Consultation on Coronial Investigations of Stillbirths

Dr Emma Milne

Middlesex University
School of Law
The Burroughs
Hendon
NW4 4BT
e.milne@mdx.ac.uk
+44 (0) 20 8411 4385

Summary

Introduction of coronial investigations into stillbirth cases may open the doors for the regulation of behaviour of women while pregnant, and so may have unforeseen negative consequences on women's reproductive rights, and, consequently, their human rights.

Q1. Do you think coroners should have a role in investigating stillbirths? Please provide reasons.

Potentially there is scope for coroners to have a role in investigating stillbirths, particularly in light of concerns over the level of independence of investigations completed by the NHS into their own practice. However, the desire for independent investigation needs to be balanced with the need to protect women's reproductive rights, and, consequently, their human rights. As a scholar who researches criminal justice involvement in the harm to, and death of, foetuses and newborn children, I am concerned that opening the door to coronial inquest will lead to the control and regulation of women's reproduction and the "policing of pregnancy", potentially resulting in a restriction of women's reproductive rights through a widening of criminal law. While the widening of coronial powers into the investigation of stillborn children may be considered and implemented with the best of intentions, there is a strong possibility that the shift in law, policy and scope of powers will result in unforeseen and negative consequences for women and their reproductive freedom.

Under English and Welsh criminal law, a person only gains full protection of the law upon the completion of live birth.[1] As such, a pregnant woman has no duty of care to her unborn child, and is not liable under criminal or civil law[2] for any harm or death

[1] Signified by complete expulsion from the birth canal, independent circulation and breathing after birth, *R v Poullton* [1832] 5 C&P 329; *R v Enoch* [1833] 5 C&P 539; *R v Reeves* [1839] 9 C&P 25; *R v Brain* [1834] C&P 349.
[2] With the exception in tort of harm caused by a pregnant woman to her foetus while she is driving a motor vertical (Congenital Disabilities (Civil Liability) Act 1976, s. 2), whereby the child born alive and

caused due to action or inaction, unless there is clear intent to kill the foetus or cause an illegal miscarriage.[3] Such harm may occur in instances where a woman chooses to not follow medical advice and/or refuses medical treatment proposed by medical staff during her pregnancy and labour and delivery.

As per paragraph 93 of the consultation, the expectation created by this proposal is that all full-term stillbirths will result in an investigation by a coroner, rather than allowing the coroner to determine whether an investigation is required (see response to questions 17, 19 and 20). As such, there is a great possibility that the mother of a stillborn child will be called as a witness during the inquest, and so may be asked questions about her behaviour while pregnant and/or during labour and delivery, by 'any interested person'.[4] Such interested persons may include legal representation for the NHS Trust(s)[5] who delivered care to mother and foetus. In cases where there is very clear indication that the baby was stillborn due to failings by the medical team, then such questioning may not be problematic. However, in instances where there is doubt as to the reason for the stillbirth, a tactic of the legal team representing the medical team(s) may be to attempt to deflect attention from the conduct of medical staff to that of the woman while pregnant and/or during labour and delivery.

While coroner's inquests are a fact-finding process and not to establish blame, identifying behaviour conducted by a woman while pregnant that may go against advice provided by public health and medical professionals[6] may serve to propose suggestions as to the possible causes of the stillbirth, that may otherwise not have been a focus of the inquest.

Interrogation of the behaviour of a woman while pregnant as a possible outcome of an inquest is of particular concern with the reduction of legal aid and therefore the increased likelihood that parents of stillborn children would be unable to afford legal representation, compared to medical team(s), who are likely to be able to procure legal representation.

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with a disability due to the car accident can sue their mother. However, this, in essence, allows for the child born alive to claim through the mother's car insurance, see E Cave, *The Mother of All Crimes: Human Rights, Criminalization, and the Child Born Alive* (Ashgate 2004).

[3] In which case the following offences may have been committed: child destruction (Infant Life (Preservation) Act 1929), or procuring a miscarriage (Offences Against the Person Act 1861, s. 58) if the miscarriage is procured outside of the requirements of the Abortion Act 1967, c. 87.

[4] Ministry of Justice, 'Guide to Coroner Services' (24 February 2014) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/363879/guide-to-coroner-service.pdf> accessed 17 June 2019, section 8.9.

[5] Or private medical team(s).

[6] Such as consuming alcohol, controlled substances, eating food that is considered risky (such as rare beef), smoking, travelling to countries where there is a risk of contaminating the Zika virus, or not following medical advice.

In instances where the cause of stillbirth is not clear, it is possible a narrative conclusion may be presented by the coroner (or jury), setting out the facts surrounding the death in more detail and explaining the reasons for the decision.[7] If the conduct of the birth mother while pregnant or during labour and delivery was a focus of the line of question directed toward her during the inquest, and behaviour that may be perceived to be harmful to the foetus has been identified, then the coroner may feel it appropriate for these findings to be outlined as part of the narrative conclusion. As such, a number of coroner's inquests into stillbirths may result in behaviour by the pregnant woman deemed harmful to the foetus featuring as part of the conclusion, whether or not there is evidence to conclude that this behaviour caused the stillbirth.

Conclusions about women's behaviour while pregnant is likely to draw on perspectives of best practice in pregnancy held by the medical community, over the perspective of pregnant women about their own ideas as to what is best for themselves and their unborn baby. This is often referred to as 'medical hegemony'.[8] The perception that medical staff always know what is best in pregnancy has resulted in infringement of women's rights during pregnancy, labour and delivery,[9] as well as promotion of advice that is not fully supported by scientific evidence.[10] The influence of medical hegemony on the perception of coroners has been witnessed in cases relating to women's decisions in labour and delivery. For example, in New South Wales, Australia, in 2012, a coroner was highly critical of the birth mother and the practice or freebirthing,[11] following the death of a child soon after birth.[12] The coroner's criticism was, arguably,

[7] Ministry of Justice, 'Guide to Coroner Services' (24 February 2014) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/363879/guide-to-coroner-service.pdf> accessed 17 June 2019, section 9.1.
[8] T Anderson, 'The Misleading Myth of Choice: The Continuing Opression of Women in Childbirth' in Kirkham (ed) *Informed Choice in Maternity Care* (Palgrave Macmillan 2004).
[9] For example, a survey by Birthrights of women's experiences of childbirth found a mixed picture of maternity care across the UK, with only half of women agreeing they had the birth they wanted, indicating lack of choice, and only 57% of women reporting they felt in control of their birth, Birthrights, 'Dignity in Childbirth' (16 October 2013) < http://www.birthrights.org.uk/wordpress/wp-content/uploads/2013/10/Birthrights-Dignity-Survey.pdf> accessed 4 December 2018. These findings support other research, from the UK and other countries, that indicates there is a conflict between the woman's legal right to autonomy in birth and the role doctors and midwives feel they play in securing the welfare of the foetus, see for example, SR Baker, PYL Choi, CA Henshaw and J Tree, ''I Felt as though I'd been in Jail': Women's Experiences of Maternity Care during Labour, Delivery and the Immediate Postpartum' (2005) 15 Feminism & Psychology; S Kruske, K Young, B Jenkinson and A Catchlove, 'Maternity Care Providers' Perceptions of Women's Autonomy and the Law' (2013) 13 BMC Pregnancy and Childbirth; E Prochaska, 'Misunderstanding Autonomy in Childbirth' (2013) 23 MIDIRS Midwifery Digest; E Prochaska, 'The Importance of Dignity in Childbirth' (2013) 21 British Journal of Midwifery.
[10] See for example analysis about public health messages in relation to drinking alcohol in pregnancy, B Thom, R Herring and E Milne, 'Drinking in pregnancy: shifting towards the 'precautionary principle'' in MacGregor and Thom (eds), *Alcohol, Drugs and Risk in Historical and Cross-cultural Perspective* (Routledge Forthcoming).
[11] Giving birth without medical assistance.
[12] L Davies, 'Baby's Death Due to Rash Mother, Says Irate Coroner' *The Sydney Morning Herald* (29 June 2012) <http://www.smh.com.au/nsw/babys-death-due-to-rash-mother-says-irate-coroner-20120628-215a2.html> accessed 29 August 2017.

unfounded as most freebirths result in the birth of healthy babies, and there is no way of knowing if the outcome of the labour and delivery would have been different if it had occurred under medical care.[13]

I am not attempting to argue that a woman's behaviour will never be an element of a stillbirth. As noted in paragraph 84 of the consultation, there is research that suggests that a substantial number of stillbirths occur in the antepartum period and are associated with 'life-style' factors of the pregnant women. However, the impact of coroner's conclusions that a woman's behaviour has contributed to, or possibly caused, a stillbirth needs to be considered in terms of the possible negative outcomes for women's reproductive rights; notably that this may lead to proposals to regulate the behaviour of pregnant women through criminal law. Such forms of regulation have been seen widely in the United States of America, where, in a number of states, it is now illegal for pregnant women to consume narcotics (including prescription drugs), and handle substances considered to be harmful (such as paint containing toxins).[14]

As noted above, unlike many states in the United States, in England and Wales a pregnant woman does not commit a crime against the foetus for conduct that may cause harm unless done with intent to illegally procure a miscarriage or kill a child capable of being born alive. Nevertheless, it is important to note that state's laws in the US reflected this principle until the 1970s when movements towards foetal protection developed. Furthermore, the development of legislation to protect foetuses developed not through the intent to punish pregnant women, but to protect foetuses from being harmed by third parties who attached pregnant women with either the intent to kill the foetus or with disregard as to whether or not the foetus would survive the attack.[15] Through the creation of laws to protect foetuses, legal possibility has been created to punish those who are perceived to have harmed or killed a foetus, including pregnant women. In many instances, the decisions to extend laws and apply them in cases where the conduct of the pregnant woman is under suspicion has been made by prosecutors adapting existing laws, rather than been the product of the legislature actively criminalising behaviour by pregnant women.[16] Furthermore, women who have

[13] For analysis of the concept of risk in childbirth and the impact on medical decision see, AD Lyerly, MM Lisa, A Elizabeth Mitchell, HH Lisa, K Rebecca, K Miriam and L Margaret Olivia, 'Risk and the Pregnant Body' (2009) 39 Hastings Center Report 34.
[14] See for example, R Suppé, 'Pregnancy on Trial: The Alabama Supreme Court's Erroneous Application of Alabama's Chemical Endangerment Law in Ex Parte Ankrom' (2014) 7 Health Law & Policy Brief 49; D Johnsen, 'From Driving to Drugs: Governmental Regulation of Pregnant Women's Lives after Webster' (1989) 138 U Pa L Rev 179.
[15] See, E Milne 'Putting the Fetus First – the Consequences of Legal Regulation and Motherhood' (manuscript); AS Murphy, 'A Survey of State Fetal Homicide Laws and Their Potential Applicability to Pregnant Women Who Harm Their Own Fetuses' (2014) 89 Indiana University Maurer School of Law 847; J Flavin, *Our Bodies, Our Crimes: The Policing of Women's Reproduction in America* (New York University Press 2009).
[16] AS Murphy, 'A Survey of State Fetal Homicide Laws and Their Potential Applicability to Pregnant Women Who Harm Their Own Fetuses' (2014) 89 Indiana University Maurer School of Law 847.

been the focus of criminal sanction and punishment have been the most vulnerable in society, specifically poor women and women of colour.[17]

In jurisdiction where legal regulations on women's behaviour have been implemented, substantial negative consequences have been reported for both pregnant women and foetuses. These include:

- Damage to the relationship between medical staff and pregnant women, resulting in women avoiding medical care when pregnant for fear they may be reported to the police by medical staff.[18] Lack of prenatal care, along with poverty and depravation have been found to have a far greater detrimental impact on the wellbeing of a foetus, than the conduct of the pregnant woman.[19]
- There is also evidence that the threat of penal sanction has led women to decide to terminate wanted pregnancies rather than become subject to legislation designed to protect the life and health of the foetus.[20]
- Limiting of women's rights to liberty, privacy and bodily integrity.[21]

[17] LM Paltrow and J Flavin, 'Arrests of and Forced Interventions on Pregnant Women in the United States, 1973–2005: Implications for Women's Legal Status and Public Health' (2013) 38 J Health Pol, Poly & L 299.
[18] The American College of Obstetricians and Gynecologists, 473 Substance Abuse Reporting and Pregnancy: The Role of the Obstetrician–Gynecologist. (January 2011 [Reaffirmed 2014]) <https://www.acog.org/-/media/Committee-Opinions/Committee-on-Health-Care-for-Underserved-Women/co473.pdf?dmc=1&ts=20170224T0820264139> accessed 1 March 2016; Center for Reproductive Rights, *Punishing Women for their Behavior During Pregnancy: An Approach That Undermines Women's Health and Children's Interest* (September 2000) <https://www.reproductiverights.org/document/punishing-women-for-their-behavior-during-pregnancy-an-approach-that-undermines-womens-heal> accessed 5 March 2017; JM Boudreaux and JW Thompson, 'Maternal-Fetal Rights and Substance Abuse: Gestation Without Representation' (2015) 43 Journal of the American Academy of Psychiatry and the Law Online 137.
[19] DA Frank, M Augustyn, WG Knight, T Pell and B Zuckerman, 'Growth, Development, and Behavior in Early Childhood Following Prenatal Cocaine Exposure: A Systematic Review' (2001) 285 JAMA 1613; ED Kampschmidt, 'Prosecuting Women for Drug Use During Pregnancy: The Criminal Justice System Should Step Out and the Affordable Care Act Should Step Up' (2015) 25 Health Matrix: Journal of Law-Medicine 487; SJ Ondersma, SM Simpson, EV Brestan and M Ward, 'Prenatal Drug Exposure and Social Policy: The Search for an Appropriate Response' (2000) 5 Child Maltreatment 93.
[20] LC Fentiman, 'The New Fetal Protection: The Wrong Answer to the Crisis of Inadequate Health Care for Women and Children' (2006) 84 Denver University Law Review 537.
[21] M Brazier, 'Liberty, Responsibility, Maternity' (1999) 52 CLP 359; J Gallagher, 'Prenatal Invasions & Interventions: What's Wrong with Fetal Rights' (1987) 10 Harvard Women's Law Journal 1; D Johnsen, 'From Driving to Drugs: Governmental Regulation of Pregnant Women's Lives after Webster' (1989) 138 U Pa L Rev 179.

Q10. Do you agree that no consent or permission from the bereaved parents, or anyone else, should be required for a coronial investigation into a stillbirth to be opened? Please give your reasons.

Conducting an inquest without consent will potentially result in a hugely traumatic experience of parents who may be grieving from the loss of their unborn child. Considering the proposal is currently going to require coroners to open investigation in all cases of full-term stillborn babies (including those that have died *in utero* prior to full-term, were diagnosed prior to full-term with a congenital abnormality that means they cannot survive outside of the womb, or where the cause of death cannot be determined, or could not be prevented by the behaviour of pregnant women or medical staff), then the distress caused in these instances may be unwarranted and unjustified. See response to questions 17, 19 and 20.

Q11. Do you agree that the coroner's duty to hold an inquest should apply to investigations of stillbirths? Please give your reasons.

See response to questions 17, 19 and 20.

Q12. Do you agree with the proposals for the links and sequencing between coronial and non-coronial investigations? Please give your reasons.

Paragraph 67 – it is not clear why a person being charged with a criminal offence relating to the conception of the child would result in the coronial investigation into the stillbirth being suspended. The nature of the conception would, in my opinion, be a very separate matter from the occurrence of a stillbirth, and so should have no impact on the coronial investigation.

Q13. Do you think coroners should have the same powers in relation to evidence, documentation and witnesses in stillbirth investigations, as well as in ordering medical examinations, as they do for death investigations now? Please give your reasons.

In order to protect the rights of women in relation to reproductive freedom, limiting the nature of questions that can be directed towards a woman about her behaviour while pregnant and during labour and delivery may be warranted (see response to question 1).

Q17. Do you agree with the proposal to investigate only full-term stillbirths, or do you think the obligation to investigate should encompass all stillbirths?

The limit drawn in the consultation of full-term as the cut-off point for investigation will potentially result in stillbirths being investigated where the foetus has died *in utero* before 37^{+0} weeks, or has been diagnosed (pre-37^{+0} weeks) with a congenital anomaly that means they cannot survive post-birth, but the pregnant woman has

decided to continue the pregnancy to full-term, rather than to obtain an abortion to end the pregnancy before full-term. The necessity of a coroner's inquest in to such instances of stillbirth may not be warranted due to the nature of the death of the foetus.

Concerns over inquests being used as forum to identify women's behaviour as the cause of the stillbirth may be limited if coroner's obligation to investigate is limited to full-term stillbirths. As evidence cited in paragraphs 84 to 86 of the consultation indicates, there is often no firm evidence to determine the cause of a stillbirth when occurring before term, or even at term but in the antepartum period. As such, if coroners were to have a duty to investigate stillbirths before 37^{+0} weeks then there is an increased likelihood that this would result in a narrative verdict, which is more likely to result in suggests being made that the death of the foetus was, at least in part, due to the behaviour of the pregnant woman. As indicted in my response to question one, it is within this form of conclusion to an inquest that there is increased concern over the control and regulation of the behaviour of pregnant women, and so potential violation of women's human rights.

Q19. Do you agree that coroners should investigate all full-term stillbirths (i.e. all stillbirths in scope)? Or do you think a further distinction should be made within this category?

In paragraph 93 of the consultation, it is stated that it is not appropriate to draw a distinction between "natural" and "unnatural" full-term still births. However, this premise works on the assumption that all stillbirths that occur at term could be prevented and therefore the foetus *should* have survived. Outside of the issue of foetuses that die *in utero* prior to full-term but are not delivered until full-term, there may be a number of stillbirths that occur at or after full-term where cause of death is unknown or due to circumstances that could not have been prevented by either the behaviour of the pregnant woman or care by the medical teams. A coroner's inquest in such instances would potentially be distressing for the parents and be an inappropriate use of resources. Allowing coroners to make the decision to not hold an inquest upon being notified of a full-term stillbirth (as will all other death notifications) would be more appropriate here. See response to question 20.

Q20. Do you agree with the above proposal as to how a stillbirth should be registered when a coronial investigation has taken place?

Paragraph 99(b) seems to suggest that *all* full-term stillbirths will result in an investigation, but this presumption does not consider that, upon a stillbirth being reported to the coroner, they may determine that an investigation is not required.[22] See response to question 19.

[22] As outlined in section 2.2 of the Ministry of Justice, 'Guide to Coroner Services' (24 February 2014) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/363879/guide-to-coroner-service.pdf> accessed 17 June 2019, when a death is reported to a coroner, the coroner may determine that no investigation is required.

About the respondent

Dr Emma Milne is a lecturer in criminology at Middlesex University. Her work focuses on criminal justice responses to women suspected of killing or harming their foetus or newborn child. Dr Milne has published in the area of criminal laws related to newborn child death, such as the offences of infanticide, procuring a miscarriage, child destruction and concealment of birth. Dr Milne's research also analyses the nature and impact of foetal protection laws that have developed in a number of states in the United States of America. For further details about Dr Milne's research see: https://www.mdx.ac.uk/about-us/our-people/staff-directory/profile/milne-emma.