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Pre-Natal Fictions and Post-Partum Actions

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The author examines the theory of liability for pre-natal injuries adopted by Canadian courts. This theory has recently been adopted by the New Brunswick Court of Appeal in an unprecedented decision that allows an infant to sue its own mother for alleged negligent conduct that occurred prior to the child's birth. The author argues that, despite contrary claims, the present theory of liability relies on the judicial use of a legal fiction. He maintains that this fiction has been stretched beyond its theoretical limits and concludes that courts are no longer justified in adopting the present theory of liability in cases where a child sues its own mother. He ends by suggesting that courts must undertake a deeper analysis of the issues relevant to a determination of the proper scope of recovery for pre-natal injuries.

L'auteur examine la théorie de la responsabilité pour des blessures prénatales retenue par les cours canadiennes. Cette théorie a récemment été retenue par la Cour d'appel au Nouveau-Brunswick dans une décision sans précédent qui permet à un enfant de poursuivre sa mère en justice pour une conduite alléguée négligente qui a eu lieu avant la naissance du bébé. L'auteur argumente que malgré des revendications contraires, la théorie actuelle de responsabilité invoque l'utilisation judiciaire de la fiction légale. Il maintient que cette fiction a été étendue au-delà de ses limites théoriques et conclut que les cours ne sont plus justifiées en retenant la théorie actuelle de la responsabilité dans les causes où un enfant poursuit sa mère en justice. Il termine en suggérant que les cours se chargent de faire une plus profonde analyse de ces questions ayant rapport à une résolution de la portée de la guérison convenable pour des blessures prénatales.

Introduction

On 9 December 1996, a motion was brought before the New Brunswick Court of Queen's Bench, Trial Division, in order to determine whether an infant plaintiff has the legal capacity to commence an action against its mother for injuries sustained during pregnancy.[1] According to the

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1. *Dobson (Litigation Guardian of)* v. *Dobson* (1997), 143 DL.R. (4th) 189 (N.B.Q.B) [hereinafter *Dobson*].

facts alleged by his litigation guardian, Ryan Leigh MacLean Dobson was born with permanent mental and physical impairment after his mother Cynthia Dobson negligently crashed her car while pregnant with Ryan. On 20 January 1997, Miller J. rendered a decision that was the first of its kind in a Canadian court, allowing the infant plaintiff to sue his own mother for pre-natal injuries suffered as a result of her alleged negligence. This unprecedented decision is controversial in many respects. On the level of public policy, it raises a number of serious concerns for women about their right to control their own bodies and to make fundamental decisions about how to live. It is also contentious on the level of theory: the decision raises difficult questions about the nature and extent of foetal rights.

Miller J. acknowledged both of these difficulties. With respect to the public policy issues, Miller J. admitted that

> [t]he implications of approving of unborn child-mother litigation are manifold. While the negligent operation of a motor vehicle may be uncomplicated insofar as liability is concerned, many other problems could arise as the result of other allegations of negligence by a mother towards the foetus.
>
> Can a child at birth sue its mother because she used narcotics or drank alcoholic beverages? Did the mother over-exercise and cause foetal damage? Did the mother follow an unsafe diet program?[2]

Miller J. also recognized "the difficulty of reconciling competing legal principles"[3] with respect to theoretical questions about the nature and extent of foetal rights. "In one respect, the answer appears to be clear—a foetus is not a person."[4] However, Miller J. went on to consider a body of established Canadian cases where the Courts have been willing to recognize "the juridical personality of a foetus as a fiction which is utilized in order to protect the future interest of the foetus."[5] After an extremely brief analysis of only two of those cases,[6] Miller J. quickly concluded with the following argument:

> [I]f an action can be sustained by a child against a parent, and if an action can be sustained against a stranger for injuries suffered by a child before

2. *Ibid.* at 190.
3. *Ibid.* at 192.
4. *Ibid.* at 190.
5. *Ibid.* at 191.
6. *Montreal Tramways* v. *Leveille*, [1933] S.C.R. 456, [1933] 4 D.L.R. 337; *Duval* v. *Seguin*, [1972] 2 O.R. 686; 26 D.L.R. (3d) 418 (Ont. H.C.).

> birth, then it seems to me a *reasonable progression* to allow an action by a child against his mother for pre-natal injuries caused by her negligence.[7]

This conclusion was, however, punctuated with an important *caveat.* Miller J. explicitly recognized that "[t]his is a question with obvious expanding implications and is one which must ultimately be determined by a higher court of the judicial structure."[8]

Not surprisingly, a notice of appeal was filed in the New Brunswick Court of Appeal forthwith. The appeal was heard on 16 May 1997 and a decision was dispatched within twelve days.[9] A unanimous three member panel of the New Brunswick Court of Appeal[10] affirmed the reasoning adopted by Miller J. and dismissed Cynthia Dobson's appeal.

Given the potential political implications for women flowing from these two decisions, the so-called "reasonable progression" that is said to allow a child born with injuries to sue his or her own mother requires careful scrutiny. Public policy arguments aside,[11] I maintain that there are serious theoretical problems inherent in the reasoning that is adopted in both *Dobson* decisions and in the earlier cases upon which both *Dobson* decisions rely. The aim of this paper is to expose those theoretical problems so that a still higher court, if ultimately called upon to resolve this enormously complex problem, is fully aware of the fictitious reasoning upon which the present theory of liability for pre-natal injuries depends.

I begin by considering the historical use of the legal fiction that treats the child *en ventre sa mêre* as though already born. An examination of its earliest use in the law of property reveals that the fiction was originally employed not to ensure or protect foetal rights or interests but merely to realize a testator's intention to transfer property. In fact, we see that the notion of foetal "future interests" only became prevalent after the property fiction achieved a general application via the doctrine of *stare decisis.* It was not until much later that the Supreme Court of Canada co-opted the property fiction into the law of tort so that a child born with pre-natal injuries was able to recover damages. I shall argue that there was no sound theoretical basis in the law of tort for adopting the property law fiction. Recognizing this to be the case as well, other courts since have attempted to avoid an explicit use of the property fiction, opting instead for a more elegant approach based on the tort law concept of the

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7. *Dobson, supra* note 1 at 192 [emphasis added].
8. *Ibid.*
9. *Dobson (Litigation Guardian of)* v. *Dobson,* [1997] N.B.J. No. 232 (QL) (N.B.C.A.).
10. The members of the panel were Hoyt C.J.N.B., Ayles J.A., and Turnbull J.A.
11. None were considered by the New Brunswick Court of Queen's Bench or the New Brunswick Court of Appeal.

"foreseeable plaintiff". Although this latter approach has generally been accepted, I argue that it is no better able to avoid reasoning through the use of a legal fiction than its predecessor, though use of the fiction under this approach is implicit. I then attempt to demonstrate the problems inherent in an implicit use of the legal fiction. Finally, once the theoretical problems surrounding the use of legal fictions have been exposed, I return to *Dobson* to critically examine the reasoning adopted by the Court of Queen's Bench and by the Court of Appeal. I argue that the courts' uncritical adoption of the property fiction results in confusion and error. Not only is the ultimate conclusion reached by both courts insupportable on the very theory that each adopts, the reasoning in both *Dobson* decisions—because its basis is purely theoretical—fails to address a number of crucial non-theoretical issues.

I. *Legal Fictions*

Sometimes the bare application of an established common law or statutory rule leads to a result that appears unjust. Judges confronted with such cases often feel compelled to make a difficult choice. Should the court follow the established rule or should it disregard the rule in favour of an outcome that is thought to be just? One way out of the dilemma, according to some, is accomplished by the legal fiction.[12]

Generally, a legal fiction is a false assumption of fact made by a court as the basis for resolving a legal issue. One of its purposes, as Fuller astutely pointed out,[13] is to reconcile a specific legal result with an established rule of law. If no such rule precludes the desired result, there is no need for a legal fiction; likewise if no particular result is desired. The legal fiction, it is said, provides a mechanism for preserving the established rule while ensuring a just outcome. Instead of ignoring or altering the rule that would have precluded the just result, the judge openly revises

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12. See O.R. Mitchell, "The Fictions of Law: Have They Proved Useful or Detrimental to its Growth?" (1893) 7 Harv. L. Rev. 477; J. Smith, "Surviving Fictions" (1917) 27 Yale L.J. 147; M. Cohen, "On the Logic of Fictions" (1923) 20 J. Phil. 477; P. Olivier, *Legal Fictions In Practice and in Legal Science* (Rotterdam: Rotterdam University Press, 1979); R.A. Samek, "Fictions and the Law" (1981) 31 U. Toronto L.J. 290; J. Stoneking, "Penumbras and Privacy: A Study of the use of Fictions In Constitutional Decision-Making" (1985) W. Va. L. Rev. 859; P. Birks, "Fictions Ancient and Modern" in P. Birks & N. MacCormick, eds., *The Legal Mind: Essays for Tony Honoré* (New York: Clarendon, 1986); A. Soifer, "Reviewing Legal Fictions" (1986) 20 Ga. L. Rev. 871; K.S. Hamilton, "Prolegomenon to Myth and Fiction in Legal Reasoning, Common Law Adjudication and Critical Legal Studies" (1989) 35 Wayne L. Rev. 1449; L. Harmon, "Falling Off the Vine: Legal Fictions and the Doctrine of Substituted Judgment" (1990) 100 Yale L. Rev. 1.

13. L. Fuller, *Legal Fictions* (Stanford: Stanford University Press, 1967) at 51-53.

the facts of the case. By fictionalizing the facts, the desired result is said to be reconciled with the established rule while, at the same time, leaving the established rule intact.

Thus the legal fiction is a judicial device. It is perhaps best understood as a practice that some judges invoke on occasions where it is perceived that the scope of an existing legal rule falls short of what is required in order to achieve a just outcome. In Roman law, for example, the function of the legal fiction was to allow actions otherwise unavailable on a strict interpretation of the Roman civil code. As a result of the court's deliberate assumption of a false state of affairs (via a formula that was prescribed by the *praetor*), persons previously excluded from its operation were brought within the ambit of the Roman civil code. To take a typical example, actions pursuant to the *ius civile* were not originally available to or against foreigners. However, as the Romans began to interact commercially with citizens of other city-states, there were times when justice seemed impossible without the device of the legal fiction. Since the *ius civile* applied only to Roman citizens, the courts had to pretend that certain foreigners were citizens for the purpose of litigation. By treating certain foreigners as though they were citizens, the Roman courts allowed the rigours of the *ius civile* to remain intact while, at the same time, allowing it to keep pace with the swift and steady progress of contemporary life.[14]

Similar strategies have been employed throughout the history of the common law.[15] Another typical example is the fiction of "inviting" employed in the "allurement" cases in the law of tort.[16] According to the common law, landowners owed a duty of care only to "invitees", *i.e.* to those who were permitted or invited on to their land. In other words, no duty was owed to trespassers. However, a strict application of the common law became problematic in a series of cases involving children, usually living close to industrial districts, who were in the habit of playing on-site, sometimes on equipment that had been abandoned or left unattended. According to the common law, since the children were neither permitted nor invited to play there, no duty of care was owed to them by the landowners.

Notwithstanding the fact that the children were clearly "trespassers" within the meaning of the common law, a number of courts decided to

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14. See, I. Kerr, *Legal Fictions* (Ph.D. Thesis, The University of Western Ontario, 1995) at 13-31; P. Olivier, *Legal Fictions in Practice and in Legal Science* (Rotterdam: Rotterdam University Press, 1975) at 5-13.

15. See I. Kerr, "The Historical Debate About Legal Fictions", *ibid.*

16. See *e.g.* Bohlen, "The Duty of a Landowner Toward Those Entering His Premises of Their Own Right"(1921) 69 Pa. L. Rev. 340; J.Smith, "Liability of Landowners to Children Entering Without Permission" (1898) 11 Harv. L. Rev. 349; L. Fuller, *supra* note 13 at 66-70.

circumvent the common law in order to find the landowners liable in negligence for leaving potentially dangerous sites unattended.[17] Given the allure of the abandoned equipment, etc., the courts decided to treat the children as though they had been beckoned to the site and, hence, as though they were "invitees." In so doing, it was held that a duty of care was owed to those children despite the fact that the landowners had neither invited nor even permitted the children to play on their land. By using the fiction of "inviting", the courts were able to bring these cases within the cover of existing doctrine.

However, the very need to pretend to be true things that are known to be false demonstrates that the legal fictions employed in all of these different examples are perhaps less a panacea than they are evidence of a deeper pathology. The need for legal fictions, as Fuller once put it, is itself a symptom of the complex relation between theory and fact, between concept and reality.

> When all goes well and the established legal rules encompass neatly the social life they are intended to regulate, there is little occasion for fictions. There is also little occasion for philosophizing, for the law then proceeds with a transparent simplicity suggesting no need for reflective scrutiny. Only in illness, we are told, does the body reveal its complexity. Only when legal reasoning falters and reaches out clumsily for help do we recognize what a complex undertaking the law is.[18]

Following Fuller, it is my contention that the need for the legal fiction that treats the child *en ventre sa mêre* as though already born is itself a symptom of an extremely complex relationship between theory and fact, concept and reality. Rather than providing a satisfactory solution to the theoretical problem that arises when a child born with injuries attempts to sue his or her own mother, reasoning through the device of fiction attempts to conceal the complexity underlying the legal issue in order to circumvent it. By exposing the extent to which the reasoning adopted in *Dobson* falters and reaches clumsily for help, my aim is to facilitate a more thoughtful recognition of the complex undertaking that the law is in determining the scope of child-mother litigation.

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17. For three more recent examples, see *Van Oudenhove* v. *D'Aoust* (1969), 8 D.L.R. (3d) 145, 70 W.W.R. 177 (Alta. S.C.); *Marquand* v. *DeKeyser* (1970), 75 W.W.R. 439 (Alta. S.C.); *Daneau* v. *Trynor Enterprises Ltd.* (1972), 24 D.L.R. (3d) 434 (N.S.S.C.).
18. *Supra* note 13 at viii.

II. *The Child* En Ventre sa Mêre *in the Law of Property*

A. *Personality Begins at Birth*

Selecting the appropriate moment to ascribe personhood to human beings has proved to be a challenging task. Difficulties have been experienced not only in law but also in philosophy, theology and science. However, as the Supreme Court of Canada has quite recently stated,

> [t]he Court is not required to enter the philosophical and theological debates about whether or not the foetus is a person, but, rather, to answer the legal question of whether [the law] has accorded the foetus personhood. Metaphysical arguments may be relevant but they are not the primary focus of inquiry. Nor are scientific arguments about the biological status of the foetus determinative in our inquiry. The task of properly classifying a foetus in law and in science are different pursuits.[19]

Thus although it may be said in the realms of theology and medicine that life begins at conception, "the law has selected birth as the point at which the foetus becomes a person with full and independent rights."[20] This long-standing common law rule is premised on the idea that "[a]n unborn child has no existence as a human being separate from its mother."[21]

Although the foetus does not achieve independent legal status until such time as it is born alive and has an existence physically separate from that of its mother, the common law has always provided some protection to the unborn. As early as the thirteenth century, as is clear in Bracton, the foetus was under the guardianship of the criminal law.[22] It is important to note, however, that the protection afforded to the unborn in criminal law did not in and of itself imply that the unborn enjoyed independent legal status. This point was epitomized by Coke in his famous discussion of the law prohibiting murder.

> If a woman be quick with child and by a potion or otherwise killeth it in her womb, or if a man beat her, whereby the child dieth in her body and she is delivered of a dead child, this is . . . no murder, but if the child be born alive and dieth of the potion, battery, or other cause, this is murder; for in law it is accounted as a reasonable creature, *in rerum natura* when it is born alive.[23]

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19. *Tremblay* v. *Daigle*, [1989] 2 S.C.R. 530 at 552-53, 62 D.L.R. (4th) 634.
20. *Dehler* v. *Ottawa Civic Hospital* (1979), 25 O.R. (2d) 748 at 761, 101 D.L.R. (3d) 686 (Ont. H.C.), aff'd (1980), 29 O.R. (2d) 677, 117 D.L.R. (3d) 512 (Ont. C.A.).
21. See the *dicta* of Holmes J. in *Dietrich* v. *Northampton*, 138 Mass. 14, 52 Am. R. 242 (1884).
22. See *e.g.*, Law Reform Commission of Canada, *Crimes Against the Foetus* (Working Paper 58) (Ottawa: Law Reform Commission, 1989).
23. Sir E. Coke, *The Third Part of the Institute of the Laws of England: Concerning High Treason, and other Pleas of the Crown, and Criminal Causes*, 4th ed. (London: A. Crooke, 1669) at 50.

According to Coke one cannot murder a child *en ventre sa mêre*. This is because the common law requires the child to be born alive before it can be considered a "reasonable creature" or, in modern parlance, a legal person. Once born, the child achieves the legal status of person and is thereby attributed certain legal rights and remedies otherwise unavailable. At any point prior to birth, however, the child is not a person and is not *independently* entitled to such legal rights or remedies.

This rule has been reaffirmed on numerous occasions in Canada in both the criminal and civil context. For example, the Supreme Court of Canada recently determined that a botched delivery attempt by two negligent midwives, during which an unborn child's heart ceased to function while trapped in its mother's birth canal, could not result in a conviction for criminal negligence causing death to another person.[24] The Court held that there could be no such conviction because the line of demarcation between a foetus and a person at common law inevitably leads to the conclusion that a child in the birth canal is, as a matter of law, not another person but a part of its mother. Consequently, the Supreme Court of Canada agreed with the British Columbia Court of Appeal that the two negligent midwives could only be convicted of criminal negligence causing bodily harm to the mother. This result, though in the criminal context, is consistent with the rationale underlying the Court's decision two years earlier in *Tremblay* v. *Daigle*.[25] In *Tremblay* v. *Daigle* the Supreme Court considered the status of the foetus under the Quebec *Civil Code* and in Anglo-Canadian private law and concluded that the foetus is not in law a person and is therefore not entitled to an interlocutory injunction preventing the woman carrying it from having an abortion.

B. *Fulfilling the Testator's Intentions*

The strictness of this common law rule was first encountered by judges in the law of property. The facts in *Thellusson* v. *Woodford*[26] illustrate the hardships suffered under the rule. At the time of the testator's death, the wife of his son Peter Thellusson was pregnant with twin sons, later born William and Frederick Thellusson. According to the common law rule, since the twins were not yet born and therefore not persons at the time of the devise, they were not entitled to inherit from their grandfather. This was so despite the fact that the devisor bequeathed to his grandchildren "*as shall be living at the time of my decease or born in due time*

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24. *R.* v. *Sullivan*, [1991] 1 S.C.R. 489, 55 B.C.L.R. (2d) 1.
25. *Supra* note 19.
26. (1798), 4 Ves. Jun. 227, 31 E.R. 117 (Ch.) [hereinafter cited to E.R.].

afterwards."[27] The court considered a long line of cases to determine whether the testator had transgressed the boundary of executory devises by extending the devise to include nonpersons. In deciding that William and Frederick could inherit, the court followed a number of older cases including one from the Court of Common Pleas[28] which stated as a settled principle that, for purposes of inheriting, "the child *en ventre* is to be considered begotten and born." In *Thellusson* v. *Woodford* the court also relied on "the fiction of Roman Law that considered children in the womb as living persons" and held that this fiction has been adopted by the common law "to enable them to take legacies and devises."[29] Thus a legal fiction was employed so that the court could execute Thellusson's devise in the manner that he had intended it. With the legal fiction the court was able to honour his request without altering the rule at common law that only those who are born are persons.

The scope of this fiction within the law of property was tested in later cases. Questions ensued when a testator would make specific bequests in his will to "surviving children" or to "all living children" without a clause including those "born in due time afterwards." What would happen if the testator had a posthumous child? In other words, what if the child was *en ventre sa mêre* at the time of his or her father's death? Would that child count as a "surviving" or "living" child such that he or she could inherit once born? On a strict common law analysis the child *en ventre sa mêre* would not have been a "living" child since, at the relevant time, the child did not have an existence separate from that of its mother. Consequently, the child *en ventre sa mêre* could not inherit.

However, in *Trower* v. *Butts,*[30] a strict application of the common law rule was found problematic. The court reasoned that, as long as the donor had not expressed or implied in the document an intention to confine the gift to children born at the date at which the gift takes effect, the posthumous child could inherit. For if the donor had thought about it at all, he would almost certainly have said that he wished to include his posthumous children among the beneficiaries. This reasoning was subsequently adopted in a number of English cases[31] and by a Canadian court in *Re Charlton Estate,*[32] where it was held that if the potential existence

27. *Ibid.* at 159.
28. *Whitelock* v. *Heddon* (1798), 1 Bos. & Pul. 243, 126 E.R. 883.
29. *Supra* note 26 at 140.
30. (1823), 1 Sim. & St. 181, 57 E.R. 72 (V.C.).
31. *Blasson* v. *Blasson,* (1864) 2 De G.J.& S. 665, 46 E.R. 534 (Ch.); *Villar* v. *Gilbey,* [1907] A.C. 139 (H.L.); *Elliot* v. *Joicey,* [1935] A.C. 209 (H.L.).
32. [1919] 1 W.W.R. 134 (Man. K.B.).

of such child placed it plainly within "the reason and motive of such gift", the court will resort to a legal fiction and construe the will so as to include the child by finding him alive at the relevant time. It is crucial to note that the reasons for adopting the legal fiction were not stated in terms of the rights or interests of the unborn. In each of these cases the issue was simply whether the donor had likely intended the class of recipients to include the unborn.

Thus, in the law of property, a legal fiction was sometimes invoked to alter the facts in particular situations. In order to fulfill the intentions of a testator, the posthumous child was treated as though *in rerum natura* at the time of the will. This is said to allow an unborn child to inherit in spite of the common law rule to the contrary. Further, use of the fiction is said to achieve this result without having to relinquish the original common law rule. By merely fictionalizing the facts in a given case, the rule that personality begins at birth is said to remain intact. Since it is the facts that are altered and not the original rule, the desired result is said to have been reconciled with the common law.[33]

C. *Extending the Perpetuities Period*

Since the advent of this legal fiction, its subsequent use has engendered a lineage of its own. In the law of property it has had the further effect of extending the lifespan of the common law rule against perpetuities. Originally the rule against perpetuities limited the subject-matter of the devise to a period no longer than a life in being plus twenty-one years thereafter. However, with the continued use of the fiction which treats the child *en ventre sa mêre* as though it were *in rerum natura*, the perpetuity period was eventually extended to include the ordinary period of human gestation. Instead of determining the perpetuity period by considering lives already "in being," as the courts had always done in the past, judges began to consider the child *en ventre sa mêre* as though it were a "life in being," not only for the purpose of the acquisition of property by the child itself but also a "life in being" chosen to form part of the perpetuities period.[34]

Use of the property law fiction has since been extended to the law of tort. What began in the law of property as a judicial device to preserve the intentions of a testator has since become a mechanism for furnishing the

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33. See *e.g.* Fuller, *supra* note 13.

34. P.H. Winfield, "The Unborn Child" (1942) 4 U. Toronto L.J. 278 at 279; see also *Perpetuities Act*, R.S.O. 1990, c. P-9, ss. 1, 8(2), 8(3), 8(4).

unborn with rights and remedies not otherwise available at common law. Is it legitimate to extend the use of this fiction to other areas of the law?

III. *A Theory of Liability for Pre-natal Injuries*

A. *Co-opting the Property Fiction into the Law of Tort*

A separate theoretical consequence of the common law rule that legal personality begins at birth is that the child *en ventre sa mère* is unable to recover damages in tort for injuries suffered prior to birth. While still in the womb the foetus is not yet a person. Since the scope of tort duties extends only to persons, no remedy exists at common law for a child born with injuries sustained during pregnancy.

Eventually the harsh consequences of the application of this rule within the tort regime resulted in a judicial response similar to that experienced in the law of property. In order to allow a child born with injuries to recover damages, the fictitious ascription of personality to the child *en ventre sa mère* was extended from property law to the law of tort. The Supreme Court of Canada seemed to have set the standard for the rest of the English-speaking world in *Montreal Tramways* v. *Leveille*.[35] In that case a child *en ventre sa mère* subsequently born with club feet was found to have been injured by the fault of the defendant, who had caused the woman who would soon become his mother to fall while alighting from a tram car. The majority of the Court recognized that in 1933 "the great weight of judicial opinion in the common law courts denies the right of a child when born to maintain an action for prenatal injuries."[36] Nevertheless, the majority boldly reversed this by declaring that a child who suffers injury while in its mother's womb as the result of a wrongful act or default of another has the right, after birth, to maintain an action for its prenatal injuries. Lamont J. justified his rejection of the common law in this case on the basis of the following principle.

> If a child after birth has no right of action for prenatal injuries, we have a wrong inflicted for which there is no remedy. . . . 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.[37]

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35. *Supra* note 6.
36. *Ibid.* at 460.
37. *Ibid.* at 464.

As a result, the majority took notice of the fact that in the law of property, the child *en ventre sa mêre* had already been treated as a person and, likewise, applied the fiction to the case at bar.

Unfortunately, Lamont J. did not proceed further with the analysis. Once the child *en ventre sa mêre* was deemed to be a person, the Court held *without question* that the child could recover damages for its pre-natal injury. The Court failed to provide a theoretical basis for its decision. For example, the majority did not reason that the unborn child, by virtue of its position, was deemed to be a party to the contract between its mother and the tramway company. Nor did the majority contend that the unborn child, once deemed to be a person, became a foreseeable plaintiff who was owed a duty of care by the tramway company. Lamont J. simply ignored these issues.

The decision in this case not only required an adoption of the property law fiction but also seemed somehow to transcend the issues usually considered in tort law analysis. As Lamont J. put it:

> 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.[38]

Other than this rather esoteric appeal to "natural justice" and an odd use of the notion "its person," no theory was put forward to account for the decision. In particular, no theory was provided to support the proposition that the child in the womb is ascribed legal personality. There was no discussion of how or why the property law fiction was relevant or material or how the property law fiction could apply as a proper precedent across such diverse areas of law. It is important to remember that the property law fiction was originally employed only so that the court could fulfill the intentions of the testator. It was not originally invoked to protect foetal rights or future interests. Despite all of these deficiencies in the reasons, there has been an increasing tendency for Courts in a number of common law jurisdictions to allow compensation for pre-natal injuries following the decision in *Montreal Tramways* v. *Leveille*.

B. *The Unborn Child as a Foreseeable Plaintiff*

Donoghue v. *Stevenson*,[39] which was decided one year before *Montreal Tramways* v. *Leveille*, extended the reach of negligence actions in this

38. *Ibid.* [emphasis added].
39. [1932] A.C. 562 (H.L.).

area further still. The decision in *Donoghue* v. *Stevenson* and in a number of cases since[40] have made it clear that it is unnecessary for damages to coincide in time or place with the wrongful act or default. Further, in a number of these cases the existence of the particular plaintiff was unknown to the defendant.

In the leading Canadian case on prenatal injuries[41] Fraser J. said of these earlier cases that "it would have been immaterial to the causes of action if the plaintiffs had been persons born after the negligent acts."[42] In *Duval* v. *Seguin* a women thirty-one weeks pregnant was involved in a car accident caused by the negligent actions of another. Three weeks later her child, Ann Duval, was prematurely born suffering cerebral defects as a result of the accident. In deciding whether the child had a right to damages for the pre-natal injury, Fraser J. developed an approach more precise than the appeal to "natural justice" invoked in *Montreal Tramways* v. *Leveille*. By extrapolating from the developing law of negligence, Fraser J. determined the scope of recovery for pre-natal injuries by citing the famous *dictum* of Lord Atkin in *Donoghue* v. *Stevenson.*

> The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? *receives a restricted reply.* You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be—*persons* who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.[43]

Under this doctrine Fraser J. held that an unborn child is within the scope of foreseeable risk incurred by a negligent third party motorist. He further held that once the child is born alive with injuries resulting from the accident, the cause of action is completed.

Following the modern developments in the law of negligence, Fraser J. awarded damages for pre-natal injuries without *expressly* employing a legal fiction. Because Fraser J. held that a child *en ventre sa mêre* is a foreseeable plaintiff he thought that

> it is not necessary in the present case to consider whether the unborn child was a person in law or at which stage she became a person. For negligence to be a tort there must be damages. While it was the foetus or child *en ventre*

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40. See especially *Grant* v. *Australian Knitting Mills*, [1936] A.C. 85 (P.C.); *Dorset Yacht Co.* v. *Home Office*, [1970] A.C. 1004 (H.L.).
41. *Duval* v. *Seguin, supra* note 6.
42. *Ibid.* at 700.
43. *Donoghue* v. *Stevenson, supra* note 39 at 580 (emphasis added); cited *ibid.* at 699.

> *sa mere* who was injured, the damages sued for are the damages suffered by the plaintiff Ann since birth and which she will continue to suffer as a result of the injury.[44]

According to Fraser J. the common law rule that an unborn child is not a person has no bearing on the ability to recover for pre-natal injuries suffered after birth. Because Ann Duval was a foreseeable plaintiff who was owed a duty of care, once born she was able to bring an action to recover damages for injuries brought on by the negligence of Mr. Seguin. This was so notwithstanding the fact that Mr. Seguin's negligent act was completed long before there ever existed a legal person named Ann Duval.

In the same year that *Duval* v. *Seguin* was decided, the full court of the Supreme Court of Australia handed down a comparable decision on a case with remarkably similar facts.[45] In *Watt* v. *Rama* a pregnant woman driver had been injured by the faulty driving of the defendant. The woman driver had subsequently given birth to the plaintiff who suffered from brain damage, epilepsy and paralysis from the neck downward. Like the majority in *Duval* v. *Seguin*, all three members of the Court in *Watt* v. *Rama* resorted to the basic principles of modern negligence, in particular to the statement of the "neighbour principle" by Lord Atkin in *Donoghue* v. *Stevenson*. Winneke C.J. and Pape J. held that it was reasonably foreseeable at the time of the collision that the defendant's conduct might cause injury to a pregnant woman in the car with which it collided. Therefore, the Court concluded, the possibility of injury on birth to the child she was carrying must also be reasonably foreseeable. For Winneke C.J. and Pape J., this foreseeability gave rise to a potential relationship capable of imposing a duty on the defendant to the child if, and when, the child was born alive. On such birth the relationship crystallized, since it was then that the child suffered injuries as a living person. With the crystallization of this relationship a retrospective duty of care arose owed by the defendant to the child.

The third member of the Court, Gillard J., reached the same conclusion but by quite another means. In a very different application of the "neighbour principle", Gillard J. held that the plaintiff was already a member of a class of persons which might reasonably and probably be affected by the defendant's carelessness.

> *The unborn child should be included in the class of persons* likely to be affected by [the driver's] carelessness since the regeneration of the human species implies the presence on the highway of many pregnant women.[46]

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44. *Supra* note 6 at 701.
45. *Watt* v. *Rama*, [1972] V.R. 353.
46. *Ibid.* at 374 [emphasis added].

Unlike the majority, who felt the need to impose a retrospective duty of care owed by the plaintiff to the defendant, Gillard J. was prepared to include the unborn child in the category of persons using the highway.

The decisions in *Duval* v. *Seguin* and *Watt* v. *Rama* have laid the foundation for the current theory of recovery for pre-natal injuries in spite of the common law rule that legal personality begins only at birth. As a result, the courts in most common law jurisdictions no longer find any difficulty in holding that there is a duty to take reasonable care for the safety of unborn plaintiffs that stand foreseeably within the scope of the defendant's risk.

IV. *An Analysis of the "Unborn Plaintiff" Approach*

Since the twin decisions in *Duval* v. *Seguin* and *Watt* v. *Rama*, most common law analysts have been convinced that the fiction ascribing personality to the unborn used in *Montreal Tramways* v. *Leveille* is no longer required to award damages for prenatal injuries. As one English writer put it,

> [s]ince the tort of negligence is incomplete unless and until damage is suffered by the plaintiff, that tort is in fact completed on the live birth of the injured infant, at which time the infant has legal personality and is able to sue through his next friend, albeit that injuries were inflicted on the infant while he was *in utero*. This last approach has the undeniable attraction of rendering unnecessary any decision as to the legal status of the unborn child, *though it is implicit in it that such child does have a separate identity from that of its mother.*[47]

On this view, with the concept of the "foreseeable plaintiff" there is no longer any need to account for or to fictionalize the legal personality of the unborn. Thus, as Gordon once described it, there is a shift in emphasis from the "unborn child" to the "unborn plaintiff."[48]The result of this shift is a more elegant analysis. The desired legal result is achieved without resort to a legal fiction. Or is it?

The decisions in both *Duval* v. *Seguin* and *Watt* v. *Rama* rely on Lord Atkin's "neighbour principle." Applying this principle in *Duval* v. *Seguin*, Fraser J. held that "[s]uch a child therefore falls within the area of potential danger which the driver is required to foresee and take reasonable care to avoid." [49]Applying the principle in *Watt* v. *Rama*,

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47. P.J. Pace, "Civil Liability For Prenatal Injuries" (1977) 40 Mod. L. Rev. 141 at 142 [emphasis added].
48. D.A. Gordon, "The Unborn Plaintiff Approach" (1965) 63 Mich. L. Rev. 579.
49. *Supra* note 6 at 701.

Gillard J. held that "[t]he unborn child should be included in the class of persons likely to be affected by [the driver's] carelessness."[50] Are these correct applications of Lord Atkin's "neighbour principle"?

It is worthwhile to remember that Lord Atkin, in answer to the question "who, then, in law is my neighbour?", responded first by saying that the answer "*receives a restricted reply.*" [51]He then went on to say, "The answer seems to be—*persons* who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts and omissions which are called in question."[52] Thus for Lord Atkin the notion of a foreseeable plaintiff is *restricted to persons.* This limits the scope of a negligence action to persons.[53] For example, a dog cannot bring an action nor can the dog's owner bring an action on the dog's behalf since the dog is not a person and therefore cannot be said to stand within the scope of a risk. Even if it was foreseeable that the dog would be injured as a result of some risk, the risk-taker will never be liable *to the dog* since no duty of care is owed to dogs.[54] Thus, according to Lord Atkin, every negligence action must have an answer to the question: *upon whom was the wrong inflicted?* If it cannot be said that there was some *person* upon whom a wrong was inflicted, there is no cause of action in tort.

While it is true that *Donoghue* v. *Stevenson* and subsequent cases have made it clear that it is unnecessary that the damage coincide in time or place with the wrongful act it does not follow that it is "immaterial to causes of action if the plaintiffs had been persons born after the negligent acts."[55] In some cases it may be immaterial. The defendant may owe a duty of care to some *person* who will exist in the future. This is so in the hypothetical case of a manufacturer of baby toys. Assume that in 1997 a manufacturer negligently produces a defective baby toy that will sit unsold on a store shelf until 1999. An expectant father comes along and purchases the toy for his soon-to-be-born child, not knowing it to be defective. A few months later the child is born. A year after that, on the boy's first birthday, the father gives him the toy. Shortly after receiving the defective toy, the child suffers an injury while playing with it. In such case, it is clear that the child has a cause of action notwithstanding the fact that he was not alive in 1997 when the manufacturer produced the

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50. *Supra* note 45 at 374.
51. *Supra* note 43 [emphasis added].
52. *Ibid.* [emphasis added].
53. Therefore, all plaintiffs must be legal persons. This is precisely why Kings, Queens and corporations have been ascribed personality.
54. At least, not yet.
55. Fraser J. in *Duval* v. *Seguin*, *supra* note 6 at 700.

defective toy. What makes the manufacturer liable in negligence is not the mere fact that a defective toy was produced. The manufacturer is liable because a *person* who is within the class of ultimate consumers to whom a duty of care was owed was injured as a result of the careless manufacturing of the defective toy.

However, it does not follow from this example that it is *always* immaterial whether the plaintiff was born before or after the occurrence of the careless act. For instance, the actual time of birth may be more important in certain types of cases that do not involve a manufacturer's liability. This is because the scope of a manufacturer's risk is far greater than the scope of risk incurred by certain other types of risk-takers (such as careless drivers). The reason that there is a cause of action in the baby toy case imagined above is precisely because an existing person who stood within the scope of the manufacturer's risk suffered an injury as a result. Although the careless act that ultimately made the manufacturer liable occurred three years before the child was born, the negligence of the manufacturer caused an injury to a living child who, at the time of injury, was already a member of the class of persons owed a duty of care by the manufacturer. But this is so only because a manufacturer is required to reasonably foresee that the ultimate consumer may not use the product immediately.

The facts in *Duval* v. *Seguin* and *Watt* v. *Rama* must be distinguished from the case of the negligent toy manufacturer, since the children ultimately seeking damages in these two cases were not yet born at the time when they were injured. At the time of the collisions each was a foetus; neither was a person in the eyes of the law. Consequently, according to the principle as set out in *Donoghue* v. *Stevenson,* Gillard J. was wrong to say that "[t]he unborn child should be included in the class of persons likely to be affected by [the driver's] carelessness."[56] Likewise, Fraser J. was equally in error by holding that "[s]uch a child therefore falls within the area of potential danger which the driver is required to foresee and take reasonable care to avoid."[57] On a strict temporal analysis of the facts, there is no cause of action in either case because each child *en ventre sa mêre* was not yet a *person* at the time of the collision. Although the drivers in these two cases owed a duty of care to all persons who use the highway, the unborn children were not persons according to the common law and therefore could not possibly have been members of the class of persons using the highway.

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56. *Supra* note 46 at 374.
57. *Duval* v. *Seguin, supra* note 6 at 701.

It is incorrect to say that although the unborn child was not yet a person at the time of the accident, she was a foreseeable plaintiff.[58] A plaintiff is a person who commences an action. The very notion of being a plaintiff—foreseeable or otherwise—entails being a person. Further, as we have already seen, only persons are owed a duty of care in tort law. Although this legal truism was clearly stated by Lord Atkin, who restricted the duty of care to "*persons* closely and directly affected", somehow his restriction was overlooked in both *Duval* v. *Seguin* and *Watt* v. *Rama*. Because in each case the tortious act was completed prior to birth, neither child was a person at the time of the alleged wrongdoing. Each therefore lacked the standing necessary to commence an action. In other words, both children were incapable of being plaintiffs at that time. Consequently, neither could possibly be said to belong to the subcategory of plaintiffs known as "foreseeable plaintiffs" at the time of the collision.

A foreseeable plaintiff is a person to whom a duty of care is owed; such a person is one who has a cause of action if that duty is breached. In deciding whether there exists a foreseeable plaintiff one must ask: does there exist some person who might reasonably be anticipated to suffer an injury as a result of my risk? Of course, if no person is closely and directly affected by my careless conduct, there can be no cause of action. Because of the common law rule that personality begins at birth, a strict temporal analysis of the facts in *Duval* v. *Seguin* and in *Watt* v. *Rama* logically compels the trier of fact to conclude that the person who commenced the action sometime after being born was, strictly speaking, not at the accident scene. The issue then becomes whether there is some way in which the newborn plaintiff can now sue for something that happened in the past, though in theory not to that person.

The error in the analysis in *Duval* v. *Seguin* and in *Watt* v. *Rama* is that both courts mistook the notion of a "foreseeable plaintiff" with that of a potential plaintiff. Consequently, the status of "person" was attributed in both cases to an entity that was not in law a person, though each entity certainly had the potential to become a person. Both courts were correct in stating that it is reasonably foreseeable that pregnant women will give birth.[59] But the foreseeability of the event of birth no more makes the child *en ventre sa mêre* a foreseeable plaintiff than it makes it a newborn infant. A potentially newborn infant is not newly born. Likewise, a potentially foreseeable plaintiff is not a foreseeable plaintiff. Thus although it is

58. Although she is *foreseeably* a plaintiff. See the discussion of potential plaintiffs below.
59. And that pregnant women drive on highways, and that injured pregnant women will sometimes give birth to injured children, etc.

foreseeable that an unborn child might become a foreseeable plaintiff, it does not follow that it is one.

This makes the analysis in *Duval* v. *Seguin* and in *Watt* v. *Rama* problematic. The difficulty is illustrated in *Watt* v. *Rama* when Winneke C.J. said that the events

> constituted a potential relationship capable of imposing a duty on the defendant in relation to the child if and when born. On birth the relationship crystallized and out of it arose a duty on the defendant in relation to the child.[60]

Winneke C.J. held that the potential relationship crystallized upon the birth of the child, since it was then that the child first suffered injuries as a person. With the crystallization of this relationship a retrospective duty of care arose owed by the defendant to the child. Since it was held that this duty was breached, the defendant was liable for damages to the newborn. These reasons for judgment are extremely difficult to grasp. How is a "potential relationship" capable of imposing a past duty? The concept of potentiality lends nothing to the analysis. To say that there existed only a potential relationship at the time of the accident is precisely to mean that there was no actual relationship at the time of the accident. The allegation that Rama was in a "potential relationship" at the time of the accident leaves available to him a perfect line of defence: since the relationship was only a "potential relationship" there was no actual relationship at the time of the accident. "Therefore," Rama would submit, "I owed no duty of care other than to the mother at the time of the accident." Alternatively, if it were alleged that Rama was in an actual relationship that crystallized with the birth of a child who is now suffering an injury from some previous event, Rama would still have had a perfect defence. Rama would agree that he now has a relationship with the child and that he owes a duty to take reasonable care not to injure this newly born infant. But since he has not acted carelessly toward or injured the infant since her birth, he has not breached his duty of care.

Winneke C.J. was correct in stating that a relationship crystallized at birth. However, he failed to explain how it is that this newly-formed relationship can legitimately be applied *ex post facto* to prior events where it is admitted that no duty was owed. Winneke C.J. is horned by the following dilemma. If he refuses to employ the fiction used in *Montreal Tramways* v. *Leveille*, pretending that the unborn child was a person at the time of the accident, his decision forces him to utilize a different kind of fiction. He must pretend that there was a breach of duty at the time of the accident when really there was none. Either way, Winneke C.J. is forced

60. *Supra* note 45 at 360.

to employ an implicit retrospective fiction in order to find for the injured child.

If this assessment of the reasons for judgment in *Watt* v. *Rama* is correct, it would seem that commentators like Pace are incorrect in thinking that the "unborn plaintiff" analysis "has the undeniable attraction of rendering unnecessary any decision as to the legal status of the unborn child."[61] Without conferring legal status upon the unborn child in one way or another, there is no plaintiff with standing to bring an action. Thus the only way the "unborn plaintiff" analysis really works is to presume, as Gillard J. did in *Watt* v. *Rama*, that "[t]he unborn child should be included in the class of persons likely to be affected by [the driver's] carelessness."[62] At its best, this too is an implied use of the legal fiction ascribing personality to the unborn child. Although there is no mention that a fiction is being utilized, the analysis cannot proceed without it. Without implicitly treating the child *en ventre sa mêre* as though it were a person, it will not fit into the class of persons protected by the "neighbour principle." A tacit use of the fiction is also evident in the rhetorical words of Fraser J. in *Duval* v. *Seguin*:

> Ann's mother was plainly one of a class within the area of foreseeable risk and one to whom the defendants therefore owed a duty. Was Ann any less so? I think not.[63]

Upon reading those words one is tempted to ask: "One of a class *of what*? *Persons*?" Thus in both *Duval* v. *Seguin* and *Watt* v. *Rama* the "unborn plaintiff" analysis only works alongside an unwritten treatment of the child *en ventre sa mêre* as though it were a child *in rerum natura*. Though its use is unspoken, a legal fiction is still required to award damages for prenatal injuries. This is not at all surprising, given the existence of the rule at common law that personality begins at birth.

V. *A Model for Understanding the Use of the Fiction*

A. *The Deductive Argument*

One way to understand how the legal fiction has been utilized in these cases is to compare the traditional model of legal reasoning to the deductive argument in logic. An argument consists of a set of premises that are put forth in support of a further proposition, called the conclusion.

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61. *Supra* note 47. In fact, as will become clear in the course of the analysis to follow, the error is foreshadowed by the language in the second half of Pace's claim, cited *ibid.*, wherein Pace admits that "it is implicit that such a child does not have a separate identity from that of its mother."
62. *Supra* note 46 at 374.
63. *Supra* note 6 at 701.

In one type of argument, known as a syllogism, the argument is composed of three propositions: a major premise, a minor premise and a conclusion. For example:

Major Premise:	Only persons alive at the time of the devise are entitled to inherit.
Minor Premise:	Frederick Thellusson was not a person alive at the time of the devise.
Conclusion:	Frederick Thellusson is not entitled to inherit.

With this example one can think of the legal rule as the major premise, the fact situation in a particular case as the minor premise, and the judicial decision as the conclusion. The traditional model of legal reasoning involves applying the facts of a particular dispute to the relevant legal rule in order to reach a decision. In syllogistic terms this means applying the minor premise to the major premise in order to come to some conclusion.

B. *Applying the Model to the Property Fiction*

Using this model of reasoning, one can isolate the stage of the analysis at which the legal fiction comes into play. The explicit use of the fiction in the early property law cases applied the fiction directly to the *minor premise*. The strategy in *Thellusson* v. *Woodford*,[64] for example, was to treat Frederick Thellusson as though he was a person alive at the time of the devise despite the established fact that he was not yet born. If it could be pretended that he was, the minor premise would transpose the conclusion to its logical opposite in the following way:

Major Premise:	Only persons born at the time of the devise are entitled to inherit.
Minor Premise:	Frederick Thellusson "*was*" a person born at the time of the devise.
Conclusion:	Frederick Thellusson is entitled to inherit.

This model would allow Frederick Thellusson to inherit just as his grandfather had wished. The reason for transposing the facts in the minor premise is to allow for this wish *while at the same time keeping the major premise intact*. Generally speaking, the Court accepted the common law rule that only persons are entitled to inherit and did not wish to implement a new rule to the contrary. Instead the Court pretended that Frederick Thellusson was a person at that time for the in order to achieve the intended result without having to sacrifice the original rule.

64. *Supra* note 26.

C. *Applying the Model to the Tort Fiction*

The same model of reasoning can also be used to examine more recent tort decisions such as *Duval* v. *Seguin*.[65] Here one begins to see that the fiction is applied somewhat differently. As the above analysis demonstrated, the fiction is no longer restricted to the minor premise but is ultimately applied to the *major premise* of the syllogism. Before applying the fiction, the original syllogism would have been as follows:

Major Premise:	Only persons are owed a duty of care.
Minor Premise:	Ann Duval was not a person (but was a potential person).
Conclusion:	Ann Duval was not owed a duty of care.

Rather than applying a fiction to the minor premise and pretending that Ann Duval was a person, thus transposing the conclusion to its logical opposite, Fraser J. *fictitiously* broadened the scope of the rule so as to include the unborn. In other words, it was the major premise that was amended. The reasoning was as follows:

Major Premise:	Persons and "potential persons" are owed a duty of care.
Minor Premise:	Ann Duval was a potential person.
Conclusion:	Ann Duval was owed a duty of care.

This model allows Ann Duval, once born, to recover damages. But notice that it does so at the expense of altering the major premise. The rule no longer restricts the duty of care to persons. With this application of the fiction, the common law rule is substantially altered.

D. Stare Decisis, *Rule Erosion and an Implicit Use of the Fiction*

The above analysis reveals a serious danger when one considers the effect of repeated uses of a legal fiction. When a fiction is repeatedly employed and the Court alters the facts in a series of cases, it soon begins to look as though the fiction itself acquires a more general application. Ironically, as the fiction acquires a general application via the doctrine of *stare decisis*, it has the ultimate effect of eroding the original rule that the judge who first employed the fiction had meant to preserve. As the common law rule deteriorates, the traditional method of legal reasoning becomes inverted. While the correct method of legal reasoning involves the application of a particular set of facts to the relevant legal rule, it is now *the fiction and not the facts* that is applied to the rule. The result is that the fiction is no longer applied overtly to the facts of the case but, instead, the

65. *Supra* note 6.

fiction becomes tacitly built into the legal rule. Once this occurs the common law has become substantially altered.

Rule erosion resulting from multiple uses of a legal fiction is illustrated by the fiction that treats the child *en ventre sa mêre* as if it were born. While it was originally utilized in the law of property to preserve both the rule that personality begins at birth and the particular intentions of a testator, it was later adopted and applied in the law of tort. The fiction was borrowed by the courts without any attempt to justify its use. For example, how is the property law fiction relevant to the tort analysis? Having been used in so many property cases, the Supreme Court of Canada simply stated that the fiction of the civil law "must be held to be of general application."[66] Further, Lamont J. found support for the use of the fiction in the fact that "none of the judges below cast any doubt upon the right of the respondent to sue."[67] This is not the least bit surprising. Because the fiction had been successfully employed in so many previous cases, the legal determination that an unborn child is not a person in law becomes blurred. Interestingly, the potential for misuse of this fiction was recognized in sole dissent of Smith J. in *Montreal Tramways* v. *Leveille,* who submitted that the fiction has a narrow scope that is restricted to the law of property.[68] For this reason Smith J. was of the view, contrary to the majority, that the fiction could not be given general application.

Perhaps even more dangerous than an explicit application of the fiction is its implicit use. In tort law an implicit use of the fiction ascribing personality to the child *en ventre sa mêre* likely originated in one of two ways. The courts might have abandoned the explicit use of the fiction after having heard the dissent in *Montreal Tramways* v. *Leveille*. More likely, however, the implicit use of the fiction was simply the result of an erosion of the common law rule after a repeated explicit use of the fiction. Either way, the courts soon began to favour the "unborn plaintiff" approach. This approach does not merely erode the common law rule. It actually rewrites the rule. By calling the child *en ventre sa mêre* an "unborn plaintiff", the common law rule has been completely recast. With the "unborn plaintiff" approach, the courts are not simply saying that in particular cases we treat the unborn child as if it were born, but rather, that legal personality no longer begins at birth. Such orchestrations fly in the face of the rule of law and are contrary to the proper scope of the original fiction in the law of property, which was used to achieve a particular result without altering the common law rule.

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66. *Montreal Tramways, supra* note 6 at 465.
67. *Ibid.* at 465-66.
68. *Ibid.* at 481.

V. *The Expanding Use of the Fiction*

A. *Preconception Torts*

As judges continue to use the legal fiction ascribing personality to the unborn child, they continue to widen the scope of legal personality. This is already happening in the law of tort. The implicit use of the fiction in *Duval* v. *Seguin* widened the class of entities that can recover in tort. It is no longer merely foetuses that are protected by the "unborn plaintiff" analysis. Because the fiction expands the category of foreseeable plaintiffs to include nonpersons, a number of common law jurisdictions have accepted an emerging tort known as "preconception negligence." In preconception negligence, a child born with injuries will bring an action in negligence for some event that affected one of its ancestors, sometime before the child was ever conceived.[69] This increases the scope of civil liability immensely. The potential for mischief was recently visited in the Supreme Court of New York in *Entright* v. *Eli Lilly Co.*[70] Extending the unborn plaintiff approach to preconception injuries, the Court allowed an action by a plaintiff who was the granddaughter of a person who suffered a genetic impairment as a result of ingesting a defective pharmaceutical product. According to the decision in *Entright*, the category of plaintiffs can now be said to include not only foreseeable plaintiffs and potentially foreseeable plaintiffs but also potential potentially foreseeable plaintiffs. One must now foresee not only the unborn but also the unconceived. In *Entright*, one must even foresee those to be conceived by the not yet

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69. See J. Greenberg, "Reconceptualizing Preconception Torts" (1997) 64 Tenn. L. Rev. 315; A. Ennecking, "The Missouri Supreme Court Recognizes Preconception Tort Liability: *Lough* v. *Rolla Women's Clinic*" (1994) 63 UMKC L. Rev. 165; C. Stern & C.M. Gillen Tierny, "Inheriting Workplace Risks: The Effect of Workers' Compensation 'Exclusive Remedy' Clauses on the Preconception Tort After *Johnson Controls*" (1993) 28 Tort & Ins. L.J. 800; M.M. Hershiser, "Preconception Tort Liability—The Duty to Third Generations: *Entright* v. *Eli Lilly & Co.*" (1991) 24 Creighton L. Rev. 1479; M.L. Mascaro, "Preconception Tort Liability: Recognizing A Strict Liability Cause of Action for DES Grandchildren" (1991) 17 Am. J.L. & Med. 435; W.J. Stilling, "*Entright* v. *Eli Lilly & Co.*: Recognizing DES Granddaughter's Preconception Strict Liability Claim" (1991) 17 J. Contemp. L. 175; D.K. Andrews, "Recognizing A Cause of Action For Preconception Torts in Light of Medical Advancements Regarding the Unborn" (1984) 53 UMKC L. Rev. 78; M.A. Driscoll, "A Step Backward for the Infant in Preconception Tort Actions: *Albala* v. *City of New York*" (1982) 15 Conn. L. Rev. 161; J.E.S. Fortin, "Legal Protection for the Unborn Child" (1987) 51 Mod. L. Rev. 54; P.B. Babin, "Preconception Negligence: Reconciling an Emerging Tort" (1979) 67 Geo. L.J. 1239; V.E. Stoll, "Preconception Tort—The Need for Limitation" (1979) 44 Mont. L. Rev. 143; J.L. Ross, "Preconception Torts: A Look at our Newest Class of Litigants" (1978) 10 Tex. Tech. L. Rev. 97; D.S. Steefel, "Preconception Torts: Foreseeing the Unconceived" (1977) 48 U. Colo. L. Rev. 621.

70. 155 A.D.2d 64, 553 N.Y.S.2d 49 (1990).

conceived. Although such an action has yet to commence in Canada, inevitably it will. Whether and to what extent it will succeed, we shall have to wait and see.

B. *Family Law and the "Child in Need of Protection"*

The general application of the fiction has also been ascribed to the child *en ventre sa mêre* in the area of family law. In 1981 the Ontario Family Court in Kenora held that the Ontario *Child Welfare Act*[71] did not preclude a finding that a child *en ventre sa mêre* was "a child in need of protection" within the meaning of the *Child Welfare Act*.[72] Bradley J. recognized a child *en ventre sa mêre* as "a child in need of protection" because of the physical abuse she suffered through her mother's excessive consumption of alcohol and the mother's failure to obtain proper treatment. The implication was clear that the child *en ventre sa mêre* is protected against abuse from its mother from the moment of conception through the full nine months of pregnancy. This decision was affirmed in *Re Children's Aid Society of City of Belleville and T.*[73]

These cases demonstrate that the fiction can be applied even more aggressively than in the tort cases. In tort the fiction was employed so that a child born with injuries could recover. In family law the fiction is now being used to preempt injuries that have not yet occurred to a child that is not yet born. This gives the unborn child certain powers over what a mother can and cannot do—sometimes even before she does it. Although these cases do not have binding authority on all Canadian courts, both cases have been cited (neither with clear approval nor contempt) in a discussion of foetal rights in Anglo-Canadian law in a recent Supreme Court of Canada decision.[74]

C. *A Progressive Movement?*

A number of leading authors on the law of tort including William Prosser have attempted to argue that these expanding uses of the fiction demonstrate a progressive movement towards treating the child *en ventre sa*

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71. *Child Welfare Act*, R.S.O. 1980, c. 66, as rep'd by *Child and Family Services Act*, R.S.O. 1990, c. C.11.

72. *Re Children's Aid Society for the District of Kenora and L.(J.)* (1981), 134 D.L.R. (3d) 249 (Ont. Prov. Ct. Fam. Div.).

73. (1987), 50 O.R. (2d) 204 (Ont. Prov. Ct. Fam. Div.).

74. See *Tremblay* v. *Daigle*, *supra* note 19. It is important to note, however, that the Supreme Court of Canada contrasted these cases with the approach taken by the British Columbia Supreme Court in *Re Baby R* (1988), 53 D.L.R. (4th) 69, 15 R.F.L. (3d) 225, where precisely the opposite conclusion was reached. The Court also noted that the position in England

mêre as if it were a person.[75] Yet it is interesting to note the manner in which this so-called progressive movement has come about in Canada. It was not motivated by any particular steps taken toward statutory reform by Parliament or the Provincial Legislatures. It was not motivated by anything like the general sentiment of society. Nor was it even motivated by any clearly established form of judicial precedent.[76] Rather, the recent move towards treating the unborn child as though it were a person has come about as a result of a haphazard series of applications of a legal fiction by a random group of judges over long stretches of time, most of whom were trying to solve distinct legal problems. Unfortunately, the continued use of the legal fiction has resulted in the fact that there no longer exist any clearly established boundaries delineating the onset of legal privileges and protections. In some areas of law the unborn are treated as though they are persons, in other areas they are not. In many respects, this has caused serious confusion.[77]

VII. *The Confusion in* Dobson

Such confusion is demonstrated by the reasoning adopted in *Dobson (Litigation Guardian of)* v. *Dobson* both at the New Brunswick Court of

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supports the British Columbia decision. In *Re F. (in utero),* [1988] 2 W.L.R. 1288, the English Court of Appeal held that a foetus did not have, at any stage of its development, a separate existence from its mother and it was therefore held that the Court could not extend its wardship jurisdiction to a foetus.

A similar decision was reached in Canada quite recently. In *Winnipeg Child and Family Services (Northwest Area)* v. *G.(D.F.)* (1996), 113 Man. R. (2d) 3, 138 D.L.R. (4th) 254 [hereinafter *Winnipeg Child and Family Services*], the Manitoba Court of Appeal followed the English approach taken in *Re F (in utero).* In so doing the Court set aside an order by Schulman J. which would have committed an expectant mother to the custody of the Director of Child and Family Services thereby empowering him, in effect, to dictate her medical treatment for an addiction to sniffing solvents. Some aspects of these decisions will be further discussed below in Part VII.

75. W.L. Prosser, *Handbook of the Law of Torts,* 4th ed. (St. Paul: West, 1974) at 335-336.

76. In fact, a number of recent decisions both in public and private law reaffirm the common law rule that the foetus is not a person. See *e.g., R.* v. *Sullivan, supra* note 12; *Tremblay* v. *Daigle, supra* note 19; *Medhurst* v. *Medhurst* (1984), 46 O.R (2d) 263, 9 D.L.R. (4th) 252 (Ont. H.C.); *Dehler* v. *Ottawa Civic Hospital, supra* note 20.

77. An illustration of such confusion is found in the following passage:

> There exists today a grotesque contradiction at the heart of our legal system as it touches the unborn child. On the one hand, the unborn child enjoys the right to inherit property; she can sue for injuries inflicted while in the womb; and she has the right to be protected from abuse or neglect by her mother. On the other hand, she no longer enjoys that right which is the indispensable precondition of the exercise of all her other rights — the right not to be killed. How has this contradiction come about?

I. Gentles, "The Unborn Child in Civil and Criminal Law", in W. Cragg, ed., *Contemporary Moral Issues*, 2nd. ed. (Toronto: McGraw-Hill Ryerson Ltd., 1987) at 18.

Queen's Bench[78] and, more recently, at the New Brunswick Court of Appeal.[79] Both courts relied on the legal fiction ascribing personality to the unborn to allow Ryan Dobson to sue his own mother for pre-natal injuries suffered as a result of her alleged negligence.

A. *The New Brunswick Court of Queen's Bench*

In reaching his decision, Miller J. not only acknowledged the well established common law rule that personality begins at birth but also the implications of that rule.

> In plain terms, it would seem to logically follow that if a foetus is not a person it does not have the rights that attach and accrue to "a person". The foetus, not being a person, is part of its mother.[80]

However, Miller J. then went on to describe the effect of applying the legal fiction to the above rule.

> The fiction recognized in the *Montreal Tramways* case must mean that two persons - the mother and the foetus have *the same* enforceable rights.[81]

By fictitiously treating the foetus as though it were a person, Miller J. seemed to think that the foetus somehow attains "the same enforceable rights" as its mother.

But in precisely what sense are they *the same* rights? There is an important ambiguity inherent in the above claim that must be sorted out. Does Miller J. mean that the "rights" of the foetus are *exactly similar* to those of its mother (*i.e.* that the foetus and its mother are each owed a separate though similar duty of care by third parties)? Or does Miller J. mean that the "rights" of the foetus and its mother are *identical* (*i.e.* that the duty of care owed by a third party to the mother and her foetus is one and the same)? The distinction is critical, especially in deciding whether the fictitious ascription of personality to the unborn ought to be extended from third party claims to claims against a child's own mother. For if the correct sense of the phrase "the mother and the foetus have the same enforceable rights"[82] is that their "rights" are identical, this would seem to undercut the entire basis for prenatal liability against the child's own mother.

Throughout his judgment Miller J. suggests that the "rights" of the foetus and its mother are one and the same.

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78. *Supra* note 1.
79. *Supra* note 9.
80. *Supra* note 1 at 191.
81. *Ibid.* [emphasis added].
82. *Ibid.*

> I accept the defendant's argument that at the time of the commission of the tort the plaintiff did not exist as a person and in law was part of the defendant mother. I also accept that in tort a person cannot sue himself or herself, even though insured.[83]

However, if, stemming from their common existence, the "rights" of the foetus are identical to those of its mother then it is not at all clear that the Court should have extended use of the fictitious ascription of personality to a case where the child was suing his own mother. As Miller J. rightly pointed out, to allow such an action is, in theory, to allow an individual to sue herself merely for insurance purposes.

What all of this reveals is that the main justification for allowing actions in the case of pre-natal injuries caused by negligent third parties—namely, that the mother and her unborn child are said to be in *similar* positions *vis-à-vis* negligent third party drivers[84]—is not operative in the case where it is the mother herself who is being sued for negligent driving. In the latter situation, the mother and her unborn child are *not* in *similar* positions *vis-à-vis* the negligent driver. They are in *identical* positions; according to the law, the foetus is an indistinguishable part of its mother. Thus, given the well established principles that: (i) the unborn child is considered to be part of its mother, and (ii) a person cannot sue herself in tort, it must therefore follow that an unborn child—whether or not it is fictitiously ascribed personality—cannot sue its mother in tort once born.

Why did Miller J. set up this argument, only to ignore it? For some reason, Miller J. seemed to prefer the following argument.

> 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 pre-natal injuries caused by her negligence.[85]

Though the logical structure of this argument appears to be valid, its reasoning is in fact fallacious. The link between its premises and conclusion depends on an ambiguous use of the term "child". Given the preceding analysis of the child *en ventre sa mêre* in the common law, it

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83. *Ibid.* at 192.

84. Presumably, this is in essence what Prosser meant when he said that, "[a]ll writers who have discussed the problem have joined in condemning the old rule, in maintaining that the unborn child in the path of an automobile is as much a person in the street as the mother, and in urging that recovery should be allowed upon proper proof", *supra* note 75. Interestingly, Prosser's rhetoric in this passage illustrates once again the confusion resulting from the use of the legal fiction. Though there may be good reason to treat the unborn child as if it were a person in the case of a third party motorist, strictly speaking, the unborn child in the path of an automobile is *not* "as much a person in the street as its mother." This point becomes especially clear in the case where the mother is the driver of that automobile.

85. *Supra* note 1 at 192 [emphasis added].

is clear that Miller J. is equivocating between two very different uses of the term "child" in the above argument. In the first premise of the argument Miller J. refers to a *child already born*; because such a child is a legal person with a separate existence, there are no theoretical grounds precluding him or her from commencing an action against a parent.[86] The second premise and the conclusion, however, refer to the *unborn child.* As we have seen, the common law generally regards the unborn child as a very different sort of entity than the child who is born alive.

To say that a court should allow post-partum actions against a child's own mother simply because it seems a *reasonable progression* to treat the unborn in *the same* way that we treat living children begs the question entirely. Why is it reasonable to treat them the same? Certainly not because the foetus is in the same position *vis-à-vis* its mother as, say, a toddler or an adolescent. Quite obviously, it is not. The central difficulty underlying almost every question concerning the unborn is precisely the fact that an unborn child exists as a part of its mother. While this difference between an unborn child and a newly born infant might be thought of as minimal in the context of the duty of care owed by a third party motorist, the difference is absolutely crucial in the context of a woman's right to control her own body and to make fundamental decisions about how she should live.[87] Unfortunately, this latter point is completely lost in the bare application of the legal fiction ascribing personality to the unborn. Although Miller J. stated near the outset that "[t]he implications of approving of unborn child-mother litigation are manifold",[88] nothing in the judgment rendered reflects these manifold implications.

Some of the implications of allowing such litigation have been examined quite recently by another Canadian court. In *Winnipeg Child and Family Services (Northwest Area)* v. *D.F.G.*[89] the Manitoba Court of Appeal considered the implications of unborn child-mother litigation in rendering its decision that the Manitoba Court of Queen's Bench lacked the authority necessary to order a mother to undergo treatment for the

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86. Though in certain instances there might be good reasons to invoke a policy that provides an immunity for the parent against such an action. See D.E. Carroll, "Parental Liability for Preconception Negligence: Do Parents Owe a Legal Duty to Their Potential Children?" (1986) 22 Cal. W. L. Rev. 289; R. Beal, "Can I Sue Mommy: An Analysis of a Woman's Tort Liability for Prenatal Injuries to her Child Born Alive" (1984) 21 San Diego L. Rev. 325; D. Steefel, "Preconception Torts: Foreseeing the Unconceived" (1978) 48 U. Colo. L. Rev. 621.

87. See *R.* v. *Morgentaler*, [1988] 1 S.C.R. 30, 44 D.L.R. (4th) 385.

88. *Supra* note 1 at 190.

89. *Supra* note 74.

protection of an unborn child. Following many of the decisions discussed above, the Court of Appeal began with the recognition that

> [a]bsent a possible cause of action until the birth of the child, there is no one at common law who may sue to restrain the mother from a course of action potentially harmful to the child.[90]

However, Twaddle J.A. acknowledged a much more serious obstacle to allowing such a cause of action in the following lengthy but crucial passage.

> The much more serious obstacle lies in the conflict between the rights of the mother and those of the child. If the unborn child is to be recognized as having rights, those rights can only be protected by infringing the mother's.
>
> The mother's right to sniff solvents may not seem of much importance, but I do not see how a court can select which conduct harmful to an unborn child should be restrained and which not. That is more properly a legislative function. Even then, as Fleming points out, "there is an aversion against inquisition into alleged parental indiscretions during pregnancy, like excessive smoking, drinking or taking drugs."
>
> This aversion stems not only from respect for the mother's rights, but also from fear of the conflict which would arise between the mother's existing rights and those of the unborn child should they be recognized. Such a conflict was considered to be "most undesirable" by May L.J. in *Re F (in utero)*. . . .
>
> Although the common law permits suit by a living child against a parent for those torts which would be clearly actionable between strangers, it has, as Fleming observes in *The Law of Torts,* been reluctant to intrude unduly into the field of family relations. Even more so is this reluctance justified, in my opinion, where the proposed suit would pit an unborn child's rights against those of its mother.[91]

This passage illustrates—*contra* Miller J. in *Dobson*—why it is not a "reasonable progression" to allow pre-natal actions against a child's own mother simply because other children already alive can in certain circumstances commence such an action.

In conjunction with the above considerations, the Manitoba Court of Appeal recognized other potential consequences of allowing child - mother litigation in *Winnipeg Child and Family Services*. According to Twaddle J.A., allowing such litigation will in many cases engender a resentment between child and mother that is more harmful to the child in the long run than whatever was done to him or her prior to birth.[92] To cause

90. *Ibid.* at 260.
91. *Ibid.* at 261 [citations omitted].
92. *Ibid.*

a mother to resent her own child is indeed "most undesirable". This is especially true in the pre-natal injury scenario, where the litigation is usually motivated by insurance claims. Although Twaddle J.A.'s comments do not apply to *Dobson* directly—in that the harm done to Ryan Dobson prior to his birth far outweighs any potential resentment on the part of his mother—it would not be altogether inaccurate to describe the *Dobson* litigation as insurance-driven. With this in mind, it would be rather unfortunate if the difficult and deeply personal questions raised by the multi-faceted issue of child-mother litigation are ultimately resolved on the basis of a case that is *really* about whose insurer ought to pay.

Besides considerations affecting the autonomy of women and the potential strain on future family relations, the Manitoba Court of Appeal also contemplated the effect on the public interest if such litigation were allowed. Twaddle J.A. recognized that, by allowing such litigation,

> we may induce other expectant mothers, fearing state intervention in their conduct, to avoid detection by not seeking desirable pre-natal care. There is a public interest in having expectant mothers receive proper pre-natal care. This public interest militates against recognition of foetal rights.[93]

This passage reflects the public interest in protecting the well-being of pregnant women. Given that interest, we need to consider much more carefully the numerous unforeseen effects of child-mother litigation before allowing such actions.

Regardless of whether one is ultimately persuaded by the unanimous view of Manitoba Court of Appeal that these sorts of considerations outweigh our interest in protecting the unborn, what is important to recognize presently is that, in *Dobson,* Miller J. has allowed a very similar cause of action without making *any such* considerations. On the basis of an extremely superficial and fallacious argument, Miller J. has extended the scope of recovery for pre-natal injuries in a manner that is both unprecedented and insupportable at the level of theory.

B . *The New Brunswick Court of Appeal*

The New Brunswick Court of Appeal affirmed the reasoning adopted by Miller J. at the Court of Queen's Bench, dismissed Cynthia Dobson's appeal and awarded costs to the respondent litigation guardian.[94] Relying uncritically on the precedent set in *Montreal Tramways* v. *Leveille*,[95] Hoyt C.J.N.B. endorsed Miller J.'s "reasonable progression" argument.[96]

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93. *Ibid.*
94. *Supra* note 9.
95. *Supra* note 6.
96. See the discussion above at note 85.

What is perhaps even more remarkable about the decision is the expeditious manner in which it was released. Despite the controversy surrounding its potential implications and despite the fact that an important case cited within the decision was about to be heard at the Supreme Court of Canada,[97] judgment was reserved for only twelve days and resulted in a written decision which occupied a mere five and one half pages. In those few pages the Court was adamant in its opinion that the appeal raises a very narrow issue that is not subject to social policy considerations. In fact, that very point was reiterated in three of the twelve paragraphs that make up the reasons for judgment.

The Court of Appeal made no attempt to grapple with the unique theoretical problems arising from the fact that Ryan Dobson was attempting to sue his own mother rather than some third party. This gap in the reasons for judgment is curious, especially given the Court's recognition that Ryan Dobson "did not exist as a person and in law was part of the defendant mother."[98] In response to the appellant's submission that the plaintiff lacked the legal status necessary to commence an action, Hoyt C.J.N.B. stated that the

> submission fails because of the *very real distinction* between an action brought by or on behalf of a foetus and one brought on or behalf of a child. The law seems settled that a foetus has no right to sue or be the subject of an action. See, for example, *Tremblay* v. *Daigle, Sullivan, In Re F (in utero)* . . . and *Winnipeg Child and Family Services* (which is under appeal to the Supreme Court of Canada). These cases, however, do not have application where, as here, it is not a foetus but a child who is bringing the action.[99]

There *is* a very real distinction between an action brought by or on behalf of a foetus and one brought by or on behalf of a child. The obvious rationale underlying this distinction is the common law rule that personality begins at birth. What is not so obvious is why the New Brunswick Court of Appeal was willing to recognize the very real distinction in its determination of who can be a plaintiff, but was unwilling to recognize *the very same distinction* its determination of who can be a foreseeable plaintiff. There was simply no discussion of the matter.

The Court then went on to reject the appellant's submission that there are sound policy reasons against allowing a child to sue his own mother for pre-natal injuries occasioned by his mother's actions.

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97. *Winnipeg Child and Family Services (Northwest Area)* v. *D.F.G.*, [1996] S.C.C.A. No. 424 (QL) (Court File No. 25508) (S.C.C.). Oral submissions were heard on June 18, 1997 and judgment was reserved.

98. *Supra* note 9 at para. 3.

99. *Ibid.* at para. 8 [emphasis added].

> Nor am I attracted to the appellant's submission that there are social policy reasons for rejecting this claim. Mrs. Dobson raises the spectre of mothers being sued by their children for various activities or lifestyle choices such as smoking, drinking and the taking or refusal of medication, during pregnancy that injure the child, with the result that mothers will be unable to control their own bodies and make autonomous choices. Cases alleging negligent conduct of such a nature by a mother during pregnancy may well involve difficult policy decisions, but they do not arise here. As noted, the narrow issue here concerns pre-natal injuries received by a child as a result of a mother's negligent driving of her motor vehicle and not injuries occasioned as a result of a mother's lifestyle choices.[100]

The basis for rejecting the social policy argument in this case, according to Hoyt C.J.N.B., is to be found in the distinction between a woman's choice to drive while pregnant, and other sorts of lifestyle choices she might make that are more "peculiar to parenthood."[101] According to the Court, the duty owed by the defendant mother to her unborn child in this case is derived from the general duty that she owes to the public to drive carefully. It therefore cannot be characterized as a duty that is "peculiar to parenthood." Consequently, any concern that a finding of liability in this case will set a precedent allowing mothers to be sued by their children for making various "peculiar" lifestyle choices is said to be unwarranted.

Is this argument persuasive? Or does it beg the question in exactly the same way that Miller J. did? As the following passage illustrates, its ultimate success depends on the premise that *duties owed by a pregnant woman to the general public are owed to her unborn child as well.*

> A pregnant mother has a general duty to drive carefully, a duty she owes to her children as well as to the general public. If, as it is alleged here, the child suffers injury during his or her lifetime as a result of the mother's negligent driving during pregnancy, there is no reason that the child should not be able to enforce his or her rights. To hold otherwise would create a partial exclusion to a pregnant mother's general duty to drive carefully.[102]

Would denying a child the right to commence an action under these circumstances really create a partial exclusion to a pregnant mother's general duty to drive carefully? The answer to this question is yes *only if one already considers the unborn to be part of the general public.* Of course, an unborn child is not in law considered to be part of the general public—not without implicitly employing the legal fiction that treats the

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100. *Ibid.* at para. 9.

101. *E.g.* smoking, drinking or taking drugs. Hoyt C.J.N.B. cites an Australian case and an English statute in support of this distinction, *ibid.* at para. 10: *Lynch* v. *Lynch (By Her Tutor Lynch)* (1991) 25 N.S.W.L.R. 411; *Congenital Disabilities (Civil Liability) Act* 1976 (UK), 1976, c. 28.

102. *Supra* note 9 at para. 11.

unborn child as though already born. Since an unborn child is not in law a person, it is not part of the general public. According to a well established common law rule, the unborn child is part of its mother. Although there is undeniable precedent that an unborn child has the same enforceable right as its mother against a negligent third party motorist, it is quite another thing to say that the unborn child can enforce *that* right—a right which is in law dependant upon the mother's own right to sue—against the mother herself. Since the child is in law a part of its mother and not part of the general public, refusing to allow a child to sue its own mother for driving negligently would not create a partial exclusion to a pregnant mother's duty to the general public to drive carefully.

In addition to begging the question about the legal status of the unborn, the reasoning adopted by the Court of Appeal is subject to an additional problem. According to Hoyt C.J.N.B., the Court of Appeal was attempting to narrow the issue in *Dobson* by distinguishing between activities where there is a general duty to avoid injury to the public (*e.g.* driving while pregnant) and activities where the duty is peculiar to parenthood (*e.g.* smoking while pregnant). Does this distinction truly narrow this issue in a manner that will preserve a woman's ability to control her own body and make autonomous choices, thereby rendering social policy considerations unnecessary? The New Brunswick Court of Appeal seemed to think so, citing Fleming's claim that:

> there is a strong aversion against inquisition into alleged parental indiscretions during pregnancy, like excessive smoking, drinking or taking drugs.[103]

Perhaps this is the case in Australia, but it is by no means clear that the same holds true in Canada and the United States. [104]In any event, employing 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

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103. *Ibid.* at para. 10.

104. Considering the original order of Schulman J. in *Winnipeg Child and Family Services*, *supra* note 74 and the fact that the Supreme Court of Canada has granted leave to reconsider that order, *supra* note 97, it is not clear that there is a strong aversion to such inquisitions in Canada. In any event, there is no guarantee that activities such as smoking during pregnancy will be remain immune to litigation, especially if the reasoning adopted above is applied.

It appears as though activities such as smoking are moving more and more from the private to the public realm, especially as the effects of secondhand smoke on children become better known. Canadian Courts have already held that the effects of secondhand smoke are a relevant factor in a determination of "the best interests of the child" in custody and access disputes: *Bourdon* v. *Casselman* (1988), 12 R.F.L. (3d) 395 (Ont. Prov. Ct. Fam. Div.); *Watt* v. *Watt*, [1995] Y.J. No. 95 (QL) (Y.C.A.). In other jurisdictions the Courts have gone a step further by issuing protective orders that prescribe when and where a parent may smoke: *Unger* v. *Unger* 644 A.2d 691 (N.J. Sup. Ct. Ch. Div. 1994).

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. Thus the Court of Appeal was incorrect in stating that

> the narrow issue here concerns pre-natal injuries received by a child as a result of a mother's negligent driving of her motor vehicle and not injuries occasioned as a result of a mother's lifestyle choices.[105]

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. Despite the Court's

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Smoking claims have in some jurisdictions made inroads into the law of tort as well. U.S. employers must now consider the possibility of negligence actions for allowing smoke in the workplace: see M. Moorby, "Smoking Parents, Their Children, And The Home: Do The Courts Have The Authority To Clear The Air?" (1995) 12 Pace Envtl. L. Rev. 827 ; *Action on Smoking and Health (ASH), ASH Smoking and Health Review,* Special Report, "Involuntary Smoking: A Factual Basis for Action at 9" (July-Aug 1992). Smokers have also been found liable for battery in at least two U.S. Appellate Courts: *Leichtman* v. *W.L.W. Jacor Communications, Inc.*, Ohio Ct. App., No. C-920922, Hamilton County; *Richardson* v. *Hennly*, Ga. Ct. App. Nos. A93A0680. A93A0807. In *Richardson* the plaintiff had been hospitalized twice for allergic and respiratory illness due to exposure to a pipe smoker who worked 30 feet way from her. Although her employer purchased air cleaners for her, it was held that its failure to stop her co-worker from smoking gave rise to an action in battery. According to the Court, "We are not prepared to accept the argument that pipe smoke is a substance so immaterial that it is incapable of being used to batter indirectly."

Given these recent trends, it may not be long before some form of public smoking gives rise to a tort action in Canada. According to the reasoning adopted by the New Brunswick Court of Appeal above, if a pregnant woman owes a general duty to the public to refrain from smoking in certain places, she must owe that duty to her children as well. If her child suffers an injury during his lifetime as a result of her failure to refrain from smoking during pregnancy, there is no reason why the child should not be able to enforce his or her rights. To hold otherwise would create a partial exclusion to the pregnant woman's general duty to refrain from smoking in certain places. Therefore, according to the Court's own reasoning, in the near future, a child born with pre-natal injuries may be able to commence an action against his or her mother for failing to refrain from smoking during her pregnancy.

I am indebted to Daniel Debow for the above argument and for supplying me with the supporting case law.

105. *Supra* note 100.

intention to narrow the scope of liability to negligent driving,[106] its failure to acheive that intention will ultimately do more to harm to the autonomy of pregnant women than good. While *fictitiously* treating the foetus as a member of the general public might be justified as against a third party, surely different considerations apply as against its own mother. This point has been recognized by some judges in other jurisdictions:

> Holding a third party liable for negligently inflicting prenatal injuries furthers the child's right to begin life free of injuries caused by the negligence of others, but does not significantly restrict the behaviour or actions of the defendant beyond the limitations already imposed by the duty owed to the world at a 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 behaviour 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.
>
> 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 the 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. "No other plaintiff depends exclusively on any other defendant for everything necessary for life itself. . . . 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." *Stallman* v. *Youngquist* 125 Ill.2d 267, 278-79, 531 N.E.2d 355, 360 (1988).[107]

Deciding whether a child can sue his own mother for pre-natal injuries caused by her negligent driving is not a narrow issue. This much was acknowledged by Miller J. in the original motion that gave rise to this appeal. According to Miller J., "[t]his is a question with obvious expanding implications and is one which must ultimately be determined by a higher court of the judicial structure."[108] Ironically, the New Brunswick Court of Appeal affirmed every aspect of Miller J.'s decision except for this one. Instead of seizing the opportunity to confront the obvious expanding implications that are sure to result from this decision, the Court

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106. A decision no doubt inspired by insurance considerations.

107. Brock C.J. and Batchelder J (dissenting) in *Bonte* v. *Bonte* (1992), 136 N.H. 286. This case was mentioned by Hoyt C.J.N.B., *ibid.* at para. 10.

108. *Supra* note 8.

of Appeal has chosen instead to adopt the unsound reasoning of the lower court.

Conclusion

In principle, I have no quarrel with those who believe that our law ought to offer a restricted range of protection to the unborn including, in certain limited circumstances, a cause of action for pre-natal injuries. All that I have tried to demonstrate is that the usual justification for employing the fiction that treats the child *en ventre sa mêre* as though born is stretched beyond its theoretical limits in the case of pre-natal injuries—especially where a child born with injuries is attempting to recover against his or her own mother. By demonstrating that the reasoning adopted in both *Dobson* decisions is insupportable, I hope to have cleared the ground for a deeper analysis of the non-theoretical issues that must be addressed in a proper determination of the scope of recovery for pre-natal injuries.

Lon Fuller once remarked on the motives that give rise to legal fictions by saying that

> it is possible that the fiction may proceed from purely intellectual considerations. The judge . . . was not thinking of fooling others, nor was he carried away by an emotional desire to preserve the existing doctrine. . . . He was simply seeking a solution for a case which was intellectually satisfying to himself. And that solution turned out to involve a forcing of the case into existing categories, instead of the creation of new ones.[109]

Decisions such as the one in *Thellusson* v. *Woodford*,[110] where the use of a legal fiction in an isolated case was not subject to competing considerations, may indeed have provided a solution which was, at the time, intellectually satisfying. However, the current theory of liability for prenatal injuries—whether the legal fiction is used explicitly or implicitly—is not intellectually satisfying. As I have demonstrated, the intellectual considerations motivating the early use of the fiction are no longer applicable.

When the conditions of modern life no longer fit within existing legal categories, the creation of new ones becomes imperative. Whether such reform is ultimately delivered via statute or judicial pronouncement, there is an immediate need to stop using old judicial artifices and to start thinking long and hard about how best to treat the unborn in a manner that is consistent with the protection of the autonomy of women. Though such a project certainly begins with a recognition of the intellectual shortcom-

109. *Supra* note 13 at 68.
110. *Supra* note 26.

ings of the present theory of liability based on its use of a legal fiction, it must inevitably include a substantive analysis of the nature and extent of a woman's right to make autonomous choices. Unfortunately, such considerations have been completely side-stepped by the reasoning adopted in both of the *Dobson* decisions.