Dobson v. Dobson

2 S.C.R. 753, 1999 CanLII 698
Supreme Court of Canada
July 9, 1999

Cynthia Dobson, Appellant, v. Ryan Leigh MacLean Dobson by his Litigation Guardian, Gerald M. Price, Respondent, and The Canadian Abortion Rights Action League, the Evangelical Fellowship of Canada and the Catholic Group for Health, Justice and Life, Interveners. Indexed as: Dobson (Litigation Guardian of) v. Dobson. File No.: 26152. 1998 December 8; 1999 July 9. Present: Lamer C.J. and L'Heureux-Dubé, Gonthier, Cory, McLachlin, Iacobucci, Major, Bastarache and Binnie JJ. On appeal from the Court of Appeal for New Brunswick.

The judgment of Lamer C.J. and L'Heureux-Dubé, Gonthier, Cory, Iacobucci and Binnie JJ. was delivered by CORY J.

CORY J.

I. Introduction

1¶ Pregnancy speaks of the mystery of birth and life; of the continuation and renewal of the species. The relationship between a pregnant woman and her foetus is unique and innately recognized as one of great and special importance to society. In the vast majority of cases, the expectant woman makes every effort to ensure the good health and welfare of her future child. In addition, the sacrifices made by the mother for her newborn child are considerable. Yet, what if hopes for the future are dashed by an injury caused to the foetus as a result of a prenatal negligent act of the mother-to-be? Should a mother be held liable for the damages occasioned to her born alive child? That is the question to be resolved in this appeal.

II. Facts

2¶ On March 14, 1993, the appellant was in the 27th week of her pregnancy. On that day, she was driving towards Moncton in a snowstorm. She lost control of her vehicle on a patch of slush and struck an oncoming vehicle. It is alleged that the accident was caused by her negligent driving. The infant respondent, Ryan Dobson, was allegedly injured while in utero, and was delivered prematurely by Caesarean section later that same day. He suffers from permanent mental and physical impairment, including cerebral palsy.

3¶ The infant respondent, by his grandfather and litigation guardian, launched a tort claim against, inter alia, the appellant for the damages he sustained. The respondent's father was the owner of the vehicle driven by the appellant. As required by provincial law, he was insured against damages caused by the negligence of drivers of his motor vehicle.

4¶ The issues of liability and quantum of damages were severed by a consent order dated June 25, 1996. Thus, the only question to be determined is whether Ryan Dobson has the legal capacity to bring a tort action against his mother for her allegedly negligent act which occurred while he was in utero. Miller J., on an application for determination of this question of law, found that the infant respondent had the legal capacity to sue for injuries caused by the appellant's prenatal negligence. The Court of Appeal dismissed the appeal from that decision.

III. Judicial History

A. New Brunswick Court of Queen's Bench, (1997), 186 N.B.R. (2d) 81

5¶ Miller J. recognized the difficulty of reconciling competing legal principles regarding the nature and extent of foetal rights. He accepted that legal personality begins at birth and ends at death: *Tremblay v. Daigle*, 1989 CanLII 33 (S.C.C.), [1989] 2 S.C.R. 530. Therefore, at the time of the commission of the tort, the infant respondent did not exist as a person in law.

6¶ Miller J. based his decision on two principles of tort law. First, there is no common law bar to actions in tort by children against their parents: *Deziel v. Deziel*, [1953] 1 D.L.R. 651. The doctrine of parental tort immunity, which exists in certain American jurisdictions, has never been a part of Canadian law. Second, Canadian courts have recognized the juridical personality of the foetus as a fiction which is utilized, at least in certain contexts, to protect future interests. Although a foetus is not a legal person, certain rights accrue and may be asserted by the infant upon being born alive and viable: *Montreal Tramways Co. v. Léveillé,* [1933] S.C.R. 456. In this case, the injury was allegedly suffered by the foetus, but the damages sued for are those sustained by the infant Ryan after his birth. Accordingly, if the damages had been caused by the negligence of some third-party, the infant respondent would be entitled to seek compensation in a tort action.

7¶ Miller J. 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 prenatal injuries caused by her negligence" (p. 88). He therefore held that the infant respondent had the legal capacity to sue his mother for the injuries allegedly caused by her prenatal negligence.

B. New Brunswick Court of Appeal 1997 CanLII 9513 (NB C.A.), (1997), 189 N.B.R. (2d) 208

8¶ Hoyt C.J.N.B. also accepted that, at the time of the accident, the infant respondent did not possess juridical personality. He noted that it was common ground between the parties that a child may sue his or her parents in tort, and that a child may sue a third-party for prenatal negligence. Moreover, he found that there was a real distinction between an action brought by or on behalf of a foetus and one brought by or on behalf of a child. Accordingly, Canadian decisions involving the former -- *Tremblay v. Daigle*, supra; *R. v. Sullivan*, 1991 CanLII 85 (S.C.C.), [1991] 1 S.C.R. 489; and *Winnipeg Child and Family Services (Northwest Area) v. G.* (D.F.), 1997 CanLII 336 (S.C.C.), [1997] 3 S.C.R. 925 -- had no application to the case before him.

9¶ Hoyt C.J.N.B. further found that different considerations would arise if this case involved damages resulting from lifestyle choices made by a woman during pregnancy, such as smoking, drinking and the taking of or refusal to take medication. Although cases alleging such negligent conduct by a pregnant woman would raise difficult policy decisions, those issues do not arise in this case. Hoyt C.J.N.B. found that the narrow issue to be resolved concerns the allegedly negligent driving of a pregnant woman resulting in injuries to her born alive child, and not injuries occasioned as a result of her lifestyle choices. Hoyt C.J.N.B. found support for this distinction in *Bonte* v. *Bonte*, 616 A.2d 464 (N.H. 1992), *Lynch v. Lynch* (1991), 25 N.S.W.L.R. 411, and J. G. Fleming, The Law of Torts (8th ed. 1992), at p. 168. He observed that, in *Lynch*, supra, Clarke J.A.

stated that different policy considerations arise in the context of a claim based on negligent driving as opposed to a case involving a pregnant woman's lifestyle choices.

10¶ Hoyt C.J.N.B. concluded that the duty on the appellant in this case arose from her general duty to drive carefully and could not be characterized as a lifestyle choice which is "peculiar to parenthood" (p. 216). He noted that the same distinction was made in the Congenital Disabilities (Civil Liability) Act 1976 (U.K.), 1976, c. 28. That Act exempts a mother from tort liability for prenatal negligence to her children who are born alive. However, the exemption does not apply to prenatal negligence which occurs when the pregnant woman is in breach of her general duty to drive carefully. Therefore, Hoyt C.J.N.B. held that a pregnant woman has a general duty to drive carefully, in relation to both her subsequently born child and third-party motorists. If, as alleged here, the child suffers injury during his or her lifetime as a result of the mother's negligent driving during pregnancy, the child should be able to enforce his or her rights. To hold otherwise would create a partial exclusion to a pregnant woman's general duty to drive carefully.

IV. Issue

11¶ This appeal raises but one issue. Should a mother be liable in tort for damages to her child arising from a prenatal negligent act which allegedly injured the foetus in her womb?

V. Analysis

12¶ Perhaps as a prelude to considering the public policy aspects of this appeal, it may be helpful to begin with a review of the case law which allows infants to receive compensation in tort for prenatally inflicted injuries.

A. Tort Liability for Prenatal Negligence

13¶ In *Montreal Tramways*, supra, a child born with club feet two months after an incident of alleged negligence by the tramcar company brought an action for the prenatal injuries which caused the damages. Lamont J., for the majority, held that the child did indeed have the right to sue. He based his conclusion on the following rationale (at p. 464):

> If a child after birth has no right of action for pre-natal 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 be allowed to maintain an action in the courts for injuries wrongfully committed upon its person while in the womb of its mother. [Emphasis added.]

14¶ The infant respondent argued that the underlined passage provides a born alive child with the right to sue in tort for all prenatally inflicted injuries, including those allegedly caused by the prenatal negligence of his or her mother. It is true that the reasoning of Lamont J., on behalf of the majority of this Court, was based in part on general principles of compensation and natural justice. However, the decision contains no direct reference to the tort liability of a mother for prenatal negligence. Even if

Montreal Tramways, supra, could be understood to encompass tortious acts by a pregnant woman that cause injury to her foetus, it must be emphasized that the decision dealt with the negligence of a third-party tortfeasor. Nothing in the decision suggests that the Court directed its attention to the sensitive issue of maternal tort liability for prenatal negligence. Accordingly, the decision in *Montreal Tramways*, while important, should not be taken as determinative of the issue raised in this appeal.

15¶ A different legal analysis was employed to achieve the same result in *Duval v. Seguin*, [1972] 2 O.R. 686 (H.C.), aff'd (1973), 1 O.R. (2d) 482 (C.A.). In that case, a pregnant woman was involved in an automobile accident caused by the negligent acts of another. Three weeks later, her child was born prematurely with cerebral defects. Fraser J. held that once a child is born alive with injuries caused by an incident of prenatal negligence, the cause of action is complete (at pp. 700–701):

> [T]he law has been clear that it is unnecessary that the damages coincide in time or place with the wrongful act or default. In this connection reference is made to *Grant v. Australian Knitting Mills, Ltd.,* [1936] A.C. 85, and to *Dorset Yacht Co. v.* Home Office, [1970] A.C. 1004. In these cases the existence of the plaintiffs was unknown to the defendant. It would have been immaterial to the causes of action if the plaintiffs had been persons born after the negligent acts.
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> Procreation is normal and necessary for the preservation of the race. If a driver drives on a highway without due care for other users it is foreseeable that some of the other users of the highway will be pregnant women and that a child en ventre sa mère may be injured. Such a child therefore falls well within the area of potential danger which the driver is required to foresee and take reasonable care to avoid.

16¶ The approach adopted in *Duval* applies the "neighbour principle" articulated in the famous dictum of Lord Atkin in *Donoghue v. Stevenson,* [1932] A.C. 562 (H.L.), at p. 580. Since it is reasonably foreseeable at the time of an accident that negligent driving may cause injury to a pregnant woman, the possibility of injury to the child on birth is, as well, reasonably foreseeable. It is this foreseeability that creates a relationship which is sufficiently proximate to give rise to a duty of care. Once the child is born alive with injuries, the relationship crystallizes and the claim for damages can be made. By contrast, the holding in *Montreal Tramways*, supra, is based in part on a legal fiction borrowed from the civil law. Once the child is born alive with injuries, it is "deemed to have been born at the time of the accident to the mother" (per Lamont J., at p. 465).

17¶ 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 some 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.

18¶ It must be added that in City of *Kamloops v. Nielsen*, 1984 CanLII 21 (S.C.C.), [1984] 2 S.C.R. 2, it was recognized that even where a duty of care exists, it may not be imposed for reasons of public policy. Although a duty of care to the born alive child may exist, for reasons of public policy, which will be explored later, that duty should not be imposed upon a pregnant woman. Matters of public policy are concerned with sensitive issues that involve far-reaching and unpredictable implications for Canadian

society. It follows that the legislature is the more appropriate forum for the consideration of such problems and the implementation of legislative solutions to them.

B. Imposing a Duty of Care in this Situation

19¶ The test set out in *Kamloops*, supra, must be considered and applied in determining whether the appellant mother should be held liable to her child in the present case. This analysis is particularly important in light of the significant policy consequences raised by this appeal. In *Kamloops*, it was held that before imposing a duty of care, the court must be satisfied: (1) that there is a sufficiently close relationship between the parties to give rise to the duty of care; and (2) that there are no public policy considerations which 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.

20¶ The first criterion may be satisfied if it is assumed that a pregnant woman and her foetus can be treated as distinct legal entities. It should be noted that this assumption might be seen as being contrary to the holding of McLachlin J. in *Winnipeg*, supra, at p. 945 that "the law has always treated the mother and unborn child as one". Nonetheless, it 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. With regard to foreseeability, it is clear that almost any careless act or omission by a pregnant woman could be expected to have a detrimental impact on foetal development. Indeed, the very existence of the foetus depends upon the pregnant woman. 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.

21¶ However, even if it is assumed that the first stage of the *Kamloops* test is satisfied, the public policy considerations in this case clearly indicate that a legal duty of care should not be imposed upon a pregnant woman towards her foetus or subsequently born child. The second branch of the *Kamloops* test requires a consideration of those public policy consequences which may negate or limit the imposition of such a duty of care upon mothers-to-be. Although increased medical knowledge makes the consequences of certain behaviour more foreseeable, and facilitates the establishment of a causative link in negligence suits, public policy must also be considered. Significant policy concerns militate against the imposition of maternal tort liability for prenatal negligence. These relate primarily to (1) the privacy and autonomy rights of women and (2) the difficulties inherent in articulating a judicial standard of conduct for pregnant women.

22¶ In addition, an intervener submitted that to impose a legal duty of care upon a pregnant woman towards her foetus or subsequently born child would give rise to a gender-based tort, in contravention of s. 15(1) of the Canadian Charter of Rights and Freedoms. That contention may be correct. However, in light of the conclusion reached with respect to the second branch of the *Kamloops* test, this case need not, and should not, be decided on Charter grounds. It cannot be forgotten that the parties did not address the Charter. Indeed, apart from the submissions of one intervener, no argument was put forward on the Charter. In those circumstances, it is inappropriate to resolve that issue in these reasons.

1. Privacy and Autonomy Rights of Women

23¶ First and foremost, for reasons of public policy, the Court should not impose a duty of care upon a pregnant woman towards her foetus or subsequently born child. To do so would result in very extensive and unacceptable intrusions into the bodily integrity, privacy and autonomy rights of women. It is true that Canadian tort law presently allows a child born alive and viable to sue a third-party for injuries which were negligently inflicted while in utero: *Montreal Tramways*, supra. However, of fundamental importance to the public policy analysis is the particularly unique relationship that exists between a pregnant woman and the foetus she carries.

(a) Overview

24¶ Pregnancy represents not only the hope of future generations but also the continuation of the species. It is difficult to imagine a human condition that is more important to society. From the dawn of history, the pregnant woman has represented fertility and hope. Biology decrees that it is only women who can bear children. Usually, a pregnant woman does all that is possible to protect the health and well-being of her foetus. On occasion, she may sacrifice her own health and well-being for the benefit of the foetus she carries. Yet it should not be forgotten that the pregnant woman -- in addition to being the carrier of the foetus within her -- is also an individual whose bodily integrity, privacy and autonomy rights must be protected.

25¶ The unique and special relationship between a mother-to-be and her foetus determines the outcome of this appeal. 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 an 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. This was recognized in the majority reasons of McLachlin J. in *Winnipeg*, supra, at pp. 944-45:

> Before birth the mother and unborn child are one in the sense that "[t]he 'life' of the foetus is intimately connected with, and cannot be regarded in isolation from, the life of the pregnant woman": *Paton v. United Kingdom* (1980), 3 E.H.R.R. 408 (Comm.), at p. 415, applied in Re F (in utero), [[1988] 2 All E.R. 193]. It is only after birth that the fetus assumes a separate personality. Accordingly, the law has always treated the mother and unborn child as one. To sue a pregnant woman on behalf of her unborn fetus therefore posits the anomaly of one part of a legal and physical entity suing itself.

26¶ It was recognized in both *Montreal Tramways*, supra, and *Duval*, supra, that the strongest argument for imposing a duty of care upon third parties towards unborn children is that tort law is designed to provide compensation for harm caused by negligence and, to a lesser extent, to deter tortfeasors. It was submitted that to deny recognition to the type of action at issue in this appeal could leave an infant plaintiff without the protection and compensation provided by tort law, solely because the defendant is his or her mother. Accordingly, it was argued that the compensatory principle should be the basis for the imposition of a similar duty of care upon expectant women.

27¶ Yet, this argument fails to take into account the fundamental difference between a mother-to-be and a third-party defendant. The unique relationship between a pregnant woman and her foetus is so very different from the relationship with third parties. Everything the pregnant woman does or fails to do may have a potentially detrimental impact on her foetus. Everything the pregnant woman eats or drinks, and every physical action she takes, may affect the foetus. Indeed, the foetus is entirely dependent upon its mother-to-be. Although the imposition of tort liability on a third party for prenatal negligence advances the interests of both mother and child, it does not significantly impair the right of third parties to control their own lives. In contrast to the third-party defendant, a pregnant woman's every waking and sleeping moment, in essence, her entire existence, is connected to the foetus she may potentially harm. If a mother were to be held liable for prenatal negligence, this could render the most mundane decision taken in the course of her daily life as a pregnant woman subject to the scrutiny of the courts.

28¶ Is she to be liable in tort for failing to regulate her diet to provide the best nutrients for the foetus? Is she to be required to abstain from smoking and all alcoholic beverages? Should she be found liable for failing to abstain from strenuous exercise or unprotected sexual activity to protect her foetus? Must she undertake frequent safety checks of her premises in order to avoid falling and causing injury to the foetus? There is no rational and principled limit to the types of claims which may be brought if such a tortious duty of care were imposed upon pregnant women.

29¶ Whether it be considered a life-giving miracle or a matter of harsh reality, it is the biology of the human race which decrees that a pregnant woman must stand in a uniquely different situation to her foetus than any third-party. The relationship between a pregnant woman and her foetus is of fundamental importance to the future mother and her born alive child, to their immediate family and to our society. So far as the foetus is concerned, this relationship is one of complete dependence. As to the pregnant woman, in most circumstances, the relationship is marked by her complete dedication to the well-being of her foetus. This dedication is profound and deep. It affects a pregnant woman physically, psychologically and emotionally. It is a very significant factor in this uniquely important relationship. The consequences of imposing tort liability on mothers for prenatal negligence raise vastly different considerations, and will have fundamentally different results, from the imposition of such liability on third parties.

30¶ In *Winnipeg*, supra, the majority rejected an argument which sought to extend tort principles in order to justify the forced confinement and treatment of a pregnant woman with a glue-sniffing addiction, as a means of protecting her foetus. McLachlin J. observed that difficult legal and social issues arise in examining the policy considerations under the second branch of the *Kamloops* test. First, the recognition of a duty of care owed by a pregnant woman to her foetus has a very real potential to intrude upon that woman's fundamental rights. Any intervention may create a conflict between a pregnant woman as an autonomous decision-maker and the foetus she carries. Second, the judicial definition of an appropriate standard of care is fraught with insoluble problems due to the difficulty of distinguishing tortious and non-tortious behaviour in the daily life of an expectant woman. Third, certain so-called lifestyle "choices" such as alcoholism and drug addiction may be beyond the control of the pregnant woman, and hence the deterrent value of the imposition of a duty of care may be non-existent. Lastly, the imposition of a duty of care upon a pregnant woman

towards her foetus could increase, to an unwarranted degree, the level of external scrutiny focussed upon her. In *Winnipeg*, supra, it was held that the lifestyle choices of a pregnant woman should not be regulated because to do so would result in an unacceptably high degree of intrusion into her privacy and autonomy rights. If that is so, then it follows that negligent acts resulting from unreasonable lapses of attention, which may so often occur in the course of a pregnant woman's daily life, should not form the basis for the imposition of tort liability on mothers.

31¶ On behalf of the infant respondent, it was argued that the reasoning in *Winnipeg* is not determinative because it dealt with the standing of the foetus to sue while still in utero. In *Winnipeg*, the foetus which sought the detention of its mother-to-be was not a legal person and possessed no legal rights. By contrast, the present action is brought on behalf of an infant born alive whose legal rights and interests vested at the moment of birth. In other words, the sole issue in this appeal is whether a child born alive -- as opposed to a foetus -- should be able to recover damages for prenatal negligence from every person except his or her mother. Despite the important legal distinction between a foetus and a child born alive, as a matter of social policy and pragmatic reality, both situations involve the imposition of a duty of care upon a pregnant woman towards either her foetus or her subsequently born child. To impose either duty of care would require judicial scrutiny into every aspect of that woman's behaviour during pregnancy. Irrespective of whether the duty of care is imposed upon a pregnant woman towards her foetus or her subsequently born child, both would involve severe intrusions into the bodily integrity, privacy and autonomous decision-making of that woman. Accordingly, the policy concerns raised by McLachlin J. in *Winnipeg* are equally pertinent to this appeal.

32¶ I am strengthened in this conclusion by the final report of the Royal Commission on New Reproductive Technologies, Proceed with Care (1993), vol. 2, which rejected judicial interventions in pregnancy and birth. The Commission expressed its concern with these same policy issues, and recognized the need to ensure support for pregnant women and their foetuses without interfering with the privacy interests and physical autonomy of those women. It articulated its position in the following way (at pp. 955-56):

> Permitting judicial intervention therefore has serious implications for the autonomy of individual women and for the status of women collectively in our society. All individuals have the right to make personal decisions, to control their bodily integrity, and to refuse unwanted medical treatment. These are not mere legal technicalities; they represent some of the most deeply held values in society and form the basis for fundamental and constitutional human rights.
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> A woman has the right to make her own choices, whether they are good or bad, because it is the woman whose body and health are affected, the woman who must live with her decision, and the woman who must bear the consequences of that decision for the rest of her life.

33¶ Thus, it was the far-reaching implications for the privacy and autonomy rights of pregnant women which caused the Commission to recommend specifically that "civil liability never be imposed upon a woman for harm done to her fetus during pregnancy" (p. 964).

34¶ At trial, Miller J. observed that the existing jurisprudence permits recovery from third parties, and permits a child to sue his or her parents for postnatal negligence. He held that to permit an action by a child against his mother for prenatal negligence is a "reasonable progression" in tort jurisprudence. With respect, I believe that the imposition of a duty of care upon pregnant women in these circumstances cannot be characterized as a reasonable progression. Rather, in my view, it constitutes a severe intrusion into the lives of pregnant women, with attendant and potentially damaging effects on the family unit. This case raises social policy concerns of a very real significance. Indeed, they are of such magnitude that they are more properly the subject of study, debate and action by the legislature.

(b) Position in the United Kingdom

35¶ A similar concern with the privacy and autonomy rights of women led the Parliament of the United Kingdom to fashion a rule of maternal tort immunity for prenatal negligence, with a limited exception for negligent driving. This legislative solution is set out in the Congenital Disabilities (Civil Liability) Act 1976 (U.K.), s. 1(1), and will be discussed in greater detail below. However, it should be noted at this point that, in its memorandum to the U.K. Law Commission, the Bar Council emphasized the social policy concerns inherent in the issue on appeal:

> We recognise that logic and principle dictate that if a mother's negligent act or omission during or before pregnancy causes injury to a foetus, she should be liable to her child when born for the wrong done. But we have no doubt at all that in any system of law there are areas in which logic and principle ought to yield to social acceptability and natural sentiment and that this particular liability lies in such an area. [Emphasis added.]

(Law Com. No. 60, "Report on Injuries to Unborn Children" Cmnd. 5709 in Law Commission Reports (1979), vol. 5, at para. 55.)

36¶ Although the law of torts has traditionally been the province of the courts, to impose tort liability on mothers for prenatal negligence would have consequences which are impossible for the courts to assess adequately. This development would involve extensive intrusions and frequently unpredictable effects on the rights of bodily integrity, privacy and autonomous decision-making of pregnant women. The resolution of such fundamental policy issues is a matter best left to the legislature. In the United Kingdom, it was Parliament that provided a carefully tailored and minimally intrusive legislative scheme of motor vehicle insurance coverage. It was designed to provide a measure of compensation for a child who sustains prenatal injuries as a result of the negligent driving of his or her mother. Yet, it provides protection for mothers by prohibiting claims against them beyond the limits of their insurance policies.

(c) American Case Law

37¶ The American cases indicate that there is no judicial consensus on the issue of maternal tort liability for prenatal negligence, in the context of motor vehicle accidents or otherwise. However, in *Stallman v. Youngquist*, 531 N.E.2d 355 (1988), the Supreme Court of Illinois declined to recognize a cause of action by a foetus, subsequently born alive, against his or her mother for the unintentional infliction of prenatal injuries caused by her negligent driving. Cunningham J. held that to impose a duty of care in this context would infringe the mother's rights of privacy and bodily integrity. His decision emphasized the policy concerns which militate against imposing tort liability on

mothers for prenatal negligence. He articulates his position in this manner (at pp. 359-60):

> It is clear that the recognition of a legal right to begin life with a sound mind and body on the part of a fetus which is assertable after birth against its mother would have serious ramifications for all women and their families, and for the way in which society views women and women's reproductive abilities. The recognition of such a right by a fetus would necessitate the recognition of a legal duty on the part of the woman who is the mother; a legal duty, as opposed to a moral duty, to effectuate the best prenatal environment possible.
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> Holding a third person liable for prenatal injuries furthers the interests of both the mother and the subsequently born child and does not interfere with the defendant's right to control his or her own life. Holding a mother liable for the unintentional infliction of prenatal injuries subjects to State scrutiny all the decisions a woman must make in attempting to carry a pregnancy to term, and infringes on her right to privacy and bodily autonomy.
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> The relationship between a pregnant woman and her fetus is unlike the relationship between any other plaintiff and defendant. No other plaintiff depends exclusively on any other defendant for everything necessary for life itself. No other defendant must go through biological changes of the most profound type, possibly at the risk of her own life, in order to bring forth an adversary into the world. It is, after all, the whole life of the pregnant woman which impacts on the development of the fetus. As opposed to the third-party defendant, it is the mother's every waking and sleeping moment which, for better or worse, shapes the prenatal environment which forms the world for the developing fetus. That this is so is not a pregnant woman's fault: it is a fact of life.

38¶ In the case of *Bonte*, supra, a child sued his mother for injuries sustained as a result of her negligent failure to use a designated crosswalk when she was seven months pregnant. The three-to-two split in the Supreme Court of New Hampshire, in favour of allowing the infant's cause of action to proceed, is typical of the division of judicial opinion in the United States. The reasons of Thayer J., for the majority, reflect those of the trial judge in the instant appeal. Thayer J. recognized the infant's cause of action for the following reasons (at p. 466):

> Because our cases hold that a child born alive may maintain a cause of action against another for injuries sustained while in utero, and a child may sue his or her mother in tort for the mother's negligence, it follows that a child born alive has a cause of action against his or her mother for the mother's negligence that caused injury to the child when in utero.

39¶ With respect, I believe that the public policy considerations are paramount in this appeal. Accordingly, I agree with the dissenting decision of Brock C.J. and Batchelder J., which eloquently echoes the policy concerns that pertain to this difficult case (at p. 467):

> Holding a third party liable for negligently inflicted prenatal injuries furthers the child's legal right to begin life free of injuries caused by the negligence of others,

> but does not significantly restrict the behavior or actions of the defendant beyond the limitations already imposed by the duty owed to the world at large by long standing rules of tort law. Third parties, despite this recently imposed duty to the fetus, are able to continue to act much as they did before the cause of action was recognized. Imposing the same duty on the mother, however, will constrain her behavior and affirmatively mandate acts which have traditionally rested solely in the province of the individual free from judicial scrutiny, guided, until now, by the mother's sense of personal responsibility and moral, not legal, obligation to her fetus.
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> Although it is true that the law may impose liability based on the special relationship between certain parties, we can think of no existing legal duty analogous to this one, which could govern such details of a woman's life as her diet, sleep, exercise, sexual activity, work and living environment, and, of course, nearly every aspect of her health care. Imposing a legal duty upon a mother to her fetus creates a legal relationship which is irrefutably unique.

40¶ The willingness of the trial judge and the New Brunswick Court of Appeal to impose tort liability on mothers for prenatal negligence appears to be based in large part on principles of tort law which, to date, have been applied solely to negligent third parties. The infant respondent argues that these general principles, which may result in third-party liability, may equally result in maternal prenatal liability. Yet, I agree with the position put forward by the dissent in *Bonte*, which was expressed as follows: "[W]hether to subject the day-to-day decisions and acts of a woman concerning her pregnancy to judicial scrutiny is not properly a question to be decided by a mechanical application of logic" (p. 467).

41¶ Rather, it is the policy concerns, so central to this issue, which should determine whether tort liability should be imposed on mothers for prenatal negligence. With the greatest respect, I am of the view that the judgments below failed to appreciate fully the extensive intrusion into the privacy and autonomy rights of women that would be required by the imposition of tort liability on mothers for prenatal negligence. Such a rule of law would have profound implications and consequences for all Canadian women who are or may become pregnant.

(d) Consequences of Recognizing this Cause of Action

42¶ There are many circumstances in which the acts or failures to act of a pregnant woman may constitute negligence and result in injury to her foetus. A general social survey indicates that of all the types of accidents in which women were involved, 28 percent occurred in motor vehicles and 21 percent occurred in the home: Statistics Canada, Catalogue No. 82-003, Health Reports (1995), vol. 7, No. 2, at p. 12. In addition, for hospital admissions due to unintentional falls, the place of occurrence is the home for 47 percent of the females who reported injuries: Canadian Institute for Health Information, National Trauma Registry Report --Hospital Injury Admissions, 1995/96 (1998), at p. 57. If a legal duty of care is imposed upon a pregnant woman towards her foetus or subsequently born child, such accidents, if they occur while the woman is pregnant, could be characterized as prenatal negligence and result in tort liability.

43¶ Moreover, a pregnant woman will very often choose, or be compelled by economic reality, to continue her employment in order to support and maintain, or to assist in the support and maintenance, of her family. It seems clear that imposing a legal duty of care upon a pregnant woman would adversely affect that woman's ability to

work during pregnancy. Indeed, all of the legal problems inherent in maternal tort liability for prenatal negligence, in the context of household and highway accidents, are equally apparent in the workplace setting. Statistical data indicates that, of all the accidents in which women were injured, 14 percent occurred in the course of employment: Health Reports, supra, at p. 12.

44¶ Whether it be in the household, on the roadways, or in the workplace, the imposition of a duty of care upon a pregnant woman towards her foetus or subsequently born child could render that woman liable in tort, even in situations where her conduct could not possibly affect a third-party. A mother could be held liable in tort for negligent acts or defaults, which occurred while she was pregnant and alone, and which subsequently caused damages to her born alive child. This could include the careless performance of household activities -- such as preparing meals, carrying loads of laundry, or shovelling snow -- while alone in the home. It could include the negligent operation of any motor vehicle -- be it for personal, family or work-related purposes -- even if no third-party could possibly be affected. A mother who injured her foetus in a careless fall, or who had an unreasonable lapse of attention in the home, at work or on the roadways, could potentially be held liable in tort for the damages suffered by her born alive child. The imposition of tort liability in those circumstances would significantly undermine the privacy and autonomy rights of women.

45¶ It becomes apparent that many potential acts of negligence are inextricably intertwined with the lifestyle choices, the familial roles and the working lives of pregnant women. Women alone bear the burdens of pregnancy. Our society collectively benefits from the remarkably important role played by pregnant women. The imposition by courts of tort liability on mothers for prenatal negligence would restrict a pregnant woman's activities, reduce her autonomy to make decisions concerning her health, and have a negative impact upon her employment opportunities. It would have a profound effect upon every woman, who is pregnant or merely contemplating pregnancy, and upon Canadian society in general. Any imposition of such tort liability should be undertaken, not by the courts, but by the legislature after careful study and debate.

46¶ Moreover, the imposition of tort liability in this context would carry psychological and emotional repercussions for a mother who is sued in tort by her newborn child. To impose tort liability on a mother for an unreasonable lapse of prenatal care could have devastating consequences for the future relationship between the mother and her born alive child. In essence, the judicial recognition of a cause of action for maternal prenatal negligence is an inappropriate response to the pressing social issue of caring for children with special needs. Putting a mother through the trauma of a public trial to determine whether she was at fault for the injury suffered by her child can only add emotional and psychological trauma to an already tragic situation.

47¶ Such litigation would, in all probability, have detrimental consequences, not only for the relationship between mother and child, but also for the relationship between the child and his or her family. Yet, family harmony will be particularly important for the creation of a caring and nurturing environment for the injured child, who will undoubtedly require much loving attention. It seems clear that the well-being of such a child cannot be readily severed from the interests of his or her family. In short, neither the best interests of the injured child, nor those of the remainder of the family, would be served by the judicial recognition of the suggested cause of action.

48¶ The primary purposes of tort law are to provide compensation to the injured and deterrence to the tortfeasor. In the ordinary course of events, the imposition of tort liability on a mother for prenatal negligence would provide neither compensation nor deterrence. The pressing societal issue at the heart of this appeal is the lack of financial support currently available for the care of children with special needs. The imposition of a legal duty of care on a pregnant woman towards her foetus or subsequently born child will not solve this problem. If anything, attempting to address this social problem in a litigious setting would merely exacerbate the pain and trauma of a tragic situation. It may well be that carefully considered legislation could create a fund to compensate children with prenatally inflicted injuries. Alternatively, amendments to the motor vehicle insurance laws could achieve the same result in a more limited context. If, as a society, Canadians believe that children who sustain damages as a result of maternal prenatal negligence should be financially compensated, then the solution should be formulated, after careful study and debate, by the legislature.

2. Difficulties of Articulating a Judicial Standard of Conduct for Pregnant Women

49¶ The infant respondent and certain interveners argued that a legal duty of care should be imposed upon a pregnant woman towards her foetus or born alive child. If such a duty of care is imposed upon pregnant women, then a judicially defined standard of conduct would have to be met. One intervener argued that tort liability should be imposed where a woman's conduct fails to conform to a "reasonable pregnant woman" standard, which would apply to all aspects of her behaviour while pregnant. By contrast, the infant respondent argued in favour of the test put forward by the Court of Appeal in this case. This test draws a distinction between those situations in which a pregnant woman owes a "general duty of care" and those which relate to "lifestyle choices peculiar to parenthood". In the latter cases, a mother would be immune from tort liability for prenatal negligence. Another strand in the respondent's argument is that, at the very least, a mother should be held liable for all damages suffered by her born alive child as a result of prenatal injuries caused by her allegedly negligent driving. It was argued that the existence of a mandatory insurance regime for motor vehicle negligence entitles the born alive child to compensation in such cases.

50¶ I believe that the courts cannot, and should not, articulate a standard of conduct for pregnant women. To do so raises all of the troubling questions posed by Cunningham J. in *Stallman*, supra, (at p. 360):

> It must be asked. By what judicially defined standard would a mother have her every act or omission while pregnant subjected to State scrutiny? By what objective standard could a jury be guided in determining whether a pregnant woman did all that was necessary in order not to breach a legal duty to not interfere with her fetus' separate and independent right to be born whole? In what way would prejudicial and stereotypical beliefs about the reproductive abilities of women be kept from interfering with a jury's determination of whether a particular woman was negligent at any point during her pregnancy?

51¶ For the reasons set out later, I am of the view that the various approaches advocated by the infant respondent and the interveners fail to avoid the pitfalls of a judicially defined standard of care for pregnant women. To adopt the "reasonable pregnant woman" standard involves far-reaching implications and extensive intrusions into the rights of bodily integrity, privacy and autonomy of pregnant women. The test articulated by the Court of Appeal is, I believe, inconsistent with general principles of

tort law and unworkable in practice. Finally, if the existence of motor vehicle insurance is to be relied upon as the basis for imposing a legal duty of care upon pregnant women, then this solution should be enacted by the legislature. A specific and insurance-dependent rule of tort liability cannot, and should not, be created by the courts.

(a) Reasonable Pregnant Woman Standard

52¶ Linked to the unpredictable impact on the privacy and autonomy rights of women, lies the difficult, perhaps impossible, task of judicially defining a standard of conduct for pregnant women. An intervener argued that a mother-to-be should be held liable for all negligent behaviour causing damages to her foetus, which would be determined in accordance with a "reasonable pregnant woman" standard. An intervener submitted that, once aware of the pregnancy, a woman should be required to conform to the standard of behaviour of a "reasonably prudent expectant mother conducting herself under similar circumstances": D. Santello, "Maternal Tort Liability for Prenatal Injuries" (1988), 22 Suffolk U. L. Rev. 747, at p. 775. This would involve an analysis of the risks associated with a given activity, the gravity of the possible injury, and the likelihood of that injury occurring. The standard of care would be reasonable rather than absolute, and thus a pregnant woman would not be expected to act as the insurer for the health of her subsequently born child.

53¶ In my view, this standard is inappropriate. It raises the spectre of judicial scrutiny and potential liability imposed for "lifestyle choices". Thus, it brings into play all of the policy concerns articulated in *Winnipeg*, supra. For instance, it would be open to the trier of fact to determine that a "reasonable pregnant woman", who knows or has reason to know of her condition, should not smoke cigarettes or drink alcohol. Decisions involving the standard of care in tort law focus upon generally accepted norms, rather than on the individual woman. This objective standard would permit triers of fact to dictate, according to their own notions of proper conduct, the manner in which an expectant woman should behave throughout her pregnancy. Accordingly, a pregnant woman whose lifestyle conduct was under judicial scrutiny would not benefit from a truly individual standard, which takes into account her personal situation and acknowledges her autonomy.

54¶ The importance of an individual standard of assessment is emphasized by the great disparities which exist in the financial situations, education, access to health services and ethnic backgrounds of pregnant women. These disparities would inevitably lead to an unfair application of a uniform legal standard concerned with the reasonable pregnant woman. In this regard, Cunningham J. noted in *Stallman*, supra, at p. 360:

> Pregnancy does not come only to those women who have within their means all that is necessary to effectuate the best possible prenatal environment: any female of child-bearing age may become pregnant. Within this pool of potential defendants are representatives of all socio-economic backgrounds: the well-educated and the ignorant; the rich and the poor; those women who have access to good health care and good prenatal care and those who, for an infinite number of reasons, have not had access to any health care services.

55¶ Tort law is concerned with the application of objective standards of reasonable behaviour to impugned conduct. It cannot adequately address the profound public policy implications raised by this appeal. Brock C.J. and Batchelder J., in dissent, expressed serious doubts as to whether it is "possible to subject a woman's judgment,

action, and behavior as they relate to the well-being of her fetus to a judicial determination of reasonableness in a manner that is consistent and free from arbitrary results": *Bonte*, supra, at p. 468. I share those reservations.

(b) Lifestyle Choices Peculiar to Parenthood

56¶ On behalf of the infant respondent, it was argued that these policy considerations, although admittedly profound, are not raised in this appeal. Rather, it was submitted that this case is only concerned with whether a mother may be liable to her born alive child for her prenatal negligence in the operation of a motor vehicle. This position was adopted by the New Brunswick Court of Appeal. Hoyt C.J.N.B. held that, because a pregnant woman who is driving owes a general duty of care to members of the public, she must owe that same duty to her subsequently born child. However, he went on to hold that, if the activity in question is "peculiar to parenthood" or involves a "lifestyle choice", then a child born alive with injuries cannot commence an action in negligence against his or her mother. A similar dividing line is described by Professor Fleming, supra, at p. 168:

> More complex is the question whether a child should have a claim for prenatal injury against a parent. A distinction is in order between the general duty to avoid injury which the defendant owes to all others and those peculiar to parenthood. An instance of the former is the duty to drive carefully, which even the mother at the wheel owes to her foetus. On the other hand, there is strong aversion against inquisition into alleged parental indiscretions during pregnancy, like excessive smoking, drinking or taking drugs.

Thus, Professor Fleming describes the immunity from tort liability in this context as relating to all those activities which are "peculiar to parenthood"; that is to say, those activities that relate uniquely to parenting.

57¶ With respect to those who hold this opinion, I am of the view that this distinction is unworkable. It fails to consider the scope of the role of a parent. Driving is an integral part of parenting in a great many families. For instance, a parent must often drive to pick up children from school or child care, to take them to the dentist or doctor, or to hockey practice or swimming lessons. Indeed, I doubt whether any court can articulate a sound legal test, which is both theoretically coherent and workable in practice, that could effectively limit maternal prenatal liability to cases of motor vehicle negligence. Ultimately, only the legislature can create such a narrow and specific basis of tort liability.

58¶ In my view, a distinction based on duties which are "peculiar to parenthood" would lead to inconsistent results. In this regard, the American cases which considered a partial abrogation of the parental immunity doctrine, which excludes acts involving the "exercise of parental authority and discretion", are instructive. Certain American courts have rejected the parental immunity exceptions because they result in arbitrary distinctions between acts unique to parenting and those that are not: *Hartman by Hartman v. Hartman*, 821 S.W.2d 852 (Mo. 1991), at pp. 856-57. Significantly, several American cases considered the operation of a motor vehicle to be a family activity which engaged the parental immunity doctrine. This position treated the use of an automobile as essential to the functioning of a household. In *Hogan v. Hogan*, 435 N.E.2d 770 (Ill. App. Ct. 1982), it was held that driving a child to her piano lesson constituted the operation of a motor vehicle to accomplish a family purpose. Similarly, *Eisele v. Tenuta*, 404 N.E.2d 349 (Ill. App. Ct. 1980), held that driving with a minor to a college was

directly connected with family purposes and objectives. In *Johnson v. Myers*, 277 N.E.2d 778 (Ill. App. Ct. 1972), at pp. 779-80, it was stated that "[i]n a modern society the motor vehicle plays an intimate and necessary part in the accomplishment of many family purposes". This seems to be an eminently sensible conclusion which reflects the scheduling demands of contemporary society.

59¶ The Court of Appeal also referred to a "general duty of care" in articulating its test for maternal tort liability. With respect, there can be no such duty owed to the public at large. As a matter of tort law, a duty of care must always be owed by one person to another. Negligence cannot exist in the abstract. There must be a specific duty owed to a foreseeable plaintiff, which is breached, in order for negligence to arise. A "general duty of care" does not exist. Accordingly, it cannot be used as a legal test for the imposition of tort liability in cases of prenatal negligence. Even if it were possible to identify readily those activities in which a woman owes a "general duty of care", this would not limit the extent of external scrutiny and control over a pregnant woman's daily life. To rely on the "general duty of care" distinction, in order to hold that this appeal does not raise important issues of social policy, is bound to introduce a significant element of uncertainty into tort law.

60¶ Moreover, 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. The potential breadth of maternal tort liability under this test was recognized by Professor Ian R. Kerr in "Pre-Natal Fictions and Post-Partum Actions" (1997), 20 Dalhousie L.J. 237, at pp. 270-71:

> [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. The rule that the Court of Appeal has derived from Fleming's distinction is that duties owed by a pregnant woman to the general public are owed to her unborn child as well. The consequence of this rule, which seems to have gone completely unnoticed by the Court, is that 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 a 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. . . .
>
> Ironically, in its attempt to shield women from inquisitions into alleged parental indiscretions such as smoking and drinking, the Court of Appeal has expanded the liability of pregnant women. [Emphasis in original.]

61¶ In essence, 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. Is drug use, if prescribed by a physician, a lifestyle choice? Is a hazardous work environment a lifestyle choice? Indeed, is it not arguable that driving while pregnant, for the benefit and welfare of the family, constitutes a lifestyle choice?

62¶ In *Winnipeg*, supra, it was argued that the potential state intrusions on behalf of the foetus would be minimal because the duty of care could be defined narrowly. It was submitted that the standard should be "to refrain from activities that have no substantial value to a pregnant woman's well-being or right of self-determination" (para. 38). In rejecting this test as too vague and broad, McLachlin J. observed that the proposed standard raised the following intractable questions (at para. 39):

> What does substantial value to a woman's well-being mean? What does a woman's well-being include? What is involved in a woman's right of self-determination -- all her choices, or merely some of them? And if some only, what is the criterion of distinction? Although it may be easy to determine that abusing solvents does not add substantial value to a pregnant woman's well-being and may not be the type of self-determination that deserves protection, other behaviours are not as easily classified.

63¶ Similarly the test proposed by the Court of Appeal fails to articulate a workable judicial standard for distinguishing between tortious and non-tortious conduct. Just as McLachlin J. could not identify a bright line to ground liability on the basis of conduct which fails to add "substantial value to a pregnant woman's well-being", a similar difficulty is presented by a liability rule defined by behaviour involving "lifestyle choices" or conduct "peculiar to parenthood". The determination of whether a duty of care should be imposed must be made by considering the effects of tort liability on the privacy and autonomy interests of women, and upon their families, rather than by reference to a formalistic characterization of the conduct in question.

(c) Motor Vehicle Exception

64¶ In articulating a distinction between lifestyle choices and the general duty to drive carefully, the Court of Appeal relied on the Congenital Disabilities (Civil Liability) Act 1976. However, it must be remembered that, under this statute, the Parliament of the United Kingdom exempted mothers from tort liability for injuries caused to their children while in utero, with the exception of injuries sustained as a result of motor vehicle accidents. With respect, the U.K. legislative solution to the issue at bar cannot be interpreted as support for the test suggested by the Court of Appeal. To do so presumes that it is appropriate for courts to resolve an extremely sensitive and complex issue of public policy and insurance law. The Court of Appeal failed to appreciate the significance of the fact that maternal liability for motor vehicle negligence is provided for in the United Kingdom in legislation rather than the common law.

65¶ Thus, it must be emphasized that the general rule for mothers in the United Kingdom is one of immunity for prenatal negligence with the limited exception of injuries caused by negligent driving. The Act provides that a mother cannot be held liable for any amount of damages which exceeds the limit fixed by statute. This will benefit both the mother and the rest of the family. The legislation renders it impossible to argue by analogy that the duty of care should be extended to other tortious situations. A judicial finding of liability in this appeal would not necessarily place pregnant women in Canada in the same legal position. If such an action were allowed, even in the narrow

context of negligent driving, it would have to recognize a duty and articulate a standard of care for the conduct of pregnant women. As a matter of tort law, this carries the risk that the duty would be applied in other contexts where it would impose unreasonable obligations upon pregnant women.

66¶ As previously discussed, the consequences of imposing tort liability on a mother, for prenatally inflicted injuries causing damages to her born alive child, are far-reaching. It cannot be forgotten that the relationship between a mother-to-be and her foetus is such that everything the former does may affect the latter. To reiterate some of the most obvious examples -- the ingestion of prohibited drugs, the consumption of alcohol, and the smoking of cigarettes -- all could be found to breach a duty of care owed by a pregnant woman to her foetus or subsequently born child. Perhaps the decision to avoid eating fruits and vegetables could also be found to constitute tortious conduct. The same conclusion might be reached with regard to unprotected sexual intercourse, rigorous exercise or no exercise. Every aspect of the life of a pregnant woman would be subjected to external scrutiny if liability for tortious conduct to her foetus were imposed.

67¶ Moreover, it is noteworthy that the U.K. regime is a direct result of the compulsory liability insurance mandated for motor vehicle negligence. See Law Com. No. 60, "Report on Injuries to Unborn Children", supra, at paras. 59-60. This underlying rationale was recognized by Ray Carter in the Parliamentary Debates, 5th ser., vol. 904, col. 1589 (6 February 1976) at col. 1595:

> Clause 2 deals with the special case in which the Law Commission thought that a mother should be liable for negligence causing injuries to her child. In this case alone the Law Commission thought that it would relieve rather than increase the stress naturally imposed on her if her child could recover damages against her. Because she is bound to be insured for liability while driving, there should be no question of inability to pay the sum awarded, and this provision accords with the general policy that the blameless victims of road accidents caused by negligence should recover compensation. For those reasons motor accidents are treated as a special case. From a legal point of view, I understand that there may be said to be some inconsistency between the provisions of Clauses 1 and 2 [maternal immunity and motor vehicle exception], but I believe that the provisions are based on common sense and reflect the realities of everyday life. [Emphasis added.]

68¶ The legislative record in the United Kingdom clearly demonstrates that the motor vehicle exception to maternal tort immunity for prenatal negligence was designed as a measure to decrease the anxiety of women who continue to drive during their pregnancies. It does so by providing recourse to insurance if there is a motor vehicle accident. The distinction in the Act between driving negligence and all other types of negligence stems from pragmatic and logistical considerations. It reduces the driving-associated worries of pregnant women with the mandatory requirement of motor vehicle insurance. These are precisely the types of "common-sense" criteria that legislators may consider in the course of their studies. Courts, if they are going to create exceptions or distinctions, must do so in a more legally principled manner. As a matter of tort law, a motor vehicle exception to maternal immunity for prenatal negligence is "legally weak and untidy": B. Steinbock, Life Before Birth: The Moral and Legal Status

of Embryos and Fetuses (1992), at p. 98. However, it may well be appropriate for a legislative body to create such an exception.

69¶ Once again, the American experience with the partial abrogation of the parental tort immunity doctrine is instructive in this regard. In *Black v. Solmitz*, 409 A.2d 634 (1979), the Supreme Judicial Court of Maine refused to carve out a motor vehicle exception for the following reasons at p. 639:

> It seems proper to add, however that we do not intend to limit our decision to automobile negligence cases in the manner of the Virginia Supreme Court of Appeals, nor do we intend to follow the Massachusetts Supreme Judicial Court in abrogating the rule of parental immunity only to the extent of the parent's automobile liability insurance. Those limitations seem to us objectionable as suggesting that the decision to restrict immunity is based on expediency rather than on correct legal principles. In our view such decisions are difficult to defend against the charge that they effect a result more appropriately reserved for legislation. [Emphasis added; citations omitted.]

70¶ It may well be that a legislative exception to maternal tort immunity can be created for damages, caused to a child upon birth, as a result of the negligent driving of a pregnant woman. For example, the statute might specify that this constituted an exception to the general rule of tort immunity, fix the limits of liability, and prohibit the recovery of damages above the limit fixed in the insurance policy. Legislation of this type could be socially rewarding for it could benefit the injured child, the mother and the rest of the family. Yet, if it were carefully drafted, such legislation would not constitute an undue intrusion into the privacy and autonomy rights of pregnant women in Canada.

(d) Insurance-Dependent Rationale

71¶ Clearly, the judicial creation of a motor vehicle exception would be predicated, in large part, on the existence of a mandatory insurance regime for automobile negligence. This underlying rationale was accepted by the Australian High Court in *Lynch*, supra. In that case, the facts were strikingly similar to those presented in this appeal. The court strictly limited maternal tort liability for prenatal injuries to cases of motor vehicle negligence on the basis that insurance was compulsory in that context. In arriving at this conclusion, Clarke J.A. considered the policy concerns that all those injured in road accidents should be compensated and that all owners of motor vehicles should contribute to the cost of injury through insurance. By adopting an insurance-dependent rationale, it was not necessary for the court to consider whether a pregnant woman owed a duty of care to her foetus or subsequently born child.

72¶ It must be recognized that, although the appellant mother is in the legal position of defending this action, an award of damages in favour of the respondent would greatly assist the appellant and her husband with the financial requirements of caring for their severely disabled child. It is true that, in this particular case, the material interests of the mother and child are aligned, notwithstanding the fact that their legal relationship is adversarial. As one author notes, "[i]f there is automobile insurance, allowing such suits does not make the mother and fetus -- or, rather, subsequently born child -- genuine adversaries, since the whole family benefits by allowing the child to recover": *Steinbock*, supra, at p. 100.

73¶ An insurance-driven judicial solution to the issue raised in this appeal imposes liability on a mother on the basis of her ability to satisfy a judgment by means of her

insurance coverage. However, tort law is not, and should not be, result-oriented in this manner. A rule founded on access to insurance would run counter to the decision in *Hamstra (Guardian ad litem of) v. British Columbia Rugby Union*, 1997 CanLII 391 (S.C.C.), [1997] 1 S.C.R. 1092, at p. 1108. There it was held that juries should generally not be advised that a judgment will be paid by an insurer, because the existence of insurance is irrelevant to the determination of the issue of liability. Although some American courts have seized upon the prevalence of liability insurance as a rationale for allowing intra-family tort litigation, this reasoning has been the subject of considerable judicial criticism: *Black*, supra; *Hartman*, supra.

74¶ Quite simply, the existence of insurance is not an appropriate basis for the determination of tort liability between litigating parties. As Viscount Simonds noted in *Lister v. Romford Ice & Cold Storage Co.*, [1957] 1 All E.R. 125 (H.L.), at p. 133: "As a general proposition it has not, I think, been questioned for nearly two hundred years that, in determining the rights inter se of A and B, the fact that one or other of them is insured is to be disregarded".

75¶ Moreover, problems of application are bound to arise with a judicial exception to maternal tort immunity based on motor vehicle insurance. For instance, should liability be confined to the limits of the mother's insurance policy? Contributory negligence as a vehicle passenger may not be covered by insurance. In addition, the mother's action may be barred by a wide range of coverage defences available to her insurer. This Court has consistently held that the existence of insurance is irrelevant to a determination of tortious liability. Accordingly, it would be inappropriate to resolve this appeal on that basis.

VI. Summary

76¶ Perhaps a very brief summary of some of the more significant conclusions reached in these reasons may be of assistance. This is the first case in which Canadian courts have had to examine the theory of maternal tort liability for prenatal negligence. The judicial recognition of a legal duty of care owed by a pregnant woman towards her foetus or subsequently born child requires that the two-step test articulated in *Kamloops*, supra, be satisfied. The conclusion reached with respect to the second branch of that test determines the outcome of this appeal. 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 pregnant woman towards her foetus or subsequently born child. However, unlike the courts, the legislature may, as did the Parliament of the United Kingdom, enact legislation in this field, subject to the limits imposed by the Canadian Charter of Rights and Freedoms.

77¶ Biology dictates that only women can become pregnant and bear children. In light of this very demanding biological reality, the courts should be hesitant to impose additional burdens upon pregnant women. In addition, the relationship between an expectant woman and her foetus is truly unique. Accordingly, there can be no meaningful analogy between a child's action for prenatal negligence against a third-party tortfeasor, on the one hand, and against his or her mother, on the other.

78¶ The actions of a pregnant woman, including driving, are inextricably linked to her familial role, her working life, and her rights of privacy, bodily integrity and autonomous decision-making. Moreover, the judicial recognition of this cause of action would involve severe psychological consequences for the relationship between mother and child, as well as the family unit as a whole. It is apparent that the imposition of tort liability in this context would have profound effects upon every pregnant woman and

upon Canadian society in general. Therefore, I must agree with the conclusion reached by Brock C.J. and Batchelder J., dissenting in *Bonte*, supra (at p. 468):

> Such after-the-fact judicial scrutiny of the subtle and complicated factors affecting a woman's pregnancy may make life for women who are pregnant or who are merely contemplating pregnancy intolerable. For these reasons, we are convinced that the best course is to allow the duty of a mother to her fetus to remain a moral obligation which, for the vast majority of women, is already freely recognized and respected without compulsion by law.

79¶ There is as well a need for judicial restraint in the development of tort law as it pertains to sensitive and far-reaching issues of public policy. The imposition of a legal duty of care upon a pregnant woman towards her foetus or subsequently born child cannot be characterized as the simple application of existing tort rules to meet the requirements of a specific case. Rather, it constitutes a severe intrusion into the lives of pregnant women, with potentially damaging effects on the family unit.

80¶ Moreover, there can be no satisfactory judicial articulation of a standard of conduct for pregnant women. A rule based on a "reasonable pregnant woman" standard raises the spectre of tort liability for lifestyle choices, and undermines the privacy and autonomy rights of women. A compromise judicial solution, based on the murky distinction between "lifestyle choices peculiar to parenthood" and a "general duty of care" owed to third parties, is simply too vague to be manageable, and will inevitably lead to inequitable and uncertain results.

81¶ Finally, a rule based on a strictly defined motor vehicle exception to delineate the scope of maternal tort liability should not be created by the judiciary. To do so would be to sanction a legal solution based solely on access to insurance. If this approach were to be adopted, the provincial legislatures would be required to amend their legislative compensation regimes for motor vehicle accidents. Any such amendment might well be required to specify that it constituted an exception to the general rule of maternal tort immunity for prenatal negligence, and that the injured child could not recover damages above the limit established by the insurance scheme. A carefully tailored solution could benefit both the injured child and his or her family, without unduly restricting the privacy and autonomy rights of Canadian women.

VII. Disposition

82¶ The order of the Court of Appeal and the trial judgment are set aside. The appeal is allowed but, under the circumstances, without costs.

The reasons of L'Heureux-Dubé and McLachlin JJ. were delivered by MCLACHLIN J.

83¶ **MCLACHLIN J. –** The issue on this appeal is whether the common law should hold a pregnant woman civilly liable for injury to her foetus when the foetus is later born alive. Thus far the courts have not imposed such liability. I agree with Cory J. that they should not do so now and unconditionally endorse his analysis and disposition of this appeal. I wish merely to add observations about the constitutional values underpinning the autonomy interest of pregnant women and the difficulty with using tort principles to restrict that interest.

84¶ In my view, to apply common law liability for negligence generally to pregnant women in relation to the unborn is to trench unacceptably on the liberty and equality interests of pregnant women. The common law must reflect the values enshrined in the

Canadian Charter of Rights and Freedoms. Liability for foetal injury by pregnant women would run contrary to two of the most fundamental of these values – liberty and equality.

85¶ I turn first to liberty. Virtually every action of a pregnant woman -- down to how much sleep she gets, what she eats and drinks, how much she works and where she works -- is capable of affecting the health and well-being of her unborn child, and hence carries the potential for legal action against the pregnant woman. Such legal action in turn carries the potential to bring the whole of the pregnant woman's conduct under the scrutiny of the law. This in turn has the potential to jeopardize the pregnant woman's fundamental right to control her body and make decisions in her own interest: *R. v. Morgentaler*, 1988 CanLII 90 (S.C.C.), [1988] 1 S.C.R. 30, per Wilson J.

86¶ The intrusion upon the pregnant woman's autonomy worked by the proposed common law rule would also violate her right to equal treatment. Canadians generally enjoy the full right to decide what they will eat or drink, where they will work and other personal matters. Pregnant women, however, would not enjoy that right. In addition to the usual duties of prudent conduct imposed on all who engage in life's various activities, pregnant women would be subject to a host of additional restrictions. Any other individual can avoid being a tortfeasor by isolating himself or herself from other members of society. The pregnant woman has no such choice. She carries her foetus 24 hours a day, seven days a week.

87¶ To say women choose pregnancy is no answer. Pregnancy is essentially related to womanhood. It is an inexorable and essential fact of human history that women and only women become pregnant. Women should not be penalized because it is their sex that bears children: *Brooks v. Canada Safeway Ltd.*, 1989 CanLII 96 (S.C.C.), [1989] 1 S.C.R. 1219. To say that broad legal constraints on the conduct of pregnant women do not constitute unequal treatment because women choose to become pregnant is to reinforce inequality by the fiction of deemed consent and the denial of what it is to be a woman.

88¶ Those who urge intrusion of common law tort liability into the lives of pregnant women do not, in the main, contest the impermissibility of broad interference with the rights of women to make decisions about their bodies and lives. They seek rather to reduce the intrusion on the autonomy of the pregnant woman to the point where the infringement on her liberty and equality interests is acceptable.

89¶ My difficulty is that the common law is unable to achieve this restrained result without distortion of the very methodology by which it operates and the introduction of new difficulties. The first proposal -- the rule that only children "born alive" can sue -- eliminates liability for abortion but leaves vast scope for curtailment of the pregnant woman's autonomy. The second proposal -- a rule that liability follows only where the mother has an insurance policy to cover the damage -- flies in the face of the maxim that tort liability cannot be predicated on the means of the defendant. A third proposal, adopted by the Court of Appeal -- that liability be restricted to situations where the pregnant woman already owes a duty to other people "generally" (in this case, a general duty to "drive carefully") -- violates the precept that a common law duty of care arises from the relationship of the parties before the court, not from the relationship between the defendant and a hypothetical plaintiff. Finally, the variant on the Court of Appeal's theory adopted by Major J. -- that the additional duty must be owed to an actual third party -- still violates the principle that the duty of care in tort must be founded on the relationship between the actual parties to the dispute before the court, and makes recovery conditional on the serendipitous coincidence that another person stood to be injured by the pregnant woman's act or omission. I am not persuaded that the common

law can be narrowed to achieve the result here sought while staying true to its principles.

90¶ The goal of the Court of Appeal and those who advocate liability in this case is modest. They simply want children who are born with injuries sustained before birth due to their mother's negligence in operating a motor vehicle to be able to recover under the mother's liability insurance policy. That may be a laudable goal. The difficulty is that in order to achieve this modest goal judicially, they cast themselves on the horns of a dilemma: either they shape the common law in a way that has the potential to render pregnant women liable for a broad range of conduct and unjustifiably trammel liberty and rights to equal treatment; or they accept category-based restrictions antithetical to the common law method. Legislative action, the route chosen in England, can accomplish the limited goal of permitting children like the respondent to access motor vehicle liability insurance without these negative consequences. In these circumstances, the courts should not intervene.

The reasons of Major and Bastarache JJ. were delivered by MAJOR J.

91¶ **MAJOR J. (dissenting)** -- On March 14, 1993, the appellant Cynthia Dobson was driving a motor vehicle towards Moncton, New Brunswick, on Route 126. There were patches of drifted snow and slush on the road and the weather was unsettled. At approximately 12:30 p.m., her vehicle collided with that of John Carter. Cynthia Dobson was 27 weeks pregnant. The respondent Ryan Dobson was born by Caesarean section later the same day. He suffered injuries in the collision resulting in permanent mental and physical impairment, including cerebral palsy, and alleges that the collision was caused by his mother's negligent driving.

92¶ The issue is whether a born alive child has the legal capacity to commence a tort action against his mother for prenatal injuries sustained as a result of her alleged negligent driving.

93¶ The trial judge granted the respondent standing to sue. He reasoned that since a child has a right to sue his parents in tort (*Deziel v. Deziel*, [1953] 1 D.L.R. 651 (Ont. H.C.)), and since a born alive child has a right to sue third parties in tort for injuries sustained in utero (*Montreal Tramways Co. v. Léveillé,* [1933] S.C.R. 456; *Duval v. Seguin*, [1972] 2 O.R. 686 (H.C.), aff'd (1973), 1 O.R. (2d) 482 (C.A.), it follows that a born alive child has a right to sue his mother in tort for injuries sustained in utero.

94¶ The trial judge held (186 N.B.R. (2d) 81, at p. 88) that his conclusion followed as a matter of "reasonable progression":

> But 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 prenatal injuries caused by her negligence.

95¶ There are two central objections to the trial judge's conclusion. Both are based on the unique relationship between a pregnant woman and her foetus. The first is that the trial judge's reasons rest on the mistaken assumption that the relation between a pregnant woman and her foetus can be analogized to the relation between third parties and the foetus. A pregnant woman cannot have a duty of care to her own foetus, which is at law but a part of herself. Thus, it is argued that the sui generis nature of the relation between a pregnant woman and her foetus does not permit the application of the

holdings in *Montreal Tramways*, supra, and *Duval*, supra, to the instant case. The legal unity of pregnant woman and foetus precludes the finding of a duty of care.

96¶ The second objection raises the policy implications of the trial judge's decision. A pregnant woman and her foetus are physically one, in the sense that she carries her foetus within herself. Virtually every aspect of her behaviour could foreseeably affect her foetus. Thus the vindication of a born alive child's right to sue his mother in tort would severely constrain a pregnant woman's freedom of action. The physical unity of pregnant woman and foetus means that the imposition of a duty of care would amount to a profound compromise of her privacy and autonomy. Therefore, even if a duty of care could be said to arise in the instant case, there are determinative policy considerations, formulated by this Court in *Winnipeg Child and Family Services (Northwest Area) v. G. (D.F.)*, 1997 CanLII 336 (S.C.C.), [1997] 3 S.C.R. 925, negativing the finding of a duty of care.

The First Branch of the *Kamloops* Test

97¶ These two objections correspond to the two-step test in *Anns v. Merton London Borough Council*, [1978] A.C. 728 (H.L.), at pp. 751-52, which was adopted by this Court in City of *Kamloops v. Nielsen*, 1984 CanLII 21 (S.C.C.), [1984] 2 S.C.R. 2. The test was stated by Wilson J. at pp. 10-11:

> (1) is there a sufficiently close relationship between the parties (the [defendant] and the person who has suffered the damage) so that, in the reasonable contemplation of the [defendant], carelessness on its part might cause damage to that person? If so,
>
> (2) are there any considerations which ought to negative or limit (a) the scope of the duty and (b) the class of persons to whom it is owed or (c) the damages to which a breach of it may give rise?

98¶ The parties to the present action are a mother and her born alive child, not a pregnant woman and her foetus. The parties are separate legal entities. This distinguishes the appeal from cases dealing with abortion (see *R. v. Morgentaler*, 1988 CanLII 90 (S.C.C.), [1988] 1 S.C.R. 30; *Tremblay v. Daigle*, 1989 CanLII 33 (S.C.C.), [1989] 2 S.C.R. 530) and the autonomy rights of pregnant women (see *Winnipeg*, supra).

99¶ The well-settled rule that a born alive child has a right to sue third parties for injuries prenatally sustained (i.e., the "born alive rule") does not entail an assertion of foetal rights. If the rule is applied in the present case, the duty of care at issue would not be owed by the pregnant woman to her foetus. It would be owed to her born alive child.

100¶ The foetus has no cause of action. 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.

101¶ As Lamont J. put it in *Montreal Tramways*, supra, at p. 463, "[t]he wrongful act of the Company produced its damage on the birth of the child and the right of action was then complete" (emphasis added). There was no legal damage, though there was physical injury, before the birth of the child. The actionable damage did not antecede the birth. 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.

102¶ There is no such thing as "liability for prenatal injuries". Under existing Canadian law the foetus does not exist for purposes of state protection or civil action: see *Winnipeg*, supra. The pregnant woman has no responsibility for damages or otherwise to the foetus and that is so whether the harm is accidental, negligent or deliberate. While most pregnant women take special care to ensure a healthy foetus, there is no legal requirement that they do so. Only damages to a legal person are actionable.

103¶ The law of tort views a born alive child as a person capable of suing third parties for damages resulting from injuries inflicted on her as a foetus. Absent the born alive child, however, foetal injuries are legally irrelevant. Thus, while there is no liability for prenatal injuries, there is liability for post-natal injuries resulting from prenatal events caused by a third party's negligence.

104¶ The ability of the child to sue depends on his legal existence. In this appeal, the physical injury sustained in utero is irrelevant to the question of standing. It has relevance only as a matter of causation. The plaintiff must prove, on the balance of probabilities, that his damages were in fact caused by the defendant's negligence. Ryan Dobson must prove that his damages result from the negligent driving of his mother.

105¶ A pregnant woman cannot owe a duty of care to her foetus any more than she can owe a duty of care to herself. The duty of care is owed to the born alive child. Whatever may be said as a matter of policy, the trial judge's "reasonable progression" is not inconsistent with the legal unity of pregnant woman and foetus. It has nothing to do with that unity.

106¶ In Canada, a pregnant woman has an unrestricted legal right to an abortion from conception to the time of birth, but once the child is born alive he is a legal person with all the rights that accompany that status. The right of the pregnant woman to terminate her pregnancy is unrelated to her possible responsibility to her child once born alive. An application of the first branch of the *Kamloops* test to the present case would unquestionably find that the appellant mother while driving her car owed a duty of care to other users of the highway and to passengers in her car. In my opinion, the duty of care owed by the mother to her born alive child is obvious, providing she knows or ought to know that she is pregnant at the time of the act.

The Second Branch of the *Kamloops* Test

107¶ The next question is whether policy reasons as contemplated in *Kamloops* deprive the born alive plaintiff Ryan Dobson of his cause of action.

108¶ In para. 31 of his reasons, Cory J. postulates that such policy considerations do exist. He states:

> On behalf of the infant respondent, it was argued that the reasoning in *Winnipeg* is not determinative because it dealt with the standing of the foetus to sue while still in utero. In *Winnipeg*, the foetus which sought the detention of its mother-to-be was not a legal person and possessed no legal rights. By contrast, the present action is brought on behalf of an infant born alive whose legal rights and interests vested at the moment of birth. In other words, the sole issue in this appeal is whether a child born alive -- as opposed to a foetus -- should be able to recover damages for prenatal negligence from every person except his or her mother. Despite the important legal distinction between a foetus and a child born alive, as a matter of social policy and pragmatic reality, both situations

> involve the imposition of a duty of care upon a pregnant woman towards either her foetus or her subsequently born child. To impose either duty of care would require judicial scrutiny into every aspect of that woman's behaviour during pregnancy. Irrespective of whether the duty of care is imposed upon a pregnant woman towards her foetus or her subsequently born child, both would involve severe intrusions into the bodily integrity, privacy and autonomous decision-making of that woman. Accordingly, the policy concerns raised by McLachlin J. in *Winnipeg* are equally pertinent to this appeal.

109¶ In my opinion, the policy concerns raised in *Winnipeg*, supra, relative to the pregnant woman and her foetus do not apply to the mother and her born alive child. This action was brought on behalf of a legal person, not a foetus. Cory J. suggests that, from the perspective of a pregnant woman, the important legal distinction between her foetus and her born alive child might not appear relevant. In his view, a pregnant woman might conclude that the behavioural restrictions to which she would be subjected in either case are identical. But the compelling point of departure is that, in contrast to *Winnipeg*, supra, in this appeal the pregnant woman's perspective is not the only legally recognized perspective. It competes with the recognized perspective of her born alive child.

110¶ The issue here is twofold. First, would a finding that Cynthia Dobson owes the respondent a duty of care result in additional behavioural restrictions on her while she was pregnant? If so, are those restrictions of a nature that would justify a finding that the respondent's right to commence a tort action against his mother for prenatal injuries allegedly sustained as a result of her negligent driving should give way to Cynthia Dobson's autonomy rights on policy grounds?

111¶ I respectfully disagree with Cory J. that sufficient policy concerns have been raised on the facts of this case to negative the child's right to sue in tort. The appellant Cynthia Dobson was already under a legal obligation to drive carefully. She owed a duty of care to passengers in her car and to other users of the highway, such as John Carter, the other motorist involved in the collision. If her negligent driving caused the collision, she will be liable to John Carter.

112¶ In these circumstances, it would be unjustified to hold that the appellant should not be liable to her born alive child on the grounds that such liability would restrict her freedom of action. Her freedom of action in respect of her driving was already restricted by her duty of care to users of the highway. Hence, to acknowledge that the suffering of her born alive child, Ryan Dobson, was within the reasonably foreseeable ambit of the risk created by her negligent driving is hardly a limitation of her freedom of action. The appellant mother would not have had to take any further precautions, additional to those she was already legally obliged to take, in order to avoid liability to her born alive child.

113¶ The appellant's autonomy interests are not in issue. She 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. The respondent child cannot take away from his mother a freedom she did not have.

114¶ I respectfully disagree with McLachlin J. that the liberty and equality interests of pregnant women are in issue in this appeal. The values enshrined in the Canadian Charter of Rights and Freedoms do not grant pregnant women interests of any kind in negligent driving.

115¶ On the facts of this case, Ryan Dobson's prima facie right to sue in tort arises only on the same grounds and in the same way as that of the driver of the other car. In these circumstances, the appellant's freedom of action is not in issue, and the suggestion that her son's rights ought to be negatived so as to protect her freedom of action is misplaced.

116¶ Where a pregnant woman already owes a duty of care to a third party in respect of the same behaviour for which her born alive child seeks to find her liable, policy considerations pertinent to the pregnant woman's freedom of action cannot operate so as to negative the child's prima facie right to sue. The duty of care imposed on the pregnant woman is not more onerous because of her potential liability to her born alive child.

117¶ The presence of a duty of care owed to a third party in respect of the same behaviour for which her born alive child seeks to find her liable precludes a pregnant woman from arguing successfully that her freedom of action would be restricted by the imposition of a duty of care to her born alive child. A grant of immunity from tort liability rooted in policy considerations pertinent to a pregnant woman's freedom of action must necessarily rest on a showing that such freedom of action would be restricted by the imposition of a duty of care to the born alive child. No such showing seems possible where the pregnant woman's freedom of action is already restricted in the very same respect by a duty of care owed to a third party.

118¶ I disagree with McLachlin J. that this view of the matter violates the principle that the duty of care in tort must be founded on the relationship between the actual parties to the dispute before the court. The point is not that the child's prima facie right to sue arising from the first branch of *Kamloops* is conditional on the "serendipitous coincidence" that a third party is owed a duty of care. The point is that, where a duty of care is owed to a third party, the child's prima facie right to sue cannot be negatived under the second branch of *Kamloops* on policy grounds flowing from the pregnant woman's freedom of action. The point is precisely that where, as here, a pregnant woman's freedom of action is not in issue, nothing in the relationship between the actual parties to the dispute can possibly support the proposition that the imposition of liability to her born alive child would infringe her freedom of action.

119¶ But matters are different where the pregnant woman does not owe a third party a duty of care in respect of the behaviour, as, for instance, in her lifestyle choices such as smoking, drinking, and dietary and health-care decisions. That is also true of various other activities that may place the pregnant woman in harm's way. The examples range from an unhealthy work or home environment to activities as extreme as bungy jumping. In such cases, the second branch of the *Kamloops* test may prevent the imposition of a duty of care because her freedom of action is in issue and policy reasons for immunity can be adduced. The distinction is plain and is obscured only by slippery slope and flood-gate types of argument founded in an understandably emotional response to the question.

120¶ Assume, for example, that another pregnant woman was a passenger in Cynthia Dobson's car. If, as a result of negligent driving, the other pregnant woman gave birth to an injured child, there is absolutely no doubt that that born alive child would have a right to sue Cynthia Dobson: see *Montreal Tramways*, supra, and *Duval*, supra. In those circumstances, policy reasons flowing from Cynthia Dobson's freedom of action capable of negativing Ryan Dobson's right to sue seem impossible to formulate. His mother's freedom of action in respect of her driving was already restricted by the duty of care she owed to, inter alia, another born alive child.

121¶ The example confirms that no intrusion into a pregnant woman's freedom of action can be demonstrated in cases where a duty of care owed to a third party in respect of the same behaviour forms part of the factual situation. In such cases, the pregnant woman's freedom of action is not in issue.

122¶ This view of the matter has the advantage of providing a bright-line test to distinguish situations in which the pregnant woman's freedom of action is in issue from situations in which her freedom of action is not in issue. A given factual transaction either involves a duty of care to third parties or it does not. These matters are not crystal clear. But the law of tort is well-equipped to distinguish between situations where duties of care are owed and situations where duties of care are not owed. In jurisprudential matters, few lines could be brighter than those situations where a pregnant woman owes to third parties a duty of care in respect of the very same behaviour of which her born alive child complains and situations where she does not owe such duty to third parties.

123¶ Policy considerations flowing from a pregnant woman's autonomy interests are not operative in situations, such as the case before us, where those interests are not in issue. These situations are distinguishable from situations where those interests are indeed in issue. Therefore, there is no need to beware that, in deciding this appeal on its own facts, we will have decided infinitely more difficult cases truly involving lifestyle choices and autonomy interests of pregnant women. On the contrary, the very depth, complexity and importance of such cases demands that they not be decided until they in fact arise before this Court.

124¶ The determining question is what social policy can justify the conclusion that, as between the rights of a pregnant woman and those of her born alive child, the rights of the child should yield.

125¶ The concerns formulated in *Winnipeg*, supra, are not sufficient to take into account the additional factor present in the instant case: the legal personality of the born alive child. At issue is the relationship between the rights of a pregnant woman and the rights of her born alive child. A one-sided emphasis on either side of this relationship necessarily misses the subject-matter it is attempting to analyse. Such an emphasis simply begs the question.

126¶ That question is what social policy considerations justify the denial of a born alive child's right to recover for negligently caused physical damages. No compelling evidence, in fact no evidence, was presented that should as a matter of social policy place the child in a subservient position to that of the negligent mother.

127¶ The bare assertion of social policy concerns expressly and unilaterally centred on a pregnant woman's rights are not a sufficient answer to the question whether a pregnant woman's rights should prevail over the equally recognized rights of her born alive child. It is no answer to the plaintiff in this case that unilateral concerns about a pregnant woman's competing rights are sufficient to "negative" a negligent violation of his physical integrity. His rights, too, are at stake.

128¶ While the law may grant immunity from liability based on policy reasons, those reasons must be clear and compelling and are conspicuously absent in this case. The removal of the child's cause of action is extreme and it should follow that the policy reasons for doing so should be obvious and persuasive. There was no authority advanced to support the defendant's claim in this case; that is, authority that would negate a pregnant woman's legal responsibility for negligent acts against her born alive child, where the effects of those acts are reasonably foreseeable and where they violate the physical integrity of a legal person. To recall Lamont J.'s words in *Montreal*

Tramways, supra, at p. 464, no other plaintiff would "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".

129¶ The special relationship between a pregnant woman and her foetus is a biological fact. This biological fact is significant for the mother-defendant. But it is also deeply significant for the born alive child-plaintiff. The legal or social policy implications to be drawn from that biological fact cannot be ascertained in the absence of equal acknowledgment of the rights of the child.

130¶ To grant a pregnant woman immunity from the reasonably foreseeable consequences of her acts for her born alive child would create a legal distortion as no other plaintiff carries such a one-sided burden, nor any defendant such an advantage.

131¶ Aside from a pregnant woman's autonomy interests, there may be policy considerations flowing from concerns about the appropriateness of intra-familial litigation that may be sufficient to negative any child's right to sue its parents in tort. The considerations, however, must apply to all members of the defined family unit. The conclusion that such concerns only bar tort action brought by born alive children who sustained injuries while still in utero is not justified.

132¶ As no policy concerns sufficient to negative the child's right to sue arise on the facts of this case, the born alive respondent has the legal capacity to commence a tort action against his appellant mother for prenatal injuries allegedly sustained as a result of her negligent driving.

133¶ Under the direction given by the majority in *Winnipeg*, supra, it is my opinion that the removal of Ryan Dobson's right to sue in tort for negligent violations of his physical integrity lies within the exclusive purview of the legislature, subject to the limits imposed by the Canadian Charter of Rights and Freedoms.

134¶ I would dismiss this appeal.