

Case Comment: Dobson v. Dobson (Litigation Guardian)

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Introduction

In *Dobson v. Dobson (Litigation Guardian)*,¹ the Supreme Court of Canada faced for the first time the question whether a child can sue his or her mother for injuries sustained due to the mother's prenatal negligence. For many Canadian legal scholars and lawyers, the Court's decision—that a pregnant woman has no legal duty toward her fetus—came as a surprise. A child is free to sue a third party for damages sustained as a result of the third party's prenatal negligence, and a child is free to sue either or both of his or her parents for their negligence – why, then, did the Court hold that a child has no legal capacity to sue his or her mother based solely on the timing of the injuries?²

In this brief case comment, I will first examine the case law that provides the foundation permitting recovery for prenatal injuries caused by the negligence of third parties. Second, I will consider the decisions in the *Dobson* case, with a particular focus on the decision of the Supreme Court of Canada. Finally, I will analyse briefly the positions of the majority and minority of the Supreme Court and conclude by noting some of the issues that remain unresolved in the wake of the *Dobson* decision.

Background: Recovery for Prenatal Injuries

The two Canadian cases considered to be authoritative with respect to the question of third party liability for prenatal injuries are *Montreal Tramways v. Leveille*³, and *Duval v. Seguin*.⁴

In the first, *Montreal Tramways*, the child plaintiff was born with club feet after her mother, while pregnant, fell while disembarking from a tramway car. The concern of the court— that a child so injured would have no meaningful hope of recovery to compensate his or her losses—is evident in this often-quoted passage:

If a child after birth has no right of action for prenatal injuries, we have a wrong inflicted for which there is no remedy, for, although the father may be entitled to compensation for the loss he has incurred and the mother for what she has suffered, yet there is a residuum of injury for which compensation cannot be had save at the suit of the child. 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. To my mind it is but natural justice that a child, if born alive and viable, should not be allowed to maintain an action in the Court for injuries wrongfully committed upon its person while in the womb of its mother.⁵

The Court thus adopted the legal fiction used in property law⁶ and employed it in the tort law context. Based on the above quotation, it is apparent that the Court did so for reasons of fairness (or “natural justice”).⁷ The court recognized that in order to reach the desired result (recovery for the child), it had to find that the child was a person at the time of the accident and that this could be achieved only by the use of the fiction.

In *Duval v. Seguin*, the Ontario High Court⁸ held that a child who was injured while *en ventre sa mère* could maintain an action, once born alive, for his or her injuries. In this case, the court approached the issue from the point of view of foreseeability and the “neighbour principle” articulated in *Donoghue v. Stevenson*.⁹ In essence, the court held that the fetus *in utero* is a “reasonably foreseeable” plaintiff and that the foreseeability of the fetus gives rise to a duty of care on the part of third parties. When and if the child is born alive with injuries, the cause of action “crystallizes” and the claim for damages can be made.

The Decisions in Dobson v. Dobson

As noted earlier, *Dobson* is the first case in which Canadian courts have been asked to resolve the question of whether there is a maternal duty of care to the fetus *in utero*.¹⁰ The facts of the case are straightforward: Cynthia Dobson, 27 weeks pregnant, was driving towards Moncton, New Brunswick in unsettled weather. The road was partly covered in drifted snow and slush. Ms. Dobson's car collided with that of another individual. Ryan Dobson, the child respondent, was born by Caesarean section later on the day of the accident. As a result of the collision, Ryan suffered permanent physical and mental impairment, including cerebral palsy. Ryan alleges that the collision was caused by his mother's negligent driving. The question before the court was whether a born alive child has the legal capacity to bring a tort action against his mother for her allegedly negligent act which occurred while the child was a fetus *in utero*.

The trial judge, Miller J., acknowledged that a finding that Ryan did have the capacity to sue his mother for his injuries would require the creation of a yet unrecognized duty of care – that of a pregnant woman toward her fetus.¹¹ Although Miller J. accepted that a fetus is not a legal person (and therefore that Ryan was not a legal person at the time of the collision), he concluded that the action could be maintained. Miller J. based his reasoning first, on the fact that there is no bar to lawsuits by children against their parents and, second, on the recognition by Canadian courts that a legal fiction can be utilized to protect future interests of a fetus.¹² In Miller J.'s view the fact that the common law has allowed a child, injured while a fetus *in utero*, to bring an action against a third party for his or her injuries was determinative of the question in this case. He concluded that:

...if 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 a reasonable progression to allow an action by a child against his mother for the injuries allegedly caused by her prenatal negligence.¹³

The New Brunswick Court of Appeal dismissed the appeal, holding that the narrow issue requiring consideration in this case is the potential liability of a pregnant woman for negligent driving causing injuries to her born alive child.¹⁴ Therefore, according to the Court, any policy considerations that might arise in cases involving negligent in "lifestyle choices"¹⁵ are not relevant in this context.¹⁶ The Court concluded that the duty on a pregnant woman toward her

unborn fetus in the context of driving a motor vehicle is a part of her "general duty to drive carefully" and that if a child suffers injury as a result of his mother's negligent driving during pregnancy, the child should be able to sue for compensation.¹⁷ In the Court's view, to hold otherwise would constitute a partial exception to a pregnant woman's general duty to drive with care.¹⁸

A majority of the Supreme Court of Canada (per Cory J.) allowed Cynthia Dobson's appeal, holding that "the public policy concerns raised in this case are of such a nature and magnitude that they clearly indicate that a legal duty of care cannot, and should not, be imposed by the courts upon a woman towards her foetus or subsequently born child."¹⁹

After reviewing *Montreal Tramways* and *Duval v. Seguin*, Cory J. noted that neither of these cases, in holding that a third party may be found liable to a child for damages resulting from prenatally inflicted injuries, considered in any way the question of maternal liability for such injuries. Hence, in his view, the cases are not determinative. Indeed, Cory J. took note of the fact that the two cases reached the same result based on distinct approaches,²⁰ and stated that:

For the purposes of this appeal, it is not necessary to resolve the differences apparent in the reasoning of *Montreal Tramways* and *Duval*. It is sufficient to observe that when a child sues a third party for prenatal negligence, the interests of the newborn and the mother are perfectly aligned. Neither approach addresses the physical unity of a pregnant woman and her foetus, or the post-natal conflict of interest between mother and child, which are raised in this appeal.²¹

Cory J. then proceeded to consider the test articulated in *City of Kamloops v. Nielsen*,²² which requires that as a pre-requisite to creating a new tort duty, the court must satisfy itself that (i) there is a sufficiently close relationship between the parties to give rise to the duty of care, and (ii) there are no public policy concerns that ought to negative or limit the scope of the duty, the class of persons to whom it is owed, or the damages to which a breach of it may give rise. In applying the *Kamloops* test to the situation of a pregnant woman and her fetus, Cory J. acknowledged that the assumption necessary for the first branch of the test to be met—that the woman and her foetus can be regarded as two distinct legal entities—"might be seen as being contrary to the holding of McLachlin J. in *Winnipeg*...that 'the law has always treated the mother and unborn child as one.'"²³ He nevertheless proceeded to "assume without deciding" that the situation of a pregnant woman and her foetus can be understood to involve two legal persons.

Cory J. then moved on to the second stage of the *Kamloops* analysis, holding that “[s]ignificant policy concerns militate against the imposition of maternal tort liability for prenatal negligence”²⁴ and that these concerns fall into two primary categories: (i) those relating to the privacy and autonomy rights of women, and (ii) the difficulties inherent in articulating a judicial standard of conduct for pregnant women. The balance of Cory J.’s reasons comprise a fairly lengthy description and explanation of the policy concerns that arise in the context of the imposition of tort law duties on pregnant women toward their fetus, the details of which will not be discussed here.

Major J. wrote dissenting reasons in *Dobson*; in his view (and that of Bastarache J., who concurred with the dissent), the two central objections to recognizing the child plaintiff’s right of action for prenatal injuries—(i) that the relationship of a pregnant woman to her fetus is not analogous to the relationship of a third party to a fetus, and (ii) that policy considerations dictate that no duty can be imposed on a pregnant woman toward her fetus—are easily overcome in this case. For Major J., this case is about the right of a born alive child to sue his or her mother for the injuries the child is suffering from. The parties to this action are two separate legal entities: a born alive child and the child’s mother. Neither the fetus as an entity, nor any rights or interests it may have, are relevant. As Major J. describes his view of the case:

There is no doubt that a foetus can be injured in a car accident. But this physical injury is not an actionable harm. It is not a legal fact. It is legally meaningless until it arises as the suffering of a legal person – the born alive child. Had there been no birth, no legally recognized injury would have taken place. Birth transforms the physical injury sustained by the foetus into an actionable harm. Not the injury to the foetus but the injury to the born alive child’s mental and physical functioning is actionable.²⁵

Turning to the second objection to recognizing the child’s right to sue in this case, Major J. admits that policy concerns exist with respect to questions of legal duties of a pregnant woman to her fetus,²⁶ but argues that the same concerns do not apply here, where the sole issue is the duty of a woman to another legal person – her born alive child. According to Major J., the policy considerations relating to the privacy and autonomy of pregnant women become

largely irrelevant. The concern here is not with abrogating the rights of pregnant women in favour of the fetus, an entity with no legal rights of its own; rather, the question for the court is whether there are compelling policy reasons to extinguish the right of a child to sue for injuries caused by the negligence of his or her mother. In Major J.’s view, the autonomy interests of pregnant women are not at issue in this context.²⁷ The fact that a pregnant woman owes a duty of care in respect of her driving to other users of the road precludes the argument that the imposition of a duty of care toward her fetus would limit

the woman’s freedom of action any more than it is already limited.²⁸ In his view, this distinction—between acts which involve a duty of care to third parties and those that do not—has the effect of restricting the potential liability of pregnant women to their fetuses and subsequently born children.

Comments

Major J.’s decision while perhaps superficially attractive, in that it would allow recovery in cases like this one, seems to be entirely based on the spurious distinction between what he refers to as “prenatal injuries” and “prenatal events”. The dissenting reasons seem to immensely over-simplify the issues in order to reach a result that will permit compensation to the child plaintiff.

While at first glance, it appears that Major J. has decided simply to disregard the fact that the injury occurred prior to Ryan’s birth, upon closer reflection, it becomes apparent that he is in fact aware of the timing of the injury. He states: “while there is no liability for prenatal injuries, there is liability for *post-natal injuries resulting from prenatal events...*”²⁹ As he puts it: “What is actionable in this appeal is not whatever it was that happened to the respondent as a foetus. What is actionable in this appeal is what is now happening to the respondent as a child. It is the child’s cerebral palsy and related injuries that are actionable.”³⁰ This reasoning leads inexorably to the question as to what, if not a “prenatal injury”, is the cause of Ryan’s suffering? To my mind, Major J.’s assertion that the court is concerned with post-natal consequences of “prenatal events” rather than with “prenatal injuries” is a fallacious argument. Whether we refer to the accident as a prenatal event causing post-natal injuries, or as a prenatal injury, seems to make no difference to the ultimate question for the court: can a child sue his or her mother for injuries caused by her negligence

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during pregnancy? In my view, Major J.'s reasoning is an attempt to "have it both ways" – as he sees it, the fact of pregnancy can be ignored for one purpose (that of the child's ultimate capacity to maintain the action) and relied upon for another (the fact of the injury).

As to Major J.'s argument that the autonomy interests of pregnant women are not engaged in this appeal, since they owe duties of care to third parties in any event, Professor Kerr makes a compelling point:

[E]mploying the distinction between duties owed to the general public and those peculiar to parenthood does not assist the Court in narrowing the issue in *Dobson*. In fact, it has the very opposite effect.... it will allow a child's litigation guardian to commence actions for pre-natal injuries resulting from innumerable sorts of lifestyle choices that a pregnant woman might embrace. These would include activities such as rollerblading, shopping in a crowded mall, spraying weedkiller on her crops, sailing, lighting fireworks for her children on Canada day, or any other activity where there is risk of harm to the general public. There is nothing unique or narrow about the act of driving a car. It is just as much a lifestyle choice as any of the other activities just mentioned....³¹

Although I sympathize with Major J.'s desire to permit Ryan to recover in this case, his reasoning in this case is ineffective and misguided. As I will discuss below, the imposition of maternal liability for prenatal negligence is not essential to permitting compensation for the type of injuries at issue in this case.

In my view, the majority of the Court came to the appropriate conclusion in this case, albeit for what can be considered to be peculiar reasoning. What is peculiar about it is the fact that Cory J. did not simply hold that, in the case of a pregnant woman and her fetus, there are no two entities between whom a duty can be owed. Instead, Cory J. "assumed without deciding" that there are two legal entities and then went on to find that, on the basis of policy considerations, there is no right of recovery in any event. In approaching the case in this manner, Cory J. seems to have cast doubt on the legitimacy of the reasoning employed in

Duval v. Seguin and *Montreal Tramways* – he leaves unanswered the question of how a third party can be liable to a non-entity. In other words, Cory J.'s concern about the mother and fetus being a single entity seems to exist in the case of third party liability as well as in the case of the liability of the pregnant woman. I agree with the policy reasons enumerated by Cory J. in support of his refusal to impose a legal duty of care in this case, but in my view, his reliance on policy considerations instead of a searching analysis of the first step of the Kamloops test is problematic.

Although the reasons in *Dobson* leave a great deal of room for criticism, the point I ultimately hope to make is that the

whole question of maternal liability for prenatal injuries seems largely beside the point. Even if we agree that there ought to be a mechanism for compensation for all fetuses/children injured in motor vehicle accidents, this does not lead ineluctably to the argument that we have to first find that pregnant women owe

legal duties toward their fetuses. What we need to do is look for more productive solutions—possibly outside of tort law—such as mandatory insurance coverage for this type of injury,³² or perhaps the creation of a public insurance scheme, much like the situation of uninsured motorist coverage. As Cory J. notes in his reasons, the problem reflected in this case is the lack of financial resources available to help the families of children with disabilities.³³ A more productive question than that of maternal liability is whether there can be compensation without any such duty being imposed. Instead of attempting to fasten blame, either through the common law or legislation, on pregnant women, with all of the emotional, familial and psychological consequences that may have, the time has come to seek alternative solutions.

What is peculiar about [the majority's reasoning] is the fact that Cory J. did not simply hold that, in the case of a pregnant woman and her fetus, there are no two entities between whom a duty can be owed.

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1.(1999), 174 D.L.R. (4th) 1 (S.C.C.) [hereinafter *Dobson*].
2. See T. Foley, "Dobson v. Dobson: Tort Liability for Expectant Mothers?" (1998) 61 Sask. L. Rev. 177 at 180 [footnotes omitted]:

... it *does* seem like a logical progression to allow a fetus to sue its own mother for injuries caused by her negligence. Without this progression, one could arrive at absurd results. For example, if Ryan were sitting in a car seat beside his mother as she was bringing him home from the hospital immediately after his birth, he could sue. If Ryan had an older brother or sister sitting in the car as well, there is no doubt that this sibling could bring an action. Even the fetus of another pregnant woman was a passenger in the car driven by Ryan's mother, or in the car hit by Ryan's mother, once born, could sue. If Ryan himself were not allowed to bring an action, the result would appear to be neither logical nor fair.

3.[1933] 4 D.L.R. 337 (S.C.C.) [hereinafter *Montreal Tramways*].

4.(1972), 26 D.L.R. (3d) 418 (Ont. H.C.); aff'd (1974), 1 O.R. (2d) 482 (Ont. C.A.).

5.*Montreal Tramways*, *supra* note 3 at 345.

6. See I.R. Kerr, "Pre-Natal Fictions and Post-Partum Actions" (1998) 20 Dal. L. J. 237. As Kerr explains (at 241), "the legal fiction is a judicial device ... a practice that some judges invoke on occasion where it is perceived that the scope of an existing legal rule falls short of what is required in order to achieve a just outcome." The legal fiction adopted by the Court in *Montreal Tramways* began as a "judicial device to preserve the intentions of the testator". In cases where the common law rule prevented a child that was not born at the time of the testator's death from inheriting in spite of the testator's clear intention that the child should inherit, the court altered the facts (treating the child as though he or she had been alive at the time of the testator's death), leaving the common law rule intact (see Kerr, *ibid.* at 247).

7. See *Montreal Tramways*, *supra* note 3 at 340-41. See also Kerr, *ibid.* at 247-48. As Kerr notes at 248:

Other than this rather esoteric appeal to "natural justice" and an odd use of the notion "its person", no theory was put forward to account for the decision. There was no discussion of how or why the property law fiction was relevant or material or how the property law fiction could apply ... across such diverse areas of law.

8. Aff'd (1974), 1 O.R. (2d) 482 (C.A.).

9.[1932] A.C. 562 (H.L.). As Lord Atkin stated (at 580):

You must take reasonable care to avoid acts or omission which you can

reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be – persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being affected when I am directing my mind to the acts or omissions which are called in question.

10. The issue was raised in *Winnipeg Child and Family Services (Northwest Area) v. G. (D.F.)*, [1997] 3 S.C.R. 925 [hereinafter *Winnipeg*], but the court declined to respond to it other than to state that even if there is a duty of care that could give rise to a claim on the part of the child once born alive, there is certainly no such right in the case of a not-yet-born fetus.

11.(1997), 143 D.L.R. (4th) 189 (N.B.Q.B.).

12.*Ibid.* at 191-92.

13.*Ibid.* at 192.

14.(1997), 148 D.L.R. (4th) 332.

15. By this, Hoyt C.J.N.B. seems to have meant such things as cigarette smoking, consumption of alcohol and other legal or illegal substances, and the taking of or refusal to take medication.

16. The Court made reference to the fact that this distinction has been employed in legislation in the United Kingdom: the *Congenital Disabilities (Civil Liability) Act 1976* (U.K), 1976, c.28. The Act provides that mothers cannot be sued by their children for prenatal injuries, with the exception of injuries caused by motor vehicle accidents. The specific reason for this exception is the existence of a mandatory insurance regime with respect to motor vehicles; the UK Law Commission that recommended the enactment of this legislation was of the view that permitting recovery by the child (to the extent of the policy limits) in this situation would decrease the anxiety pregnant women feel in relation to driving; see Law Commission Report (Law Com. No. 60) on Injuries to Unborn Children, 1974, Cmnd. 5709.

17. The Court of Appeal found support for its decision in an Australian case (*Lynch v. Lynch* (1991), 25 N.S.W.L.R. 411 (N.S.W.C.A.) and in some of the U.S. jurisprudence. It should be noted, however, that there is no consistency among U.S. decisions as to whether a pregnant woman owes a duty of care toward her fetus. In part, the development of the law on this point in the U.S. seems to have been confounded by the existence of what is known as the "parental immunity"

An Analysis of a Woman's Tort Liability for Prenatal Injuries to her Child Born Alive" (1984) 21 San Diego L. Rev. 325 at 326. See also D.M. Santello, "Maternal Tort Liability for Prenatal Injuries" (1988) 22 Suffolk University L. Rev. 747 at 748.

18. This argument is also relied upon by Major J. in his dissenting reasons in *Dobson*, see *infra* note 28.

19. *Dobson*, *supra* note 1 at 32.

20. What Cory J. seems to mean by this is that there is no legal fiction operating in the Court's reasoning in *Duval v. Seguin*. Professor Kerr disagrees; in his view, although the fiction is not made explicit in *Duval*, it must be operating nonetheless. The comments of Lord Atkins that are relied on in *Duval* refer specifically to the notion that there must be *persons* among whom tort duties can be owed (see *supra*, note 9). Given that the fetus *in utero* is not a legal person, the only way in which Lord Atkins' comments can make sense in the context of a duty being owed by some third party to the fetus is if we deem the fetus to have been a legal person at the time of the accident. In Kerr's view, the court in *Duval v. Seguin* confused the idea of a *foreseeable* plaintiff with that of a *potential* plaintiff. As he states at 256: "Though its use is unspoken, a legal fiction is still required to award damages for prenatal injuries. This is not at all surprising, given the existence of the rule at common law that personality begins at birth." Kerr, *supra* note 6 at 249-56.

21. *Dobson*, *supra* note 1 at 10.

22. [1984] 2 S.C.R. 2.

23. *Dobson*, *supra* note 1 at 11. McLachlin J.'s comment is also consistent with other Supreme Court of Canada cases, including *R. v. Sullivan*, [1991] 1 S.C.R. 489 and *Tremblay v. Daigle*, [1989] 2 S.C.R. 530.

24. *Dobson*, *supra* note 1 at 11.

25. *Dobson*, *supra* note 1 at 38.

26. Such as was the case in *Winnipeg*, *supra* note 10.

27. As he put it, "[s]he was not legally free to operate a motor vehicle without due care. She did not have the freedom to drive carelessly. Therefore, it cannot be said that the imposition of a duty of care to her born alive child would restrict her freedom to drive." *Dobson*, *supra* note 1 at 43.

28. Major J. refers to the idea that a tort duty would not be imposed here as a "grant of immunity from liability", as though the liability of the woman is clear. That this is not the case is apparent from the very history of the *Dobson* litigation.

29. *Ibid.* at 39 [emphasis added].

30. *Dobson*, *supra* note 1 at 38.

31. Kerr, *supra* note 6 at 270-71. See also *Dobson*, *supra* note 1 at 26 (para. 60), per Cory J.:

...it is clear that the duty of care imposed by the Court of Appeal is by no means

narrow. It would impose tort liability on mothers for prenatal negligence in all situations in which a "general duty of care" is owed to third parties. The distinction between lifestyle choices and a so-called "general duty of care" involves a standard which can be readily applied to many areas of a pregnant woman's behaviour, most of which are not protected by insurance.

32. One potential objection to this point is that it may lead insurance companies either to deny coverage to women of childbearing years, or to raise premiums for this group so severely that coverage is, in practice, unavailable to most women. Given that *Dobson* is the first case of its kind, however, perhaps we can assume that the actual number of such claims will not be terribly high.

33. It bears mention here that this point is acknowledged by Cory J. as being the real issue in cases such as this one: *Dobson*, *supra* note 1 at 21.



