S.C.C. No.: 36585

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA)

BETWEEN:

HER MAJESTY THE QUEEN

APPELLANT
(Appellant)

- and -

MEREDITH KATHARINE BOROWIEC

RESPONDENT
(Respondent)

RESPONDENT'S FACTUM

(MEREDITH KATHARINE BOROWIEC, RESPONDENT)
(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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PART I – OVERVIEW AND STATEMENT OF FACTS

OVERVIEW

1. Section 233 of the *Criminal Code* provides that infanticide is both a stand alone indictable offence and a partial defence to a charge of murder. A mother who kills her baby with the *mens rea* for murder shall be convicted of infanticide if her mind was disturbed as a result of giving birth. The *mens rea* of infanticide requires willful acts or omissions which may equate murder or manslaughter.[1]

2. Infanticide convictions are rare, distinguishable from murder and manslaughter by their unique *actus reus:* causing the death of her newly-born child while the mother is not fully recovered from the effects of giving birth or lactation and by reason thereof her mind is then disturbed.[2]

3. Where there is an air of reality to a partial defence of infanticide in a trial for murder, the Crown must negate beyond a reasonable doubt that at the requisite time the accused was not fully recovered from the effects of giving birth and by reason thereof her mind is then disturbed.[3]

4. The Appellant seeks to revise and restrict the defence of infanticide, absent a constitutional challenge or evidentiary record, on the grounds that it makes "sense from a policy perspective", reflects "modern societal values" and accords with this "Courts' moral and legal obligation to protect the most vulnerable members of our society".[4]

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[1] *R v B (L)*, 2011 ONCA 153 at paras. 97- 99, 113-121; leave to appeal refused [2011] SCCA No 208 [Respondent's Book of Authorities ("RBA") Tab 1]; *R v Coombs*, 2003 ABQB 818 at para. 17 [Appellant's Book of Authorities ("ABA") Tab 5]; and *R v Gore*, [2007] EWCA Crim 2789. [RBA Tab 4]

[2] *R v B (L)*, *supra*, at para 1, 137 [RBA Tab 1]; *R v Effert*, 2011 ABCA 134 at para. 28 [ABA Tab 6], Linden, Fortin, Lemelin, Reid, Maingot, Cote, Handfiled and Fitzgerald "Criminal Law, Homicide", Law Reform Commission of Canada, (1984), Working Paper No 33 at p. 77 [ABA Tab 21]

[3] *Criminal Code*, RSC 1985, c C-46 s. 233

[4] Appellant's Factum ("AF") at paras. 89, 93 and 112

5. Amending criminal law to protect vulnerable persons is a matter of public policy within the legislative purview of Parliament and not the Court.[5] The trial record is bereft of evidence of "modern societal values" and the assertion that the Court has a moral obligation to intervene in lieu of statutory amendment is misplaced. Academic criticism of s. 233 *CC* does not compel this Court to intervene. The policy questions raised by s. 233 *CC* are conundrums for Parliament and not the Court.[6]

6. To find an error of law on this record an appellate court would be compelled to interpret s. 233 *CC* more narrowly, injecting the Court's "own analysis and philosophy", contrary to Parliament's decision to do just the opposite. As the majority of the Alberta Court of Appeal critically stated:

> … As an appellate court, we are not to embark on a journey of discovery involving a review of facts and expert opinion that were not properly in evidence before the trial judge (or judge and jury) in the matter under appeal. It is trite law that this appeal must be decided based upon the existing legislative regime in Canada, the applicable case law, and the evidence (both expert and lay) that was before the court below.[7]

7. The Appellant's proposed test is predicated upon theory, not evidence adduced at trial. Nor does it accord with the principles of statutory interpretation. The dissenting judge's reliance on judicial notice (and his own research) and the Appellant's reliance on secondary sources to contextualize "modern societal values" diverts attention from the actual evidence called in this case.

8. The trial judge did not err by acquitting the Respondent of two counts of murder, convicting her of infanticide instead. He held that the Respondent disposed of her newly born babies while experiencing symptoms of depersonalization attributable to births from which she had not recovered. *Her mind was then disturbed*. The Respondent's bizarre behavior, in the context of all the evidence, as explained by expert evidence, gave rise to the partial defence of

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[5] Majority Judgment, at para. 61 [Appellant's Record ("AR") Vol I page 57], *R v Malmo-Levine* 2003 SCC 74, 2003 CarswellBC 3133 at para. 5, 176-78 and 212 [RBA Tab 10], and *R v B (L), supra*, at para. 104 [RBA Tab 1],

[6] *R v B (L), supra*, at para. 50 [RBA Tab 1]

[7] Majority Judgment, at para. 85[AR Vol I page 51]

infanticide which had not been disproven beyond a reasonable doubt. The Alberta Court of Appeal correctly dismissed an appeal against those verdicts.

B. FACTS

9. The testimony at trial has been aptly summarized in the Appellant's Factum at paragraphs 9 -57, however, not all of that evidence was expressly accepted by the trial judge. Accordingly, the Respondent relies upon the following additional evidence, which reflects the trial judge's actual findings of fact.

Summary of the Evidence of the Offences

10. In October of 2010, a newborn baby was found in a dumpster by the Respondent's townhouse complex. Police arrived at the scene in the early afternoon and found her seated on the steps of her residence in bloody clothing. Suspecting that she was the mother of the baby, the Respondent was transported to hospital. In the ambulance she told EMS she had delivered around noon.[8] At this time she was chartered and cautioned for child abandonment. Later at the hospital the Respondent confessed to leaving the baby in the dumpster.[9] As a result of this incident and some discrepancies in her statement police began to investigate her further.

11. From October of 2010 to November of 2011 police gathered evidence to support their theory that the Respondent had been pregnant on two previous occasions. There were no medical records of pregnancy or live births,[10] so the investigation depended on anecdotal information from her co-workers.[11] The Respondent had given them false explanations for what appeared to be pregnancies and denied being pregnant when they asked direct questions.[12]

12. In November of 2011 the Respondent was arrested for attempted murder for the 2010 Baby. Police conducted a six hour long accusatory interview in which the Respondent disclosed details about the 2010 Baby and also confessed that she had done the same with two other

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[8] Trial Judge's Ruling *Voir Dire* #1 [AR Vol I at page 152/35-41]
[9] Trial Judge's Ruling *Voir Dire* #1 [AR Vol I at page 163/9]
[10] Trial Judge's Ruling *Voir Dire* #1 [AR Vol I at page 163/17-22]
[11] Trial Judge's Ruling *Voir Dire* #1 [AR Vol I at page 163/1-6]
[12] Trial Judge's Ruling *Voir Dire* #2 [AR Vol II at page 82/31]

newborns in 2008 and 2009. The Respondent was charged with two counts of second degree murder for the earlier incidents and attempted murder with respect to the 2010 Baby.

The Trial

13. The prosecution of the Respondent for two counts of murder in 2008 and 2009 depended on the admissibility of her November 2011 statement.[13] After a lengthy *voir dire* the trial judge ruled the post charter/caution portion of the November 2011 statement admissible. He also ruled the 2010 hospital statement voluntary.

14. In the second *voir dire*, the Crown applied to lead similar fact evidence in relation to the 2010 incident in the trial. At that time the 2010 Baby was the subject of another indictment set for trial in front of a different judge.[14] The Crown argued the 2010 evidence confirmed the Respondent's confession as credible and reliable, demonstrated the mental state necessary for murder, and rebutted the defence of infanticide. The trial judge allowed the Crown's application finding the probative value of the 2010 evidence outweighed its prejudicial effect. [15]

15. After the Respondent's statement and similar fact evidence were ruled admissible, the focus of the trial was whether the Crown could disprove infanticide. The Crown expert testified that he was unable to find evidence of a diagnosis of "mental illness"[16], "mental disorder"[17], "major depressive disorder"[18] and "mood disorder"[19] or any level of "distress" that was from his perspective "disproportionate to the circumstances".[20] He explained that a diagnosis as per the diagnostic manual (DSM) questioned "whether the level of distress is disproportionate to the circumstances before them". The Crown expert incorporated a balancing into his assessment of

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[13] Trial Judge's Ruling *Voir Dire* #1 [AR Vol I at page 154/1-2]
[14] Following the convictions for infanticide the Crown accepted a plea to aggravated assault for the 2010 Baby and the Respondent was sentenced by trial judge Justice P.J. McIntyre for all three offences
[15] Trial Judge's Ruling *Voir Dire* #2 [AR Vol II at page 85/37-38]
[16] Dr. Hashman's Testimony [AR Vol II at pages 107/9, 16; 109/4-5; 111; 116/1-10; 117/35; 118/38; 119/25; 127/19]
[17] Dr. Hashman's Testimony [AR Vol II at pages 105/1, 21; 106/14; 106/34; 109/12; 110/41; 111/12; 114/16; 115/4
[18] Dr. Hashman's Testimony [AR Vol II at pages 106/32; 127/3]
[19] Dr. Hashman's Testimony [AR Vol II at pages 109/5; 113/4-10]
[20] Dr. Hashman's Testimony [AR Vol II at pages 106/39-41, 107/1-5; 109/12]

the Respondent relying on the term "balance of the mind"[21] which he interpreted as "the person's mental state shouldn't be so minimal that it trivializes the death of the individual".[22]

16. Dr. Smith, called as an expert witness by the defence, testified that the descriptions the Respondent provided both herself, the police and the other assessors were consistent with significant depersonalization[23] brought about by the abrupt change in her denial by the labour pains and the delivery.[24] Dr. Smith explained dissociation is a generic term that describes the process where the normally integrated functions of the mind (i.e. consciousness, awareness of one's body, perception of the environment) become disrupted or fragmented. In a "dissociative state" one is totally detached from the world producing essentially automatic behavior. She explained depersonalization to be a symptom of dissociation where there is a sense that a person is acting but they are outside their body. The symptoms include a subjective sense of numbness (even to physical pain), detachment, a reduced awareness of one's surroundings, and more specifically, the person feels disconnected or detached from their own body.[25]

17. In argument at the close of the case the trial Crown advocated "balance of the mind" should be read into s. 233 *CC*, requiring a threshold of whether the mind was sufficiently disturbed such that it was disproportionate to the act. Relying on the lower court decision in *R v B (L)*[26] Crown submitted that accepting symptoms of depersonalization as a 'mental disturbance' creates a precedent where the disorder is so minimal it would open the "floodgates" and "disparage the lifes of the individuals that were taken".[27]

18. In final argument Defence counsel highlighted the Crown's interpretation of the meaning of disturbed in s. 233 *CC* was predicated on the lower court decision of *L.B* which was not adopted on appeal and conflicted with the jurisprudence in Alberta. Defence counsel argued Dr.

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[21] Dr. Hashman's Testimony [AR Vol II at pages 105/4; 106/27-27; 118/7-8; 119/9-16]
[22] Dr. Hashman's Testimony [AR Vol II at page 119/7-16]
[23] Dr. Smith's Testimony [AR Vol II at page 146/37]
[24] Dr. Smith's Testimony [AR Vol II at page 173/21-22]
[25] AF at paras. 49 and 104 that the Respondent's symptoms ranged from a minor sense of numbness and unreality like sleep deprivation and jet lag is not accurate. Dr. Smith testified that there are a spectrum of possible symptoms, however, those exhibited by the Respondent were "significant".
[26] *B (L)*, 237 CCC (3d) 215 the [ABA Tab 2]
[27] Crown Closing Argument [AR Vol III at page 19/15-22]

Hashman relied upon to an elevated standard of "mind disturbed" and incorporated "balance of the mind" into his testimony which was not contained in s. 233 *CC*. Defence counsel also pointed to medical records indicative of Dr. Hashman's assumption that disturbed in law required a diagnosis of a mental disorder.[28]

19. Cases were provided to the Court with factually similar scenarios in the context of the neonaticide paradigm.[29] Defence counsel submitted the Crown had not disproven that the defence of infanticide did not apply and that if the trial judge found the babies had been born alive he was to acquit the Respondent of murder and convict her of infanticide.

Trial Judge's Decision and Findings of Fact

The Respondent's Confession

20. The trial judge concluded that the 2008 and 2009 babies were born alive and abandoned in a similar manner to the third in 2010. He characterized the Respondent's "tearful, emotional state" in her 2011 November audio/video police statement as "consistent with real recollection". He held that the Respondent was "reliving a real memory of what occurred". He found it was evident from the confession that the Respondent was "anguished about these births"[30] and her bizarre statement to the Police about "hoping maybe someone would help them" was consistent with the Respondent believing the newborns were still alive when she abandoned them.[31]

21. Contrary to the Appellant's submission[32] that the Respondent had a "strong memory", the trial judge found "there is not much detail" in the Respondent's recollection about the 2008 and 2009 births. The trial judge's reference to "strong memory" related to whether the Respondent had an operating mind at the time of being interviewed by Police at the hospital in 2010. In his opinion, the fact that she remembered what she told the officers at the scene and to Det. Witt's

[28] Defence Closing Argument [AR Vol III at pages 30 -33]
[29] Defence Closing Argument [AR Vol III at pages 34/5-13]
[30] Trial Judge's Voir Dire #2 Decision [AR Vol II at page 85/23]
[31] Trial Judge's Decision [AR Vol III at page 49/32-34]; See November 2011 Statement [AR Vol V at page 170/5-7] - The Trial Judge's reference correctly refers to the 2008 and 2009 babies contrary to the AF at para. 54, Footnote 87 - "find or help the babies" relates to the 2010 Baby
[32] AF at paras. 25 and 108

request to call her upon being released from the hospital was indicative of her ability to remember at that time.

22. The trial judge characterized the November 2011 confession as containing "ambiguities and contradictions"[33] and acknowledged that there were several instances for which the Respondent said she had no memory. He found the descriptions the Respondent gave about the deliveries in 2008 and 2009 to the police in her confession were consistent with significant depersonalization.[34]

The Respondent's Co-workers

23. The judge found confirmation of her confession through the evidence of the Respondent's coworkers. They recalled her physical presentation perceived to be pregnancies and her denial of same. Their recollections were consistent with the Respondent's explanation to the Police about these denials. The Respondent's behavior at work was also consistent with psychiatric observations about her state of denial.

Retrospective Mental Disturbance

24. The trial judge found both experts eminently qualified to give an opinion on the Respondent's retrospective mental state.[35] Each psychiatrist had access to the same material [36] and he found the observations provided by the Respondent to the Police and psychiatrists were consistent with depersonalization.[37]

25. The trial judge explained why he gave reduced weight to Dr. Hashman's evidence. He found Dr. Hashman's opinion was conclusory such that, "without a mental disorder, there was no disturbance of the mind".[38] He also found the omission of the symptoms of depersonalization in

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[33] Trial Judge's Voir Dire #2 [AR Vol II at page 84/30-43]
[34] Trial Judge's Reasons [AR Vol III pages 59 to 60]; Trial Judge cites Jacqui Leland's Psychological Assessment [AR Vol VI at pages 37 and 38]; Dr. Hashman's May 1, 2012 Letter [AR Vol VI pages 79 to 80]; Dr. Smith's Report [AR Vol VI at page 111, para. 7]
[35] Trial Judge's Reasons [AR Vol III at page 57/35-36]
[36] Trial Judge's Reasons [AR Vol III page 58/15-17]
[37] Trial Judge's Reasons [AR Vol III pages 59 to 60]; Trial Judge cites Jacqui Leland's Psychological Assessment [AR Vol VI at pages 37 and 38]; Dr. Hashman's May 1, 2012 Letter [AR Vol VI pages 79 to 80]; Dr. Smith's Report [AR Vol VI at page 111, para. 7]
[38] Trial Judge's Reasons [AR Vol III pages 59/9-13]

Dr. Hashman's June 1, 2012 opinion undermined its value, especially when contrasted with their importance to him in the early part of his assessment. The trial judge found Ms. Leland noted these observations in her psychological assessment[39] and the fact that these observations were not included in Dr. Hashman's final report weakened his opinion.[40]

26. The trial judge also found Dr. Hashman's remarks that "a disturbance in the balance of the mind should not be so significant that it would reach the bar of a not criminally responsible assessment, but it -- the person's mental state shouldn't be so minimal that it trivializes the death of the individual", not an accurate reflection of the law. [41] Additionally, quoting the terminology used by Dr. Hashman the trial judge reasoned "an acute mental disturbance, significant mental illness, or mental disorder are not necessary to establish a disturbance of the mind."[42]

27. The trial judge preferred the opinion of Dr. Smith, whose approach he found more thorough.[43] He accepted the birthing process, with labour pain and delivery, abruptly disrupted the Respondent pregnancy denial. This traumatic shift triggered symptoms of significant depersonalization.[44]

Mind Is Then Disturbed

28. The trial judge cited the Alberta Court of Appeal decision in ***R v Effert***[45] that an un-rejected opinion by a qualified psychiatrist that the mind of the accused was disturbed at the time of her offences may be sufficient to raise a reasonable doubt.[46] In determining whether the Respondent's mind was disturbed, the trial judge looked at the case as a whole. The statements she made to the police, her interaction with her co-workers, symptoms of depersonalization, her bizarre behavior and her troubled upbringing were all factors which contributed to his conclusion

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[39] Jacqui Leland's Psychological Assessment [AR Vol VI at pages 37 and 38]; Referred to by the trial judge [AR Vol III page 58/15-19, 59/21-22]; Dr. Hashman's May 1, 2012 Letter [AR Vol VI pages 79 to 80]
[40] Trial Judge's Reasons [AR Vol III at page 60/17-19]
[41] Trial Judge's Reasons [AR Vol III at page 61/29-32]
[42] Trial Judge's Reasons [AR Vol III at page 61/40-41 to 62/1]
[43] Trial Judge's Reasons [AR Vol III at pages 59/5-11]
[44] Trial Judge's Reasons [AR Vol III at pages 60/2; 62/22]
[45] *R v Effert*, 2011 ABCA 134 [ABA Tab 6]
[46] Trial Judge's Reasons [AR Vol III at page 58/24-28]

that her mind was disturbed as a result of having recently given birth (from which she had not recovered) at the time of the offences.

29. The Trial Judge held "to accept the Crown's approach was to set the bar too high".[47] He found the Crown failed to disprove the defence of infanticide, acquitted the Respondent of murder and convicted her of two counts of infanticide. [48]

Crown Appeal to ABCA

30. The Crown appealed to the Alberta Court of Appeal claiming the Trial Judge erred (1) in applying the law relating to infanticide, (2) in his consideration of the expert evidence and (3) for failing to provide adequate reasons to allow for meaningful appellate review. The majority of the Alberta Court of Appeal dismissed the Appellant's first argument on the basis that the Trial Judge did not commit an error of law on the existing legislative scheme in Canada. The trial judge's assessment of expert evidence did not give rise to an issue of law, and his reasons were sufficient for the purpose of appellate review.[49]

31. The dissenting Justice addressed the first issue only. He favored the test of disturbance of the mind proffered by Justice Herold in *R v B (L)*[50], but opined it lacked precision. In his view, the serious nature of the offence (homicide) compels a correspondingly high degree of disturbance to justify the partial defensive of infanticide. Displaying a penchant for quantification, in his view, only a substantial disturbance of the mind could offset the moral blameworthiness of the offender such that justice is served by a verdict for the lesser offence of infanticide.[51]

32. Rather than formulating his ruling on the basis of the trial record, the dissenting Justice extensively reviewed academic articles, case comments, infanticide provisions and law reform commission reports from various jurisdictions throughout the world. By doing so he expanded

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[47] Trial Judge's Reasons [AR Vol III at page 62/20-41 to 63/1-6]
[48] Trial Judge's Reasons [AR Vol I at page 62 para. 98]
[49] Majority Reasons [AR Vol I at page 58 para. 62; page 60 para. 75-76; page 61 para. 84]
[50] *R v B (L)*, 237 CCC (3d) 215 [ABA Tab 2]
[51] Dissenting Reasons [AR Vol I at page 82 para. 150]

his assessment of the circumstances to encompass the postpartum psychological states of baby blues, postpartum depression, and postpartum psychosis. He then formulated a sliding scale of mental disturbance commensurate with each condition, such that baby blues is insufficient to give rise to a mental disturbance capable to offset culpability for murder; postpartum depression might qualify, depending on the evidence in the case, and postpartum psychosis would be encompassed within the insanity defense provided for in s. 16 *CC*.[52] None of those conditions were at issue at trial – this case concerned neonaticide only.

PART II – STATEMENT OF ISSUES

33. The Appellant has framed the issue as "what is the legal standard for infanticide in s. 233 *CC*".[53] As this is an appeal as of right based on the dissenting reasons of Justice Wakeling it is those reasons which gives the Crown a narrow ground of appeal.[54] The dissenting reasons frame the issues as follows:

(i) The trial judge erred in accepting the application of the defence of infanticide without first determining the medical "benchmarks" of a "disturbed mind" in s. 233 *CC*? [55]

The Respondent disagrees. Parliament requires only that the *mind be disturbed* in s. 233 *CC*, which does not require a diagnosis of mental disorder or any other "medical benchmark". The trial judge did not err in finding significant symptoms of depersonalization attributable to giving birth precluded the Crown from proving beyond a reasonable doubt the defence of infanticide did not apply. The test proposed by both the dissenting judge and the Appellant does not accord with principles of statutory interpretation and prior jurisprudence. The appeal should be dismissed.

(ii) It is necessary to order a new trial because the "benchmark" articulated by the dissenting justice's reasons was unknown to the physiatrists and the trial judge in considering whether the defence of infanticide applied? [56]

The Respondent disagrees. The dissenting judgment does not acknowledge the Crown's failure to discharge its burden to prove beyond a reasonable doubt that the

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[52] Dissenting Reasons [AR Vol I at pages 82 paras. 151 to 158]
[53] AF at page 18
[54] *R v Keegstra*, [1995] 2 S.C.R. 381, 1995 CarswellAlta 172 at para. 25 and 27 [RBA Tab 8]
[55] Dissenting Reasons [AR Vol I page 64 para. 95]
[56] Dissenting Reasons [AR Vol I page 64 para. 96 and 97]

defence of infanticide did not apply. On this record, the Appellant cannot show the verdict would not necessarily have been the same. The appeal should be dismissed.

PART III – STATEMENT OF ARGUMENT

Overview

34. The Appellant questions the "legal standard" contained in s. 233 *CC*, advocating "the disturbance of the mind must be of sufficient gravity to substantially compromise the psychological health of the mother, and must be seen to have objectively caused the wrongful act or omission that resulted in the death."[57] They argue disturbed mental state should be part of the *mens rea* because that better accords with the concern of society and the courts to consider the moral culpability of an offender.[58]

35. The difficulty with the test proposed by the Appellant[59], the dissenting Justice[60] and Justice Herald in *R v B(L)*[61] is that they are inherently trying to reconcile competing interests as components of the *mens rea*. The Respondent advocates the proper sphere for "her mind is then disturbed" is a component of the *actus reus*, tempering the voluntariness of the prohibited willful act or omission.

Neonaticide Paradigm

36. Historically Commonwealth judges and juries were notoriously reticent to convict of murder mothers who killed their newborn babies given the mandatory sentences of death or life imprisonment for culpable homicide.[62] Sympathetic to the untenable circumstances of these desperate women (typically young, alone, unmarried, working class and without means), Courts routinely acquitted them or convicted of lesser or other offenses which failed to reflect the nature

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[57] AF at para. 93 "must similarly be interpreted to include an objective standard to reflect modern societal values"
[58] AF at para 97
[59] AF at paras. 82 to 88
[60] Dissenting Reasons, at paras. 150 to 158 [AR Vol 1 pages 82 to 85]
[61] *R v B(L)*, 237 CCC (3d) 215, 2008 CarswellOnt 5270 (SCJ) at para. 59 [ABA Tab 2]
[62] *R v B(L)*, 2011 ONCA 153, 2011 CarswellOnt 1214 (CA) paras. 67, 73 [RBA Tab 1]

of their criminal conduct.[63] In the rare cases where convictions were entered for a capital offence, the penalty of death was commuted.[64] A pragmatic approach was ultimately adopted to resolve this conundrum by enacting legislation which distinguished infanticide as a third form of criminal homicide.[65]

37. The *Infanticide Act* 1922 (U.K.) was understood by Parliamentarians to address a notorious problem, but the wording of the Bill caused much consternation.[66] The Lord Chancellor Viscount Birkenhead expressed the purpose of the proposed legislation as follows:

> The mischief, of course, is a very simple one. It is that, under the existing law, if a woman has given birth to a child under the circumstances contemplated by this Bill and Its predecessors, and has, it has ultimately been determined, not been completely mistress of her faculties, but has been distraught in the period immediately following on the birth of the child and has done it to death, there exist no means which would avoid the necessity of imposing upon her in open Court the death sentence, which, in fact, never was carried out, which all those who listened to it in Court with its dreadful paraphernalia knew quite well would not be carried out. It has been felt by generations of lawyers and a long succession of distinguished Judges who have had to go through this form that it ought to be corrected.[67]

38. The difficulty in drafting was to ensure the new provision captured only a subset of offenders. The legislation was intended to exclude "a normal healthy woman, who … has gone through the ordinary physical suffering of a woman in childbirth, aggravated by such additional mental suffering as a woman who has an illegitimate child." Such an offender would still be

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[63] Kirsten Johnson Kramer, PhD & William D. Watson, PhD, "*Canadian Infanticide Legislation 1948 and 1955: Reflections on the Medicalization/Autopoiesis Debate*" (2008) 33:2 Can J Sociology, at 242-243, 248 [ABA Tab 18]

[64] *R v B(L)*, 2011 ONCA 153, 2011 CarswellOnt 1214 (CA) paras. 68, 73 [RBA Tab 1]; Ottawa, Dominion of Canada, "Debates House of Commons", 20th Parl, 4th Sess, Vol V (14 June 1948) at 5187 (Diefenbaker) [ABA Tab 22]

[65] *R v B(L)*, 2011 ONCA 153, 2011 CarswellOnt 1214 (CA) at paras. 69, 71, 92 [RBA Tab 1]; Ottawa, Dominion of Canada, *Debates House of Commons*, 20th Parl, 4th Sess, Vol V, (14 June 1948) at 5187 [ABA Tab 22]; Kirsten Johnson Kramer, PhD & William D. Watson, PhD, "*Canadian Infanticide Legislation 1948 and 1955: Reflections on the Medicalization/Autopoiesis Debate*" (2008) 33:2 Can J Sociology at 247, 251-253, 258 [ABA Tab 18]; Sanjeev Anand, "*Rationalizing Infanticide: A Medico-Legal Assessment of the Criminal Code's Child Homicide Offence*" (2009-2010) 47 Alta Law Rev, at pages 706, 714-715 [ABA Tab 27]

[66] Kirsten Johnson Kramer, PhD & William D. Watson, PhD, "Canadian Infanticide Legislation 1948 and 1955: Reflections on the Medicalization/Autopoiesis Debate" (2008) 33:2 Can J Sociology at 248 [ABA Tab 18]

[67] Child Murder (Trial) Bill (Hansard, 25 May 1922) at page 2 [RBA Tab 21]

prosecuted for murder. New terminology was adopted, not as a term of art, but to allow a conviction for infanticide if a woman, by willful act or omission, killed her newly born child when she was not fully recovered from the effects of giving birth to the child, and by reason thereof the balance of her mind was disturbed. The object was to capture in the new legislation:

> …a case where, taking all the circumstances of the birth, taking the immense emotional and physical strain in combination under these circumstances, those elements in the human mind which lead to action at its decisive moment have been so deranged that there is not a free decision as between the forces of right and the forces of wrong.[68]

39. In closing argument, the trial Crown submitted the Respondent was the type of individual contemplated by the legislators in created the infanticide provisions.[69] The Respondent's history, presentation and the circumstances of her pregnancy and delivery demonstrate the quintessential variables that exist within the neonaticide paradigm. Support for this is found not only in the testimony of the experts in this case, but also in the jurisprudence[70] and academic literature.[71]

40. Neonaticide (the killing of a newborn baby on its day of birth by the mother) is often preceded by pregnancy denial and dissociative symptoms.[72] Lack of prenatal care and an unattended birth are typical. Characteristics common to almost all are passivity, low self-esteem, unpreparedness to be a parent, and lack of support or fear of losing the support of their partner. They often come from troubled homes and are described as "parentified".[73] The Respondent in

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[68] Child Murder (Trial) Bill (Hansard, 25 May 1922) at page 3 [RBA Tab 21]
[69] Crown's Closing Argument [AR at Vol III page 22/5-9]
[70] *R v Taylor*, 2011 BCPC85, 2011 CarswellBC 941 at paras. 5 and 6 [RBA Tab 20]; *R v Russell*, 2011 NBPC 21, 2010 CarswellNB 207 at paras. 10 and 11 [RBA Tab 17]; *R v Gorril*, [1995] N.S.J. No. 463 at para. 68, 1995 CarswellNS 386 [RBA Tab 5]; *R v Peters*, [1995] O.J. No. 4080, 1995 CarswellOnt 633 at para. 3 [RBA Tab 16];*R v Morrow*, 2008 NBPC, 2008 CarswellNB 180 at paras. 81-82 [RBA Tab 13]; *R v Effert*, 2011 ABCA 134, 2011 CarswellAlta 670 at para. 36 [ABA Tab 6]; *R v Leung*, 2014 BCSC 1894, 2014 CarswellBC 2941 at paras. 41, 43-44 [RBA Tab 8]; *R v Gore*, [2007] EWCA Crim 2789, 2007 WL 3389583 at paras. 5-12 [RBA Tab 4]; *R v Smith*, (1976) 32 C.C.C. (2d) 224, 3 C.R. (3d) 259, (Newf. Dist. Ct.) at paras. 20-26, 29-30 [RBA Tab 18];
[71] Isabel Grant, "Desperate Measures: Rationalizing the Crime of Infanticide" 14 Can Crim L Rev at p. 267-269 [AA's Tab 25]; Margaret G. Spinelli, Infanticide: Psychosocial and Legal Perspectives on Mothers Who Kill, Chapter 6 Neonaticide: A Systemic Investigation of 17 Cases, 1d (Washington, D.C.: American Psychiatric Publishing, 2003) at pages 105 -109 [RBA Tab 25]
[72] Dr. Smith's Report [AR at Vol VI page 94, para. 51]
[73] Dr. Hashman's Report [AR at Vol VI pages 68 and 77]; Dr. Smith's Report [AR at Vol VI page 93, para. 48]; Psychological Assessment [AR at Vol VI page 42]; Margaret G. Spinelli, *Infanticide:*

this case concealed and denied her pregnancies, had no prenatal care, an unattended birth, low self-esteem, exhibited passivity, was characterized as "parentified", came from a troubled home, feared losing the support of her partner, did not want to have a baby and felt unprepared to be a parent.

41. The Respondent, consistent with most perpetrators of neonaticide, did not suffer from a mental disorder but experienced symptoms of depersonalization, anxiety and confusion reflecting a disturbance in the mind. In neonticide the mother typically experiences the delivery as if watching herself from outside her body. In this state of depersonalization she feels little or no pain, consistent with the experience described by the Respondent.

42. The case at bar concerned neonaticides, but the legislation has been expanded since its enactment. The *Infanticide Act* 1922 (U.K.) was adopted verbatim in Canada in 1948.[74] Parliamentary debates reveal members' concern to secure convictions in these sympathetic cases as a policy measure. The goal of legislators was to induce Courts to convict for homicide even if for a reduced penalty.[75] It was a practical solution from which myriad problems emerge.

43. The first problem was the definition of "newly born" child. The infanticide provisions in the U.K. 1938 and in Canada 1954 were expanded to define the newly born as offspring under twelve months of age.[76] The impetus for the amendments, whether medical or social in origin,[77]

Psychosocial and Legal Perspectives on Mothers Who Kill, Chapter 6 Neonaticide: A Systemic Investigation of 17 Cases, 1d (Washington, D.C.: American Psychiatric Publishing, 2003) at page 111 [RBA Tab 25]

[74] *R v B(L)*, 2011 ONCA 153, 2011 CarswellOnt 1214 (CA) at Appendix A, B [RBA Tab 1]; Crankshaw's *Criminal Code of Canada*, Legislative Histories, Gary P. Rodrigues, Criminal Code S. 233 [RBA Tab 22]

[75] Ottawa, Dominion of Canada, *Debates House of Commons*, 20th Parl, 4th Sess, Vol V, (14 June 1948) at 5187 [ABA Tab 22]

[76] *R v B(L)*, 2011 ONCA 153, 2011 CarswellOnt 1214 (CA*)* at paras. 72, 81, 82, App. A, A1, B [RBA Tab 1]

[77] Judith Osborne, "The Crime of Infanticide: Throwing out the Baby with the Bathwater" (1987) 6 Can J Family L, p. 54 [ABA Tab 30]

acknowledged that the wretched circumstances of working class mothers overburdened with offspring and suffered "lactational insanity" or "exhaustion psychosis". [78]

44. The 1954 reissue of the *Criminal Code* (Canada) reflected amendments to the infanticide provisions that were primarily changes in form, not substance, with one exception.[79] Section 570 *CC* (now s. 663 *CC*) was enacted to preclude wrongful acquittals of women charged with infanticide for whom no disturbance of the mind consequent on birth or lactation was proven. The willfulness of the unlawful act or omission was retained an essential element of the offence.[80] The new provision was not relevant if the charge was murder rather than infanticide.[81]

Jurisprudence

45. Notwithstanding the Appellant's floodgates argument[82], prosecutions for infanticide have been few and far between. The jurisprudence is sparse. Only recently have Courts begun to analyze the elements of the *actus reus* and *mens rea* for infanticide.

46. Parliamentarians had directed their attention to the circumstances of the offence with little or no regard for the intent with which it was committed. The few reported cases overwhelmingly conclude that the *mens rea* of infanticide is the willful act or omission. The remaining criteria comprise the *actus reus* – that a female causes the death of her newly-born child, if at the time of the act or omission she is not fully recovered from the effects of giving birth to the child and by reason thereof or of the effect of lactation consequent on the birth of the child her mind is then disturbed. The Parliamentarians' practical approach incorporated

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[78] Kirsten Johnson Kramer, PhD & William D. Watson, PhD, "Canadian Infanticide Legislation 1948 and 1955: Reflections on the Medicalization/Autopoiesis Debate" (2008) 33:2 Can J Sociology at 244-245, 254 [ABA Tab 18]

[79] *R v B(L)*, 2011 ONCA 153, 2011 CarswellOnt 1214 (CA*)* at paras. 80, 94-99 [RBA Tab 1]

[80] *R v B(L)*, 2011 ONCA 153, 2011 CarswellOnt 1214 (CA) at paras. 83, 84, 85, Appendix B [RBA Tab 1]; Crankshaw's Criminal Code of Canada, Legislative Histories, Gary P. Rodrigues, Criminal Code S. 663 [RBA Tab 23], Sanjeev Anand, "Rationalizing Infanticide: A Medico-Legal Assessment of the Criminal Code's Child Homicide Offence" (2009-2010) 47 Alta Law Rev, at page 709 [ABA Tab 27]; Kirsten Johnson Kramer, PhD & William D. Watson, PhD, "Canadian Infanticide Legislation 1948 and 1955: Reflections on the Medicalization/Autopoiesis Debate" (2008) 33:2 Can J Sociology 255-257 [ABA Tab 18]; Linden, Fortin, Lemelin, Reid, Maingot, Cote, Handfiled and Fitzgerald, "Criminal Law Homicide," Law Reform Commission of Canada, (1984), Working Paper No 33at p. 75-76 [ABA Tab 21]

[81] *R v Smith*, (1976) 32 C.C.C. (2d) 224, 3 C.R. (3d) 259, (Newf. Dist. Ct.) at para. 9 [RBA Tab 17]

[82] AF at para. 81

amendments to permit an infanticide conviction even where the latter circumstances were not proved. The policy underlying the amendment was to secure a conviction for the unlawful death despite the mother's tragic predicament, without regard for its wilfulness.

47. If "mind is then disturbed" is an essential element of *actus reus*, no threshold is engaged, no "benchmark" is required. The test would be satisfied if the accused was, in the requisite circumstances, "not completely the mistress of her faculties … distraught" or "so deranged that there is not a free decision as between the forces of right and the forces of wrong" of which she is otherwise aware.[83] An interpretation of the "mind being then disturbed" as an essential element of the *actus reus* is consistent with the practical purpose for which Parliament enacted the provision and is compatible with application of the section to offenders such as the Respondent without distortion of the provision.

48. All of the cases to date have been decided without the need to reconcile the *actus reus* / *mens rea* dichotomy. For the reasons given below, this appeal may be dismissed without categorizing "the mind is then disturbed" or establishing a benchmark of any sort. Nonetheless, a history of the jurisprudence is in order.

49. An early case relative to this issue is the 1976 trial decision of *R v Smith*. The judge determined that the *mens rea* of infanticide is a willful unlawful act consisting of intentional wrongdoing.[84] The finding that the accused's mind was disturbed when she caused the death of her newborn baby in that case did not alter the *mens rea*.[85]

50. Mental disturbance within the meaning of the infanticide provision was distinguished from a mental disorder by 1981, with an acknowledgement that the former results in a conviction whereas the latter attracts an acquittal. [86] The same principle was reiterated in *R v Coombs* (2003). Justice Veit clarified that a mental disturbance is not the same as a mental disorder. She

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[83] Child Murder (Trial) Bill (Hansard, 25 May 1922) [RA at Tab 21]
[84] *R v Smith*, (1976) 32 C.C.C. (2d) 224, 3 C.R. (3d) 259, (Newf. Dist. Ct.) at para. 31 [RBA Tab 17]
[85] *R v Smith*, (1976) 32 C.C.C. (2d) 224, 3 C.R. (3d) 259, (Newf. Dist. Ct.) at paras. 29, 31, 34 [RBA Tab 17]
[86] *R c Dupont*, 1981 CarswellQue 616, [1981] C.S.P. 1055, J.E. 81-792 at para. 12 [RBA Tab 2]

also held that the threshold for a mental disturbance is low, far less than needed to raise a defence of NCR.[87]

51. Evidence of a disturbance of the mind simpliciter was sufficient in the subsequent case of *R v Effert*[88]. The Court of Appeal of Alberta set aside a verdict of second degree murder, substituting instead a conviction for infanticide to ameliorate jury error of disregarding expert evidence that the accused "was suffering from the imbalance of the mind at the time which could have resulted from the immediate effects of parturition …" No Court acting judicially could disregard such evidence given the Crown's obligation to negate disturbance of the mind beyond a reasonable doubt. [89]

52. A threshold of disturbance was also irrelevant to the 2014 trial in *R. v. Leung.* The charge to the jury defined the disturbance as a disruption of the accused's power of reasoning, or a disruption of the mind's logical process. [90] The reasons for judgment further clarified that "a diagnosis of mental disorder is not required."[91]

53. All of those decisions are consistent with a willfulness standard for *mens rea* and "the mind disturbed" being a component of *actus reus*. [92]The essential element was either disproven or not, without regard to degree of derangement.

54. A balancing test first emerged in the 2008 trial decision *in R v B(L)* Justice Herold proposed that the weight evidence of disturbance of the mind be juxtaposed with the severity of the outcome, in the following test:

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[87] *R v Coombs*, 2003 ABQB 818, 2003 CarswellAlta 1396 (QB), at paras. 8, 13, 14, 61-62 [ABA Tab 5]
[88] *R v Effert* 2011 ABCA 134, 2011 [ABA Tab 6]
[89] *R v Effert*, 2011 ABCA 134, 2011 CarswellAlta 670 (CA) at paras. 25, 27 [ABA Tab 6]
[90] *R v Leung*, Jury Instruction and Charge, April 2014, BCSC at p. 39 [ABA Tab 29]
[91] *R v Leung*, 2014 BCSC 558 at para. 32 [RBA Tab 7], [2014] B.C.J. No. 3353, Appeal to BCCA abandoned [RBA Tab 22]
[92] Appellate decision from the U.K. has confirmed the ratio in *R v Smith*, (1976) 32 C.C.C. (2d) 224, 3 C.R. (3d) 259, (Newf. Dist. Ct.) that the *mens rea* for infanticide is the willful act or omission, but without reference to malevolent motive: *R v Gore*, [2007] EWCA Crim 2789, 2007 WL 3389583 at para. 34 [RBA Tab 3]

> the disorder must not be so minimal that finding it crosses the threshold cheapens or disrespects the memory of the innocent victim. On the other hand, it must not be so severe as to be almost indistinguishable from a section 16 defence, nor should it inject into the mix something which Parliament apparently decided to exclude, the element of causation.[93]

55. Tensions emerge trying to reconcile the concept of a willful act, a disturbed mind, and sanctity of the deceased. The exercise becomes irreconcilable absent the element of causation. Accordingly, both the Appellant and the dissenting Justice advocate incorporating causation into the test.

56. If considered within the parameters of *mens rea*, evidence that the "mind is then disturbed" would undercut the willfulness of the unlawful act or omission. It would have been an illogical result at the time of the trial judgment in R v B(L) when the *mens rea* of infanticide was presumed to be murder.[94] The problematic of reconciling *mens rea* with a disturbed mind was recognized long ago: "Finding intent from a person's acts is always difficult but finding intent from acts done by a person with a disturbed mind is doubly so." [95]

57. The balancing act proposed by Justice Herold is ill suited to the statute. Without causation, there is no way to adjudge the level of disturbance required to offset the memory of the innocent victim killed by a willful act or omission. How would a Court assess whether a homicide cheapens or disrespects the deceased as a precurser to conviction? With respect, it is properly a principle of sentencing.

58. The absence of any need for a nexus between mental disturbance consequent on birth or lactation and the willful act or omission further buttresses its inclusion as a component of *actus reus* and not *mens rea*.[96] In the ordinary course, the mental element of intent elevates the moral

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[93] *R v B(L)*, 237 CCC (3d) 215, 2008 CarswellOnt 5270 (SCJ) at para. 59 [ABA Tab 2]
[94] *R v B(L)*, 237 CCC (3d) 215, 2008 CarswellOnt 5270 (SCJ) at para. 58 [ABA Tab 2]
R v B(L), 2011 ONCA 153, 2011 CarswellOnt 1214 (CA) at paras. 116, 121 [RA at Tab 1]; Linden, Fortin, Lemelin, Reid, Maingot, Cote, Handfiled and Fitzgerald, "Criminal Law Homicide," Law Reform Commission of Canada, (1984), Working Paper No 33at p. 77 [ABA Tab 21]
[95] *R v Smith*, (1976) 32 C.C.C. (2d) 224, 3 C.R. (3d) 259, (Newf. Dist. Ct.) at para. 34 [RBA Tab 18]
[96] *R v B(L)*, 2011 ONCA 153, 2011 CarswellOnt 1214 (CA) at para. 59 [RBA Tab 1]

culpability of murder over that of manslaughter.[97] Infanticide, however, offers mitigation dependent on the circumstances of an offender. The *mens rea* is not diminished – the distinguishing features of the *actus reus* set it apart from other homicides. The mind being disturbed as a result thereof is circumstantial, not intentional, and therefore is rationally ensconced within the *actus reus* framework.

59. Including mind disturbed as an element of *mens rea* for infanticide is unworkable. The statute requires that a disturbance of the mind arise from birth or lactation, and be manifest at the time the newly born is killed. The relevance is circumstantial, not causative.[98] This feature distinguishes the mental disturbance at issue from a defence of diminished capacity in which it is shown that the "act was the result of [the] disorder."[99]

60. The Ontario Court of Appeal overruled by implication the test proposed by the trial judge in *R v B(L)*. A unanimous Court affirmed that the unique features of the circumstance of the offence were the impetus for the enactment of the statute, the absence of the element of causation and that mental disturbance is a component of the *actus reus* rather than the *mens rea*. [100]

61. The mental element of intent elevates the moral culpability of murder over that of manslaughter.[101] The circumstances of an offender provide mitigation through the partial defence of infanticide. The *mens rea* is not diminished – the distinguishing features of the *actus reus* set infanticide apart from other homicides.[102] The mind being disturbed as a result thereof is circumstantial, not intentional, and therefore is rationally ensconced within the *actus reus* framework.

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[97] *R v B(L)*, 2011 ONCA 153, 2011 CarswellOnt 1214 (CA) at para. 56 [RBA Tab 1]
[98] *R v Guimont*, 141 C.C.C. (3d) 314, 1999 CarswellQue 4735 (CA) at paras. 12-14, 20 [ABA Tab 10], *R v Gore*, [2007] EWCA Crim 2789, 2007 WL 3389583 at para. 20(iv) [RBA Tab 4]; *R v B(L)*, 2011 ONCA 153, 2011 CarswellOnt 1214 (CA) at para. 59 [RBA Tab 1]
[99] Judith Osborne, "The Crime of Infanticide: Throwing out the Baby with the Bathwater" (1987) 6 Can J Family L, at page 55 [ABA Tab 30]
[100] *R v B(L)*, 2011 ONCA 153, 2011 CarswellOnt 1214 (CA) at para. 57, 59, 121 [RBA Tab 1]
[101] *R v B(L)*, 2011 ONCA 153, 2011 CarswellOnt 1214 (CA) at para. 56 [RBA Tab 1]
[102] hence its exclusion from consideration in *R v Laberge*, 1995 ABCA 1996 at para. 26 [ABA Tab 12]

62. Analogies may be drawn between the legal treatment of "mental disorder, "mind then disturbed" and automatism, notwithstanding the differences between those concepts. If an affliction is such that the accused's powers of cognition are diminished, rendering one incapable of appreciating the nature of the act or that it is wrong, *mens rea* is lacking: the offender is unable to appreciate the wrongfulness of the act. Automatism, on the other hand, negates *actus reus* on the basis that the accused's actions were not of her choosing and hence involuntary – "the conscious mind is disassociated from the part of the mind that controls action." Unlike the NCR defence, automatism can be a product of external forces.[103] The commonality between "mind then disturbed" and non-insane automatism lies in the external forces – outward circumstances – predicating the offences, the absence of a psychotic condition, and the irrelevance of causation.

63. An interpretation of the disturbance of the mind as an essential element of the *actus reus* for infanticide is consistent with the practical purpose for which Parliament enacted the provision. Regardless of whether the disturbance arises from latent psychological defects brought to the fore by the trauma of birth, hormonal changes, personal circumstances, or a combination thereof matters not. The shock of labour and delivery upon an offender in denial of pregnancy may trigger mental disturbance akin to that suffered consequent to any other personal injury offence.[104] Any and all of those factors (biological, social, circumstantial, psychological) give rise to the circumstances of the offender.

64. The curious choice of words – the mind is then disturbed – were not terms of art. Rather, it was a legal construct designed to solve a policy issue. The same has been said for "*mental disorder"* which s. 2 CC defines as a disease of the mind. Neither concept parallels any medical definition; each encompass broader factors, which may include a medical diagnosis, injury, illness, abnormality, or other circumstance that impairs thought and function. Policy

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[103] *R v Luedecke*, 2008 ONCA 716, 236 C.C.C. (3d) 317 (Doherty J.A.) at paras. 53-58 [RBA Tab 11]
[104] *R v G(A)*, [2003] OJ No 2335, 2003 CarswellOnt 2311 (CJ) at paras. 3 and 9) [ABA Tab 8]; See also the acknowledgement of physical trauma as a precurser to mental disturbance in *R v Coombs*, 2003 ABQB 818, 2003 CarswellAlta 1396 (QB), at para. 63 [ABA Tab 5]

considerations are inextricable from the definition. As such, self-induced intoxication cannot give rise to the condition, though a finding of dangerousness contributes to the determination.[105]

65. The infanticide provision was borne of a policy decision. The vague language – "wooly" words – are consistent with a rationale which enables courts to make a finding of mental disturbance in appropriate circumstances to ensure a just result. The policy always was and remains to obtain rightful convictions for infanticide rather than wrongful acquittals for murder. While not specifically stated the majority of the Alberta Court of Appeal appears to have adopted disturbance of the mind as an aspect of *actus reus*, enabling judges and juries to come to a just result.

66. Interpreting disturbance of the mind in accordance with the circumstances of the accused takes into account social, psychological, economic, isolation which continue to resonate in modern times.[106] Infanticide in general, and neonaticide in particular, are part of the human condition. Times have changed, women's circumstances have improved, neonaticides have substantially diminished, but prototypical offenders, of which the Respondent is the most recent, are and probably always will be amongst us.

The Dissenting Reasons Should Not Be Adopted

67. In formulating his test, the dissenting justice "considered a number of possible solutions and settled on one which recognizes the magnitude of the crime" and "ensures that not every mother may utilize the infanticide concept just because she has had the misfortune to cause the death of her own infant". The dissent proposes that in order to rely on the defence, the accused's psychological health must be substantially compromised such that "a minor diminution of the mother's psychological health" would not be enough. Secondly the abnormal psychological

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[105] *R v Luedecke*, 2008 ONCA 716, 236 C.C.C. (3d) 317 (Doherty J.A.) at paras. 60-62, 70-78 [RBA Tab 11]

[106] Isabel Grant "Desperate Measures: Rationalizing the Crime of Infanticide" 14 Can Crim L Rev at pp. 269-270 [ABA Tab 25]; Sanjeev Anand, "*Rationalizing Infanticide: A Medico-Legal Assessment of the Criminal Code's Child Homicide Offence*" (2009-2010) 47 Alta Law Rev at 713 [ABA Tab 27]

health condition must substantially impair the mother's ability to make rational decisions which promote the best interests of her infant.[107]

68. The dissent, properly characterized, is predominantly obiter dicta. The case at bar concerns neonaticide which precedes and is unrelated to the other three postpartum conditions reviewed in detail by Justice Wakeling. The Crown Appellant did not call medical or other evidence regarding the "baby blues," postpartum depression or postpartum psychosis. In the normal course, the party seeking the benefit of social science and medical facts must adduce this evidence through experts available for cross examination. Judicial notice is kept on a "short leash" and new evidence is not allowed on appeal absent a successful application to admit fresh evidence .[108] The dissenting justice nonetheless relied upon journal articles and controversial medical views (which the Respondent had no opportunity to rebut) to formulate his reasons. To make findings of fact not based on the trial record is a clear and reversible error of law. The mischief wrought is aptly summarized by Justice Doherty:

> A third problem with the trial judge's conduct of the proceedings is that it created a real risk of inaccurate fact-finding. The trial judge introduced a veritable blizzard of raw statistical information. He also produced various forms of opinion on a wide variety of topics. None of this material was analyzed or tested in any way.[109]

69. The dissenting Justice and the Appellants raise a floodgates argument that mothers suffering the "baby blues" will kill their offspring days or weeks or months after birth, then escape murder convictions if this appeal is dismissed. There is no need on these facts and with this record to consider mothers at the margins. Neonaticides are readily distinguishable from other postpartum conditions. Disassociation typical in neonaticides triggers a separation of mind and body significant enough to suppress even the pains of labour. Offenders feel like they are watching their actions, not doing them.[110] These indicators are typical, but occur very infrequently.

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[107] Eric Vallillee, "*Deconstructing Infanticide*" (2015) Vol 5: Iss 4, Western Journal of Legal Studies, Article 1 at p 11 [ABA Tab 24]
[108] *R v Spence*, 2005 SCC 71, [2005] 3 S.C.R. 458 at para. 60 [RBA Tab 19]
[109] *R v Hamilton*, 189 O.A.C. 90, 186 C.C.C. (3d) 129 at paras. 65, 72, 75, 78, 116 and 119 [RA at Tab 7]
[110] Margaret G. Spinelli, *Infanticide: Psychosocial and Legal Perspectives on Mothers Who Kill*, Chapter 6 Neonaticide: A Systemic Investigation of 17 Cases, 1d (Washington, D.C.: American Psychiatric Publishing, 2003) pages 105-112 [RBA Tab 25]

70. The essential element that her "mind is then disturbed" excludes from infanticide provisions the usual mother who suffered the vicissitudes of birthing or lactation. It captures only the small subset, like the Respondent, for whom the new reality or complications therefrom is untenable.[111] The paucity of reported cases speak to its rarity in modern times. It is hardly a floodgates issue.

71. The question raised by the Appellant of whether the vicissitudes of circumstance should be a mitigating factor for anyone (new fathers, adoptees, nannies, etc.) or no-one (by abolishing the infanticide provision) is a matter reserved for Parliament.[112] The job of the Court is to give meaning to the provision as enacted, not to read down a statutory defence because of an alleged shift in "modern societal values" or a plea to the Court's "moral and legal obligation". If anything, appellate Courts envision their role as expanding defences rather than narrowing them.[113]

72. The Appellant asks this Court to redress an alleged imbalance of moral blameworthiness by limiting the availability of the partial defense of infanticide, such that murder convictions are more readily obtained. Parliament could solve the Crown's concern by increasing the maximum penalty for infanticide, thereby re-situating the offense within the penological scale of moral culpability. [114]

73. Disengaging the analysis from the circumstances at bar enabled the dissenting justice to express opinions of policy and individual responsibility on a broad scale, but failed to address the impetus for the enactment of the infanticide statute or the intent of Parliament. The emphasis on drafting a new and modern test for proof of infanticide displaced what should have been the

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[111] *R v Coombs*, 2003 ABQB 818, 2003 CarswellAlta 1396, at para. 63 [ABA Tab 5]
[112] *R v B(L)*, 2011 ONCA 153, 2011 CarswellOnt 1214 at para. 104 [RBA Tab 1]
[113] *R v Gore*, [2007] EWCA Crim 2789, 2007 WL 3389583 at para. 21 [RBA Tab 4], see also *R v McIntosh*, [1995] S.C.J. No. 16 at paras. 20 to 28 the words "without having provoked the assault" should not be read in. No ambiguity arose on the face of the statutory provision and, under the golden rule of literal construction, it should be interpreted in a manner consistent with its plain meaning. [RBA Tab 13]
[114] *R v B(L*), 2011 ONCA 153, 2011 CarswellOnt 1214 at paras. 60, 75 discusses relative moral blameworthiness as expressed by penalty) [RBA Tab 1]

issue: whether the trial judge erred in finding the Crown failed to disprove beyond a reasonable doubt that this Respondent had a disturbance of the mind consequent on birth from which she had not recovered.

74. The dissenting judge would have ordered a new trial on the basis that Dr. Smith did not define what she understood were the distinguishing features of the requisite disturbed mind.[115] Such criticism fails to appreciate the purpose of the expert evidence. Dr. Smith testified that her opinion was from a "psychiatric perspective"[116], not a legal one. She explained that she evaluated disturbance to mean a disruption in the normal functioning of the mind.[117] Her opinion was used by the trial judge as one piece of evidence indicative of the Respondent's mind "being then disturbed" within the legal meaning of s. 233 *CC*.

75. Regardless of the expert witnesses' understanding of the law, the trial judge demonstrated his understanding and weighed their evidence in formulating his findings of fact. The anomaly in this case was that Dr. Hashman testified to his assumption that in order to rely on the defence of infanticide the Respondent needed to have a mental health problem that was not so minimal that it "would trivialize the death".[118] The trial Crown agreed experts ought not define mental disturbance as if it were a legal term.[119] The trial judge found Dr. Hashman incorporated an elevated interpretation of "mind disturbed" in s. 233 *CC* given his search for "an acute mental disturbance, significant mental illness, or mental disorder" in the 'balance of the mind' which is not necessary to establish disturbance of the mind".[120] The trial judge disagreed with Dr. Hashman's remarks regarding the availability of the defence in this case. He also gave Dr. Hashman's opinion diminished weight because he failed to include in his final opinion the Respondent's symptoms of depersonalization which he found compelling in his May 1, 2012 letter to the Court.[121]

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[115] Dissenting Reasons [AR Vol I at page 67 para. 110 and page 86 at para. 161]
[116] Dr. Smith's Testimony [AR Vol II at page 136/14]
[117] Dr. Smith's Testimony [AR Vol II at page 189/8]
[118] Dr. Hashman's Testimony [AR Vol II at page 119/24]
[119] Crown Closing Argument [Vol III at page 9/6]
[120] Trial Judge's Reasons [Vol III pages 61/41 to 62/1]
[121] Trial Judge's Reasons [Vol III pages 59/9-41 to 60/1-20]

76. Expert evidence, be it psychiatric or some other field, does not always provide a dispositive answer to questions of fact raised in an adjudicative legal context.[122] Some accused raising the defence of infanticide relied on expert evidence; others need not.[123] The determination of the usefulness of psychiatric evidence is fact specific. Some have found "disturbance of the mind" may not be a concept known to psychiatry[124] and in others jurists have presumed the defence will "invariably rely on expert evidence"[125] to reconstruct the accused's retrospective mind.[126] Here, the trial judge looked at the case as a whole, of which the expert evidence was only one piece, to determine whether the Crown had disproved beyond a reasonable doubt that the Respondent's mind was not disturbed at the time of the offences.

The Appellant's Proposed Test Is Unprincipled And Should Not Be Adopted

77. The Appellant submits that the requisite disturbed mental state manifest a substantial impairment to psychological health of the offender and that it be a cause of the homicide as a component of *mens rea* to constitute the offence of infanticide. A lesser standard, she submits, would permit most mothers suffering from even a minor disturbance to escape conviction for murder.[127] This revised test, the Appellant submits, better accords with the concerns of society and the courts' ability to assess the moral culpability of an offender.[128]

78. The Respondent quieries whether the Appellant is challenging the long-standing principle that a mental disturbance is something other than a mental disorder. Her written materials suggest that the test of a substantial impairment "confirms that a significant level of mental disorder must be present."[129]

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[122] *R v Molodowic*, 2000 SCC 16, 2000 CarswellMan 169 at para. 15 [RBA Tab 14]
[123] *R v Leung*, 2014 BCSC 558, 2014 CarswellBC 4128, [2014] B.C.J. No. 3353 at paras. 34-36 [RBA Tab 9]
[124] *R v Coombs*, 2003 ABQB 818, 2003 CarswellAlta 1396 (QB), at para. 46 [ABA Tab 5]
[125] *R v Effert*, 2011 ABCA 134, 2011 CarswellAlta 670 (CA) at para. 34 [ABA Tab 6]
[126] mental state indicative of whether the accused's mind was disturbed as part of the *actus reus* and not the *mens rea*
[127] AF at paras. 89 and 93
[128] AF at para. 97
[129] AF at para. 84b

79. The Appellant expressed alarm that "the lower the effective threshold for what qualifies as 'disturbed,' the greater the number of accused mothers who can raise the defense." To demonstrate such a calamity, the example given is that a mother with the baby blues, frustrated or angry by crying or lack of sleep, could kill her infant then avail herself of the defense of infanticide.[130] On the contrary, there has been no "benchmark" against which to measure disturbance of the mind, yet only a handful of reported cases have emerged in almost 100 years. The floodgates argument rings hollow.

80. The Appellant views the defences of infanticide and provocation as analogous. Infanticide is also comparable to provocation in the sense it is "does not excuse or justify what would otherwise be criminal conduct" but "declares the conduct to be a separate and less culpable crime than murder".[131] They are similar in that the Crown bears the burden of disproving the partial defence to murder.[132] In a murder case where there is evidence of provocation, s. 11(d) requires both that the Crown prove the essential elements of murder beyond a reasonable doubt and negate the defence of provocation beyond a reasonable doubt by ensuring at least one of the constituent elements of the defence is not available on the evidence. [133]

81. The Appellant extends the analogy to submit that, because provocation requires a causal connection, so too should the defence of infanticide. The Respondent disagrees. Causation is statutorily required to establish provocation. Section 232 *CC* (1) provides that: "Culpable homicide that otherwise would be murder may be reduced to manslaughter if the person who committed it did so in the heat of passion caused by sudden provocation." As the Court so aptly stated in *R v Tran*, "the focal point for any analysis on the nature of the defence therefore lies in the wording of the statute". [134] There is no reference to causation in s. 233 *CC*. Thus, the Appellant's argument that infanticide to must be interpreted to include an objective standard of causation mirroring *Tran* to reflect modern society values is baseless.

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[130] AF at para. 81
[131] *R v B(L)*, 2011 ONCA 153, 2011 CarswellOnt 1214 at Footnote 3 [RBA Tab 1]
[132] *R c Fontaine*, 2004 SCC 27, [2004] 1 S.C.R. 702, at para. 56 [RBA Tab 3]
[133] *R v B(L)*, 2011 ONCA 153, 2011 CarswellOnt 1214 at para. 125 [RBA Tab 1]
[134] *R v Tran*, [2010] 350 SCR 350, 2010 CarswellAlta 2281 at para. 9 [ABA Tab 16]

Appellant's Complaints Are About the Facts, Not the Law

82. On an appeal by the Crown the review is limited to question of law alone and the Court cannot interfere with the trial judge's findings of fact.[135] Two of three grounds of appeal dismissed by the majority of the Alberta Court of Appeal concerned the trial judge's assessment of evidence and reasons for judgment. Both grounds were dismissed, the first because it was not a question of law and the second for adequacy. There was no dissent on either point. Accordingly, the Crown has no right of appeal to this Court on either issue.

83. The Appellant's submissions at paragraphs 103 to 111 in the Factum are a request for this Court to re-weight the evidence and and reassess the adequacy of reasons. The Crown presumes the trial judge failed to weigh each incident separately. The Appellant also makes incorrect assertions: The trial judge did not find as fact the "Respondent's symptoms ranged from a minor sense of numbness and unreality (like sleep deprivation and jet lag)".[136] Dr. Smith testified that there are a spectrum of possible symptoms, however, those exhibited by the Respondent were "significant".[137] The trial judge found as fact the Respondent experienced significant depersonalization at the time of the she disposed of her new born infants. The Appellant, on the other hand, tries to recast the evidence in a new light, such as "For each baby, the Respondent demonstrated goal oriented behavior indicating rational thought."[138] The Appellant is critical that "the trial judge failed to consider "a multitude of facts and that he "abdicated this duty [to consider mental disturbance] to the experts"[139] All of these submissions relate to questions of fact, mixed fact and law, and issues for which there is no right of appeal. None of these submissions are properly before this Court.

The Appellant Has Not Met the Onus On Appeal

84. To obtain a new trial, the Crown must satisfy the court that the verdict would not necessarily have been the same had the error not been made.[140]

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[135] *Criminal Code*, RSC 1985, c C-46 s. 676(1)
[136] Dr. Smith's Testimony [AR Vol II at page 146/14-22]
[137] Dr. Smith's Testimony [AR Vol II pages 146/37 and 152/40]
[138] AF at para. 107
[139] AF at paras. 109-111
[140] *R v Graveline*, 2006 SCC 16, [2006] 1 S.C.R. 609 (S.C.C.) at para. 14 [RBA Tab 6]

85. The dissenting justice failed to consider whether, in light of the Crown's burden to disprove the defence of infanticide, the result would necessarily have been the same. The trial judge found as fact that the Respondent's retrospective mental state from a "psychiatric perspective" was disturbed as a result of significant depersonalization triggered by the process of giving birth. Dr. Smith described disturbed as a disruption in the normal integration of the mind. This was but one piece of evidence that led the trial judge to conclude that the Crown had not negated the partial defence of infanticide on the basis that the Respondent's mind was disturbed.[141]

Conclusion

86. The appeal should be dismissed. The difficulty with the test proposed by the Appellant, is that they are inherently trying to reconcile competing interests as components of the *mens rea* when the proper sphere for "her mind is then disturbed" is within the *actus reus*. This interpretation tempers the voluntariness of the prohibited willful act or omission and most accords with the intent of Parliament.

87. No principle of law and nothing on this record supports this Court reading down a statutory defence to make it less available to the Respondent. Furthermore, there is no scientific evidence or public policy evidence to demonstrate that the proposed test supports "modern societal values".

PART IV - COSTS

88. The Respondent makes no submissions regarding costs.

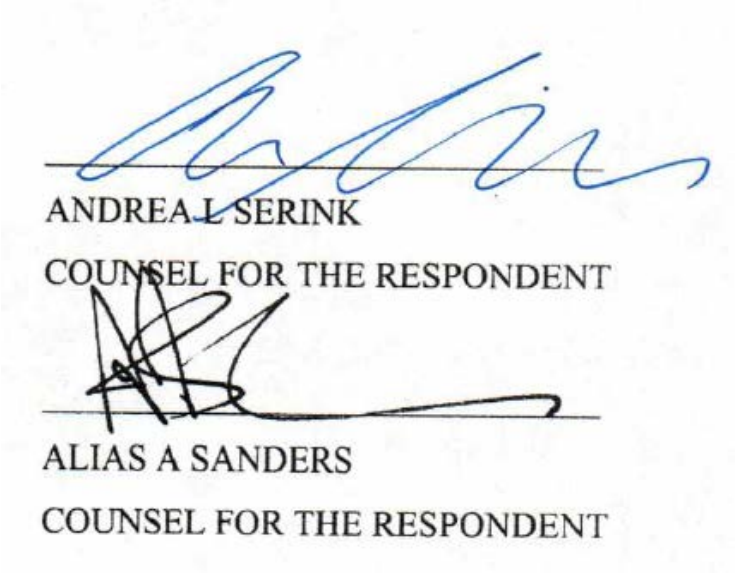
[141] For the same reason the Alberta Court of Appeal reversed a jury verdict in *R v Effert*, 2011 ABCA 134 , 2011 CarswellAlta 670 at paras. 25, 27 [ABA Tab 6]

PART V – ORDER SOUGHT

89. The Respondent requests that the appeal be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

DATED at Calgary, Alberta this 4th day of January, 2016



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PART VI – TABLE OF AUTHORITIES

	2003)	
	The Honourable Madam Justice B.M McLachlin, *"Crime and Women – Feminine Equality and the Criminal Law"* 25 UBC Law Rev 1 1991 [ABA Tab 19]	/

PART VII – STATUTORY PROVISIONS

Criminal Code, RSC 1985, c C-46 ss. 2("mental disorder"), 16, 233, 234, 237, 663, 676(1)

2. "mental disorder"

« troubles mentaux »

"mental disorder" means a disease of the mind

Defence of mental disorder

16. (1) No person is criminally responsible for an act committed or an omission made while suffering from a mental disorder that rendered the person incapable of appreciating the nature and quality of the act or omission or of knowing that it was wrong.

Presumption

(2) Every person is presumed not to suffer from a mental disorder so as to be exempt from criminal responsibility by virtue of subsection (1), until the contrary is proved on the balance of probabilities.

Burden of proof

(3) The burden of proof that an accused was suffering from a mental disorder so as to be exempt from criminal responsibility is on the party that raises the issue.

Infanticide

233. A female person commits infanticide when by a wilful act or omission she causes the death of her newly-born child, if at the time of the act or omission she is not fully recovered from the effects of giving birth to the child and by reason thereof or of the effect of lactation consequent on the birth of the child her mind is then disturbed.

2. « troubles mentaux »

"mental disorder"

« troubles mentaux » Toute maladie mentale.

Troubles mentaux

16. (1) La responsabilité criminelle d'une personne n'est pas engagée à l'égard d'un acte ou d'une omission de sa part survenu alors qu'elle était atteinte de troubles mentaux qui la rendaient incapable de juger de la nature et de la qualité de l'acte ou de l'omission, ou de savoir que l'acte ou l'omission était mauvais.

Présomption

(2) Chacun est présumé ne pas avoir été atteint de troubles mentaux de nature à ne pas engager sa responsabilité criminelle sous le régime du paragraphe (1); cette présomption peut toutefois être renversée, la preuve des troubles mentaux se faisant par prépondérance des probabilités.

Charge de la preuve

(3) La partie qui entend démontrer que l'accusé était affecté de troubles mentaux de nature à ne pas engager sa responsabilité criminelle a la charge de le prouver.

Infanticide

233. Une personne du sexe féminin commet un infanticide lorsque, par un acte ou une omission volontaire, elle cause la mort de son enfant nouveau-né, si au moment de l'acte ou de l'omission elle n'est pas complètement remise d'avoir donné naissance à l'enfant et si, de ce fait ou par suite de la lactation consécutive à la naissance de l'enfant, son esprit est alors déséquilibré.

Manslaughter

234. Culpable homicide that is not murder or infanticide is manslaughter.

Punishment for infanticide

237. Every female person who commits infanticide is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.

No acquittal unless act or omission not wilful

663. Where a female person is charged with infanticide and the evidence establishes that she caused the death of her child but does not establish that, at the time of the act or omission by which she caused the death of the child,

(*a*) she was not fully recovered from the effects of giving birth to the child or from the effect of lactation consequent on the birth of the child, and

(*b*) the balance of her mind was, at that time, disturbed by reason of the effect of giving birth to the child or of the effect of lactation consequent on the birth of the child,

she may be convicted unless the evidence establishes that the act or omission was not wilful.

Right of Attorney General to appeal

676. (1) The Attorney General or counsel instructed by him for the purpose may appeal to the court of appeal

(*a*) against a judgment or verdict of acquittal or a verdict of not criminally responsible on account of mental disorder of a trial court in proceedings by indictment on any ground of appeal that involves a question of law alone;

(*b*) against an order of a superior court of criminal jurisdiction that quashes an indictment or in any manner refuses or fails

Homicide involontaire coupable

234. L'homicide coupable qui n'est pas un meurtre ni un infanticide constitue un homicide involontaire coupable.

Punition de l'infanticide

237. Toute personne du sexe féminin qui commet un infanticide est coupable d'un acte criminel et passible d'un emprisonnement maximal de cinq ans.

Aucun acquittement à moins que l'acte ou omission n'ait été involontaire

663. Lorsqu'une personne du sexe féminin est accusée d'infanticide et que la preuve démontre qu'elle a causé la mort de son enfant, mais n'établit pas que, au moment de l'acte ou omission par quoi elle a causé la mort de l'enfant :

a) elle ne s'était pas complètement remise d'avoir donné naissance à l'enfant ou de la lactation consécutive à la naissance de l'enfant;

b) son esprit était alors déséquilibré par suite de la naissance de l'enfant ou de la lactation consécutive à la naissance de l'enfant,

elle peut être déclarée coupable, à moins que la preuve n'établisse que l'acte ou omission n'était pas volontaire.

Le procureur général peut interjeter appel

676. (1) Le procureur général ou un avocat ayant reçu de lui des instructions à cette fin peut introduire un recours devant la cour d'appel :

a) contre un jugement ou verdict d'acquittement ou un verdict de non-responsabilité criminelle pour cause de troubles mentaux prononcé par un tribunal de première instance à l'égard de procédures sur acte d'accusation pour tout motif d'appel qui comporte une question de droit seulement;

to exercise jurisdiction on an indictment;

(*c*) against an order of a trial court that stays proceedings on an indictment or quashes an indictment; or

(*d*) with leave of the court of appeal or a judge thereof, against the sentence passed by a trial court in proceedings by indictment, unless that sentence is one fixed by law.

b) contre une ordonnance d'une cour supérieure de juridiction criminelle qui annule un acte d'accusation ou refuse ou omet d'exercer sa compétence à l'égard d'un acte d'accusation;

c) contre une ordonnance d'un tribunal de première instance qui arrête les procédures sur un acte d'accusation ou annule un acte d'accusation;

d) avec l'autorisation de la cour d'appel ou de l'un de ses juges, contre la peine prononcée par un tribunal de première instance à l'égard de procédures par acte d'accusation, à moins que cette peine ne soit de celles que fixe la loi.