So, you think you know about *Roe v Wade*

By Geoffrey Watson SC

Since 1973 the decision in *Roe v Wade* has been exciting passions, dividing families, and even inciting violence. And at the time of writing – nearly 50 years later – it looks like the *Roe v Wade* story is just about to become a whole lot more ugly.

In this article I want to explore some of the controversies surrounding *Roe v Wade*, but matters with which I do not propose to deal are any rights and wrongs, or religious and moral questions which surround abortion. Instead, I am just looking at the lawyer things – the way the litigation was conducted, the legal basis for the decision, and some quite remarkable by-products of *Roe v Wade*. Given that it is far-and-away the most famous decision ever delivered by the US Supreme Court, you would think that it might be, by now, well-understood. It is not.

The background to the litigation

As late as the 1960s the issue of abortion was thought to be an issue controlled by the criminal law, and one solely for the American State legislatures. Although questions of pre-natal termination had become politically hot, and although American public opinion had begun to turn, political movements designed to alter the mind of the State legislators had failed dismally. As at 1971 only four States had laws permitting pre-natal termination, and 33 still had a blanket prohibition.

Activists could see political agitation was having no effect, so they turned to the courts. The civil rights movement had shown that the judges were more favourable to new ideas than the legislators.

By 1971 a number of issues, including the constitutional validity of anti-abortion laws, had been considered by intermediate appellate courts with mixed results. Try as they might, those behind the two movements – pro-choice and pro-life – could not get the matter into the US Supreme Court. Indeed, there had been several cases brought to the Supreme Court where issues similar to those ultimately considered in *Roe v Wade* were raised, but the Supreme Court masterfully ducked the larger questions.

But it was not going to go away forever. As the Supreme Court justice, Harry Blackmun (who was to come to write the principal

judgment in *Roe v Wade*) noted in his 1971 diary – *'Here we go in the abortion field'*.

Of course, to get the *Roe v Wade* into court required a litigant, and the story behind that starts out weirdly, and ends up a little disturbing.

Who was Jane Roe?

The name 'Jane Roe' is a generic legal pseudonym, commonly used in America, designed to protect the reputation and privacy of the person involved. In ordinary circumstances it would be regarded as a serious offence to reveal the true identity of a 'Jane Roe'.

But that is not a problem here because this 'Jane Roe' outed herself as Norma McCorvey.

Norma McCorvey was born in 1947 in Texas and raised in very difficult circumstances. You can get a grasp of how bad it was when she later claimed that her happiest childhood memories are from a time when she was confined in a State institution. She was unmarried when she fell pregnant for a third time in 1969, and sought an abortion. Abortion was prohibited in Texas so she claimed she had been gang raped by black men. McCorvey was lying and she was caught out in her lie, and her chance of a legal abortion was turned down. McCorvey then tried but failed to obtain an illegal abortion. It was in those circumstances that she turned to lawyers.

Who were Jane Roe's lawyers?

McCorvey was very lucky when it came to her lawyers. She was sent off to see two inexperienced recent graduates of the University of Texas – Sarah Weddington and Linda Coffee. Although fully qualified, neither had been able to secure employment in male-dominated private legal practice in Dallas. Both were interested in women's rights and both were pro-choice. They became enthusiastically involved in McCorvey's case, and they took it all the way through.

It is worth noting that this was a remarkable achievement by these women – when they met their client, Coffee was aged 28 and Weddington was only 25 years old.

***Roe v Wade* makes its way into the Supreme Court**

The proceedings had to work their way through the usual channels[1]. In 1970 Weddington and Coffee commenced proceedings in a federal court seeking two forms of relief. One was a declaration that the Texas law prohibiting abortion was unconstitutional and invalid. The other was a strange one – it was an injunction to prevent the law from being enforced. A unanimous federal District Court declared the law unconstitutional, but declined to grant the injunction.

So it is yet another oddity of this case that, even though Jane Roe had succeeded in the lower court, she was still the appellant in the US Supreme Court because she was seeking a reversal of the order refusing the injunction. At first it might seem that by taking this unusual step, McCorvey and those backing her were placing at risk their victory in the lower court. With hindsight, it was a clever gambit, played to get the case into the Supreme Court.

Weddington and Coffee filed the usual process seeking an appeal to the Supreme Court, but between the application being granted and the hearing there was a dramatic turn of events. Two judges, Hugo Black and John Harlan, took ill and suddenly resigned – reducing the number of judges to seven. In those days it was a lengthy process to

select, nominate, confirm and appoint new US Supreme Court judges (compare the unseemly haste in relation to filling the most recent vacancy).

The argument

On 13 December 1971 Sarah Weddington presented the arguments for Jane Roe. As best I can make of them, her arguments simply scattered a number of different ideas in front of the judges, presumably hoping one or some might prove attractive.

The oral argument on behalf of Texas got off to the worst imaginable start. I have always thought there was only a fuzzy line between Southern charm and Southern smarm, but counsel for Texas, Jay Floyd, hit a low point when he commenced his argument this way:

> *Mr Chief Justice and may it please the Court. It's an old joke, but when a man argues against two beautiful ladies like this, they are going to have the last word.*

Well, it may have been an old joke, but no-one laughed. Floyd's opener has since been consistently rated as America's worst ever court room joke – quite an achievement. You can actually listen to an audio recording of this argument, and when it is delivered with an oily Texas accent, it even sounds worse than it reads. Apparently Chief Justice Burger was red-faced with anger.

Judgment is reserved

Judgment was reserved and, in the way the Americans work, the seven judges went into conference. The judges tentatively agreed that Jane Roe should succeed, but their reasons were different and even incompatible.

Under the American protocol the most senior judge in the majority allocates the writing of the principal judgment to a particular judge. Burger gave the job to the most junior judge on the Bench – his old friend Harry Blackmun. There is little doubt that there was a political edge to this: Burger and Blackmun had been close for many years, and Burger would have been confident that any reasons for decision by Blackmun would be expressed narrowly and conservatively.

Notes kept by Blackmun during this time demonstrate that he became quite torn as to the outcome. Apparently not satisfied with the arguments presented by counsel, Blackmun took the unusual step of asking each of his three daughters what views they had on the matter. The fact that they had strong pro-choice views did not help him. It is quite apparent that Blackmun did not want the responsibility to decide the matter and was looking for a way out – so he claimed the matter should go back to Court to be resolved by a full-strength Supreme Court Bench. Enough judges agreed with him, and the matter was listed for re-argument.

Re-argument in the Supreme Court

The matter was listed to be reargued on 11 October 1972. By that time two new judges had been appointed – Lewis Powell Jr and William Rehnquist. Sarah Weddington again presented the argument for Jane Roe, but someone on the Texas side was smart enough to replace Jay Floyd with new counsel.

The matter was reserved again. At the judges' conference seven of the nine judges tentatively agreed that Jane Roe should succeed. Burger again allocated the writing of the judgment to Blackmun.

We have access to Blackmun's records of the research in which he engaged for the purpose of producing the reasons for his decision. On any view they are unorthodox; on the better view they are non-judicial. Before his judicial appointment Blackmun had been legal counsel to the world-leading hospital, the Mayo Clinic. During the Supreme Court vacation he sought and received permission to use the Mayo Clinic medical library as a place of research to compose his judgment. This probably explains why a proliferation of medical historical matters, utterly irrelevant to the actual issue, are littered throughout the judgment. None of this material was in evidence, but plenty of it is in the judgment.

In any event, Blackmun produced draft reasons for a decision and circulated those among the other judges. Those reasons attracted seven-to-two majority support.

The decision

Judgment was delivered on 22 January 1973. We all know that Jane Roe won, but few people know why she won, and those who do know why Jane Roe won have puzzled over the reasoning ever since – irrespective of their views upon pre-natal termination.

Looking at the matter now there are many features about the case which make you feel uncomfortable. Discussing pre-natal termination as a crime is disconcerting. So is the idea that pre-natal termination is a constitutional issue, rather than a personal issue. The idea that the matter was being decided by nine males is even more disconcerting. Perhaps the super abundance of the Y-chromosome is why the judgment got off to a miserable start when, in a critical introductory paragraph, the Supreme Court said they would undertake the exercise by examining what *'history reveals about* ***man's*** *attitudes toward the abortion procedure over the centuries'.* Sure, that kind of terminology was common back then, but it makes you wince reading it today.

Obviously, the issue ultimately at stake was one of constitutional interpretation, and in substance the issue was whether the American Constitution made abortion a federal issue, to the exclusion of the States. This is hardly a novel question for the apex court in a federal system. But it makes it hard to understand why slabs of the judgment are devoted to recounting matters of medical history, even ancient medical history. While the views of Hippocrates and many others are no doubt interesting, they shed little light upon American Constitutional interpretation. One gets the impression that Justice Blackmun had carried out a great deal of personal research which he did not wish to waste, even though it was irrelevant to the issue at hand.

About halfway through the judgment the Constitution begins to get a mention, and it is a surprisingly brief mention. The basis for the decision was ruled to be an application of the Fourteenth Amendment, which prohibits a State from depriving any person of life, liberty, or property without due process of law.

So how did that apply here? Not as you might think. The Court decided that, for the purposes of the Fourteenth Amendment, Jane Roe was the relevant '*person*' and her '*property*' which was protected was her '*right to marital privacy*' – which is odd, given that she was not married.

There are many aspects of the reasoning which are curious. One is the recognition of something called a '*right to marital privacy*'. That concept of '*marital privacy*' is marvellously ambiguous, because it is not an absolute right, rather the Court recognised that there are, in marriage, '*zones of privacy*'. And treating someone's '*zones of marital privacy*' as property is really stretching it – it makes you wonder whether you could buy or sell zones of marital privacy. And, in the end, the whole judgment seems to proceed from a quaint notion that all children are conceived in marriage.

The decision in *Roe v Wade* becomes even more strange when the ruling is stated: It is *constitutionally invalid* for a State to prevent abortion in the first trimester of pregnancy; but *constitutionally valid* for a State to impose '*some regulation*' during the second trimester; and *constitutionally valid* for States to prohibit abortion in the third trimester.

Of course, none of this reasoning had any textual or contextual basis. The US Constitution does not mention 'privacy', 'marital privacy', or 'zones' of anything. The rather shaky legal foundation for the marital privacy right came from an earlier case of *Griswold v Connecticut*[2] where a State had legislated to prohibit the sale of contraceptives. The US Supreme Court ruled that such legislation was invalid under the federal Constitution to the extent that it prohibited sales to married couples because of their 'right to privacy'. But it is not clear

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from where this right emerged. Among them, the judges in *Griswold* relied with varying degrees of emphasis upon each of the First, Third, Fourth, Fifth, Ninth and Fourteenth Amendments as the basis for this very obvious right. For example, the famous Fifth Amendment protecting against self-incrimination was cited by one judge to support a right to privacy because it would prevent '*the police to search the sacred precincts of marital bedrooms for tell-tale signs of the use of contraceptives*'.

The controversies

Where do you start with the controversies fired up by the decision in *Roe v Wade*? There have been too many.

The most immediate impact was upon Jane Roe or Norma McCorvey. Soon after the decision was delivered McCorvey identified herself, and soon after that her home was peppered with bullets. I will come back to McCorvey because her story takes another turn or two.

The most obvious impact of *Roe v Wade* was in dividing the pro-choice and pro-life groups – a division which turned very violent. It is the pro-life group which has been more violent. Over the last 50 years there have been dozens of murders and fire bombings all undertaken in the name of defending the 'right to life'.

There was also a massive dispute between legal scholars. Many scholars, including those supporting the result, sharply criticised the reasoning and methods applied by Blackmun and the Court. Along similar lines, criticisms were made that by entering the field at all, the US Supreme Court had politicised itself – and those critics have pointed out that this could have unfortunate consequences. Then there were also more traditional arguments suggesting that this type of interpretation of the Constitution involved a usurpation of States' rights.

It is fair to say that *Roe v Wade* is one of the most divisive opinions ever issued by a superior court.

What happened to Jane Roe?

Soon after Norma McCorvey recovered from the gunfire she made a startling statement: she had changed sides and no longer supported a right to abortion. McCorvey soon became a prominent anti-abortion spokesperson, aligning herself with several controversial pro-life organisations.

As part of this McCorvey converted to become a member of a conservative evangelical sect, Operation Save America (her baptism, in a swimming pool in a backyard in Dallas, was carried on national television). She was even arrested on several occasions for her anti-abortion protesting – once notably during the proceedings confirming Sonia Sotomayor's appointment to the Supreme Court.

But then McCorvey executed a double backflip. She was terminally ill, and gave an interview revealing that she had only ever taken up her anti-abortion stance because she was paid to do so. She said it was 'all an act'. Later investigations revealed that McCorvey had been paid several hundreds of thousands of dollars by pro-life groups during her years as an activist.

What has been the effect of *Roe v Wade*?

Well, one impact that *Roe v Wade* most certainly did not have was to provide any relief whatsoever to the victorious party, Norma McCorvey. Do the maths: McCorvey became pregnant in 1969 and the judgment was handed down in 1973. The child had been put up for adoption years before the decision was delivered.

One terrible and negative effect of *Roe v Wade* has been to increase the politicisation of the US Supreme Court. The way in which judges are now selected for the US Supreme Court has all the sophistication of the judicial politics of a banana republic. Hence the ugly rush to replace Justice Ruth Bader Ginsburg with a judge considered to be committed to reversing *Roe v Wade*.[3]

There has been suggested to be one upside to the decision in *Roe v Wade* – but it is a very dark and controversial upside.

In 2001 two professors of economics, Steven Levitt of Chicago and John Donohue of Yale, published a controversial study titled 'The Impact of Legalised Abortion on Crime'. They had set out to explain the reason for a massive and sudden decline in the American crime rate in 1992. After eliminating other factors, Levitt and Donohue's study demonstrated that males aged between 18 and 24 are the most likely to commit crimes, and there was strong statistical association between that and the declining crime rate occurring 19 years after *Roe v Wade*. The conclusion they drew was that the availability of abortion had reduced the number of unwanted children or children for whom proper care could not be provided, leading to fewer criminals and reduced crime. They were able to complement their analysis by an examination of the rates in reduction of crime in those States which had liberal abortion laws before *Roe v Wade*. Other studies (including studies from Australia) appear to support Levitt and Donohue's conclusions. There has, of course, been a great deal of controversy about this theory – but it is again difficult to separate the science from the moral positions taken by those offering the criticism.

What will happen next?

From here things are likely to turn ugly. The appointment of ultra-conservative pro-life judge Amy Coney Barrett tilts the playing field. Given the apparent view of at least four other judges (Thomas, Alito, Gorsuch and Kavanaugh, maybe Roberts) it would seem obvious that *Roe v Wade* is at peril. If *Roe v Wade* goes, individual States could resume imposing statutory controls over the availability of abortion.

But I think it probably goes further than that – even a lot further. The pro-lifers are certain to put another argument. The Fourteenth Amendment protects a *person* and the pro-lifers are certain to argue that a foetus is a *person* whose *life* cannot be taken away without due process. If that argument succeeds, the US Supreme Court will make abortion constitutionally illegal with America-wide effect. This could happen.

If it does happen it will stand in contrast with the usual American position – Americans seem not to mind killing each other. And if it does happen it would seem that America has become the only country in the world where its citizens lose their right to life at the moment they are born.

Further reading

The problem here that there is too much material. There are dozens of books of highly variable quality. There are made-for-tv movies, and several podcasts. I will mention only two books which I found especially interesting:

- Linda Greenhouse, *Becoming Justice Blackmun* (2005) – a high quality judicial biography.
- Ronald Dworkin, *Life's Dominion* (1993) – subtitled *An Argument about Abortion and Euthanasia* this is a typically far-reaching and thoughtful book, but not light reading. BN

ENDNOTES

1 The defendant, Henry Wade, was the long serving District Attorney for Dallas County and responded as a kind of Nominal Defendant. Wade had come to prominence following the assassination of John F Kennedy, and had prosecuted Jack Ruby for the murder of Lee Harvey Oswald.

2 *Griswold v Connecticut* 381 US 479 (1965) – the famous 'penumbras' and 'emanations' case.

3 Incidentally, there is a certain amount of irony in the fact that the death of RBG has become the vehicle for change, because RBG herself never liked the reasoning behind *Roe v Wade* – she thought the result was correct, but the legal support for the decision was better found in the 'equal protection' guarantee – a provision which RBG had deployed successfully in several of her sex discrimination cases.