

THE ETHICAL AND LEGAL CONUNDRUM:

SHOULD A MOTHER OWE A DUTY OF CARE TO HER UNBORN CHILD?

CHRISTINA DO¹ AND JACKIE MAPULANGA-HULSTON²

ABSTRACT

It is likely that, for emotional and moral reasons, the vast majority of society would agree with the proposition that a mother ought to care for and protect her unborn child. However, it is questionable whether those same members of society would all agree with the imposition of a broad, legally enforceable duty of care on an expectant mother, when armed with knowledge of the consequences that may flow from breach of such a duty.

This research paper seeks to examine the competing international policy considerations in order to conclude whether the imposition of such a duty is appropriate and acceptable in modern Australia. This analysis will compare the approaches to such a duty in Canada and the United Kingdom.

Presently in Australia, the circumstances under which a mother owes a duty of care to her unborn child are not settled. The Australian legislature and judiciary are yet to reach a definitive conclusion as to the extent of the duty of care owed by a mother to her unborn child.

I INTRODUCTION

Generally a duty of care is an ‘obligation imposed on a person to take reasonable care to ensure that they do not cause another person to suffer harm’.³ The relationship between a parent and child is a recognised ‘duty situation or relationship’ which attracts the imposition of a duty of care. The position of ‘parenthood’ is the basis for the imposition on the adult of ‘a legal obligation generally to take reasonable care to prevent [their child] falling into danger’.⁴ It is uncontroversial that an unborn child is not a person at law until birth, and as such, the duty of care outlined above does not ‘crystallise’ until that time.⁵ In most common law jurisdictions, a child’s legal rights, arising from the imposition of the parent-child duty of care, will accrue only if and when the child is born.⁶ Thus the legal status of the unborn child is referred to as the ‘born alive’ rule which stipulates that a person or parent cannot be held legally liable for injuries on a foetus in utero unless and until it is born alive.⁷

Although there is no doubt that a parent owes a duty to their child, the ethical and legal conundrum facing the Australian legislature and judiciary is whether a mother’s duty of care to her child should crystallise prior to the child’s birth. Framed in a different way, should a general duty of care be owed by a mother to her child for prenatal injuries sustained whilst in utero?

¹ Curtin Law School, Curtin University.

² Curtin Law School, Curtin University.

³ LexisNexis, *Encyclopaedic Australian Legal Dictionary*, LexisNexis <<http://www.lexisnexis.com.au>>.

⁴ *Hahn v Conley* (1971) 126 CLR 276, 283 (Barwick CJ). His Honour went on to state that in circumstances where a cause of action exists, a ‘blood relationship’ between the claimant and defendant will not constitute a bar preventing the claimant from seeking to enforce the cause of action.

⁵ *Watt v Rama* [1972] VR 353. Although there are extensive debates concerning the issue of when a foetus becomes a ‘person’, this is beyond the scope of this research paper. For a more detailed discussion of this topic, see John Seymour, ‘The Legal Status of the Fetus: An International Review’ (2010) 10 *Journal of Law and Medicine* 28.

⁶ *X and Y (by her Tutor X) v Pal* (1991) 23 NSWLR 26, 30 (Mahoney JA).

⁷ Refer generally, Bernadette Richards, Bill Madden and Tina Cockburn, ‘Considering the “Born-Alive” Rule and Possession of Sperm Following Death’ (2011) 8 *Journal of Bioethical Inquiry*, 323.

In Australia, once a baby is born it possesses the legal capacity to sue for breach of rights.⁸ The Australian courts have extended this right to include injuries sustained prior to the person's birth, and even conception,⁹ provided the plaintiff belongs to a class of persons who may reasonably suffer foreseeable harm or damage as a result of the defendant's negligent actions. The courts have held third parties, such as negligent road users¹⁰ and doctors,¹¹ liable for injuries inflicted on a foetus for which the damage materialises upon birth. Although the child was not a legal person at the time of the negligent act, their cause of action crystallises upon birth so as to impose a duty of care on the third party retrospectively.¹² This is in accordance with the established laws of negligence, as a cause of action does not arise until damage or injury is sustained, regardless of whether that damage or injury is immediate or latent.

However, the legislature and judiciary have not applied the same duty and standard of care to pregnant women in respect of the unborn child, thereby granting pregnant women 'maternal immunity' for prenatal injuries inflicted on the foetus they are carrying, whether committed intentionally or negligently. As the law currently stands in Australia, a mother does not owe a duty of care to her unborn child, except in circumstances involving road accidents.¹³ The relevant case law is discussed in Part III of this paper, but it should be noted that the existence of compulsory motor vehicle insurance was a contributing factor in the courts determining that a duty of care between the mother and unborn child existed in such circumstances.¹⁴

Although the Australian legislature and judiciary have not extended a mother's duty of care to her foetus beyond the circumstances of road accidents, neither have they expressly rejected the extension,¹⁵ unlike the definitive approaches taken in Canada and the United Kingdom.

Imposition of such a duty onto mothers would provide an avenue for a child to sue its mother for prenatal injuries sustained whilst in utero. Such a proposition raises numerous ethical and moral issues that are difficult to resolve. These issues are reflected, to a degree, in the competing policy considerations which are relevant to the judiciary and legislature's future consideration of the issue.

II POLICY CONSIDERATIONS

The policy considerations surrounding the imposition of a duty of care on pregnant mothers are extensive and complex. As acknowledged by Clarke JA, very difficult questions of policy arise when deliberating on tortious claims concerning the conduct of a pregnant mother. Courts have faced the difficult task of weighing up the principles of tort law and the competing policy considerations in order to reach an outcome that is legally just for the mother, unborn child and

⁸ *X and Y (by her Tutor X) v Pal* (1991) 23 NSWLR 26, 30 (Mahoney JA). Although there are extensive debates concerning the issue of when a foetus becomes a 'person', this is beyond the scope of this research paper. For a fuller discussion of this topic, see Seymour, above n 5.

⁹ *X and Y (by her Tutor X) v Pal* (1991) 23 NSWLR 26, 41 (Clarke JA) stated that: 'In principle it should be accepted that a person may be subjected to a duty of care to a child who was neither born nor conceived at the time of his careless acts or omissions such that he may be found liable in damages to that child.'

¹⁰ *Watt v Rama* [1972] VR 353; *Road Accident Fund v Mtati* (332/2004) [2005] ZASCA 65; [2005] 3 All SA 340.

¹¹ *X and Y (by her Tutor X) v Pal* (1991) 23 NSWLR 26; *Jacob Riely McLennan an infant suing by his next friend Yvonne Joyce McLennan v McCallum* [2007] WADC 67. In the case of *Harriton (by her tutor) v Stephens; Waller (by his tutor) v James; Waller (by his tutor) v Hoolahan* [2004] NSWCA 93, three doctors who had failed to diagnose disorders in parents were however found by the NSW Court of Appeal not to have owed a duty of care to the resulting disabled children.

¹² *X and Y (by her Tutor X) v Pal* (1991) 23 NSWLR 26.

¹³ *Lynch v Lynch* (1991) 25 NSWLR 411 affirmed in *Bowditch v McEwan* [2002] QCA 172.

¹⁴ *Lynch v Lynch (by her tutor Lynch)* (1991) 25 NSLR 411.

¹⁵ Kate Wellington, 'Maternal Liability for Prenatal Injury: The Preferable Approach for Australian Law?' (2010) 18 *Tort Law Review* 89, 90.

society as whole.¹⁶ The concept of duty of care derives from the principles laid out in *Donoghue v Stevenson* [1932] AC 562 which promulgated the concept of who a ‘neighbour’ is in law. In relation to the unborn child, considerations of a duty of care will need to take into account the aspects of foreseeability, proximity and public policy. Thus there will need to be consideration of whether the accused or defendant had a relationship with the unborn child and whether they took into account the best interests of the unborn child.

Pregnancy is unique, as the level of physical connection and dependence between a mother and foetus is one which is unparalleled. A foetus’ development is almost solely reliant on the behaviour and conduct of its mother, such that the foetus cannot be regarded as existing independently from its mother prior to birth. This unique circumstance gives rise to two interests: the bodily integrity of the pregnant woman and the foetus’ right to a healthy life. Although one would expect these interests to align in most cases, there are circumstances where these interests can directly conflict. For example, a pregnant woman may refuse to follow medical advice and undergo an emergency caesarean section when such a procedure is objectively in the best interest of the foetus.¹⁷ Ultimately, determination of whether a mother should owe a duty of care to her unborn child involves giving primacy to one of two sets of interests.

A Arguments for Imposing a Duty of Care

A rationale often relied upon in support of the imposition of a general duty of care on a mother in relation to her unborn child, is the fact that a foetus is solely dependent on the mother for its development and cannot be regarded as having an existence independent of the mother prior to birth.¹⁸ Accepting that fact, it is reasonably foreseeable that the negligent acts of a mother would impact upon an unborn child. Undoubtedly, the proximity between the mother and unborn child would satisfy the ‘neighbour principle’ established in *Donoghue v Stevenson*.

Miler J, the presiding trial judge in *Dobson (Litigation Guardian of) v Dobson* (1997) 186 NBR (2d) 81 (*Dobson v Dobson*)¹⁹ — the leading Canadian case dealing with this issue — held that, given that an action can be sustained against a third party for injuries suffered by a child before birth, and in some jurisdictions against the mother in road accidents, it appears to be a ‘reasonable progression’ to allow an action by a child against its mother for prenatal injuries caused by negligence generally.²⁰ Therefore, it would be a rational extension of the law of torts to find that the relationship between a pregnant mother and unborn child is a sufficient nexus to warrant a finding that a duty of care is owed.

On appeal to the Supreme Court of Canada, Major and Bastarache JJ in dissent held that ‘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’.²¹ The substance of this proposition is that by not holding expectant mothers liable for their negligent actions — including those that inflict prenatal injuries on their unborn child — there is a contravention of the principles of law and indeed ordinary justice.

¹⁶ *Lynch v Lynch (by her tutor Lynch)* (1991) 25 NSLR 411, 415.

¹⁷ *St George’s Healthcare National Health Services Trust v. S; Regina v Collins, Ex parte S* [1998] 3 All ER 673.

¹⁸ Bonnie Steinbock, *Life Before Birth: The Moral and Legal Status of Embryos and Fetuses* (Oxford University Press, 2nd ed, 2011) 43.

¹⁹ The matter was subsequently appealed to the Supreme Court of Canada: *Dobson (Litigation Guardian of) v Dobson* [1999] 2 SCR 753.

²⁰ *Dobson v Dobson* (1997) 186 NBR (2d) 81, 88 (Miler J).

²¹ *Dobson (Litigation Guardian of) v Dobson* [1999] 2 SCR 753, [130] (Major and Bastarache JJ).

This argument will have particular relevance to countries that are signatories to international conventions and treaties concerning the rights of children. Australia, Canada and the United Kingdom are all signatories to the Convention on the Rights of the Child. The preamble of the Convention states that ‘the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, *before* as well as after birth’ (emphasis added).²² The Convention clearly refers to a child’s interests before birth. Yet, arguably, no definitive legal protection is afforded to a child prior to birth, when it is most vulnerable. The failure of international law to provide necessary legal protection to the unborn child, according to some writers, is a failure to extend respect to the fundamental rights and interests of the individual. It is further maintained that a deliberative framework needs to be developed so as to further the recognition of the unborn in international law.²³

As suggested by Whitfield,²⁴ the imposition of a duty of care on an expectant mother is not concerned with exercising control over the mother so as to infringe her human right of bodily integrity. The imposition of a duty on an expectant mother is designed merely to hold her accountable if she acts in a manner harmful to her foetus. Whitfield contends that this imposition does not infringe a pregnant woman’s rights, as she can continue to act freely, however, if such actions inflict damage or injury on her foetus, she will be held accountable.

Whitfield’s argument appears to be in line with Lamont J’s sentiments in the *Montreal Tramways v Leveille* [1933] 4 DLR 337. Although the statement was made with reference to negligent acts of third parties (not mothers), it is nevertheless apposite: ‘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.’²⁵

1 *Proposed Approaches to Imposing a Duty of Care*

Although there are strong arguments in favour of the imposition of a duty, those considerations are undermined by practical difficulties in its imposition. Judges and commentators have posited suggestions as to how a duty of care could be imposed on an expectant mother.

Nolan has suggested that the judiciary should not adopt a blanket approach in determining whether or not a pregnant mother owes a duty of care to her unborn child. Instead, the judiciary should determine whether a duty exists on a case-by-case basis.²⁶ For instance, Nolan proposes that a mother should owe a duty of care to her unborn child in circumstances where the child is born with foetal alcohol spectrum disorder as a result of the mother consuming alcohol during pregnancy.²⁷ Nolan suggests that the imposition of the duty of care on mothers to their unborn child is merely an extension of the existing statutory law in her particular jurisdiction, namely the *Civil Liability Act 2003* (Qld). Nolan contends there is no requirement to formulate a new standard of care for pregnant mothers — the existing law can extend to encompass the actions of pregnant women in certain circumstances.

²² United Nations Human Rights, *Conventions on the Rights of the Child* (20 November 1989), Office of the High Commissioner for Human Rights <<http://www.ohchr.org>>.

²³ S A De Freitas and G Myburgh, ‘Seeking Deliberation on the Unborn in International Law’ (2011) 14(5) *Potchefstroom Electronic Law Journal* <<http://www.ajol.info/index.php/pelj/article/view/70035>>.

²⁴ Adrian Whitfield, ‘Common Law Duties to Unborn Children’ (1993) 1(1) *Medical Law Review* 28, 51.

²⁵ *Montreal Tramways v Leveille* [1933] 4 DLR 337, 345 (Lamont J).

²⁶ Elise Jane Nolan, ‘“Mummy Beerest”: A Study of Fetal Alcohol Spectrum Disorder, a Mother’s Duty of Care and Strategies for Intervention’ (2011) 19 *Journal of Law and Medicine* 69, 77.

²⁷ *Ibid.*

Similar to Nolan's proposal, Walsh proposes that when a pregnant mother engages in criminal behaviour that directly places the unborn child in harm or danger, then in those circumstances a duty of care should be imposed on the mother.²⁸ Although the categorisation of behaviour as 'criminal', or indeed 'illegal' as that term is commonly understood, is a practical starting point, it is not without its problems. Activities and behaviours that are not criminal can nevertheless still harm or endanger a foetus. Obvious examples include the consumption of alcohol, smoking, eating unhealthy food and not taking medication.²⁹ These activities can be harmful or dangerous to a foetus, even in moderation. Therefore, it is very difficult to draw a definitive distinction between behaviour that may constitute a breach, and behaviour that may be considered acceptable.

As a result of the advances in medical technology in recent years, medical science now offers an increased ability to prevent or reduce harm to foetuses.³⁰ For instance, the Western Australian Department of Health provides a list of foods that women should avoid during pregnancy in order to ensure they do not contract *Listeria* infection.³¹ Although risk of infection is rare, pregnant women are nevertheless advised not to consume the food items contained on the list. Should a mother be held to have breached her duty of care to her child if she consumed a food item from the list and contracted the *Listeria* infection? Should there be any distinction between a mother who is aware of the list, and one who is not? Taking even one example a few short steps demonstrates the difficulty in enunciating, with precision, a duty of care and what risk-based behaviour is acceptable of pregnant women.

It was suggested in *Dobson v Dobson* by an intervenor that the standard of care should be of a 'reasonable pregnant woman'. The majority of the Supreme Court in Canada did not consider the standard of a 'reasonable pregnant woman' as an appropriate standard, on the basis that the behaviour and decisions of a pregnant woman may vary according to her 'financial, educational [and] cultural circumstances'.³² The Court held that by adopting such a standard of care, mothers' lifestyle choices would be scrutinised according to judicial standards of conduct as to how pregnant women should behave, without necessary regard of the mother's actual circumstances.³³

Wellington has contended that the ordinary standard applied in negligence cases is not dissimilar to that of the 'reasonable pregnant woman'.³⁴ The 'reasonable person' test is an objective standard, and does not consider the individual circumstances of the tortfeasor. The 'reasonable person' standard of care has 'infiltrate[d] every aspect of tort law and [is] not deemed "inappropriate" by the courts'.³⁵ Given the apparent similarities between the two standards, it is perplexing why one standard is considered to be good law and the other 'inappropriate'.³⁶

²⁸ Anna Walsh, 'Can There be a Positive Maternal Duty of Care to the Unborn in Australia?' (March 2010) *Australian Health Law Bulletin* 22, 23. The example provided is the use of illicit drugs, such as heroin.

²⁹ *Ibid.* 24.

³⁰ Carl Wellman, *Medical Law and Moral Rights* (Springer, 2005) 70.

³¹ Public Health, *Listeria infection (Listeriosis) Fact Sheet* (2013) Department of Health, Government of Western Australia <<http://www.publichealth.wa.gov.au>>.

³² Ian Malkin, 'A Mother's Duty of Care to her Foetus While Driving: A Comment on *Dobson v Dobson* (and *Lynch v Lynch*)' (2001) 9 *Tort Law Journal* 1, 8 citing *Dobson (Litigation Guardian of) v Dobson* [1999] 2 SCR 753.

³³ It should be noted that the 'reasonable pregnant woman' standard of care is an objective test and therefore the personal circumstances of the mother would not be considered when determining whether the duty of care was breached in the circumstances.

³⁴ Wellington, above n 15.

³⁵ *Ibid.* 92.

³⁶ *Ibid.*

B Arguments Against Imposing a Duty of Care

The argument against imposing a duty of care on pregnant women is ‘related primarily to privacy and autonomy [of] rights of women’.³⁷ Cory J, who presided in the Supreme Court in the determination of *Dobson v Dobson*, encapsulated the rights of a pregnant woman rights perfectly by espousing that a 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’.³⁸ In essence, a pregnant woman is a human being first and foremost, and should be afforded the same rights as everyone else.

As previously stated, it is very difficult to impose a judicial standard of care on pregnant women as their relationship with the unborn child is so uniquely connected that it cannot be separated. The majority consensus amongst judicial members of the Australian High Court³⁹ is that in circumstances where an appropriate legal standard of care cannot be established, a duty of care cannot be imposed. For example, if a duty of care were to be imposed on an expectant mother, any action taken by a pregnant woman, irrespective of how mundane it may be, could be subject to judicial scrutiny.⁴⁰ Therefore, it would be extremely difficult to identify the circumstances in which a mother would have breached her duty to her unborn child.

The courts have also expressed concern that if a general duty of care is imposed on pregnant women to their children, it may have the effect of generally encouraging children to sue their parents in negligence. If such a trend was to manifest, it could have ‘devastating consequences for the future relationship between the mother and her child and also between the child and the rest of the family’.⁴¹ Although maintenance of familial relations is a strong concern of a stable society, this consideration alone cannot be sufficient justification to avoid imposition of a duty in circumstances where a wrong has been committed. Some measure of recourse remains necessary to ensure justice and fairness.

In addition to being signatories to the Convention on the Rights of the Child, Australia, Canada and the United Kingdom are also signatories to the Convention on the Elimination of All Forms of Discrimination Against Women. The Convention seeks to eliminate discrimination against women and to ensure equal rights are enjoyed by both men and women.⁴² As only women are biologically capable of having children, it is questionable whether imposing a legal duty of care upon pregnant women to their foetus is a ‘gender-based’ tort.⁴³ Imposition of law that is only applicable to women could be considered discriminatory.

1 Proposed Approaches to Not Imposing a Duty of Care

As discussed, there are substantial difficulties in regulating a pregnant woman’s behaviour. The compromise position, in an attempt to protect unborn children without imposing legal intervention on pregnant women, is community education.⁴⁴

One such example is the establishment of DrinkWise Australia 2005 to encourage a safer drinking culture in Australia.⁴⁵ In 2001, DrinkWise required the inclusion of warning labels on

³⁷ *Bowditch (by his next friend Bowditch) v McEwan* [2001] QSC 448, [10].

³⁸ *Dobson (Litigation Guardian of) v Dobson* [1999] 2 SCR 753, [24] (Cory J).

³⁹ *Jackson v Harrison* (1978) CLR 438 (Jacobs, Mason and Aickin JJ) and *Gala v Preston* (1991) 65 ALJR 366.

⁴⁰ *Dobson (Litigation Guardian of) v Dobson* [1999] 2 SCR 753, [27] (Cory J).

⁴¹ *Dobson (Litigation Guardian of) v Dobson* [1999] 2 SCR 753, [46] (Cory J).

⁴² Division for the Advancement of Women, Department of Economic and Social Affairs, *Convention on the Elimination of All Forms of Discrimination Against Women* (1979) United Nations <<http://www.un.org>>.

⁴³ *Dobson (Litigation Guardian of) v Dobson* [1999] 2 SCR 753, [22] (Cory J).

⁴⁴ Nolan, above n 26, 83.

alcohol products sold in Australia stating ‘Get the Facts ... it is safest not to drink while pregnant’ or a pictogram to that effect.⁴⁶ Of course, the success of such education programs remains, to a degree, dependent on the conduct of pregnant women and whether they choose to apply the information made available to them.

The Supreme Court of Canada contended that this debate is best resolved by the legislature rather than by the judiciary.⁴⁷ That is, the legislature is in the best position to weigh up all the policy considerations and well-established legal principles of duty of care and negligence in order to reach a legal resolution that best reflects the attitudes and interests of society. Cory J (as a part of the majority judgment) stated that: ‘[This debate] 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’.⁴⁸

III CURRENT LAW

A Australia

It is well established law within Australia that a third party, who is not the mother of an unborn child, can be found to have owed a duty of care to that child.⁴⁹ In the case of *King v Western Sydney Local Health Network* [2011] NSWSC 1025, Tamara, through her tutor, sued the Western Sydney Local Health Network, claiming that when her mother attended the hospital and told the doctor that her first-born daughter had been diagnosed with chickenpox that very morning, she ought to have been given an injection of Varicella-Zoster Immunoglobulin (VZIG). It was held that the defendant owed to the plaintiff a duty to take care, and was in breach of that duty. However, the court was not satisfied that the breach of that duty was causally related to the plaintiff’s suffering Congenital Varicella Syndrome. Of course, this is subject to the establishment of the fact that the unborn child was a member of a class of people which was likely to be injured as a consequence of the third party’s negligent act. Although the child was not a legal person at the time of the negligent act, its cause of action crystallises upon birth so as to impose a duty of care on the third party to the child retrospectively.⁵⁰

In *Lynch v Lynch (by her tutor Lynch)* (1991) 25 NSWLR 411 (*Lynch v Lynch*), the New South Wales Court of Appeal was required to consider ‘whether a mother can be liable to her child, who was born with disabilities, in respect of injury caused to that child while a foetus by the mother’s negligent driving of a motor vehicle’.⁵¹ The court unanimously answered in the affirmative. Clarke JA held that the question before the court was very narrow and related specifically to a given situation, road accidents. Therefore, the circumstances of the case did not require examination of the significant policy considerations.⁵²

The majority decision in *Lynch v Lynch* was cited with approval by the Queensland Court of Appeal in *Bowditch v McEwan* [2002] QCA 172 (*Bowditch v McEwan*). Chief Justice de Jersey held that the fact that the negligent driver was the ‘mother of the foetus was really incidental: the

⁴⁵ *DrinkWise Australia* (2005) DrinkWise Australia <<http://www.drinkwise.org.au>>.

⁴⁶ Social Policy Section, *Alcohol Warning Labels — Do They Work?* (9 May 2012) Parliament of Australia <<http://www.aph.gov.au>>.

⁴⁷ *Dobson (Litigation Guardian of) v Dobson* [1999] 2 SCR 753 and *Winnipeg Child and Family Services (Northwest Area) v G (DF)* [1997] 3 SCR 925.

⁴⁸ *Dobson (Litigation Guardian of) v Dobson* [1999] 2 SCR 753, [34] (Cory J). Similar sentiments were expressed by the Supreme Court of Canada in *Winnipeg Child and Family Services (Northwest Area) v G (DF)* [1997] 3 SCR 925.

⁴⁹ *Watt v Rama* [1972] VR 353 affirmed in *X and Y (by her Tutor X) v Pal* (1991) 23 NSWLR 26.

⁵⁰ *King v Western Sydney Local Health Network* [2011] NSWSC 1025.

⁵¹ *Lynch v Lynch (by her tutor Lynch)* (1991) 25 NSWLR 411, 415 (Clarke JA).

⁵² *Lynch v Lynch (by her tutor Lynch)* (1991) 25 NSWLR 411, 415 (Clarke JA).

driver owes a duty of care to others within the vehicle, including any foetus within a passenger — that the foetus is within the driver herself is only incidentally relevant'.⁵³ De Jersey J went on to say that the court was not required to consider the 'complex social considerations'⁵⁴ as the matter dealt with a narrow circumstance, road accidents.

It has been long established that road users owe a duty of care to other road users and pedestrians.⁵⁵ In *Watt v Rama* [1972] VR 353 this duty of care was extended to include fetuses injured in road accidents. Therefore, the justices in *Lynch v Lynch* and *Bowditch v McEwan* merely extended the duty of care imposed on a pregnant driver to include her unborn child in instances where the driver is found liable for negligent driving causing injury.

It should be noted that the existence of compulsory motor vehicle insurance was also a contributing factor in the courts determining that a duty of care between the mother and unborn child existed in the given circumstances.⁵⁶

B Canada

Canadian courts have adopted the same approach as Australia in recognising that a person's legal personality begins at birth.⁵⁷ Similarly the Canadian courts have held that a person who sustains injuries whilst a foetus, due to the negligent acts of a third party tortfeasor, will have a cause of action upon birth against the negligent third party.⁵⁸ It has been held that denial of such a right would be gravely unjust as there would have been 'a wrong inflicted for which there is no remedy'.⁵⁹

The issue of whether a mother owes a duty of care to her unborn child was dealt with by the Supreme Court of Canada in the landmark cases of *Winnipeg Child and Family Services (Northwest Area) v G (DF)* [1997] 3 SCR 925 (*Winnipeg Child and Family Services*) and *Dobson v Dobson*.

The Supreme Court of Canada in *Winnipeg Child and Family Services* held that a pregnant mother, who was addicted to glue sniffing, could not be detained against her will in the interest of the foetus. The Supreme Court of Canada suggested that the court's role and power was limited to incremental law-making and the judicial change required to incarcerate and treat a pregnant woman against her will, was beyond the scope of the Court's powers. Therefore, the Supreme Court of Canada contended that: 'To extend the law of tort to permit an order for the detention and treatment of a pregnant woman for the purpose of preventing harm to the unborn child would require major changes [to the existing law] ... these are the sort of changes which should be left to the legislature'.⁶⁰

The facts of *Dobson v Dobson* were similar to that of *Lynch v Lynch* in that both cases involved a motor vehicle accident that was caused by the negligence of the mother. It was ultimately concluded by the majority that the public policy concerns associated with imposing a duty care of on mothers towards their unborn child 'are of such a nature and magnitude that they clearly

⁵³ *Bowditch v McEwan* [2002] QCA 172, [12] (de Jersey CJ).

⁵⁴ *Bowditch v McEwan* [2002] QCA 172, [13] (de Jersey CJ).

⁵⁵ The majority in *Manley v Alexander* [2005] HCA 79 held that the driver is expected to maintain control of the speed and direction of the vehicle in such a way that the driver may know what is happening in the vicinity of the vehicle in time to take reasonable steps to react to those events.

⁵⁶ *Lynch v Lynch (by her tutor Lynch)* (1991) 25 NSLR 411.

⁵⁷ *Tremblay v Daigle* [1989] 2 SCR 530.

⁵⁸ *Montreal Tramways Co. v. Léveillé* [1933] SCR 456.

⁵⁹ *Montreal Tramways Co. v. Léveillé* [1933] SCR 456.

⁶⁰ *Winnipeg Child and Family Services (Northwest Area) v G (DF)* [1997] 3 SCR 925.

indicate that a legal duty of care cannot, and should not, be imposed by the courts'.⁶¹ Therefore, in weighing up the policy considerations, the majority did not find that a mother owes her unborn child a duty of care in any circumstances, including motor vehicle accidents.

It must be noted that there are two factors that may have contributed to the Australian and Canadian courts reaching differing conclusions in cases with similar factual matrices. First, the test to establish whether a duty of care exists in any given circumstance differs between the two jurisdictions. To determine whether a duty of care should be imposed on a person, the Canadian courts consider whether the two steps articulated in *Kamloops v Nielsen* [1984] 2 SCR 2 have been satisfied, namely:

1. establishment of a relationship sufficient to establish a duty of care; and
2. existence of no public policy considerations negating this duty of care.

Although the Australian courts are required to give weight to policy considerations when determining whether a duty of care should be imposed, it is not as explicit and regimented as the approach taken in Canada.

Second, the Canadian common law must reflect the rights and values reflected in the *Canadian Charter of Rights and Freedoms*.⁶² Although the justices presiding in *Dobson v Dobson* did query whether imposing a duty of care upon a pregnant woman to her unborn child would be considered a gender-based tort,⁶³ the justices did not find it necessary to reach a conclusion on this question as ultimately no duty of care was found to be owed in the circumstances between a mother and her unborn child.

Although the majority in *Dobson v Dobson* was in favour of a duty of care not being imposed on the mother of an unborn child, the decision was not unanimous. The minority cited the finding of the trial judge in stating that: '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 negligence.'⁶⁴ Although this argument did not gain the support of the majority, the argument has gained attention internationally in the debate favouring the legal position that a duty of care should be imposed on mothers to their unborn children.

C United Kingdom

The legal position within the United Kingdom is very similar to that of Australia. In the United Kingdom, negligent acts of a third party tortfeasor, which inflict harm on an unborn child, are actionable by the child upon birth.⁶⁵ Furthermore, a child can only sue its mother for prenatal injuries sustained in the limited circumstances of road accidents.⁶⁶

Although the Australian and United Kingdom judiciaries have reached the same resolution in this debate, the two have taken different approaches. As discussed, in Australia the legal position has

⁶¹ *Dobson (Litigation Guardian of) v Dobson* [1999] 2 SCR 753, [76] (Cory J).

⁶² *Dobson (Litigation Guardian of) v Dobson* [1999] 2 SCR 753, [22], [76], [84], [144] and [133].

⁶³ *Dobson (Litigation Guardian of) v Dobson* [1999] 2 SCR 753, [22] (Cory J).

⁶⁴ *Dobson (Litigation Guardian of) v Dobson* [1999] 2 SCR 753, [94] (Major and Bastarache JJ).

⁶⁵ *Congenital Disabilities (Civil Liability) Act 1976* (UK) s 1.

⁶⁶ *Congenital Disabilities (Civil Liability) Act 1976* (UK) s 2.

been established by the judiciary and embedded in the common law. By comparison, the legal position in the United Kingdom is cemented in legislation, namely the *Congenital Disabilities (Civil Liability) Act 1976* (UK) ('*Congenital Disabilities Act*').

Section 2 of the *Congenital Disabilities Act* states:

A woman driving a motor vehicle when she knows (or ought reasonably to know) herself to be pregnant is to be regarded as being under the same duty to take care for the safety of her unborn child as the law imposes on her with respect to the safety of other people; and if in consequence of her breach of that duty her child is born with disabilities which would not otherwise have been present, those disabilities are to be regarded as damage resulting from her wrongful act and actionable accordingly at the suit of the child.

It should be noted that in the 1979 Law Commission's report on injuries to unborn children, in light of the proposed *Congenital Disabilities Act*, the Law Commission identified the public policy concerns surrounding the Act. The memorandum highlighted the dilemma of balancing ethical and moral arguments against policy considerations and the application of the law. The memorandum states:

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.⁶⁷

It is well established law in the United Kingdom that a pregnant woman does not owe a duty of care to act in the best interest of her unborn child. As expressed by the Court of Appeal in *St George's Healthcare National Health Services Trust v S; Regina v Collins, Ex parte S* [1998] 3 All ER 673, a pregnant woman's right to bodily integrity and autonomy cannot be reduced or diminished merely because her decision to not receive medical treatment, at the risk of endangering her foetus, might appear morally repugnant.⁶⁸ The Court of Appeal ultimately held that provided a pregnant woman is competent and of sound mind, she was capable of making medical decisions for herself, regardless of the impact it may have on her unborn child.

IV SUGGESTED FUTURE APPROACH IN AUSTRALIA

In light of the strong public policy considerations militating against imposition of a duty — and the fact that imposition of a duty would occasion unresolvable practical difficulties — it appears that the Australian judiciary has reached the preferable conclusion in establishing that a pregnant woman does not owe her unborn child a duty of care, other than in the limited circumstance of car accidents.⁶⁹ Imposition of a duty of care on a pregnant woman would likely open the

⁶⁷ Law Commission, *Report on Injuries to Unborn Children*, Report No. 60, Cmnd 5709 (1979) 5, [55].

⁶⁸ *St George's Healthcare National Health Services Trust v S; Regina v Collins, Ex parte S* [1998] 3 All ER 673.

⁶⁹ *Watt v Rama* [1972] VR 353.

floodgates to an abundance of legal action for ‘the most mundane decision taken in the course of daily life’⁷⁰ by a pregnant woman.

However, it is proposed that rather than leaving the matter open to judicial revision or reinterpretation, Australian legislature ought to definitively clarify the Australian legal position through the implementation of legislation, akin to the United Kingdom. Implementing legislation to this effect will prevent future legal actions against mothers in an attempt to expand the duty of care owed by mothers to their unborn child beyond the scope of road accidents.

V CONCLUSION

Although it is very important for a pregnant woman to consider how her actions affect the development of her unborn child, it ought not to be left to the judiciary to dictate how she behaves. A pregnant woman is a human being first and foremost, and as such she is entitled to basic freedoms, such as autonomy. A pregnant woman’s basic human rights of bodily integrity and autonomy ought to prevail over the perceived needs and interests of her foetus. As discussed, the legal approaches taken by the Australian, Canadian and United Kingdom judiciary and legislature support the view that a pregnant woman’s human rights are superior to any duty to care, perceived or otherwise, to her foetus.

Therefore, it is contended that Australia has taken the correct legal position in concluding that a mother does not owe a duty of care to her unborn child, except in the limited circumstance of road accidents. It is further proposed that this legal stance be codified in legislation.

Legislative definition of the extent of any duty owed by a mother to an unborn child would ensure greater consistency, ensure mothers have a firm understanding of their legal obligations to their unborn child, and ensure mothers are able to effectively mitigate any risk — including legal risk. This final step would ensure that both the rights of an expectant mother and her unborn child are clearly articulated, and as far reasonably possible, protected.

⁷⁰ *Dobson (Litigation Guardian of) v Dobson* [1999] 2 SCR 753, [27] (Cory J).