

MANCHESTER

Fetal homicide law under scrutiny

Attorney general eyes 'born alive' principle

By [Margot Sanger-katz](#) / [Monitor staff](#)

Attorney General Kelly Ayotte is recommending a review of fetal homicide laws across the country in the wake of a New Hampshire Supreme Court decision that found a 7-month-old fetus killed in a reckless car crash could not be a homicide victim, because the fetus was not "born alive."

The decision, which came down Wednesday, vacated the negligent homicide and manslaughter convictions in the death of the fetus for Joshua Lamy, a Hooksett man who crashed his car into a Manchester taxi while driving drunk and traveling at speeds over 100 mph down a city street in February 2006. A passenger in the taxi later died from her injuries, and the taxi driver, Brianna Emmons, suffered a broken pelvis and injuries to her fetus that resulted in the fetus's death.

Emmons was rushed to Elliot Hospital after the accident, and the fetus, named Dominick Emmons, was delivered by Caesarean section. According to doctors' notes cited in the court's ruling, the fetus showed no spontaneous heartbeat, breathing or movement but was kept alive on life support for two weeks.

Among many other crimes, Lamy was found guilty of negligent homicide and manslaughter for the death of Dominick Emmons. The court found that, under principles in New Hampshire law that date back to the 14th century, the charge did not apply.

"At the very least, an expelled or extracted fetus must show some spontaneous sign of life before it is considered another and its death can result in criminal prosecution," Chief Justice John Broderick wrote in the court's opinion. Two other justices concurred with his opinion.

The state had argued that the fetus had been born alive, and it cited as evidence the doctors' judgments to treat the fetus and issue a birth certificate.

The court's decision signaled the justices' discomfort with the case's outcome.

"Should the legislature find the result in this case as unfortunate as we do, it should follow the lead of many other states and revisit the homicide laws as they pertain to a fetus," the decision said.

Yesterday, Ayotte said her office would begin a review of those other states' laws before determining whether any might serve as a useful model for New Hampshire.

"We're going to look at some legislative models of what other states have done in this area, and also I'm going to be consulting with the county attorneys," Ayotte said. "Then we'll decide whether we should talk to some legislators about sponsoring legislation."

According to the National Conference of State Legislatures, 36 states have fetal homicide laws on the books, though the details vary. Some states define a fetus as an unborn child at a certain age of development or at the time the fetus is "quick" or "viable." Others say a homicide charge could be triggered by the death of a fetus beginning at the time of fertilization. Several make specific exceptions for abortion providers.

Opponents of fetal homicide laws have argued the statutes could undermine abortion rights.

New Hampshire's governing law dates back to English common law, when many infants died in childbirth. According to the court, the "born alive" doctrine was designed to distinguish infanticide cases from the more common natural deaths.

The New Hampshire Legislature has revised its homicide statutes several times in recent years but left the "born alive" principle untouched. According to the court, 18 states still use "born alive" standards in homicide cases.

Attorney Ted Lothstein, who argued the case for Lamy, said he thought the case presented some difficult questions.

"The outcome, I think, is correct under the law, but that doesn't mean it's correct ethically or morally or public-policy-wise," he said.

However, Lothstein urged legislators to consider the issue carefully and avoid a rushed reaction. The circumstances of the case, he said, are extremely rare.

"I'm just worried that they're going to throw something together thoughtlessly," he said.

Chuck Temple, a criminal law professor at Franklin Pierce Law Center, said it's rare for the court to make a legislative suggestion, as it did in this case. But he said the practice is not unheard of.

"Our statute says born alive. This is what born alive means. Other states have addressed this issue by no longer referring to born alive but referring to a fetus," he said. "They're giving a very clear sign in that opinion that someone needs to get the Legislature to look at this and fix it."

Under the court's ruling, Lamy will get a new sentencing hearing on his remaining convictions, three counts of aggravated driving while impaired, two counts of second-degree assault, and additional counts of manslaughter and negligent homicide.

Lamy was originally sentenced to 40½ to 81 years. The remanded homicide conviction carries a 15- to 30-year sentence, though lawyers said they could not predict what sentence Lamy will receive.

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