Court File No. 25508

IN THE SUPREME COURT OF CANADA
(On Appeal from the Court of Appeal of Manitoba)

B E T W E E N :

WINNIPEG CHILD AND FAMILY SERVICES (NORTHWEST AREA)

Appellant

- and -

G.(D.F.)

Respondent

- and -

ALLIANCE FOR LIFE, ATTORNEY GENERAL FOR MANITOBA, CANADIAN ABORTION RIGHTS ACTION LEAGUE, CANADIAN CIVIL LIBERTIES ASSOCIATION, THE CATHOLIC GROUP FOR HEALTH, JUSTICE AND LIFE, THE EVANGELICAL FELLOWSHIP OF CANADA AND THE CHRISTIAN MEDICAL AND DENTAL SOCIETY, GOVERNMENT OF YUKON, L'ASSOCIATION DES CENTRES JEUNESSES DU QUEBEC, SOUTHEAST CHILD AND FAMILY SERVICES AND WEST REGION AND FAMILY SERVICES and WOMEN'S LEGAL EDUCATION AND ACTION FUND

Intervenors

FACTUM OF THE INTERVENORS, THE EVANGELICAL FELLOWSHIP OF CANADA and THE CHRISTIAN MEDICAL AND DENTAL SOCIETY

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PART I - FACTS

1. On January 31, 1997, Madam Justice L'Heureux-Dubé granted The Evangelical Fellowship of Canada ("EFC") and The Christian Medical and Dental Society ("CMDS") leave to intervene in this appeal. The EFC and CMDS accept the facts as stated in the Facta of the appellant and respondent.

2. These intervenors submit that there are five key social and medical realities against which the legal issues in this case must be decided. First, the foetus is recognized in medical literature as a human being at an early stage of development whose health should and can be cared for by modern medical technology:

> "The concept that the foetus is a patient, an individual whose maladies are a proper subject for medical treatment as well as scientific observation, is alarmingly modern. It was not until the last half of this century that the prying eye of the ultrasonographer rendered the once opaque womb transparent, letting the light of scientific observation fall on the shy and secretive foetus ...
>
> The foetus has come a long way - from the biblical "seed" and mystical "homunculus" to an individual with medical problems that can be diagnosed and treated (ie. a patient) ...
>
> Real time sonography can guide the safe acquisition of foetal blood and other foetal tissues (eg. skin, liver, muscle). Such samples enable the diagnosis of foetal hematologic

disorders and enzymatic defects that cannot be detected by amniocentesis alone. In addition, the newest non-evasive imaging technique, nuclear magnetic resonance, promises not only definition of foetal anatomy but actual chemical definition of foetal tissue without invasive sampling."

Drs. Harrison, Golbus, Filly, "The Unborn Patient: Prenatal Diagnosis and Treatment" (2 ed), W.B. Saunders Company, 1991, pp. 3, 6 and 7

3. Second, a mother's placenta does not act as a barrier between the circulatory systems of the mother and child. Teratogens (drugs or chemicals causing birth defects) ingested or consumed by the mother can cross the placenta and endanger the health of the unborn child while *in utero* and following birth. Studies show, for example, that cocaine exposure in pregnancy is associated with serious health hazards to the foetus, including intrauterine growth restriction, prematurity, stillbirth, perinatal complications, and abruption (separation) of the placenta, due to the increased blood pressure caused by cocaine. Cocaine-exposed children also have smaller head circumference, achieve significantly lower language development, and tend to achieve lower scores in IQ tests.

Dr. Gideon Koren "The Children of Neverland: The Silent Human Disaster", at pp.4, 22-24 and 48-57 (1997), Toronto

James Bopp and Deborah Gardner, "Aids Babies, Crack Babies: Challenges to the Law" (1991), 7 Issues in Law & Medicine, 3 at pp.12-16

Tom Rickhoff and Curtis Cukjati, "Protecting the Foetus from Maternal Drug and Alcohol Abuse: A Proposal for Texas" (1989) 21 St. Mary's Law Journal 259, at pp.267-275

4. Third, most organic solvents used by sniffers contain toluene, as well as a mixture of other volatile hydrocarbons. These compounds are known to be neuro-toxic to the foetus. Children exposed *in utero* to solvents exhibit central nervous system dysfunctions, developmental delay, attention deficient disorder, microcephaly, growth deficiencies, short palpebral fissures, microagnathia and abnormal auricles. Babies exposed chronically *in utero* to solvents may present with a kidney disease referred to as renotubular dysfunction with hyperchloremic acidosis.

Dr. Chudley letter dated July 29, 1996, Case on Appeal, p.22

Summary of Abstracts on Toluene, Exhibit "A" to Chudley Affidavit, Case on Appeal, p.29

Schneiderman, Joyce, "Nonmedical Drug and Chemical Use in Pregnancy", in Koren, G. (ed.), Maternal-Fetal Toxicology: A Clinician's Guide (2d ed.) at p.311

5. Fourth, reducing the exposure of the unborn child to toluene during the second and third trimester would reduce the amount of central nervous system damage from that which would occur where the exposure continued throughout all three trimesters.

Chudley Opinion, Case on Appeal, p.23

6. Fifth, in light of the history of her prior pregnancies and the medical problems suffered by two of her children following birth, the respondent reasonably could foresee that her continued glue sniffing could cause harm to her child *in utero* and after birth.

Clement Affidavit, paras. 3-7 and 9, Case on Appeal, pp.32-33

Ferguson Affidavit, para. 3, Case on Appeal, p.37

PART II - POINTS IN ISSUE

7. These intervenors will address the following issues:

(a) Does a mother stand in a sufficient relationship of proximity to her unborn child to give rise to a *prima facie* duty of care for her acts which foreseeably will harm her unborn child?

(b) Do any sound policy reasons exist to negate or limit this *prima facie* duty of care owed by a mother to her unborn child?

(c) Does a court have jurisdiction to grant the relief requested?

PART III - ARGUMENT

"I do not think so ill of our jurisprudence as to suppose that its principles are so remote from the ordinary needs of civilized society and the ordinary claims it makes upon its members as to deny a legal remedy where there is so obviously a social wrong."

Lord Atkin, in Donoghue v. Stevenson, [1932] A.C.562 at p.583

FIRST ISSUE: DOES A MOTHER STAND IN A SUFFICIENT RELATIONSHIP OF PROXIMITY TO HER UNBORN CHILD TO GIVE RISE TO A *PRIMA FACIE* DUTY OF CARE FOR HER ACTS WHICH FORESEEABLY WILL HARM HER UNBORN CHILD?

8. The starting point for any analysis of whether a duty of care arises in particular circumstances remains the language of Lord Atkin in *Donoghue* v. *Stevenson*:

"At present I content myself with pointing out that in English law there must be, and is, some general conception of relations giving rise to a duty of care, of which the particular cases found in the books are but instances...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."
>
> *Donoghue v. Stevenson, supra, at p.580, referred to recently in Hall v. Hebert, [1993] 2 S.C.R. 159, per Cory, J. at pp.201d-202d, and in Mayfield Investments Ltd. v. Stewart, [1995] 1 S.C.R. 131, per Major, J. at pp.141-2*

9. These intervenors submit an unborn child is a neighbour who is "*so closely and directly affected*" by the act of the mother that she ought reasonably to have him or her in contemplation as being so affected, when she directs her mind to the acts or omissions which are called into question. As Dr. Gideon Koren points out in his book, *The Children of Neverland*, the thalidomyde tragedy of the 1960's dispelled forever the notion that a mother's placenta acts as a barrier preventing substances in the mother's blood stream from entering that of her unborn child. In the past 30 years medical research has increased our understanding of the profound and long-lasting deleterious effects to the child which can arise from the mother's ingestion of a variety of substances during her pregnancy.

10. Typically a court's decision as to whether a duty of care exists between two parties turns on the issue of proximity. Courts have recognized that a duty of care is owed to an unborn child in the following circumstances:

    (a) an action lies against the driver of an automobile or the operator of a streetcar for injuries caused to a child while en ventre sa mère;

    Montreal Tramways Co. v. Léveillé, [1933] S.C.R. 456

    Duval v. Seguin, [1972] 2 O.R. 686

    For a summary of the cases in the United States, see Rickhoff and Cukjati, supra, at pp.277-280

    (b) a doctor performing an abortion owes a duty of care to the unborn child "at the time of the attempted therapeutic abortion" to prevent foreseeable harm which might arise from a negligently performed abortion;

    Cherry v. Borsman (1991), 5 C.C.L.T. (2d) 243 (B.C.S.C.) at p. 253; aff'd (1992), 12 C.C.L.T. (2d) 137 at p.159; leave to appeal to S.C.C. dismissed April 22, 1993

    (c) an infant can sue his mother for injuries suffered pre-natally as a result of the mother's negligence;

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

(d) one court has suggested that a mother has a duty to ensure that her prenatal care and the child's birth are effected in a proper manner having regard to her apparent medical problems.

Re A (1990), 28 R.F.L. (3d) 288 (Ont. U.F.C.), at p.296

11. In formulating the neighbour principle Lord Atkin stressed that proximity is "not confined to mere physical proximity", but extends further. In this case proximity is not an issue - in the range of human activity one cannot find a nearness, intimacy, or as lawyers put it, "proximity", which surpasses that of mother and unborn child. The relationship between a mother and the child in her womb transcends the principle of neighbourliness - mother and child are linked by nature in the most intimate of physical and emotional bonds. These intervenors therefore submit that a sufficiently close relationship exists between a mother and her unborn child to give rise to a *prima facie* duty of care.

Hall v. Hebert, supra., per Cory, J. at p.202b, quoting Wilson J. in Kamloops (City of) v. Nielsen, [1984] 2 S.C.R. 2, and per Sopinka, J. at p.191a-b

SECOND ISSUE: DO ANY SOUND POLICY REASONS EXIST TO NEGATE OR LIMIT THIS *PRIMA FACIE* DUTY OF CARE OWED BY A MOTHER TO HER UNBORN CHILD?

A. Conduct of the one claiming the protection of the duty of care

12. In cases not involving public authorities, the policy reasons generally considered by courts in limiting a duty of care relate to the conduct of the party who seeks to establish the duty of care - reasons such as the limitations of *ex turpi causa* and *volenti non fit injuria* which were considered by this Court in the *Hall* case, and the principle of contributory negligence. In the present case no limitation on a mother's duty of care can arise by reason of the conduct of her unborn child, who is innocent and depends wholly on his or her mother for sustenance and health. This is an important point, for the respondent seeks to negate a *prima facie* duty of care for reasons unconnected with the conduct of the one seeking the protection of the duty of care. In other words, the respondent seeks to negate a *prima facie* duty of care when her unborn child has "done nothing wrong".

B. Parental Immunity From a Duty of Care

13. Canadian law does not recognize any parental immunity from tort liability. Some Canadian and American courts have recognized the principle that a child has a legal right to begin life

with a sound mind and body. This has led one American state court to hold that an infant could bring suit against his mother for injuries suffered (discoloured teeth) as a result of the mother taking the medication tetracycline during pregnancy.

A.M. Linden, Canadian Tort Law (5th ed.), at p.292

Re Brown (1975), 21 R.F.L. 315 (Ont.Co.Ct.), at p.323, quoted with approval in the Children's Aid Society of Belleville, Hastings Court and Trenton v. T.(L), [1987] O.J. No. 1807

Smith v. Brennan 157 A.(2d) 497 (1960) (New Jersey Supreme Court), at p.503

Grodin v. Grodin, 301 N.W. (2d) 869 (1981) Michigan Court of Appeals, at pp.870-1

14. This Court has recognized that the relationship between parent and child is fiduciary in nature, and that parents owe an obligation to refrain from inflicting personal injuries upon their children.

M(K.) v. M.(H.), [1992] 3 S.C.R. 6 at pp.63c-d and 67e

C. The Status of the Unborn Child at Law

15. The Manitoba Court of Appeal stated that it could only issue an order to restrain tortious conduct when asked to do so by "the person who will likely suffer harm if the threatened tortious conduct is not restrained", and since the unborn child was not a "person" at law, then neither the unborn child nor anyone on its behalf could assert a cause of action until the child was born. These intervenors submit that the Manitoba Court of Appeal failed to take into account the wide protection which courts already afford to the child en ventre sa mère.

16. The common law has long recognized a rule of construction that words should be construed for the benefit of an unborn child. The rule is not merely a rule of real property, but applies to personal property as well. In inheritance cases courts have construed testamentary language referring to children "*born in (the testator's) lifetime*" or "*living*" at the time of the testator's death as including children conceived, but not yet born, at the time of the testator's death. English courts have interpreted the word "*dependent*" in Workers' Compensation legislation as including an unborn child. An unborn child has also been held by an English court to enjoy a claim under fatal accidents legislation which enables a jury to award damages "*resulting from such death to the parties respectively, for whom and for whose benefit such action shall be brought*". The court rejected the argument that the language of the Act required the actual independent existence of the claimant as a condition precedent to a right of action, and concluded that the proctor for the unborn child had a right to claim in an action, although until the child was born a reference on damages could not be made.

Villar v. Gilbey, [1907] A.C. 139 (H.L.) at pp.144-146 and 151

Williams v. Ocean Co. Company Limited, [1907] 2 K.B. 422, at p.429, followed in Schofield v. Orrell Colliery Company Ltd., [1909] 1 K.B. 178 (C.A.)

The George and Richard (1871), 3 L.R. 466 (A & E.C.) at pp.480 - 482

17. In *Montreal Tramways* this court recognized the right of an infant to recover damages for injuries suffered while en ventre sa mère. Although *Montreal Tramways* was decided under Quebec civil law, it has been adopted and followed by common law provincial courts.

Montreal Tramways v. Léveillé, supra

Duval v. Seguin, [1972] 2 O.R. 686 (H.C.J.), affirmed (1974), 1 O.R. (2d) 482 (C.A.)

18. Although Canadian courts have not permitted the recovery under wrongful death statutes for stillborn children, an Ontario court has made an award of damages under s.60 of the *Ontario Family Law Reform Act* to a child who was conceived, but not born, at the time of the accident to his father.

Seede v. Camco Inc. (1985), 50 O.R. (2d) 218 (L.J.S.C.)

Espinosa v. Garisotto, [1986] O.J. No. 418

19. In the first half of this century United States courts refused to recognize a right to recover damages for injuries sustained in the womb on the basis that the foetus was merely part of the mother with no independent tortious cause of action. Since 1946, however, American Federal and State courts have rejected that rule, and today almost every American jurisdiction allows a foetus subsequently born-alive to bring a tort claim against a third party for prenatal injuries.

Rickhoff and Cukjati, at pp.277-280

20. Many American state courts also permit recovery for the wrongful death of a viable stillborn foetus on two grounds: first, a viable child is capable of independent existence and therefore should be recognized as a separate entity entitled to the protection of the law of torts; and second, the law recognizes an unborn child by protecting its property rights and right of inheritance and also protects the unborn child against the crimes of others. The Supreme Court of Wisconsin interpreted that state's wrongful death statute to include recovery in the case of a nonviable stillborn.

Kwaterski v. State Farm Mutual Automobile Insurance Company, 148 N.W. (2d) 107 (1967), Supreme Court of Wisconsin, at pp.109-112

Danos v. St. Pierre 402 So. 2d. 633 (1981), at pp.638-9

Rickhoff and Cukjati at pp.280-281

Also, Connor v. Monkem Company Inc., 898 S.W. 2d 89 (1995) (Sup. Ct. Missouri), at pp.92-3

21. In the criminal law context, Canadian courts have recognized that an unborn child is not "a nothing" in the eyes of the law and, except in the case of an abortion, is still entitled to protection. An accused who stabbed his girlfriend in the abdomen when she was 38 weeks pregnant, resulting in the stillbirth of the child, was committed to trial on a count of attempted murder. Also, an accused who struck his pregnant girlfriend in the face to prevent her from injuring her unborn child by hitting herself in the abdomen with a rock was acquitted because his conduct was justified on the grounds of necessity.

R. v. Severight, [1993] A.J. No. 572

R. v. Manning (1994), 31 C.R. (4th) 54, at pp.58-9

22. Under English criminal law, murder and manslaughter can be committed where unlawful injury is deliberately inflicted to a child *in utero*, or its mother, where the child is subsequently born alive. Although in a recent case the English Court of Appeal differed from some American state courts in adopting the view that a foetus has no separate existence from its mother until birth, nonetheless the Court of Appeal rejected the argument that it is not unlawful to cause injury to a foetus because it has no separate existence. An injury to the foetus is just as unlawful as an assault on the mother.

Attorney General's Reference (No. 3 of 1994), [1996] 2 All E.R. 10 (C.A.)

D. The Unborn Child and Child Welfare Legislation

23. Courts have also afforded protection to unborn children under child welfare legislation. In determining whether a child when born is in need of protection under provincial child welfare legislation, Canadian courts take into account the physical injury, or abuse, caused to the child while *in utero* by the mother's excessive consumption of alcohol or use of drugs. In these cases the courts have described the child as "*in need of protection prior to birth*" and as a child born "*having been abused*".

Re Children's Aid Society for the District of Kenora and J.L. (1981), 131 D.L.R. (3d) 249 (Prov.Ct.Fam. Div.), at p.252

Superintendent of Family and Child Services v. M.(B.) and O.(D.) (1982), 28 R.F.L. (2d) 278 (B.C.S.C.), at p.283

24. Canadian courts are divided on whether an unborn child falls within the definition of a "*child in need of protection*". In 1987 an Ontario court held that it had authority to find a child en ventre sa mère to be in need of protection under the *Ontario Child and Family Services Act* where there was a possibility that the child would not be born alive or, if born alive, would be born with certain health defects because the mother refused to seek medical treatment necessary for the imminent delivery of the child.

Re Children's Aid Society of Belleville, Hastings County and Trenton v. T.(L.), [1987] O.J. No. 1807

Re Children's Aid Society of Belleville, Hastings County in Trenton v. T.(L.) (1987), 59 O.R. (2d) 204

25. The *Belleville* decision was not considered in a 1988 British Columbia Supreme Court decision which set aside an order which had found an unborn child to be a child in need of protection within the British Columbia Act. A 1990 Ontario court decision disagreed with the conclusion reached in the *Belleville* case and refused to grant an order that an unborn child was a child in need of protection under the Ontario *Child and Family Services Act* where the birth of the child was overdue but the mother neglected to obtain proper medical care and attention in preparation for the birth of the child.

Re Baby R (1988), 53 D.L.R. (4th) 69 (B.C.S.C.)

Re A (1990), 28 R.F.L. (3d) 288 (Ont. U.F.C.)

26. American state courts also have divided over whether an unborn child is a "*person*" or "*child*" within the meaning of state child protection legislation. Courts which have included an unborn child within the definition point to the policies underlying child welfare legislation which support such an interpretation:

> "The consequences of abuse or neglect which takes place after birth often pale in comparison to those resulting from abuse suffered by a viable foetus before birth"

Whitner v. State of South Carolina, (1996) S.C. Lexis 120, at para. 10

E. The "Born Alive" Rule

27. Notwithstanding that the Manitoba Court of Appeal acknowledged some legal recognition exists of the interests of an unborn child, it allowed the appeal primarily on the basis that no

cause of action can exist (or relief be granted) until a child is born alive. The court drew heavily upon certain case law - *Dehler*, *Baby R*, *In Re F* and *Tremblay v. Daigle* - standing for the proposition that until birth an unborn child is not recognized as having legal rights or an independent legal existence which would enable a court to afford it legal protection. As these intervenors have submitted in paragraphs 15 to 26 above, Anglo-Canadian courts have recognized legal interests of unborn children arising during gestation where it is for the benefit of the child to do so.

28. These intervenors submit that the cases followed by the Manitoba Court of Appeal misunderstood the genesis and purpose of the "*born alive*" rule. Two of the cases, *Dehler* v. *Ottawa Civic Hospital* and *Paton* v. *BPAS*, simply stated that the rule was one of long standing without further comment or analysis. These intervenors submit that modern courts have improperly transformed the "*born alive*" rule from an evidentiary rule, which emerged in a society with limited medical knowledge about foetal development, into a substantive rule about legal rights and personhood.

> *Dehler v. Ottawa Civic Hospital (1980), 25 O.R. (2d) 748 (H.C.J.) at p.756-762*
>
> *Paton v. B.P.A.S., [1978] 2 All E.R. 987 (A.B.D.) at pp.989h-990c*

29. In a seminal article Clarke Forsythe described the genesis of the "born alive" rule as an evidentiary standard mandated by primitive medical knowledge and technology. Until the early 19th Century medical practitioners could not determine with confidence before quickening whether a woman was pregnant or the child *in utero* alive. Consequently, the common law adopted the presumption that a child was first endowed with life at quickening. Limited medical knowledge also could not determine whether a child *in utero* was alive at the time it was subjected to injuries unless the child was born alive. An 1861 text on medical jurisprudence put the rationale for the born alive rule as follows:

> "It is well known that in the course of nature, many children come into the world dead, and that others die from various causes soon after birth. In the latter, the signs of their having lived are frequently indistinct. Hence, to provide against the danger of erroneous accusation, the law humanely presumes that every newborn child has been born dead, until the contrary appears from medical or other evidence. The onus of proof is thereby thrown on the prosecution; and no evidence imputing murder can be received, unless it be made certain by medical or other facts, that the child survived its birth and was actually living when the violence was offered to it."
>
> *C. Forsythe, "Homicide of the Unborn Child: The Born Alive Rule and Other Legal Anachronisms", (1987), 21 Valparaiso University Law Review 563 at pp.573-580 and 595*

30. The "*born alive*" rule was only one of several common law doctrines linked to the limited state of medical science:

> "In its adoption of the quickening doctrine, the born alive rule, and the year and a day rule, the common law thus can be seen to have closely followed the medical evidence of the day. It could not be proved that the child *in utero* before quickening was alive so the law adopted the presumption that the child was first alive at quickening and made the production of a miscarriage thereafter a grave offense. Likewise, the law could not prove the corpus delicti of homicide until the unborn child was observed alive outside the womb, so the law adopted the presumption that children are stillborn unless there was evidence of a live birth. It was not until a live birth occurred at any time of gestation that the law could prove life, death, and causation, and with such evidence, the common law punished the resulting death as homicide."

Forsythe, at p.595

31. Under the common law as expressed by Coke and Blackstone the unborn child was regarded as a "person" with a right to life at quickening, but the unborn child could not be the subject of homicide at common law unless "born alive" because of the evidentiary problems which prevented proof of the corpus delicti of homicide in the case of a stillborn child. The common law thus created the rebuttal presumption for purposes of homicide that the unborn child was only *in rerum natura*, or a living human being, upon live birth. The born alive rule was not a substantive element defining a human being, but an evidentiary principle applied largely in criminal cases.

Forsythe, pp.580-589

32. The origin and limited scope of the "born alive" rule have been recognized and applied in the United States in recent years by both trial and appellate courts, with the Oklahoma Court of Criminal Appeals specifically citing advances in medical and scientific knowledge and technology as abolishing the need for the "born alive" rule. As stated by one judge in that case, the abandonment of the rule "allows us to sever the umbilical cord which has linked our law of evidence with antiquity long after the light of medical knowledge has dispelled the myths of the past."

Forsythe, at pp.598-607

Hughes v. State of Oklahoma, 868 P.2d 730 (1994), at pp.732-4

Commonwealth v. Cass, 467 N.E.2d 1324 (1984)

State v. Horne, 319 S.E.2d 703 (1984), at p.704

Mary Lynn Kime, "Hughes v. State: The "Born Alive" Rule Dies a Timely Death", (1995), 30 Tulsa Law Journal 539

33. In its appeal decision in the *Commonwealth* v. *Cass* case, the Supreme Judicial Court of Massachusetts rejected the "born alive" rule, stating:

> "The rule has been accepted as the established common law in every American jurisdiction that has considered the question. But the antiquity of a rule is no measure of its soundness. 'It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down had vanished long since, and the rule simply persists from blind imitation of the past.' Address by O.W. Holmes, 10 Harv. L.Rev. 457, 469 (Jan. 8, 1897). "
>
> *Commonwealth v. Cass, 467 N.E. 2d 1324 (1984), at p.1328*

34. Canadian courts have also recognized the need to reassess common law presumptions and principles in light of advances in medical technology. In *Montreal Tramways* v. *Léveillé* this Court stated:

> "There were two other matters to which our attention was called; the first was that cases similar to the present one must have arisen many times in the past, but that no decided case (or at most only one) has been found in which the child's right of action for pre-natal injuries has been maintained. The paucity of decided cases is far from conclusive, and may be largely accounted for by the inevitable difficulty or impossibility of establishing the existence of a causal relation between the fault complained of and the injury to the child. With the advance in medical science, however, that which may have been an insuperable difficulty in the past may now be found susceptible of legal proof." (emphasis added)

Similarly, in 1972 the Ontario High Court of Justice observed:

> "Some of the older cases suggest that there should be no recovery by a person who has suffered prenatal injuries because of the difficulties of proof and of the opening it gives for perjury and speculation. Since those cases were decided there have been many scientific advances and it would seem that chances of establishing whether or not there are causal relationships between the act alleged to be negligent and the damage alleged to have been suffered as a consequence are better now than formerly. In any event the courts now have to consider many similar problems and plaintiffs should not be denied relief in proper cases because the possible difficulties of proof." (emphasis added)
>
> *Montreal Tramways v. Léveillé, supra., at p.465*
>
> *Duval v. Seguin, supra, at p. 702*
>
> *See also, R. v. Severight, [1993] A.J. No. 572 (Alta.Prov.Ct.- Crim.Div.) which describes the born alive rule as a "fiction" and contends that the law is "frozen by the limitations of medical science prior to the invention of the ultrasound."*

35. These decisions, supported by recent legal scholarship, have entirely discredited the "born alive" rule as an out-dated legal fiction, and the final rationale for denying an unborn child legal protection prior to birth has now disappeared.

36. Although the respondent argues that this Court cannot alter the framework created by the "*born alive rule*", the common law is not a fixed or immutable body of rules or principles that cannot be changed, enlarged or abandoned as required over time. The common law is a body of precedents developed by judges and, as such, it is inherently adaptable. The common law courts created the "*born alive*" rule to meet primitive evidentiary requirements; they can now abandon this obsolete rule of evidence in light of modern scientific advances.

F. Restrictions on the Respondent's Liberty Interest

(i) The Moral Dimension of Law

37. The Manitoba Court of Appeal's characterization of the "serious obstacle" in this case as the conflict between the liberty rights of the mother and the rights of the unborn child improperly polarized the required analysis, leaving it only for the court to decide which set of rights "trumps" the other. The use by courts of such absolute "rights talk" when dealing with complex human issues is artificial and unhelpful. As observed by Harvard's Professor Mary Ann Glendon, the portrayal of any individual as a "lone rights bearer" is artificial because it ignores the complex and connected social environment in which individuals operate and upon which all individuals depend for their personal development. Reliance on the language of absolute rights ignores the basic social reality that any examination of how a person acts must also consider the responsibilities owed by that individual to anyone touched by her conduct.

Mary Ann Glendon, Rights Talk: The Impoverishment of Political Discourse, at pp. 47-48 and 72-75

38. To adopt the characterization of the Manitoba Court of Appeal that the relationship between two human beings simply involves competing legal rights also obscures the process of moral decision-making in which any court must engage when assessing human behaviour. In this regard, these intervenors submit that the Manitoba Court of Appeal fundamentally misconstrued the relationship between law and morality when it stated:

> "Here is a classic dilemma. An expectant mother sniffs solvents to the probable detriment of her unborn child. If nothing is done, the child when born will surely suffer. Yet, anything which can be done necessarily involves restricting the mother's freedom of choice and, if she persists in the habit, her liberty.
>
> Fortunately for this Court, the moral issues raised by the dilemma are not before us. Our only concern is the law of Manitoba as it applies to this case ..." (emphasis added)

Court of Appeal Reasons, Case, pp.123-124

39. In previous cases this Court has also suggested that legal adjudication involves a decision-making process which does not, and cannot, engage in a moral or ethical analysis of human behaviour. In *Tremblay* v. *Daigle* this Court stated:

> "The Court is not required to enter into the philosophical and theological debates about whether or not a foetus is a person, but, rather, to answer the legal question of whether the Quebec legislature 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 a foetus determinative in our inquiry. The task of properly classifying a foetus in law and in science are different pursuits. Ascribing personhood to a foetus in law is a fundamentally normative task. It results in the recognition of rights and duties - a matter which falls outside the concerns of scientific classification. In short, this court's task is a legal one. Decisions based upon broad social, political, moral and economic choices are more appropriately left to the legislature." (emphasis added)

Subsequently, in the *Rodriguez* case, the Chief Justice stated:

> "Can the right to choose at issue here, that is the right to choose suicide, be described as an advantage of which [Ms. Rodriguez] is being deprived? In my opinion, the court should answer this question without reference to the philosophical and theological considerations fuelling the debate on the morality of suicide or euthanasia. It should consider the question before it from a legal perspective ... while keeping in mind that the *Charter* has established the essentially secular nature of Canadian society and the central place of freedom of conscience in the operation of our institutions." (emphasis added)

Tremblay v. Daigle, [1989] 2 S.C.R. 530, at pp.552i - 553b

Rodriguez v. Attorney-General of British Columbia, [1993] 3 S.C.R. 519 at p.553f-h

40. These intervenors submit that the consideration from a legal perspective of any question involving human conduct and its consequences necessarily requires a court to reflect on, analyze and decide upon the moral dimensions of human conduct. By its very nature law, whether embodied in statutes passed by a legislature or contained in a common law fashioned by judges, sets out what men and women can and cannot do in specific areas of human activity which affect others. As put by Thomas Aquinas, "law is given for the purpose of directing human acts". By concerning itself with human conduct and duty, the law deals with the very substance of moral philosophy. Ethics considers the moral principles by which a person acts and seeks to answer the question, "How should we live?". Law, in its proscriptions, sanctions, restraints and damage awards, pronounces on the "habits of life in regard to right and wrong conduct" in specific spheres of human activity.

Oxford English Dictionary, "Ethics" and "Morals", pp.900 and 1848

Thomas Aquinas, Summa Theologica, Pt. I-II, Q.92, Article 1

41. Commentators have long viewed our criminal law as one of the country's most important statements of applied morality:

> "In truth the criminal law is fundamentally a moral system. It may be crude, it may have faults, it may be rough and ready, but basically it is a system of applied morality and justice. It serves to underline those values necessary or important to society. When acts occur that seriously transgress essential values, like the sanctity of life, society must seek out and reaffirm those values. This is the true role of criminal law."
>
> *Law Reform Commission of Canada, Report No. 3 "Our Criminal Law" (1976), at p. 16.*

42. Tort law also contains a moral dimension. As noted by Professor Ernest Weinrib, tort law is concerned "... with the propriety, rather than the price, of activity." A tort is an act that wrongs a victim and the morality of tort law pertains to the relationship between the doer of harm and the sufferer of the same harm. Each harm done by and suffered from a tortious act is the core of a single transaction which has a normative dimension. According to Professor Weinrib:

> "The court's task is to decipher and to specify what is required by the normative dimension of this relationship in the context of a particular dispute. Because tort adjudication is morally limited to what is inherent in the defendant's doing and the plaintiff's suffering of the same harm, a court cannot impose upon the relationship an independent policy of its own choosing. It intervenes at the instance of the wronged party in order to undo or prevent the wrongful harm. Adjudication thus conceived makes explicit what is latent in the relationship between the parties."
>
> *Ernest Weinrib, "The Special Morality of Tort Law" (1989), 34 McGill Law Journal 404, at pp.408-410*

43. In their practical effects judicial decisions identify acceptable and unacceptable human conduct. In the ***Daigle*** case the court allowed a woman to abort her child without interference from the father. In the ***Rodriguez*** case the court refused to allow Ms. Rodriguez to seek the lawful assistance of a doctor to end her life. In the present case, the Manitoba Court of Appeal allowed a woman to continue sniffing glue while pregnant. In each case the courts considered a fundamental issue of practical decision-making, and in each case the court's decision had the effect of approving or disapproving a course of conduct by an individual. In so doing, the courts were engaged in the very process of moral decision-making. Indeed, the majority of this Court in the ***Rodriguez*** case reflected upon the moral dimensions of human conduct when considering the influence on our constitutional values of the "generally held and deeply rooted belief in our society that human life is sacred or inviolable".

> *Rodriguez, supra, at p.585 c-d*

(ii) The Integrated Approach of Tort Law

44. What are the implications to the present case of recognizing the moral dimension of legal adjudication, especially in cases raising issues of tort law? The primary consequence relates to the selection of the appropriate starting point for the legal analysis. These intervenors submit that the examination of the issue of duty of care in this case cannot proceed in an artificial framework which conceives of the world as populated by a collection of "lone rights bearers" seeking to exercise their liberties and freedoms. On the contrary, the starting point of the legal analysis must recognize the social dimension of all human activity. A harmful act should be regarded as a unit, or transaction, in which two persons, not one, are involved. Or as put by Professor Weinrib, "If the harm constitutes an integrated relationship of doing and suffering, the respective parties cannot be considered independently of each other." Nor can one party to the transaction be allowed to dominate the analysis:

> "... equality must operate within each transaction. This, in my view, is the significance of the objective standard of negligence, which precludes the doer's personal qualities from being decisive to the relationship and thus dominating it."
>
> *Weinrib, supra, at p.409*

45. Tort law continues to offer a method of legal analysis by which a holistic approach can be taken in matters of human conduct. While tort law gives due regard to the importance of an individual's freedom to act, at the same time it recognizes that in many circumstances individual liberty requires some restraint in order to prevent the infliction of harm on others. In many ways tort law embraces and balances individual freedoms and their corresponding social responsibilities. A nuanced approach therefore must be taken when considering the extent to which the potential restraint on a person's liberty properly prevents the recognition of a duty of care. In making this assessment these intervenors submit that a court should consider two factors: first, the context in which the duty of care arises and, second, the nature of the conduct in issue.

46. The respondent's liberty interest in this case must be viewed in the context of her pregnancy and the current medical knowledge about pregnancy. A mother's pregnancy involves an intimate web of emotional, physiological and biological ties between the mother and her child. As set out above, the physiological ties between mother and child are strong and direct, with the acts of the mother affecting not only herself, but also the present and future health of her unborn child. Any analysis of the mother's liberty interest in this case must recognize this physiological reality. This Court should not apply a "lone rights bearer" analysis to the liberty interest at stake because that would result in the law divorcing itself from biological and medical reality. As some members of this court observed in *Miron v.*

Trudel, it is legitimate to take into account the biological reality of a situation when such is relevant.

Miron v. Trudel, [1995] 2 S.C.R. 418, at p.443, para. 30

47. As recognized by this Court in the *Richard B* case, parental freedoms may be restrained where their exercise may harm the health or endanger the life of their children. For this reason, the Manitoba Court of Appeal's concern about a conflict which could arise between the mother's existing rights and those of her unborn child ignores the balance which always must be made between parent and child. Parental rights and freedoms are not absolute, as evidenced by the existing liability of parents in tort to their children once born and by provincial child welfare legislation embodying the principle that parental conduct which endangers the health of a child will attract the intervention of the community to protect the child. Canadian society has rejected any absolute notion of parental rights in the case of a child who is born; recognizing a duty of care in the present case would do no more than apply the same principle to the case of an unborn child.

B.(R.) v. Children's Aid Society of Metropolitan Toronto, [1995] 1 S.C.R. 315

48. The second factor the court must weigh in assessing an individual's liberty interest is the nature of the conduct. Even commentators who call for recognition of a presumption in favour of a woman's choice about pregnancy and medical procedures acknowledge that their argument is less compelling where pregnant women engage in substance abuse:

> "By definition, addicted behaviour does not reflect the woman's overt consideration of potential consequences for the foetus. This distinction suggests, on one level, that the substance abuse case may be an appropriate situation for state regulation even if the forced medical treatment case is not."

Notes, "Rethinking (M)otherhood: Feminist Theory and State Regulation of Pregnancy" (1990), 103 Harvard Law Review 1325 at p.1341

49. Further, the respondent's addiction to solvents harms both her and her unborn child. Solvent sniffing is a human tragedy and, any restraint placed on the respondent's solvent sniffing addiction would benefit her, as well as her unborn child.

50. Respondent's counsel suggests that limiting a pregnant mother's liberty in any case would subject all conduct by pregnant women to judicial scrutiny. Tort law does not operate in that way. Standards of care have been fashioned by courts in numerous situations where conduct has exceeded acceptable societal norms, and courts apply these standards incrementally to new fact situations which emerge. Nor does the present case raise the spectre of judicial

intervention in cases of parental indiscretion. This is a case of grave and habitual substance abuse. As recognized by the Manitoba Court of Appeal, if the respondent's conduct did not cease, "the child when born will surely suffer".

51. The speculation by the Manitoba Court of Appeal that recognizing a duty of care might induce other expectant mothers to avoid seeking desirable prenatal care finds no support in the evidentiary record before this Court. Moreover, the argument that protective laws should not be enacted because of a possible chilling effect has been rejected where the welfare of children is at stake. Mandatory child abuse reporting laws arguably could deter abusing parents from sending their children to school or taking them to the hospital, but such possibilities have not deterred the passage of such legislation to protect the welfare of the children.

Court of Appeal Reasons, Case, p.132

THIRD ISSUE: DOES THE COURT HAVE JURISDICTION TO GRANT THE RELIEF REQUESTED?

52. Canadian superior courts enjoy broad powers under their *parens patriae* jurisdiction to protect those who cannot care for themselves. A court's *parens patriae* jurisdiction is founded on necessity and is to be exercised in the best interests of the protected person. The categories under which the jurisdiction can be exercised are never closed, and the jurisdiction is of a very broad nature.

Re Eve, [1986] 2 S.C.R. 388, at pp.426b-427h

53. The Manitoba Court of Appeal advanced two reasons against exercising its *parens patriae* jurisdiction in the present case. First, no court had previously exercised the jurisdiction to protect an unborn child. This is not a sufficient answer. Only in recent decades has medical science developed the tools to observe and treat a child while *in utero.* As a result of this technological progress, for the first time courts have access to the evidence they require to assess the risk of certain conduct to the health of an unborn child. For courts to decline to exercise their *parens patriae* jurisdiction in the face of such newly-emerged evidence will freeze the law in time and ignore the emergence of new situations where known harm is occurring to those who are unable to protect themselves. These intervenors support the submissions on this point contained in paragraphs 8 to 18 of the factum of The Catholic Group for Health, Justice and Life.

Court of Appeal Reasons, Case, pp.6-7

54. As a second argument the Manitoba Court of Appeal pointed to the interference to the mother's liberty which would flow from the exercise of its *parens patriae* jurisdiction. In response, these intervenors rely on their submissions set out in paragraphs 37 through to 51 above, and also note that courts have traditionally possessed and exercised the power to restrain the conduct and, if required, the liberty of a person who engages in repeated tortious conduct against another. Further, the Manitoba Court of Appeal lost sight of the foundation of the *parens patriae* jurisdiction - the necessity, or need, to act for the protection of those who cannot care for themselves. Although it is true that the exercise of the *parens patriae* jurisdiction in the case of an unborn child will involve a temporary restraint over the mother's liberty, failure by the court to intervene will result in the continuation of conduct which may have a life-long effect on one who cannot care for himself. Any dispassionate assessment of the proportionality of harm to the respective parties must surely favour the unborn child. To countenance the continuation of the infliction of harm on another distorts the concept of liberty, and runs directly contrary to the principles underpinning the courts' *parens patriae* jurisdiction.

55. Some American state courts have exercised their equitable jurisdiction to protect unborn children, especially in circumstances where the refusal by a pregnant mother to obtain medical care would probably result in severe harm to both the mother and her unborn child.

Raleigh Fitkin-Paul Morgan Memorial Hospital v. Anderson 201 A. (2d) 537 (1964), at p.538

Jefferson v. Griffin Spalding County Hospital Authority 274 S.E. (2d) 457 (1981), at pp.460-1

PART IV - NATURE OF ORDER SOUGHT

56. For all of the reasons submitted above, the EFC and CMDS respectfully request that this appeal be allowed and that this Court grant the relief requested by the appellant.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

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PART V - TABLE OF AUTHORITIES

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No. 25508

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF MANITOBA)

BETWEEN:

WINNIPEG CHILD AND FAMILY SERVICES (NORTHWEST AREA)

Appellant (Plaintiff)

- and –

G.(D.F.)

Respondent (Defendant)

- and -

ALLIANCE FOR LIFE, ATTORNEY GENERAL FOR MANITOBA, CANADIAN ABORTION RIGHTS ACTION LEAGUE, CANADIAN CIVIL LIBERTIES ASSOCIATION, THE CATHOLIC GROUP FOR HEALTH, JUSTICE AND LIFE, THE EVANGELICAL FELLOWSHIP OF CANADA AND THE CHRISTIAN MEDICAL AND DENTAL SOCIETY, GOVERNMENT OF YUKON, L'ASSOCIATION DES CENTRES JEUNESSES DU QUEBEC, SOUTHEAST CHILD AND FAMILY SERVICES AND WEST REGION AND FAMILY SERVICES and WOMEN'S LEGAL EDUCATION AND ACTION FUND

Intervenors

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