

1977

# State of Utah v. Mark Leslie Larsen : Brief of Appellant

Utah Supreme Court

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STATE OF UTAH,  
Plaintiff-Respondent,  
v.  
MARK LESLIE LARSEN,  
Defendant-Appellant.

CASE NO. 15408

Appeal from the Judgment of the  
District Court of Utah County  
Honorable Allen B. Sorensen, Judge

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THE SUPREME COURT OF THE STATE OF UTAH

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STATE OF UTAH,	)	
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Plaintiff-Respondent,	)	
	)	
v.	)	CASE NO.
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	)	
MARK LESLIE LARSEN,	)	
	)	
Defendant-Appellant.	)	
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APPELLANT'S BRIEF

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THE SUPREME COURT OF THE STATE OF UTAH

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STATE OF UTAH,	)	
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Plaintiff-Respondent,	)	
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vs.	)	CASE NO. 15408
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MARK LESLIE LARSEN,	)	
	)	
Defendant-Appellant.	)	

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APPELLANT'S BRIEF

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STATEMENT OF THE NATURE OF THE CASE

Defendant was charged in the Fourth Judicial District Court upon an information alleging a violation of the provisions of the Utah Criminal Code, § 76-5-207 in that "...on or about the 19th day of June, A.D., 1976, at Utah County, State of Utah, the said Mark Leslie Larsen, while under the influence of intoxicating liquor, to a degree rendering him incapable of safely driving a motor vehicle, did while operating a motor vehicle in a negligent manner, cause the death of Baby Mlejnek."

DISPOSITION IN THE LOWER COURT

The matter was tried to a jury, the Honorable Allen B. Sorensen, District Judge, presiding. A verdict of guilty was returned by the jury. Defendant was sentenced to serve an indeterminate term not to exceed five (5) years in the Utah State Prison.

Execution of the sentence was stayed and defendant placed on probation upon the condition that he serve six (6) months in the Utah County Jail and pay a fine of \$1,000.00. Defendant was represented at trial by Richard M. Taylor, Attorney at Law, who withdrew following the conclusion of the proceedings. Defendant's present counsel has been appointed by the Utah State Supreme Court to pursue this matter on appeal.

#### RELIEF SOUGHT ON APPEAL

Defendant seeks reversal of his conviction or failing that, a new trial.

#### STATEMENT OF THE FACTS

Evidence presented at trial by the State indicated that the defendant was being pursued by a sheriff's deputy on I-15 southbound in Utah County at speeds in excess of 100 miles per hour, (R.11), and that the defendant's vehicle and another containing Andrew Mlejnek, his wife Sandra, and their two children apparently collided (R.12). There were injuries to the four occupants of the Mlejnek vehicle but no fatalities (R.25). At the time of the accident, Sandra Mlejnek was in her 26th week of pregnancy (R.67). Sandra Mlejnek testified that she felt movement of the fetus on the day the accident occurred, but not after the accident (R.36,37).

Dr. Lynn Dayton, a certified synapsatrician gynecologist, testified that on the 19th day of June, 1976, he examined Sandra Mlejnek to determine whether or not the fetus was alive (R.66). During that examination, he was unable to detect any heart tones or other fetal activity. A few days later, labor was induced and Mrs. Mlejnek delivered a stillborn fetus weighing approximate-

one and one-half pounds. Dr. Dayton further testified that in his opinion, a traumatic blow could have been the cause of death of the infant, and that based on the statement of Sandra Mlejnek that the fetus was viable up to the time of the accident. (R.70).

Dr. Dayton also testified that the word "viable" means that the baby was alive within the mother (R.70). He further testified that a fetus of the size delivered by Mrs. Mlejnek would have approximately a 25 percent chance of survival outside the uterus (R.72).

A breathalyzer test conducted on defendant indicated his blood alcohol level to be .13 at the time it was taken (R. 55).

At the close of the State's case, defense counsel moved to dismiss on the grounds that the State had failed to prove a prima facie case since a fetus was not "another" as used in the statute under which defendant was charged (R.74). The trial court denied defendant's Motion to Dismiss (R.78).

The defendant took exception to Instruction No. 5 and Instruction No. 11. (R.79).

## ARGUMENT

### POINT I

DEFENDANT DID NOT COMMIT THE CRIME CHARGED IN THE INFORMATION SINCE A VIABLE FETUS IS NOT "ANOTHER" AS USED IN UTAH CODE ANNOTATED (1953) SECTION 76-5-207.

Utah has abolished common law crimes, therefore only acts designated by the legislature are criminal. U.C.A. (1953) Section



"Common law crimes are abolished and no conduct is a crime unless made so by this code, other applicable statute or ordinance."

The Utah State Legislature has not included unborn fetuses within the class of those who may be victims of a crime. Utah Code Annotated (1953) Section 76-5-207 (1) provides:

"Criminal homicide constitutes automobile homicide if the actor, while under the influence of intoxicating liquor, a controlled substance, or any drug, to a degree which renders the actor incapable of safely driving a vehicle, causes the death of another by operating a motor vehicle in a negligent manner."

(Emphasis added)

The word "another" used in the statute is used in reference to the word "actor" used in the preceeding portion of the statute. U.C.A. (1953) Section 76-1-601 defines those terms as follows:

- "(3) "Actor" means a person whose criminal responsibility is in issue in a criminal action...
- (4) "Person" means an individual, public or private corporation, government, partnership, or unincorporated association."

Where the legislature has intended to broaden the meaning of a term they have done so expressly in the definitional section. An example is the term "person". The legislature has expanded the normal meaning of the term to include incorporations, partnerships and associations.

Websters New Word Dictionary defines the term "person" as follows:

"person. 1. a human being 2. the human body 3. person-

The foregoing terms are not normally used in reference to an unborn child.

At common law and in the absence of statute, it is generally held that the terms "person", "human being", etc. do not include an unborn fetus. In order for an infant to be victim of a homicide, the child must have been born alive.

"At common law and in the absence of statute, it is the rule that if a child dies before birth, no crime is predicable of the act causing its death, but if it is born alive and thereafter dies from the effects of the defendant's felonious act, the culpability is the same as that incurred in killing any other human being, even though the act eventually resulting in its death occurred before delivery. The element essential to culpability in this case seems to be the independent existence of the infant. If the child can be said to have had an independent existence, the act of killing, it will be murder or manslaughter; otherwise it will not."

40 Am Jur 2nd Homicide, p. 300.

The California Supreme Court confronted the question of whether or not the term "human being" as used in the California homicide statute included a "viable unborn fetus". In Keeler v. Superior Court, 2 Cal 3d 619, 87 Cal. Rptr. 481, 470 P 2d 617, 40 ALR 3d 420, the defendant had beaten his pregnant estranged wife in an effort to "stomp the baby out of her". A Caesarian section was performed. The fetus was stillborn. The pathologist testified that the cause of death was skull fracture from the beating of the mother. Further, there was testimony that there was "reasonable medical certainty" that the fetus had developed to the stage of viability and that if the child had been delivered on the date of the beating it would have had a 75 to 95 percent

chance of survival. The court in Keeler (supra) found that the term "human being" used in the California statute did not include a viable but unborn fetus. The California legislature has since passed a feticide statute.

The Supreme Court of Ohio was presented almost precisely the same issue which is presented by the present case in State v. Dickenson, 28 Ohio St. 2nd 65, 275 NE 2nd 599. Dickenson was charged under the Ohio vehicle homicide statute with causing the death of a seven month fetus aborted by the mother as a result of injuries sustained during the accident. The fetus was still-born and an autopsy indicated that death was due to injuries sustained as a result of the traffic accident. The section of Revised Code of Ohio under which the defendant was charged, § 4511.181 provides in part:

"No person shall unlawfully and unintentionally cause the death of another while violating section 4511.19 of the Revised Code. Any person violating this section is guilty of homicide by vehicle in the first degree."

The court in Dickenson (supra) held that the word "another" as used in the Ohio vehicle homicide statute did not include a viable fetus upon the ground that the common law had required that the child be born alive before it could be the victim of a homicide. The court further indicated that the Ohio General Assembly had had numerous opportunities to amend the statute but had never chosen to expand or change the meaning of the term "person" or had never enacted a feticide statute.

The foregoing cases are not isolated decisions. Many courts have found that an unborn viable fetus cannot be the

victim of a homicide where the homicide statute uses terms such as "human being" or "person" to describe the victim. For example, in State v. Gyles (La) 313 So 2nd 799, the court held that where defendant struck a pregnant woman which resulted in the delivery of a stillborn child he could not be convicted of the statutory crime of murder where the statute required the killing of a human being. In Kihner v. Hicks (Ariz 1975) 529 P 2d 706, the court held that wrongful death statutes providing for damages when "death of a person is caused by wrongful act" did not include viable fetus. See also Commonwealth v. Edelin, 359 N.E. 2nd 4, and Justiss v. Atchison, 139 Cal. Rptr. 97, 565 P 2d 122 (1977).

The trial court therefore should have granted defendant's Motion to Dismiss at the conclusion of the State's case.

#### POINT II

THE JUDICIAL ENLARGEMENT OF UTAH CODE ANNOTATED (1953) 76-5-207 BY THE TRIAL COURT CONSTITUTES AN EX POST FACTO LAW IN THAT THE DEFENDANT DID NOT RECEIVE FAIR NOTICE OF THE ILLEGALITY OF HIS CONDUCT.

Defense counsel moved to dismiss upon the grounds that the State failed to prove a prima facie case since Utah Code Annotated Section 76-5-207 did not include unborn fetuses (R.74). The trial court denied the Motion to Dismiss indicating that the question was a jury question in that the death of the fetus should be treated the same as if a living person had been killed (R.76,77). The court then instructed the jury on the theory that a fetus

could be the victim of a vehicle homicide.

Instruction No. 5 provided:

"The essential elements of the crime charged in the information is as follows:

1. That the defendant while operating an automobile on a public street or highway killed one, Baby Mlejnek.
2. That the defendant at such time was under the influence of intoxicating liquor to a degree which rendered him incapable of safely driving a vehicle.
3. That the defendant operated his automobile in a negligent manner.
4. That the death of the said Baby Mlejnek was the proximate result of the negligence, if any, of the defendant.

If the State has failed to prove to your satisfaction beyond a reasonable doubt any one or more of the above essential elements of the crime charged, you should acquit the defendant. But if the State has proved to your satisfaction beyond a reasonable doubt all of the elements of the offense as above set forth, the defendant is guilty of the offense charged in the Information...."

Further, Instruction No. 11 provided:

"The first element of Instruction No. 5 requires that you find the defendant killed one Baby Mlejnek. In order for you to do so, you must determine that the said Baby Mlejnek was a viable human being.

"Viability" is defined as having attained such form and development of organs as would be normally capable of living outside the uterus."

Defense counsel took exception to both of the foregoing instructions (R.79).

The findings of the lower court that a viable fetus could be

the victim of a homicide constitutes a judicial enlargement of U.C.A. Section 76-5-207 which was not foreseeable by the defendant. The United States Supreme Court in Bouie v. City of Columbia, (1964) 378 U.S. 347, 12 L Ed 2nd 894, 84 S.Ct. 1697, held such judicial enlargements to be "unforeseeable" and that the retroactive application of a criminal statute so enlarged is a denial of due process of law in that the defendant has no fair warning that his contemplated conduct constitutes a crime. See also Connally v. General Construction Co., 269 U.S. 385, 70 L Ed 322, 46 S. Ct. 126.

Article I, Section 18 of the Utah State Constitution expressly forbids the passage of any ex post facto laws.

Such a judicial enlargement also contravenes Utah Code Annotated, (1953) Section 76-1-104 which provides:

"The provisions of this code shall be construed in accordance with these general principles:

- (1) Forbid and prevent the emission of offenses;
- (2) Define adequately the conduct and mental state which constitute each offense and safeguard conduct that is without fault from condemnation as criminal....."

If the provisions and definitions enacted by the legislature require additional definition by the judiciary, then it would seem to follow that the statute or statutes in question do not give the defendant fair notice that his conduct subjected him to criminal sanctions. Therefore, the defendants conviction should be reversed.

### POINT III

ASSUMING THE TRIAL COURT TO HAVE BEEN CORRECT IN RULING THAT A VIABLE FETUS COULD BE THE SUBJECT OF A VEHICLE HOMICIDE, THERE WAS NOT SUFFICIENT EVIDENCE UPON WHICH, IF BELIEVED, REASONABLE MINDS COULD HAVE FOUND THE FETUS TO HAVE BEEN VIABLE BEYOND A REASONABLE DOUBT.

The State's medical expert, Dr. Lynn Dayton, testified on direct examination that he assumed the fetus was viable up to the point of the accident (R.70). Upon cross-examination he stated that by "viability" he meant that the baby was alive within the mother (R.70). The doctor indicated that a baby born at the stage of development existing at twenty-six weeks of gestation statistically does not have a good chance of survival. (R.71). Further, Dr. Dayton estimated the baby's chances of survival at only twenty-five percent (25%) had the child been born under normal circumstances. (R.72). The record contains no additional testimony concerning viability of the fetus save that of Dr. Dayton. It is difficult to perceive how reasonable minds could find beyond a reasonable doubt that the fetus was viable within the confines of Instruction No. 11 cited previously. Therefore, the conviction of defendant should be reversed.

### CONCLUSION

Appellant submits that the Trial Court should have granted Appellant's Motion to Dismiss since the Utah State Legislature has not included an unborn viable fetus within the class of persons who may be victims of homicide.


Further, that since there are no statutory definitions

nor cases which have previously defined the conduct of the Appellant as criminal, any judicial enlargement of U.C.A.(1953) Section 76-5-207 would not give Appellant the fair notice required by the United States Constitution and the Utah State Constitution and would operate as an ex post facto law as applied to Appellant.

Finally, it is respectfully submitted that there was not sufficient evidence of viability upon which reasonable minds could find that issue beyond a reasonable doubt.

Upon such basis, the Appellant seeks reversal of his conviction, or failing that, a new trial.

RESPECTFULLY SUBMITTED,



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