
Maternal liability for prenatal injury: The preferable approach for Australian law?

Kate Wellington*

The question of whether a pregnant woman owes a universal duty of care to her unborn child is as yet unresolved in Australian law. The issue invokes complex policy considerations which have been tackled differently across various jurisdictions. In some jurisdictions, such as Canada, the courts have taken relevant policy factors into account to afford mothers a general immunity from liability in this area. In other jurisdictions, including various States in the United States, the courts have upheld actions brought by infant plaintiffs injured while en ventre sa mere. This article examines the current law across a number of jurisdictions, focusing in particular on several recent Canadian cases, in order to propose the preferable approach to be adopted in Australia. That approach, it is contended, is for the courts to uphold any action falling within the well-established principles of tort law and, if public opinion is contrary to the resulting position, for Parliament to legislate accordingly.

OVERVIEW

When a child attempts to sue its mother for prenatal injuries, extensive and complex policy considerations arise. Imposing civil liability on mothers for injury to an unborn child arguably infringes upon the autonomy of pregnant women and may strain familial relationships. It is therefore perhaps not surprising that over the past two decades we have seen a divergence in the treatment of maternal liability for prenatal injuries across different jurisdictions, as their judiciaries grapple with the issues of law and policy in the area.

In Australia, the question of whether a universal duty of care is imposed on a mother to her unborn child is as yet unsettled. In Canada, where the courts are required to take policy factors into account in determining whether a duty of care exists, the Supreme Court has afforded mothers immunity from liability in negligence to their unborn children. In the United Kingdom, a similar result has been achieved through legislation. The question remains: what is the preferable approach in Australia?

This article briefly considers the current approach in Australia, Canada and the United Kingdom and contends that, under Australian law, negligent acts of a pregnant woman causing injury to her child en ventre sa mere fall squarely within the scope of well-established principles of tort law. Thus, if a claim for prenatal injury satisfies, on the facts, the elements of a cause of action in negligence (or other claim for breach of duty), the injured child should be compensated accordingly.

There remains, then, the question of whether the courts should take into account the policy factors militating against the imposition of a duty to come to a different result than that generated by the application of established tort principles. Recent cases in Canada have begun to evidence the implications of the Supreme Court's decision to render mothers immune from liability to their unborn children. Perhaps of most importance is the emerging risk that affording immunity to the mother will result in a denial of compensation to an injured child not only from its mother but also from third parties (and on a practical level, from those third parties' insurers).

These consequences of the Canadian position, which were arguably unintended by the Supreme Court, suggest that, in Australia, the preferable approach is for the judiciary to uphold a bona fide claim of a child injured en ventre sa mere under traditional tort law principles. If the policy

* The author practises at Linklaters LLP, London; however, the views expressed herein are hers alone and are not attributable to that institution. The author thanks Professor Peter Handford for his valuable comments on this article.



considerations that have caused the Canadian courts and the United Kingdom legislature to depart from this position are such as to justify granting pregnant mothers immunity from liability, then this should be reflected in statute, enacted to take into account legitimate social concerns.

THE CURRENT LAW

Australia

It is now clearly established in Australian law that a person is liable for injuries they cause to an unborn child; a fetus has legal rights that materialise when the child is born alive.¹ Further, Australian defendants are liable for tortious behaviour causing injury to members of their family, as intra-familial immunity from tort liability does not exist in Australia.² It seems to be a logical extension of these principles that a mother can be liable for injuries to her unborn child caused by her own prenatal negligence.³ While this approach has never been adopted by the Australian courts, it has never been expressly rejected either.

The New South Wales Court of Appeal in *Lynch v Lynch* (1991) 25 NSWLR 411 considered a situation where negligent driving by a mother caused her child to be born with cerebral palsy. Although policy considerations concerning the mother's right to privacy and autonomy were raised by the defendant and considered by the court, the court found that the question before it was narrow, and confined to whether a mother could be liable for injuries to her unborn child caused by her negligent driving (at 415). In deciding that she could be liable, the court noted that people injured in motor vehicle accidents deserve compensation, and that a mother will always be insured in these situations. Whether a child could sue its mother for prenatal injury in circumstances other than negligent driving was left open.⁴ The same conclusion was reached by the Queensland Court of Appeal in *Bowditch v McEwan* [2003] 2 Qd R 615 (*Bowditch*), where it was found that a mother owes a legally enforceable duty of care to her unborn child that will be breached by negligent driving.

Canada

The decision of the Supreme Court of Canada in *Dobson (Litigation Guardian of) v Dobson* [1999] 2 SCR 753 (*Dobson*) established that, while a fetus has certain rights against third parties that materialise upon birth, a child cannot sue its mother for injuries caused prenatally by the mother's negligence.⁵ *Dobson* involved a claim against a mother for injuries caused by her negligent driving. The majority found that negligent driving should be treated no differently to any other negligent act of the mother, and preferred the mother's right to autonomy and privacy during pregnancy over the child's right to claim damages for its injuries (at [19]ff). It should be noted that Canadian common law specifically requires the court to address policy considerations in determining the extent of any duty of care owed by a defendant.⁶

¹ *Watt v Rama* [1972] VR 353.

² *Hahn v Conley* (1971) 126 CLR 276 at 283.

³ This is a "reasonable progression" according to the trial judge in *Dobson v Dobson* (1997) 186 NBR (2d) 81 at 88.

⁴ For a discussion see Grubb A, "Australia: Pre-natal and Pre-conception Injury" (1993) 1 Med LR 119 at 123.

⁵ *Dobson (Litigation Guardian of) v Dobson* [1999] 2 SCR 753 (Lamer CJ, L'Heureux-Dubé, Gonthier, Cory, McLachlin, Iacobucci, Binnie JJ; Major and Bastarache JJ dissenting).

⁶ *City of Kamloops v Nielsen* [1984] 2 SCR 2 requires establishment of proximity, then consideration of policy that may limit the scope of duty. Traditionally in Australia, "proximity remain[ed] the touchstone and control of the categories of case in which negligence will admit a duty of care": *Sutherland Shire Council v Heyman* (1985) 157 CLR 424, declining to follow *Amis v Merton London Borough Council* [1978] AC 728 as adopted in *Kamloops*. While the High Court has moved away from this position in recent years (see eg *Sullivan v Moody* (2001) 207 CLR 562 at [42]-[53]), the ability to rely on policy considerations in determining whether a duty of care exists in Australia remains limited. The court in *Sullivan v Moody* (at [49]) noted that "[t]he question as to what is fair, and just and reasonable is capable of being misunderstood as an invitation to formulate policy rather than to search for principle. The concept of policy, in this context, is often ill-defined. There are policies at work in the law which can be identified and applied to novel problems, but the law of tort develops by reference to principles, which must be capable of general application, not discretionary decision-making in individual cases."



The United States

It is worth noting at this point, by way of comparison, the position in the United States. The courts of the various States have come to opposing conclusions regarding liability for prenatal injury. In *Stallman v Youngquist* 531 NE 2d 355 (Ill 1988) it was held that a mother was not liable for injuries caused to her unborn child by her negligent driving in order to preserve the mother's right to privacy and bodily integrity. Conversely, in other cases a child was found to have a cause of action against its mother for negligently failing to cross a road at a designated cross-walk, or for using a drug during pregnancy causing discolouration of the child's teeth.⁷ The United States position appears open to argument, depending on the State in which the action is brought.⁸

The United Kingdom

In the United Kingdom, Parliament has legislated on the issue. The *Congenital Disabilities (Civil Liability) Act 1976* (UK) grants mothers immunity from liability for negligence causing injury to their unborn child, except in the case of negligent driving.⁹ In recommending the implementation of this Act, the United Kingdom Law Commission considered policy factors similar to those considered by the courts in other jurisdictions.¹⁰

THE DUTY AND STANDARD THAT SHOULD BE IMPOSED

So how should an Australian court go about assessing the issue of whether a mother owes a general duty of care to her unborn child? In referring to a mother's negligent driving causing injury to her fetus, de Jersey CJ in *Bowditch* said (at 618): "This is a case which is readily susceptible of appropriate determination consistently with the fundamental principles established by the House of Lords ... in *Donoghue v Stevenson*". It is contended that not only negligent driving, but all negligent acts of a pregnant woman, fall within the requirements for negligence at common law.¹¹

There is clearly proximity between the mother and fetus; they are "neighbours" as required by Lord Atkin in *Donoghue v Stevenson* [1932] AC 562 at 580 in the sense that the actions of the mother may affect the child. In the United States case of *Stallman v Youngquist* Cunningham J noted (at 359) that "it is the mother's every waking and sleeping moment which, for better or worse, shapes the prenatal environment".¹² Further, the issues as to foreseeability of injury to the fetus that arise for third party defendants are absent in the context of a mother injuring her unborn child. The mother knows of the existence of the fetus and can foresee how her actions may injure it.¹³

Supposing that, contrary to the Canadian position, a duty of care is recognised, the next issue to be considered is breach of that duty. It was alleged in *Dobson* (at [52]ff) that determining the applicable standard of care is difficult, perhaps impossible. The suggested standard of care was that of the "reasonable pregnant woman", and the majority viewed this as inappropriate.¹⁴ In summary, they argued that standards of care in tort reflect generally accepted norms and cannot be adjusted for the situation of the individual mother who may not, eg, have access to good health care for financial

⁷ *Bonte v Bonte* 616 A 2d 464 (NH 1992) and *Grodin v Grodin* 301 NW 2d 869 (Mich 1980) respectively.

⁸ For further examples and discussion see Smolensky KR, "Creating Children with Disabilities: Parental Tort Liability for Preimplantation Genetic Interventions" (2008) 60 Hastings LJ 299 at 321ff.

⁹ *Congenital Disabilities (Civil Liability) Act 1976* (UK), s 2.

¹⁰ United Kingdom, Law Commission, *Injuries to Unborn Children, Report No 60* (1974) Cmnd 5709, pp 53-64.

¹¹ "There is perhaps more to be said under the present system [of case-by-case allocation of liability based on fault] for maternal liability than against it": Cane PF, "Injuries to Unborn Children" (1977) 51 ALJ 704 at 720.

¹² Arguing against the imposition of a duty of care. See similar comments in *Chenault v Huie* 989 SW 2d 474 at 475-476 (Tex 1999) to the effect that there is a unique symbiotic relationship between mother and child.

¹³ If she does not know she is pregnant, injury may not be foreseeable and normal principles of tort law would apply to exclude liability. The situation is still susceptible to being governed by usual principles.

¹⁴ For a more detailed discussion of the different standards of care that could be adopted, see Foley T, "Dobson v Dobson: Tort Liability for Expectant Mothers?" (1998) 61 Sask L Rev 177 at 189-192.



reasons. This objective standard “raises the spectre of judicial scrutiny” and means that mothers are potentially liable for lifestyle choices, such that judges can inflict on a pregnant woman their own notions of how she should behave.

Yet this is always the case when a standard of care is imposed on a class of people subject to different circumstances and backgrounds. For example, a parent with a duty to an already born child would be negligent in not taking the child to hospital if the child were seriously ill.¹⁵ The standard of care of the reasonable guardian requires reasonable conduct from the parent regardless of whether the parent has a car, lives within close proximity to a hospital and so on. The standard of care is objective, but does not ask what a parent with reasonable resources and reasonable finances would do. It asks what a reasonable parent would do when faced with the same situation as the defendant. If the parents’ conduct does not fall below what a reasonable person would do in that particular situation, they have not been negligent, and if it does, then they *prima facie* have. The same is true for a pregnant mother. Such objective standards of care infiltrate every aspect of tort law and are not deemed “inappropriate” by the courts.

Negligent actions of pregnant women therefore *prima facie* fall within the bounds of a common law tort. If they are to be removed from this realm for policy reasons, such that a duty is not owed by a mother to her unborn child, the reasons should be “clear and compelling”.¹⁶ The question then becomes whether the policy considerations that militate against imposing a duty are so clear and compelling that they should be reflected in the common law.

POLICY CONSIDERATIONS

Effect on family relationships

It has been argued that imposing liability on a mother for prenatal negligence would involve “severe psychological consequences” for the relationship between mother and child, and also for the rest of the family.¹⁷ This may (or may not) be true in practice, but either way it does not justify denying the child its legal right to compensation.¹⁸ It is possible for children to sue their parents for injuries inflicted *after* birth,¹⁹ or to sue their *fathers* for prenatal negligence.²⁰ Siblings and spouses may also sue one another in tort.²¹ The strain on families from such litigation is analogous to the strain created by a child suing its mother for prenatal negligence. However, in the above situations, the court does not deny that one member of the family has a duty of care to another simply because of concerns around family relationships or the psychological consequences of litigation.²² It is for the litigant, whether an adult or a child by their guardian, to weigh the personal consequences of litigation against the benefits and decide whether to bring an action.

¹⁵ This situation is “difficult to distinguish” from prenatal negligence: *Whitfield A*, “Common Law Duties to Unborn Children” (1993) 1 Med LR 28 at 50. See also *Smolensky*, n 8 at 323-325.

¹⁶ As removal of the child’s cause of action is extreme: *Dobson (Litigation Guardian of) v Dobson* [1999] 2 SCR 753 at [128] (Major and Bastarache JJ in dissent).

¹⁷ *Dobson (Litigation Guardian of) v Dobson* [1999] 2 SCR 753 at [46]-[47].

¹⁸ In the words of Kirby J (in dissent as to the overall result) in *Harriton v Stephens* (2006) 226 CLR 52 at [128]-[131] in the context of actions for wrongful life: “The flaws in this reasoning are so obvious that they scarcely require expression.”

¹⁹ *Ash v Lady Ash* (1695) Comb 357; 90 ER 526; *Roberts v Roberts* (1657) Hard 96; 145 ER 399; *Hahn v Conley* (1971) 126 CLR 276 at 283.

²⁰ As third parties, in the wake of *Watt v Rama* [1972] VR 353.

²¹ As there is no longer intra-familial immunity in Australia: *Hahn v Conley* (1971) 126 CLR 276 at 283.

²² In *Dobson (Litigation Guardian of) v Dobson* [1999] 2 SCR 753 the minority (at [131]) felt that to conclude that family relationship concerns only bar actions brought by the born alive child for prenatal injuries, and not other intra-familial actions, is not justified. See also *Greatorex v Greatorex* [2000] 1 WLR 1970 at 1985 where Cazalet J discussed the differences between an intra-familial suit for physical injury and a similar suit for psychological injury.



Gender-based tort

It has also been suggested that to impose liability on mothers for prenatal negligence would create a gender-based tort due to the fact that only women can become pregnant.²³ However, it is equally arguable that *not* imposing a duty of care on pregnant women in regard to their unborn children in effect gives women immunity based on their gender. Not imposing a duty on pregnant women is equally gender-discriminatory,²⁴ especially as fathers are liable for any injury they inflict on an unborn child.²⁵

Effect on autonomy of mothers

The most widely cited and possibly most persuasive argument against imposing a duty of care on a pregnant mother in respect to her unborn child is the effect of such duty on the mother's autonomy. In the words of Cory J in *Dobson* (at [23]), "[t]o [impose a duty] would result in very extensive and unacceptable intrusions into the bodily integrity, privacy and autonomy rights of women".²⁶ The majority noted that, because every action of a mother is connected to the fetus, "if [she] were held liable for prenatal negligence, this could render the most mundane decision taken in the course of her daily life subject to the scrutiny of the courts" (at [27]). This factor was used to distinguish the burden of liability on a mother from the burden on a third party as regards the same fetus.

The majority further claimed that there was no rational and principled limit to a mother's liability if a duty of care was imposed. They gave several examples (at [28]) of what was implied to be such "irrational" or "unprincipled" claims, including actions for failing to regulate diet, for drinking and smoking, and for tripping on stray objects in the home. However, there is a strong argument that such claims are neither irrational nor unprincipled. Indeed, there is an obvious principled limit: the limit set by the ordinary principles of negligence, applied as discussed above.

Failing to regulate diet and provide the best nutrients

Intuitively it does seem irrational for a child to bring an action against its mother for eating too many hamburgers during pregnancy. However, not only does the child have to show that its mother's eating habits have fallen below the standard of a reasonable pregnant woman,²⁷ but also that they caused the child's injury.²⁸ Where injury to the fetus is not an obvious or probable result of an activity and a direct link between action and injury cannot be drawn, causation will be a significant barrier to proving the child's right to damages.²⁹ When the ordinary principles of negligence are applied, these "irrational" claims do not seem such a threat.

Smoking, drinking, strenuous exercise and unprotected sex

The majority in *Dobson* asked whether a mother should be found liable for failing to abstain from the above activities while pregnant. The judgment implies that she should not; to find such liability would impose too great a restriction on her right to make daily life choices. It was contended above that tort

²³ Raised in *Dobson (Litigation Guardian of) v Dobson* [1999] 2 SCR 753 by an intervener, although the majority did not rely on it: see the discussion at [22].

²⁴ "To grant a pregnant woman immunity from the reasonably foreseeable consequences of her acts ... would create a legal distortion as no other plaintiff [ie the child] carries such a one-sided burden, nor any defendant such an advantage": *Dobson (Litigation Guardian of) v Dobson* [1999] 2 SCR 753 at [130] (Major and Bastarache JJ in dissent).

²⁵ The fact that fathers are less likely to inflict prenatal injury than mothers does not discount the observation that pregnant women are given immunity based on gender. Note that the United Kingdom's *Royal Commission on Civil Liability and Compensation for Personal Injury*, Cmnd 7054-I (1979) recommended that immunity be extended to fathers.

²⁶ Speaking for the majority.

²⁷ The majority in *Dobson (Litigation Guardian of) v Dobson* [1999] 2 SCR 753 claimed that an action could be brought for failing to provide the "best" nutrients for the child (at [28]) – it should not be forgotten that the standard would be that of a *reasonable* pregnant woman.

²⁸ *March v E & MH Stramare Pty Ltd* (1991) 171 CLR 506.

²⁹ For a discussion of proving causation by medical evidence, see Beal R, "'Can I Sue Mommy?': An Analysis of a Woman's Tort Liability for Prenatal Injuries to Her Child Born Alive" (1984) 21 San Diego L Rev 325.



law provides a principled limit to actions for prenatal negligence, and it is contended further that these particular examples fall *within* that limit, and therefore should be prima facie actionable.³⁰

The dangers to an unborn child of its mother smoking, drinking, putting excessive strain on her body or engaging in unprotected sex are well known in the community. Further, in assessing the calculus of negligence, there are simple and inexpensive alternatives to each activity: abstaining from smoking and drinking, doing light exercise, and having protected sex. The question of why *should* a mother be liable for damage caused by such activities could easily become: why *shouldn't* she? Every person has the right to make choices about their daily life when those choices affect only the person who makes them. But when those choices are negligently made and cause injury to a person with recognised legal rights, the principles of tort law assign responsibility to the person who makes the choice, and compensation should be granted to the person injured. To decide otherwise – to give a mother immunity from liability – leaves uncompensated an injury caused to the child by her negligence. It is equally arguable that *this* would be an “irrational and unprincipled” decision of the court.

It should be noted here that there is case authority, such as *Winnipeg Child and Family Services (Northwest Area) v G(DF)* [1997] 3 SCR 925 (*Winnipeg*), providing that pregnant women cannot be forcibly treated for addictions that may cause injury to their unborn child as this would be too great an imposition on the woman’s autonomy. This conclusion may be sound, but it does not follow that a woman should not be liable to the injured child for the consequences of her negligent acts. Tort law aims to both deter tortious behaviour and compensate those damaged by it. It is true that in some instances, such as where a mother is addicted to a harmful substance, imposing liability will not deter her from using that substance. But even if a woman cannot be deterred from carrying out a harmful act (whether by physical coercion as disallowed in *Winnipeg* or monetary incentive by imposing liability), it does not follow that her child should be left without compensation for her actions.³¹ In *Dobson* (at [48]) it was suggested that this compensation would be better provided by increasing publicly available financial assistance for children with special needs, but the question arises why society at large should bear the financial burden of a mother’s negligence. It does not do so for uninsured third parties.

Safety checks of a mother’s premises to avoid accidents

Generally, the occupier of a residence who negligently fails to ensure that the residence is in a safe condition will be liable for resulting injuries, not only to invitees but also to trespassers.³² It follows that if a mother’s act or omission in respect of her premises causes a person who enters those premises to be injured, she will be liable to the injured person. This includes the case where the injured party is her unborn child – the only difference is that the mother also experiences the accident and (possibly) some injury. The unborn child is a person with legally recognised rights (crystallising upon birth), who has been injured by the mother’s negligence.³³ The fact that the fetus is “within” the mother is only incidentally relevant.³⁴ This type of case clearly has a “principled limit”: it is limited to cases falling within the ordinary principles of legal liability.

³⁰ Again, causation may be a barrier depending on the facts, especially in the case of strenuous exercise.

³¹ “There is an important distinction between exercising control, which is an infringement of individual rights, and allowing freedom of action but making the actor pay for it if he or she breaks a duty to others”: Whitfield, n 15 at 51.

³² For example, *Occupiers’ Liability Act 1985* (WA), ss 5-7; *Wrongs Act 1958* (Vic), s 14B; *Civil Liability Act 1936* (SA), Pt 4; *Civil Law (Wrongs) Act 2002* (ACT), s 168, or at common law in negligence where the Acts of the various States do not apply.

³³ If recovery is not allowed, “we have a wrong inflicted for which there is no remedy”: *Montreal Tramways Co v Lévéille* (1933) 4 DLR 337 at 345.

³⁴ *Bowditch v McEwan* [2003] 2 Qd R 615 at 618 (de Jersey CJ).



The driving exception

The so-called “driving exception” warrants discussion at this point as it raises similar issues to failing to safely maintain a residence. The cases espousing the driving exception³⁵ argue that, whether or not mothers should be granted immunity from liability for prenatal negligence generally, they should be liable for negligent driving causing injury to their unborn child.³⁶ Liability for negligent driving does not impose upon the mother any duty to which she is not already subject, and therefore does not restrict her autonomy, privacy or right to make personal choices (no person has a right to drive negligently, whether pregnant or not). An unborn child is simply one more person in the class of people who may be injured by such conduct.

There are several issues that make the driving exception legally unsound:³⁷

- Several courts have relied on the existence of compulsory motor vehicle insurance in espousing the driving exception.³⁸ Whether a defendant is insured has not been,³⁹ and arguably should never be,⁴⁰ a factor in determining the purely legal question of liability.
- The majority in *Dobson* (at [68]) stated that any exceptions to immunity made by the judiciary should be made in a legally principled manner. Therefore, if driving is excepted, so should be other acts of negligence that do not extend the mother’s duty of care beyond that which she already owes to third parties, such as the duty to keep her premises safe.⁴¹
- It has been argued that singling out negligent driving as an exception to universal immunity is “legally weak and untidy” when done by the judiciary.⁴² If policy concerns warrant such an exception, this should be provided by the legislature, not the courts.⁴³

If judicially created exceptions are inappropriate, the proper approach (in the absence of legislative intervention) must be either universal immunity for prenatal negligence, or universal liability, governed by the general principles of tort law. For the reasons given above, it is contended that the latter is the more appropriate alternative.

IMPLICATIONS OF THE CANADIAN POSITION

In addition to the policy factors discussed above, there are other issues regarding liability for prenatal injury that do raise legitimate concerns about the appropriateness of imposing a duty of care. What if a woman refuses medication on religious grounds, causing injury to her unborn child?⁴⁴ Won’t mothers be unduly pressured to abort injured children to avoid liability? There is scope to argue that such factors could be taken into account by the Australian courts in determining whether to impose

³⁵ For example, *Lynch v Lynch* (1991) 25 NSWLR 411; *Bowditch v McEwan* [2003] 2 Qd R 615; the minority in *Dobson (Litigation Guardian of) v Dobson* [1999] 2 SCR 753; *National Cas Co v Northern Trust Bank of Florida NA* 807 So 2d 86 (Fla 2001) (a review of which was dismissed in *National Cas Co v Northern Trust Bank of Florida NA* 823 So 2d 124 (Fla 2002)).

³⁶ Note that *Bowditch v McEwan* [2003] 2 Qd R 615 did not advocate or reject general immunity, but was simply willing to extend liability to driving and did not consider general immunity. For a discussion see Morley MC, “Mother’s Duty of Care” in “Recent Cases” (2002) 76 ALJ 554 at 554.

³⁷ That is, unsound as an *exception* to general immunity from liability, as opposed to unsound in imposing liability.

³⁸ For example, see the judgment of Clarke JA in *Lynch v Lynch* (1991) 25 NSWLR 411 and see *National Cas Co v Northern Trust Bank of Florida NA* 807 So 2d 86 (Fla 2001); cf the analysis of the Queensland Court of Appeal in *Bowditch v McEwan* [2003] 2 Qd R 615.

³⁹ *Lister v Romford Ice & Cold Storage Co Ltd* [1957] 1 All ER 125 at 133; *Caltex Oil (Aust) Pty Ltd v The Dredge “Willemstad”* (1976) 136 CLR 529.

⁴⁰ Such arguments are extensive and beyond the scope of this article, but see *Black v Solmitz* 409 A 2d 634 (Me 1979); *Hartman (by Hartman) v Hartman* 821 SW 2d 852 (Mo 1991); *Hunt v Severs* [1994] 2 AC 350 at 363; arguments of the appellant in *Bowditch v McEwan* [2003] 2 Qd R 615. Cf *Kars v Kars* (1996) 187 CLR 354 at 381.

⁴¹ “There is nothing unique or narrow about the act of driving a car, it is just as much a lifestyle choice as [many] other activities”: Kerr IR, “Prenatal Fictions and Post Partum Actions” (1998) 20 Dal LJ 237 at 271.

⁴² Steinbock B, *Life Before Birth* (Oxford University Press, New York, 1992) p 98.

⁴³ See eg *Dobson (Litigation Guardian of) v Dobson* [1999] 2 SCR 753 at [68]; *Black v Solmitz* 409 A 2d 634 at 639 (Me 1979).

⁴⁴ This situation gives rise to a “novel problem of considerable legal and ethical complexity”: *Re T (Refusal of Treatment)* [1992] 3 WLR 782.



liability. Perhaps such factors would be clear and compelling enough to render immunity the preferable result. But *should* the courts rely on policy considerations of this kind to move away from the result engendered by an application of established tort law principles? The situation in Canada provides a useful case study.

Under Canadian law, the court is required to take policy factors into account in assessing whether a duty of care exists.⁴⁵ As mentioned above, this led the Supreme Court in *Dobson* to refuse to impose liability for prenatal injuries. Several cases have recently emerged from the Canadian courts, following *Dobson*, with interesting and potentially unintended outcomes. The section below briefly considers five such cases, which demonstrate some of the potential consequences of granting mothers immunity from liability, namely:

- an inability to claim against third parties who are vicariously liable for the mother's actions;
- an inability to allege contributory negligence against the mother; and
- an inability to claim against the mother's physician.

Vicarious liability

In *Rewega v Rewega* (2005) 380 AR 224 (*Rewega*), the Court of Appeal of Alberta considered whether a third party, who would be prima facie vicariously liable for the negligent acts of a mother, could rely on the mother's immunity from liability as a defence to an action brought by her child.

Rewega involved a suit by an infant plaintiff against the owner of a vehicle that was driven negligently by the plaintiff's mother while the plaintiff was en ventre sa mere. The relevant *Highway Traffic Act* rendered vehicle owners vicariously liable for the acts of drivers deemed to be their agents. The vehicle owner argued that vicarious liability attached only if the driver was herself liable, and that the reasoning in *Dobson* precluded any possible finding of liability against the mother-driver. On an application to have the claim struck out, the interlocutory question for the court was whether vicarious liability could be imputed to the vehicle owner where there was no cause of action against the mother-driver.

At first instance before a master the application was refused. The master reasoned that the constitution of the Supreme Court of Canada had changed since *Dobson* and consequently there was scope for reconsideration of the issue. On appeal, a chambers judge found that the master had erred in failing to apply *Dobson*, but refused to strike out the claim against the vehicle owner, finding that the issue of vicarious liability was still at large.⁴⁶

The Court of Appeal upheld the decision of the chambers judge, finding that the issue of the owner's liability was novel. It noted that the decision in *Dobson* was to a large extent based on policy considerations, most of which did not apply to the owner of a vehicle driven by the mother, and further that *Dobson* did not directly address the issue of vicarious liability for the mother's actions (at [10]).

In the wake of *Rewega*, the issue of whether *Dobson* precludes actions against third parties that are founded on vicarious liability for a mother's actions remains open. The wording of the *Rewega* decision (at [10]-[11]) suggests that this issue is to be resolved as a matter of tort law (as opposed to construction of the *Highway Traffic Act* in question), with the issue hinging on the presence or absence of duty, taking into account the policy factors for and against extending the immunity offered to mothers. The *Rewega* decision expressly notes that the court in *Dobson* was concerned to preserve causes of action by infants against third parties (at [10]), although it is as yet unclear whether it will be possible to preserve such actions where the third party's liability is directly contingent upon the liability of the mother.⁴⁷

⁴⁵ Applying the second stage of the so-called *Anns* test: *Anns v Merton London Borough Council* [1978] AC 728 adopted in *City of Kamloops v Nielsen* [1984] 2 SCR 2.

⁴⁶ *R (B) v R (L)* (2004) 236 DLR (4th) 754.

⁴⁷ This will essentially turn on whether the effect of *Dobson (Litigation Guardian of) v Dobson* [1999] 2 SCR 753 was to render the mother immune from a suit by the infant plaintiff, or to deny the existence of a duty of care ab initio, the latter scenario



Contributory negligence

In *Preston v Chow* (2002) 211 DLR (4th) 758 (*Preston*)⁴⁸ the Court of Appeal of Manitoba considered the issue of whether defendants to a claim by an infant plaintiff can allege contributory negligence against the plaintiff's mother for her actions while the plaintiff was en ventre sa mere. In *Preston*, the infant plaintiff suffered brain damage after contracting the herpes virus from her mother at birth. She brought a claim in negligence against a number of defendants involved in the pregnancy and birthing process. The defendants alleged that the infant's injury was caused solely or partially by the mother's conduct in having unprotected sex (which she knew or ought to have known could expose the fetus to the risk of sexually transmitted diseases) and in failing to disclose a complete history to her doctor. The question for the court was whether *Dobson* applied in this context to protect the mother from an allegation of contributory negligence.

The court found that it did. Steel JA, with whom Huband and Kroft JJA agreed, considered *Dobson* to stand for the general proposition that there is no duty of care between a pregnant woman and her fetus (at [21]). She reasoned (at [18]):

The result is no different than if the infant plaintiff had sued both her mother and the other defendants. The action against the mother would inevitably have been dismissed and the defendants would still be liable to pay all of the damages.

Consequently, the court found that, subject to statutory exceptions, the decision in *Dobson* foreclosed all possibilities of claiming against the mother, either directly or indirectly, for injury to the fetus (at [24]).⁴⁹

While this appears to be a logical extension of the principles in *Dobson*, it has the effect of shifting the burden of that part of the infant's injuries that are caused by its mother's negligence away from the infant (and thus, in practical terms, away from the family) onto third party joint tortfeasors. *Preston* thereby effectively requires third parties outside the familial unit to pay for the protection of the negligent mother's autonomy and bodily integrity as afforded by *Dobson*. Whether this is any more or less "fair" than allowing the burden to lie with the child is open to debate, but it certainly appears to further skew the result that would be expected from the application of traditional principles of tort liability.⁵⁰

Liability of medical professionals

Ontario

A number of Canadian cases decided in the wake of *Dobson* have considered the liability of medical professionals whose negligence has contributed to an infant plaintiff's injuries while en ventre sa mere. Two notable cases have recently been decided by the Court of Appeal for Ontario.

The first case, *Bovingdon (Litigation Guardian of) v Hergott* (2008) 88 OR (3d) 641 (*Bovingdon*),⁵¹ involved a suit by twin girls against their mother's obstetrician who prescribed the mother a fertility drug to help her conceive. Use of the drug led to the conception of twins who, due to the higher risk of premature birth in twins, were born prematurely and suffered severe disabilities. The plaintiffs alleged that the obstetrician failed to provide sufficient information about the increased

negating the argument that any tort occurred at all for which a third party could be held vicariously liable. The court in *Rewega v Rewega* (2005) 380 AR 224 (at [10]) noted the duality in the analysis in *Dobson* between immunity from liability and absence of duty and found that such duality should be assessed in the context of a full legal and factual analysis.

⁴⁸ This case involved an appeal against a decision of a motions court judge to strike out a counterclaim against the mother of the injured infant.

⁴⁹ This decision was applied in the subsequent trial: see *Preston v Chow* (2008) 224 Man R (2d) 39 at [196]-[198].

⁵⁰ In the context of a suit for psychiatric injury, Lord Oliver in *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310 at 418 considered it to be "a curious and wholly unfair situation" where a plaintiff could recover damages from a defendant who was responsible only in a minor degree for the plaintiff's injury while that defendant was unable to recover any contribution from the person primarily responsible because, for policy reasons, that person's negligence was not tortious vis-à-vis the plaintiff.

⁵¹ Leave to appeal to the Supreme Court of Canada was refused in *Bovingdon (Litigation Guardian of) v Hergott* (2008) 387 NR 389.



risk of twinning (and the associated risk of premature birth and injury) inherent in using the drug, to allow the mother to make an informed decision about whether to use the medication.

At trial, the judge found that a duty was owed by the obstetrician to the mother's future children.⁵² She characterised the duty as one that was "co-extensive" with the duty to the mother; that is, it was a duty to the *child* to provide the *mother* with full information as to the risks of the fertility drug.⁵³ In the Court of Appeal, Feldman JA (with whom Gillese and MacFarland JJA agreed) disagreed with the trial judge's approach. Feldman JA found (at [64]) that the obstetrician's duty to the mother was to provide her with all the information needed to decide whether to use the fertility medication. However, once she had that information, it was entirely the mother's choice whether to take the drug and she was not obliged to act in the best interests of her future children in making that choice. This freedom to choose, Feldman JA noted, was why the Supreme Court in *Dobson* protected mothers from tortious liability to an unborn child.

As a result, the court found that there could be no duty owed by the doctor to the future children (at [68]):

Because the doctor's duty with this type of drug is only to provide information sufficient to allow the mother to make an informed choice, it cannot be said that the children have a right to a drug-free birth. Nor can the doctor owe a duty to the children that is co-extensive with his duty to the mother. To frame the duty in that way is to overlook the fact ... that the choice is the mother's; she is entitled to choose to take the drug and risk conceiving twins without considering their interests. If she does, the children have no complaint against her or the doctor.⁵⁴

Thus the court essentially found that because the mother did not owe any duty to consider the interests of a future child when making decisions related to her own body, her doctor could also owe no such duty in assisting the mother to make the decision at issue.

In this way, the duty to inform is unique. In *Bovingdon*, the negligence alleged was not the act of prescribing the fertility drug,⁵⁵ but the failure to inform the mother as to its risks. In such a case any potential duty to the child has to be co-extensive with that owed to the mother. What happens then, where the injury to the child derives directly from the conduct of the doctor, and there is no intervening act or choice on the part of the mother?

This issue was addressed by the Court of Appeal for Ontario in the subsequent case of *Paxton v Ramji* (2008) 299 DLR (4th) 614 (*Paxton*).⁵⁶ In that case, a doctor prescribed an acne drug to Mrs Paxton which was known to cause fetal malformation (a teratogenic drug) and was contraindicated for prescription to pregnant women. While taking the drug, Mrs Paxton became pregnant and her child was subsequently born with severe disabilities. The infant brought a suit against the doctor alleging that he was negligent in prescribing a teratogenic drug to her mother without taking all reasonable steps to ensure that Mrs Paxton would not become pregnant. The trial judge found that a duty to take such reasonable steps was owed to Mrs Paxton's future child.⁵⁷

On appeal, Feldman JA (with whom Moldaver and Juriansz JJA agreed) approached the proposed duty as a novel one. In considering, then, whether there was a prima facie duty of care, Feldman JA found that it was reasonably foreseeable that a doctor could cause harm to a future child by

⁵² As the impugned conduct related to the use of the fertility drug, it occurred before conception of the plaintiffs. Whether the fact that the infant plaintiff was not yet conceived at the time of the negligence affects whether a duty should be imposed is discussed further below.

⁵³ See *Bovingdon (Litigation Guardian of) v Hergott* (2008) 88 OR (3d) 641 at [62] as well as the decision at trial: *Bovingdon (Litigation Guardian of) v Hergott* (2006) 83 OR (3d) 465.

⁵⁴ Feldman JA went on to comment (at [71]) that the conclusion that a co-extensive duty cannot exist is supported by a policy analysis, citing the creation of a conflict of interest between the duty to the future child and the duty to the mother.

⁵⁵ Which the court found was not a negligent act (at [59]).

⁵⁶ Leave to appeal to the Supreme Court of Canada was refused in *Paxton v Ramji* (2009) 396 NR 397.

⁵⁷ Although the doctor was found to have met the standard of care imposed: *Paxton v Ramji* [2006] OJ No 1179 (SCJ).



prescribing teratogenic medication to a woman who is or who may become pregnant (at [60]-[63]). However, on the basis of policy considerations, she found that there was no proximity between the doctor and the future child (at [64]-[76]).

The first policy factor taken into account was the potential for creating a conflict between the doctor's duty to the mother and any duty to the child. Feldman JA concluded that imposing a duty of care to both the mother and a future child creates a conflict that could prompt doctors to change the manner in which they offer treatment to female patients in a way that might deprive such patients of their autonomy and right to make informed choices in relation to their medical care (at [68]).⁵⁸

The second relevant policy consideration was that the relationship between the doctor and the future child was indirect and, in effect, "mediated" through the mother (at [71]).⁵⁹ Feldman JA first considered the position where a *non-teratogenic* drug is prescribed, and came to a conclusion consistent with *Bovingdon* (at [73]):

In the case of a drug that is not teratogenic, and where the only issue is informed consent, the patient takes the information and makes the decision. Although women take care to ensure that their babies will be born healthy, they may decide that certain risks of possible harm to a foetus ... are minimal and are worth taking to obtain the benefit of the drug. Because women are autonomous decision makers with respect to their own bodies, they neither make the decision on behalf of the future child, nor do they owe a duty to act in the best interests of a future child [citing *Dobson*].

She then went on to consider the case where a teratogenic drug is prescribed, and recognised that such a case was indeed more complicated. However, she found that, even in those circumstances, the doctor's relationship with the future child is "necessarily indirect" as the doctor cannot advise or take instructions from the future child and may not be in a position to fulfil a duty to take all reasonable precautions to protect the child from the risks of a teratogenic drug (at [75]). The result was a finding that the doctor owed no duty to the infant plaintiff.

Thus, in Ontario, the reasoning in *Dobson* has contributed to the result that a doctor does not owe a duty of care to the future child of a patient. There is some controversy as to whether a "future child" encompasses both a child en ventre sa mere as well as an unconceived child. In both *Bovingdon* and *Paxton* the infant plaintiff had not yet been conceived at the time of the impugned conduct. However, the reasoning of the court, particularly in *Paxton*, appears to be intended to apply to both conceived and unconceived children; the court repeatedly referred to a future child "whether conceived or not yet conceived".⁶⁰ However, this interpretation has been rejected in British Columbia, where a somewhat different result has emerged.

British Columbia

In *Ediger (Guardian Ad Litem of) v Johnston* (2009) 65 CCLT (3d) 1 (*Ediger*), an infant plaintiff brought a suit against her mother's obstetrician and gynaecologist for injuries sustained during her birth. The defendant doctor relied upon the reasoning in *Paxton* to argue that he owed no duty to the infant plaintiff while en ventre sa mere. Holmes J considered whether a duty could be owed by the doctor to an unborn child to, first, obtain the mother's informed consent for treatment and, secondly, provide non-negligent medical care (at [176]-[214]).

Holmes J found that the imposition of a duty to inform was not precluded by the decision in *Bovingdon*, and equally that the imposition of a duty to provide non-negligent medical treatment was not precluded by *Paxton*. Despite acknowledging that the language used in *Paxton* suggests that the court intended to extend its reasoning to both conceived and unconceived children (at [196]), Holmes J read *Bovingdon* and *Paxton* narrowly as applying only to the case of children not yet

⁵⁸ See also *Paxton v Ramji* (2008) 299 DLR (4th) 614 at [79] where the court discussed residual policy considerations.

⁵⁹ Citing Spigelman CJ in *Harriton v Stephens* (2004) 59 NSWLR 694.

⁶⁰ See in particular *Paxton v Ramji* (2008) 299 DLR (4th) 614 at [38], [53] and [76].



conceived at the time of the negligent conduct.⁶¹ In case of any doubt, Holmes J found further that any comments in *Paxton* sufficiently broad to imply that a duty could not be owed to an already conceived fetus were obiter dicta only (at [197]).

Holmes J went on to consider the main policy factors militating against imposing a duty. In relation to any conflict arising between the duty to the child and the duty to the mother, Holmes J found that, as for the mother of an already born infant, it is necessarily the mother who makes medical decisions on behalf of her unborn child and the mother, not the doctor, who must resolve any potential conflict between her child's interests and her own.⁶²

She also considered that any concerns around infringement upon the mother's autonomy and bodily integrity are "completely answered" by the fact that the mother herself owes no duty to the fetus (citing *Dobson*).⁶³ It appears somewhat fallacious to contend that this is a complete answer to the issue raised. The cases citing a potential for infringement upon a mother's autonomy as a reason for not imposing a duty to the unborn child on the doctor⁶⁴ suggest that the imposition of a duty will cause the doctor to refrain from offering available treatments to the mother, or otherwise alter the medical service provided, thereby denying the mother the right to choose for herself.⁶⁵ This risk is present irrespective of whether or not the mother herself owes a duty to the child.

In any event, Holmes J held that the suggestion that a doctor does not owe a duty of care to an unborn child stands counter to previous Canadian case law.⁶⁶ She concluded that a doctor does owe a duty to a fetus as a "necessary consequence" of the duty owed to the mother (at [207]).

OBSERVATIONS FROM THE CANADIAN CASES

While many issues in this area remain unresolved in the Canadian jurisprudence, one observation can clearly be made: the ramifications of the decision in *Dobson* are felt more widely than merely in the factual scenario that was before the Supreme Court in that case, namely a suit by an infant against its mother. On the basis of *Preston*, it appears to be established (at least in Ontario) that contributory negligence cannot be alleged against the mother of an infant plaintiff injured while en ventre sa mere, but it remains open whether a third party can be held vicariously liable for the mother's actions. The principle in *Dobson* has also had a hand in rendering a doctor immune from liability to an infant plaintiff who was not yet conceived at the time of the impugned conduct. Whether that doctor can be liable for injury to an already conceived child is unclear in the wake of *Paxton* and *Ediger*.

Denial of third party liability in such cases does not clearly follow from the policy considerations that were given weight by the court in *Dobson*, and denial of liability on the part of third parties certainly does not appear to have been an intended result of the decision to grant immunity to mothers.⁶⁷ Further, denial of liability corresponds to a denial of compensation to the injured child. This was recognised by the court in *Paxton* (at [80]):

A child born with disabilities as a result of medical treatment that would have been actionable in negligence if a duty of care were recognized will not be able to receive full compensation for the

⁶¹ See *Ediger (Guardian Ad Litem of) v Johnston* (2009) 65 CCLT (3d) 1 at [182] in relation to *Bovingdon (Litigation Guardian of) v Hergott* (2008) 88 OR (3d) 641 and at [197] in relation to *Paxton v Ramji* (2008) 299 DLR (4th) 614.

⁶² *Ediger (Guardian Ad Litem of) v Johnston* (2009) 65 CCLT (3d) 1 at [185]-[186] in relation to the duty to inform and again at [211] in relation to the duty to provide non-negligent treatment.

⁶³ *Ediger (Guardian Ad Litem of) v Johnston* (2009) 65 CCLT (3d) 1 at [184] in relation to the duty to inform and again at [209]-[210] in relation to the duty to provide non-negligent treatment.

⁶⁴ Such as *Bovingdon (Litigation Guardian of) v Hergott* (2008) 88 OR (3d) 641 and *Winnipeg Child and Family Services (Northwest Area) v G(DF)* [1997] 3 SCR 925.

⁶⁵ For example, in *Paxton v Ramji* (2008) 299 DLR (4th) 614 at [68] Feldman JA considered that "imposing a duty of care on a doctor to a patient's future child in addition to the existing duty to the female patient creates a conflict of duties that could prompt doctors to offer treatment to some female patients in a way that might deprive them of their autonomy and freedom of informed choice in their medical care" (emphasis added).

⁶⁶ As cited in *Ediger (Guardian Ad Litem of) v Johnston* (2009) 65 CCLT (3d) 1 at [200]-[201].

⁶⁷ See the majority's distinction between actions against the mother and actions against third parties (at [25]-[27]), and comments in *Rewega v Rewega* (2005) 380 AR 224 at [10].



damage suffered ... This is a serious concern, which is only somewhat mitigated by the compensation that can be claimed by the parents.⁶⁸

It is not yet known what further scenarios may arise in which the immunity afforded to a mother by *Dobson* will deny her child compensation not only from herself but also from third parties and, in practical terms, their insurers.

THE PREFERABLE APPROACH FOR AUSTRALIA?

An application of the fundamental principles of Australian tort law generates the prima facie result that a mother does owe a duty of care to her unborn child. While the Australian courts have not found that a general duty of this kind exists, a duty has been imposed in the case of negligent driving. Moreover, a universal duty has never been rejected. There are, indeed, many policy factors to be considered in this area, although none are so clear or compelling as to require the judiciary to depart from long-established common law principles of negligence to strip a child of its legal right to compensation. The Canadian cases – which are affected by the policy considerations required to be taken into account by the courts in that jurisdiction – show that there are many potential implications of refusing to impose a duty on pregnant mothers, which may have negative consequences for the injured child and unintended consequences for legal doctrine.

It would appear, therefore, that the preferable approach in Australia is for the courts to uphold and apply the general principles of tort law to any case falling within them, with the prima facie result of imposing a duty of care on mothers to their unborn children. The resolution of the many fundamental policy issues that arise in this area is a matter best left to the legislature.⁶⁹ If Parliament, reflecting the attitudes of society, is of the view that such policy considerations are so significant as to justify granting mothers immunity from liability, then this may be reflected in appropriate legislation.

⁶⁸ See also the much-cited statement of Lamont J in *Montreal Tramways Co v Lévéille* (1933) 4 DLR 337 at 345: “If a right of action be denied to the child it will be compelled, without any fault on its part, to go through life carrying the seal of another’s fault and bearing a very heavy burden of infirmity and inconvenience without any compensation therefor.”

⁶⁹ The courts in *Paxton v Ramji* (2008) 299 DLR (4th) 614 at [81] and *Dobson (Litigation Guardian of) v Dobson* [1999] 2 SCR 753 at [36] agreed that such considerations are best left to the legislature, although in the context of arguing that the legislature is best placed to impose a duty. This is the approach taken by the United Kingdom legislature by enacting the *Congenital Disabilities (Civil Liability) Act 1976* (UK) where the policy concerns in imposing liability were seen to outweigh the need for compensation: United Kingdom, Law Commission, n 10.

