an intention to do an act which is unlawful and dangerous. In this case the act which had to be shown to be an unlawful and dangerous act was the stabbing of the child&!!;s mother. There can be no doubt that all sober and reasonable people would regard that act, within the appropriate meaning of this term, as dangerous. It is plain that it was unlawful as it was done with the intention of causing her injury. As the defendant intended to commit that act, all the ingredients necessary for mens rea in regard to the crime of manslaughter were established, irrespective of who was the ultimate victim of it. The fact that the child whom the mother was carrying at the time was born alive and then died as a result of the stabbing is all that was needed for the offence of manslaughter when actus reus for that crime was completed by the child's death. The question, once all the other elements are satisfied, is simply one of causation. The defendant must accept all the consequences of his act, so long as the jury are satisfied that he did what he did intentionally, that what he did was unlawful and that, applying the correct test, it was also dangerous. The death of the child was unintentional, but the nature and quality of the act which caused it was such that it was criminal and therefore punishable. In my opinion that is sufficient for the offence of manslaughter. There is no need to look to the doctrine of transferred malice for a solution to the problem raised by this case so far as manslaughter is concerned.

Conclusion

I would give these answers to the questions referred to the House by the Court of Appeal :

Question 1.1

(i) This question does not arise on the facts of this case, so I would decline to answer it.

(ii) (*a*) Murder--No.
(*b*) Manslaughter--Yes.

Question 1.2

(*a*) Murder--Superseded.
(*b*) Manslaughter--No.

LORD CLYDE

My Lords,

I have had the advantage of reading in draft the speeches prepared by my noble and learned friends, Lord Mustill and Lord Hope of Craighead. For the reasons which they both give I would answer the questions as they propose.
