TORT LAW REVIEW
VOL. 8
2000

PREGNANT WOMEN AND THE “BORN ALIVE” RULE IN CANADA

IAN R. KERR

In 1933 the Supreme Court of Canada became the first appellate court in the common law world to allow a child to succeed in a negligence suit against a third party for injuries caused before birth. Prior to its decision in *Montreal Tramways Co. v Leveille* [1933] SCR 456, "the great weight of judicial opinion in the common law courts denied] the right of a child when born to maintain an action for prenatal injuries" (at 460). Such injuries were not actionable because of a long-standing common law rule, still applicable today, which stipulates that legal personhood commences at birth. The existence of this common law rule precluded the possibility of recovery for injuries caused prenatally. Because the unborn child was not legally recognised as a person, it was not theoretically possible to assert that the careless actor owed a legal duty to the unborn child.

In its decision to allow the Leveille infant to recover, the Supreme Court recognised that failing to do so would have forced the child to go through life carrying the seal of another's fault and bearing a very heavy burden of infirmity. As Lamont J stated, "it is but natural justice that a child, if born alive and viable, should be allowed to maintain an action in the courts for injuries wrongfully committed upon its person while in the womb of its mother" (at 464). Consequently, the court held that when a child is born alive, it is permissible for the purposes of a negligence suit to pretend that the unborn child was already an independent legal person at the moment that the careless act was committed. This judicial artifice has since become known as the "born alive" rule. It has allowed courts to circumvent the common law rule that personhood begins at birth while avoiding altogether the difficult issues that arise as a result of the unique relationship between a pregnant woman and her foetus.

The theory of recovery underlying the "born alive" rule is premised on the idea of a contingent retrospective duty. That is, the contingent event of a child's birth is said to impose a retrospective duty of care on the tortfeasor, issuing back to the time when the alleged wrong was committed. As Lamont J put it in *Montreal Tramways*, "[t]he wrongful act of the Company produced its damage on the birth of the child and the right of action was then complete" (at 463) (emphasis added). The idea of a contingent retrospective duty was further contemplated in Canada some 40

years later in *Duval v. Seguin* [1972] 2 OR 686. According to Fraser J:

> "[I]t is not necessary ... to consider whether the unborn child was a person in law or at which stage she became a person. For negligence to be a tort there must be damages. While it was the foetus . . . who was injured, the damages sued for are the damages suffered by the plaintiff ... since birth and which she will continue to suffer as a result of the injury" (at 701, affirmed (1974) 1 OR (2d) 482).

A similar theory of recovery was articulated that very same year in Australia by the Supreme Court of Victoria. According to Winneke CJ, certain events constitute "a potential relationship capable of imposing a duty on the defendant in relation to the child if and when born. On birth the relationship crystallised and out of it arose a duty on the defendant in relation to the child" (see *Watt v Rama* [1972] VR 353 at 360).

Despite its conceptual shortcomings (see I R Kerr, "Pre-natal Fictions and Post-partum Actions" (1997) 20 Dal U 237), this theory of recovery has been judicially adopted by most common law jurisdictions where recovery is not governed by legislation. In the case of third party negligence, there is intuitive appeal to this position. As a number of litigants have pointed out, it is difficult to distinguish between the plight of a newborn child injured some time after birth and that of a child born with injuries sustained *en ventre sa mere*. One need only imagine a negligent motorist who injuries a pregnant woman, her two-year-old infant and her unborn child in a car crash. What possible justification could there be for allowing the mother and her two-year-old to recover but not the other child?

While the "born alive" rule may appear unproblematic vis-a-vis third party negligence, it becomes theoretically unruly in the case of a child who is suing his or her own mother for injuries caused prenatally. Though a court may be willing to pretend that an unborn child is an independent legal entity in the case of a negligent third party, it is less clear that it ought to do so in the case of a pregnant woman. Mother-child litigation in this context raises a most perplexing legal problem. Because the existence of mother and foetus are inextricably bound at the time of the alleged negligent act, the pedigree underlying the child's right to sue is less obvious. If, from the point of view of the law, an unborn child is not a person and therefore is not the subject of rights and duties, it must follow that a pregnant woman and her unborn child are one.

Consequently, a pregnant woman cannot owe a duty of care to her foetus any more than she can owe a duty of care to herself. Thus the only possible rights that the child could be said to have prior to birth are those which can be derived from the rights of the pregnant woman. Tort theory aside, maternal prenatal negligence cases are further plagued by moral complexity. The imposition of a duty of care upon pregnant women will

interfere with their bodily integrity, privacy and autonomy rights in a way that it would not interfere with other persons who are not pregnant.

Sixty-six years after first recognising the existence of a duty of care owed by third parties to the unborn, the Supreme Court of Canada was forced to address the novel question of whether a pregnant woman owes a duty of care to her unborn child in *Dobson (Litigation Guardian of) v Dobson* [1999] 2 SCR 753; (1999) 174 DLR (4th) 1. In answer to the question as to whether or not a mother could be liable in tort for a prenatal negligent act which allegedly injured the foetus in her womb, the Supreme Court held that pregnant women are immune from maternal tort liability. The decision was not founded on established tort principles. Nor did it create any new ones. The basis for the Supreme Court of Canada decision rested solely on public policy considerations.

Like many of the cases in which children have sued for injuries caused prenatally, the Dobson case stemmed from a car crash. Ryan Dobson survived an emergency caesarean section that took place after his pregnant mother's car slid across patches of drifting snow into a pickup truck. On the night of the crash, his mother was following behind her husband in a convoy of cars, each attempting to negotiate a windswept highway. After hitting a patch of slush, her husband's car drifted into the ditch while her own car veered into oncoming traffic. Ryan now suffers from cerebral palsy. He is unable to speak, walks with difficulty and will be dependent on the help of others for the rest of his life. The action was commenced against Cynthia Dobson by her father, Gerald Price, acting as Ryan's litigation guardian. From Mr. Price's perspective, the sole motivation for the lawsuit was to receive insurance money for Ryan's future. Others, such as the Catholic Group for Health, Life and Justice and the Canadian Abortion Rights Action League, saw things differently.
Realising the potential impact of this appeal on the debate in Canada about foetal protection and autonomy of women, these public interest groups applied for and received intervener status.

Seven judges of the nine-member panel formed a majority, overturning both of the lower court decisions. First, the majority rejected the position of Miller J, who attempted to resolve the issue at first instance by way of the following syllogism:

> "[I]f an action can be sustained by a child against a parent, and if an action can be sustained against a stranger for injuries suffered by a child before birth, then it seems to me reasonable progression to allow an action by a child against his mother for prenatal injuries caused by her negligence" (see (1997) 186 NBR (2d) 81 at 88).

In short, the majority went to great lengths to examine the missing link in

this deductive chain namely, the myriad of factors which must be taken into account when the parent in question happens to be a pregnant woman. Writing for the majority, Cory J (Lamer CJ, L'Heureux-Dube, Gonthier, McLachlin, lacobucci and Binnie JJ concurring) held:

> "[T]he unique and special relationship between mother-to-be and her foetus determines the outcome. There is no other relationship in the realm of human existence which can serve as a basis for comparison. It is for this reason that there can be no analogy between a child's action for prenatal negligence brought against some third-party tortfeasor, on the one hand, and against his or her mother, on the other. The inseparable unity between expectant woman and her foetus distinguishes the situation of the mother-to-be from that of a negligent third party. The biological reality is that a pregnant woman and her foetus are bonded in a union" (at 769; 12).

Cory J recognised that a woman's entire existence during pregnancy is connected to a foetus that she might potentially harm. Accordingly, "if a mother were to be held liable for prenatal negligence, this could render ... the course of her daily life as a pregnant woman subject to the scrutiny of the courts" (at 77 l; 13).

Secondly, the majority also rejected the position of Hoyt CJNB, who attempted to resolve the issue in the New Brunswick Court of Appeal by supplementing the syllogism of Miller J with a theoretical distinction aimed at making his so-called "reasonable progression" more reasonable. The strategy employed by Hoyt CJNB was to restrict the potential liability of pregnant women by adopting Fleming's distinction between duties owed to the general public and duties "peculiar to parenthood" (see J G Fleming, The Law of Torts (9th ed, 1998), p 184). Following Fleming, Hoyt CJNB held that the duty owed by the defendant mother to her unborn child can be derived from the general duty that she owes to the public to drive carefully.

He was satisfied that maternal liability could be sufficiently contained by limiting a child's right of action to instances where a general duty was owed and by not allowing the child to sue where the activity in question (for example, drinking or smoking) was a lifestyle choice peculiar to parenthood. The majority of the Supreme Court of Canada disagreed. According to Cory J:

> "[A] rule of tort law attempting to distinguish between acts of a mother-to-be involving privacy interests and those constituting common torts would of necessity result in arbitrary line-drawing and inconsistent verdicts. Simply to state that a`general duty of care' will not apply to `lifestyle choices' is to leave open the possibility that many actions taken by pregnant women will not be considered lifestyle choices for the purposes of litigation" (at 789; 27).

On these two grounds, the majority in Dobson adopted the perspective that "the best course of action is to allow the duty of a mother to her foetus to remain a moral obligation which, for the vast majority of women, is already freely recognised and respected without compulsion by law" (see *Bonte v Bonte* 616 A 2d 464 (1992) at 468 per Batchelder J (dissenting)).

Writing in dissent, Major J (Bastarache J concurring) was careful to frame the issue in terms of the relationship between the rights of a pregnant woman and her born-alive child. Distinguishing Dobson from cases where the issue concerned the relationship between a pregnant woman and her child in utero, Major J pointed out that "a one-sided emphasis on either side of this relationship necessarily misses the subject matter it is attempting to analyse" (at 813; 43). Thus, for Major J, "in this appeal the pregnant woman's perspective is not the only legally recognised perspective. It competes with the recognised perspective of her born-alive child" (at 808; 40).

By shifting the focus to the child in *rerum natura* (rather than the child *en ventre sa mere*), Major J would have adopted the "born alive" rule from *Montreal Tramways*. He would have done so despite the fact that this was not a case of third party negligence. As he put it, "[b]irth transforms the physical injury sustained by the foetus into an actionable harm. Not the injury to the foetus but the injury to the child's mental and physical functioning is actionable" (at 805; 38). Framing the issue in this manner, Major J recognised that the ability of the child to sue in this case depends on its legal existence. But, in his view, "the physical injury sustained in utero is irrelevant to the question of standing. It has relevance only as a matter of causation" (at 806; 39). On this basis, Major J concluded that an application of the law to the facts in *Dobson* would unquestionably lead to the conclusion that the appellant mother while driving her car owed a legal duty of care to her born-alive child, provided that she knew or ought to have known that she was pregnant at the time of the accident.

Major J offered no explanation as to how birth transforms the physical injury sustained by the foetus into an actionable harm. He failed to provide any account of how the legal duty owed by a woman to her child, once born, can legitimately be applied ex post facto to events which took place prior to birth when it was admitted that no duty was owed to the child at the time those events took place.

For these reasons, the tort analysis offered by Major J in his dissenting opinion is clearly unsatisfactory. Still, it may be said that his Lordship made a better attempt to resolve the duty issue than did the majority of the Supreme Court. Astonishingly, the majority decision avoided the question of whether a legal duty of care is ever owed by a pregnant woman to her

foetus and, if so, whether there was a sufficient proximity between the parties in Dobson to give rise to such a duty. It is submitted that the manner in which this issue was circumvented by the majority contributes to an extremely controversial line of judicial reasoning.

The court began the duty inquiry in the usual manner for Canadian courts, reciting the two-step test articulated in *Anns v Merton London Borough Council* [1978] AC 728, adopted in Canada in *City of Kamloops v Nielsen* [1984] 2 SCR 2; (1984) 10 DLR (4th) 641. Although this approach has been subsequently rejected in England and Australia, it has continued to enjoy judicial application in Canada. Simply put, the approach (as interpreted by the Supreme Court of Canada) requires that two questions be asked: "(1) is there a duty relationship sufficient to support recovery? and, (2) is the extension desirable from a practical point of view, i.e., does it serve useful purposes or, on the other hand, open floodgates to unlimited liability'?" (see *Canadian National Railway Co Ltd v Norsk Pacific Steamship Co Ltd* [1992] 1 SCR 1021 at 1145; (1992) 91 DLR (4th) 289 at 364 per McLachlin J).

Although Cory J recited the two-step test, his subsequent analysis performed a different kind of two-step, avoiding altogether the first stage of the duty inquiry. Instead of fully addressing whether a duty of care was owed to Ryan Dobson by his mother prior to his birth or thereafter, the majority chassed into an examination of public policy considerations writ large. Perhaps this should come as no surprise. As Feldthusen has observed, "[o]ne problem with the Anns approach is that it creates a presumption of duty" (see B P Feldthusen, "Liability for Pure Economic Loss: Yes, But Why'?" (1999) 28 UWAL Rev 84 at 88). As such, Canadian courts tend to be less interested in the question of whether and why a legal relationship can be said to exist than they are with the question of whether a duty stemming from said relationship ought to be negatived as a result of practical concerns about potentially indeterminate liability. The reasoning in *Dobson* illustrates Feldthusen's point remarkably well. Cory J went so far as to say:

> "[I]t is appropriate in the present case to assume, without deciding, that a pregnant woman and her foetus can be treated as separate legal entities. Based on this assumption, a pregnant woman and her foetus are within the closest possible physical proximity that two `legal persons' could be . . . Thus, on the basis of the assumption of separate legal identities, it is possible to proceed to the more relevant analysis for the purposes of the present appeal, the second stage of the Kamloops test" (at 767; 11) (emphasis added).

Cory J does not explain why he thinks that the proximity/neighbourhood question is less relevant to the duty analysis than the public policy question. This is worrisome. Without a proper investigation of the nature

of the relationship between a woman and her foetus, how is it possible to engage in a meaningful examination of the relevant policy considerations'? If one simply limits the inquiry to a practical determination of whether the recognition of a novel duty will open the floodgates, one runs the risk of treating the potential recipients of that duty as a mere means to an end. One also runs the risk of being perceived as making decisions based on personal ideology rather than on the basis of established legal principle. Although the Supreme Court of Canada is to be commended for its commitment to protecting the autonomy of women, its decision to adopt public policy considerations to the exclusion of a principled approach that would explain whether or when the relationship between a pregnant woman and her foetus gives rise to a legal duty of care ultimately sidesteps the issue in Dobson in a manner similar to the old "born alive" rule which it was intended to replace.

IAN R KERR

Assistant Professor of Law University of Western Ontario