

Infanticide: guarding against harshness

Dr Karen Brennan & Dr Emma Milne examine the socio-historical context behind the infanticide law

IN BRIEF

► For the offence/defence of infanticide to apply, the mental disturbance suffered by the accused does not need to be solely due to the consequence of giving birth. Providing birth was an operating or substantial cause, there may also be other contributing factors, such as pre-existing mental health conditions.

► Infanticide operates as a mechanism for lenience in instances where a woman kills her infant while experiencing a disturbance of the balance of the mind.

► Cases of newborn child killing involve vulnerable women. This has been recognised historically in the disposal of women who kill newborn children and the Infanticide Act is still needed today to facilitate leniency in such cases.

In July 2018, the Court of Appeal ruled that a woman could rely on the Infanticide Act 1938 even in situations where the disturbance of the balance of her mind was not caused 'solely' by reason of the effect of childbirth (*R v Tunstill* [2018] EWCA Crim 1696, [2018] All ER (D) 26 (Aug)). The judgment was given in the case of Rachel Tunstill who, in January 2017, gave birth alone in her bathroom, following a concealed pregnancy. She killed the newborn baby girl by stabbing her several times with a pair of scissors, and then wrapped the remains in a plastic bag and disposed of her body in her kitchen bin. Medical evidence given at trial indicated that Tunstill was in a mentally disturbed state at the time of the birth/killing, and that this was a product of her pre-existing mental health condition, and, according to two defences experts, the impact of birth. One expert concluded she experienced an

'acute stress reaction' as a result of birth; the other found that labour 'exacerbated' her pre-existing condition. The trial judge refused to allow the jury to consider the defence of infanticide, under s 1(2) of the Infanticide Act 1938. Tunstill was found guilty of murder and sentenced to life, serving at least 20 years. She appealed this conviction on the grounds that the trial judge's refusal to leave infanticide to the jury rendered her conviction unsafe. The Court of Appeal quashed Tunstill's conviction and ordered a retrial.

Tunstill ruling

Infanticide is a homicide offence. It also provides an alternative conviction at a murder or manslaughter trial. Because it is understood to provide a more lenient option to either, infanticide, in essence, operates as a partial 'defence', particularly at murder trials where a woman wilfully kills her infant aged under 12 months if at the time of the killing, 'the balance of her mind was disturbed by reason of her not having fully recovered from the effect of giving birth to the child or by reason of the effect of lactation consequent upon the birth' (Infanticide Act 1938, s 1(1) and (2)).

The trial judge in *Tunstill* relied on the obiter comments of Judge LJ in *Kai-Whitewind* ([2005] EWCA Crim 1092, [2005] EWCA Crim 1092), who said that for the law to apply there must be 'evidence that the "balance of her mind was disturbed" either because the mother has not recovered from giving birth to the child, or the effect of lactation on her. No other circumstances are relevant' (para [134]). The trial judge held that a pre-existing mental condition constituted 'other circumstances' and so there was no proper

basis, on the evidence in this case, to leave infanticide to the jury. The issue before the Court of Appeal in *Tunstill* centred on the correct interpretation of the statute, namely whether the disturbed mental state must be solely by reason of the effect of giving birth.

The court was persuaded by Tunstill's arguments that the effect of the approach taken by the trial judge was to put women with pre-existing mental health conditions in a worse position than women who had no mental health issues prior to birth; the potential consequence being that psychiatrists would not be able to 'disentangle' the causes to determine whether the disturbed mental state was due to birth, a pre-existing condition, or both. This, the court found, would be 'anomalous' and 'harsh'. They highlighted the purpose behind the legislation which was to 'ameliorate the potential harshness of the law of murder by recognising that in a period after birth a mother's balance of mind may be affected'. To interpret the law in the way suggested by the trial judge would therefore '[run] counter to the intent of the legislation', which was to be merciful (paras [29-30]).

The Court of Appeal ruled that the words in the statute, 'by reason of', do not necessarily mean 'solely by reason of'. Rather, it is sufficient that the effects of birth was a 'substantial or operating' cause of the disturbance in the balance of the mind (para [31]). This, the court held, involved consideration of causation principles, pointing to the guidance in *R v Smith* ([1959] 2 QB 35, [1959] 2 All ER 193) and *R v Hughes* ([2014] 1 Cr App R 6) (paras [31-33]). Thus, once the effect of birth played a more than minimal contribution to the woman's disturbed mental state, then infanticide could apply; the effect

of birth did not have to be the sole or even the main cause. The court also pointed to the approach taken to diminished responsibility in cases involving intoxication as instructive (*R v Dietschmann* [2003] 2 Cr Ap R 4), (para [35]).

Understanding infanticide

It is well recognised that the Infanticide Act is unique in many respects, not least because it provides for an exceptional mitigation framework in criminal law that is available only to women who kill their biological children aged under 12 months. In comparison with the partial defence of diminished responsibility, which the jury rejected at Tunstill's trial, the requirements for infanticide are easier to meet particularly because the degree of mental disturbance needed is less, and the burden of proof falls on the Crown.

The purpose of this law, when it was first introduced in this jurisdiction in 1922, was to facilitate lenient treatment of women who killed their babies, particularly at or soon after a concealed birth, mainly because of the social, not the psychiatric, circumstances of the crime. Historically, the typical infanticidal woman was a servant or shop worker who became pregnant out of wedlock, and, faced with the shame and desperation of her situation, kept the pregnancy a secret, giving birth alone and then either killing the child or allowing it to die post-birth. Within such a context, juries were often resistant to convicting women of murder. Accused women were most often perceived as victims of their circumstances, who acted in a 'frenzy' post-birth, motivated by fear, panic and terror connected to the situation of their pregnancy and birth. In the rare instance where a murder conviction was obtained, the death sentence, from 1832 onwards, was always commuted. This pattern of condemning a woman to death only to have the sentence commuted was dubbed the 'solemn mockery'. The Infanticide Act 1922 was devised as a solution to these practical criminal justice problems, facilitating a homicide conviction that allowed for more sympathetic punishment.

In *Tunstill*, the Court of Appeal was clearly influenced by the merciful intent behind the legislation. Although the Court of Appeal did not elaborate on the historical background to the statute, and indeed there was little discussion of this in legal arguments, we would argue that is vital for criminal justice practitioners to appreciate the socio-historical background of the infanticide law. It is only through understanding the purpose of legislators in 1922 and again in 1938, and the social and legal context in which they acted, that we can fully appreciate the meaning and scope of this law.

In this regard, it is also worth highlighting

that the Infanticide Act 1938 is usually applied flexibly. For example, a study of Crown Prosecution Service files in the 1980s by Mackay showed that the mental disturbance requirement was interpreted widely, thus allowing for lenient disposals. More recent research by Milne, examining criminal justice responses to women who kill newborn children, suggests that within the past ten years, infanticide has been used in cases precisely where a pre-existing mental health condition exists. For example, in *R v S* [2014], unreported, the basis of acceptance of the defendant's guilty plea to the offence of infanticide was that she was suffering from a severe depressive episode which was triggered by an event that occurred before the birth and subsequent killing of the child.

“When a woman hides her pregnancy, she usually does so because of complex factors in her life that prevent her from seeking assistance”

Neonaticide: why the infanticide statute is still relevant today

Despite significant social and legal changes over the last century which saw women gain access to better forms of contraception and legal abortion, and the stigma attached to unmarried motherhood significantly lessen, neonaticide has not vanished. Neonaticide—the killing of a child within the first 24 hours of life—is a unique form of killing. The perpetrator is most often the birth mother and the death of the baby occurs either as a result of the birth, or through the mother's acts or omissions. The woman often keeps the pregnancy secret, fearing the reaction of friends or family to the knowledge of the baby. As such, the birth comes as a shock to the woman, who is unprepared for it. Research conducted by psychologists, such as Spinelli in 2003, indicates that where women in this situation react by killing the child, they are not in control of their actions due to dissociative psychosis or hallucinations. Such psychotic breaks are understood to be brought on by the experience of the solo birth. However, while the violent episode may be triggered by the shock and trauma of labour and birth, the context in which a woman hides a pregnancy and gives birth

alone are also significant to cases of neonaticide.

When a woman hides her pregnancy, she usually does so because of complex factors in her life that prevent her from seeking assistance. Such women are inherently vulnerable due to the circumstances of their lives. One of these factors may be pre-existing mental ill-health, such as that reportedly experienced by Tunstill. Other factors reported in the academic literature include fear of rejection or violence from parents or other family members, including a partner who may be abusive; chronic psychological conditions such as schizophrenia or bipolar disorder; and other complex social factors such as uncertain immigration status, poverty, and religious or social values governing sexuality.

Purposefully hiding a pregnancy from the world is not a 'normal' reaction to discovering you are pregnant. While such behaviour is not evidence of mental disturbance per se, the context of the pregnancy is significant in cases of newborn child homicide and thus must be considered in relation to how the Infanticide Act is employed. If the position of the trial judge in *Tunstill* had been upheld by the Court of Appeal, then infanticide would be unavailable in precisely the circumstances it is needed most: situations involving vulnerable women and teenage girls who feel compelled to hide their pregnancy and give birth alone.

Positive judgment from the Court of Appeal

The *Tunstill* judgment reflects both the intention of legislators who enacted and subsequently re-enacted the Infanticide Acts, as well as the context of neonaticide cases. By examining both the historic context of the offence and the circumstances in which a person kills a newborn child, it is evident that the Infanticide Act remains relevant and necessary for women today. *Tunstill* reaffirms the merciful purpose of the infanticide law and it provides welcome clarification on how this law is to be used, particularly where a number of factors contributed to the accused's mentally disturbed state at the time of the killing. In such cases, it will be for juries to decide whether the effect of childbirth made a sufficient contribution to her imbalanced mental state, following instruction from the judge on the legal principles governing causation. Because causation simply requires a more-than-minimal contribution, and leaves room for juries to use their own judgement based on the evidence, the ruling in *Tunstill* will allow for the law to continue to offer lenient treatment to some of the most vulnerable women in our society: those who believe they have no choice but to keep their pregnancy a secret, resulting in them labouring and delivering a child alone. **NLJ**

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