DEFINING THE STANDARD OF PRENATAL CARE: AN ANALYSIS OF JUDICIAL AND LEGISLATIVE RESPONSES

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By revisiting the Supreme Court's reasoning in Dobson v. Dobson, *the author questions whether Alberta's* Maternal Tort Liability Act *(*MTLA*), enacted in 2005, is consonant with the Court's decision six years prior. The* MTLA *creates an exception to maternal tort immunity by imposing liability on insured pregnant women for the negligent use or operation of a motor vehicle. While the Court refused to create such an exception to maternal tort immunity in* Dobson v. Dobson, *it acknowledged that this question of social policy falls squarely within the purview of the legislature, and so Alberta respected the Court's ruling in enacting the* MTLA.

The author considers whether the MTLA *would pass constitutional muster if it were challenged as a violation of section 7 of the* Canadian Charter of Human Rights and Freedoms *(*Charter*). She concludes that it is sufficiently narrow and exceptional that it would likely not infringe the pregnant woman's right to "life, liberty and security of the person", nor would it constitute a violation of the principles of fundamental justice for being vague, overbroad, or arbitrary.*

Concerned that the MTLA *may be seen as a signal to further promote fetal rights, the author considers whether legislation that lifted maternal tort immunity altogether would be deemed unconstitutional under section 7. She concludes that the all-encompassing nature of a general standard of prenatal care could violate both a pregnant woman's personal autonomy, and the principle of fundamental justice that laws must not be vague. These violations may constitute a breach of section 7 incapable of being saved by section 1 of the* Charter, *since the legislation would have more negative consequences than benefits.*

INTRODUCTION 70
I. CONTRADICTING *DOBSON*? 71
II. THE CONSTITUTIONALITY OF THE *MATERNAL TORT LIABILITY ACT* 72
A. Life, Liberty and Security of the Person 72
B. The Principles of Fundamental Justice 74
1. *Vagueness* 75
2. *Over-inclusiveness* 75
3. *Arbitrariness* 75
III. THE CONSTITUTIONALITY OF A GENERAL STANDARD OF PRENATAL CARE 76
A. Life, Liberty and Security of the Person 76
B. The Principles of Fundamental Justice 77
1. *Over-inclusiveness* 77
2. *Arbitrariness* 77
3. *Vagueness* 77
C. The *Oakes* Test 79
1. *Rational Connection* 79
2. *Minimal Impairment* 80
3. *Balancing the Salutary and Deleterious Effects* 80
CONCLUSION 81

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INTRODUCTION

Brooklynn Hannah George Rewega was born with brain damage, blindness, and cerebral palsy, and suffers up to ten seizures a day.[1] These conditions are the result of injuries she sustained in a car accident when she was in her mother's womb. When her mother Lisa Rewega was driving to church on New Year's Eve of 2000, she lost control on the highway and was thrown through the windshield. Four months later, Brooklynn was born prematurely with severe health problems. Hoping their insurance company would pay for Brooklynn's special health care needs, Doug Rewega sued his wife for negligence, as well as the owners of the vehicle, George and Tina Rewega. Justice Moreau of the Alberta Court of Queen's Bench and Justice Ritter of the Alberta Court of Appeal, confirmed the Supreme Court's ruling in *Dobson (Litigation Guardian of) v. Dobson*,[2] holding that a child cannot sue his or her mother for prenatal injuries.[3] However, had Brooklynn's father been the one driving the car, Brooklynn would have been permitted to sue him since the *Dobson* decision draws a distinction between pregnant women and third parties.

Faced with the Rewega family's tragic circumstances, the Alberta legislature moved to collapse the distinction between mothers and third parties in the context of negligent driving. In the Spring of 2005, the Alberta legislature introduced Bill Pr. 4, a private bill explicitly allowing Brooklynn Rewega to commence an action against her mother for prenatal injuries sustained in the car accident.[4] The Standing Committee on Private Bills deferred consideration of Bill Pr. 4 until the fall to give the Alberta government the opportunity to consider whether it would introduce similar legislation. In the Fall Sitting, the government presented Bill 45, the *Maternal Tort Liability Act*,[5] which provides a strict exception to the common law by granting a civil right of action to a child who sustains prenatal injuries as a result of the negligent use or operation of a motor vehicle by the child's mother during her pregnancy. The bill protects mothers by prohibiting claims against them beyond the limits of their insurance policies. Because Bill 45 would not have a retroactive effect and could not help the Rewega family, the Committee recommended Bill Pr. 4 to proceed with amendments that reflected the restrictions in Bill 45. Both the *Rewega Right of Civil Action Act* and the *Maternal Tort Liability Act* were passed into law in December of 2005.[6]

This article will first consider whether Alberta's *Maternal Tort Liability Act* is consonant with the Supreme Court's ruling in *Dobson*, second, it will address the possibility of a *Charter* challenge under section 7, and third, it will examine whether an expanded form of the legislation that permits children to sue their mother for *any* kind of prenatal negligence would be constitutional under section 7.[7]

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1 Katherine Harding, "Alberta bill would 'protect' fetuses hurt in crashes" *The Globe and Mail* (4 November 2005), online: The Globe and Mail <www.globeandmail.com>.

2 [1999] 2 S.C.R. 753 [*Dobson*].

3 *B.R. v. L.R.*, [2004] A.J. No. 259 (QL) at para. 2 [*B.R.*]; *Rewega (next friend of) v. Rewega*, [2005] A.J. No. 1443 (QL) at para. 10 [*Rewega*]. While the Court of Queen's Bench and the Court of Appeal agreed that the *Dobson* ruling prohibits a child from suing his or her mother for negligent driving causing him or her prenatal injuries, it does not address whether the owners of the vehicle could be vicariously liable for the acts of the driver, deemed to be their agent, when there is no cause of action against the driver. This question of vicarious liability was the focus of the *Rewega* litigation, not the question of exceptions to maternal tort immunity.

4 Bill Pr. 4, *Brooklynn Hannah George Rewega Right of Civil Action Act*, 1st Sess., 26th Leg., Alberta, 2005.

5 Bill 45, *Maternal Tort Liability Act*, 1st Sess., 26th Leg., Alberta, 2005.

6 *Brooklynn Hannah George Rewega Right of Civil Action Act*, S.A. 2005, c. 51; *Maternal Tort Liability Act*, S.A. 2005, c. M-7.5 [*MTLA*].

7 A discussion of whether the *MTLA* violates section 15 of the *Charter* is beyond the scope of this paper but it is an important legal question to consider in the overall assessment of the maternal-fetal conflict. Mr. Agnihotri raised this question when the *Act* was in Second Reading as Bill 45:

> It is logical to assume that this bill could easily be challenged under section 15, Equality Rights, of the Canadian Charter of Rights and Freedoms. Even with the specific exceptions to allow this type of duty of care to apply only to motor vehicle accidents, it is still subject to the provisions of the Charter, and the argument can then be made that placing this burden of care upon pregnant women that is not applied to women who are not pregnant or to men infringes upon the equality rights of women.

Legislative Assembly, *Alberta Hansard*, No. 47 (21 November 2005) at 1774 (Bharat Agnihotri).

I
CONTRADICTING *DOBSON*?

The *Maternal Tort Liability Act* (*MTLA*) imposes a legal duty upon a pregnant woman towards her fetus and subsequently-born child, a duty which the Supreme Court decided it would not impose upon pregnant women in *Dobson*. Thus, at first glance, the Alberta legislature appears to be contradicting the Court's ruling in *Dobson*.

The facts in *Dobson* are similar to the *Rewega* case. When Cynthia Dobson was twenty-seven weeks pregnant, she was involved in a serious car accident that caused prenatal injuries to her fetus. Ryan Dobson was born the next day with permanent mental and physical impairment. He brought an action for damages against his mother alleging that his prenatal injuries were caused by her negligent driving.

Justice Cory, speaking for the majority, held that the Supreme Court would not allow for this kind of tort recovery. Justice Cory arrived at this conclusion by analyzing the duty of care a pregnant woman may have to her fetus and subsequently-born child through the criteria articulated in *Kamloops*.[8] This decision requires a court to consider the legitimacy of a duty of care in light of the proximity between the two parties and policy considerations that may militate against the establishment of such a duty of care. Justice Cory found that the relationship between a mother and a fetus was sufficiently proximate to warrant a *prima facie* duty of care; however, he also found that judicially imposing such a duty would be an unjustifiable intrusion into the lives of pregnant women as individuals, and into their family lives overall.[9]

For these public policy reasons, the majority of the Supreme Court held that it should not impose a legal duty of care upon the pregnant woman. This ruling, however, did not bar the provincial legislatures from enacting legislation in this field, subject to certain limits.[10] The majority explained that:

> Although the law of torts has traditionally been the province of the courts, to impose tort liability on mothers for prenatal negligence would have consequences which are impossible for the courts to assess adequately. This development would involve extensive intrusions and frequently unpredictable effects on the rights of bodily integrity, privacy and autonomous decision-making of pregnant women. The resolution of such fundamental policy issues is a matter best left to the legislature.[11]

By way of example, the Court cited legislation from the United Kingdom that carves out an exception to maternal tort immunity in the motor vehicle context, subject to the limits of the mother's insurance policy.[12] Borrowing from this legislation, the Court went so far as to articulate what an appropriate legislative measure would involve in Canada:

> [A] rule based on a strictly defined motor vehicle exception to delineate the scope of maternal tort liability should not be created by the judiciary. To do so would be to sanction a legal solution based solely on access to insurance. If this approach were to be adopted, the provincial legislatures would be required to amend their legislative compensation regimes for motor vehicle accidents. Any such amendment might well be required to specify that it constituted an exception to the general rule of maternal tort immunity for prenatal negligence, and that the injured child could not recover damages above the limit established by the insurance scheme. A carefully tailored solution could benefit both the injured child and his or her family, without unduly restricting the privacy and autonomy rights of Canadian women.[13]

The Alberta legislature followed the Court's recommendations. Indeed, the *Dobson* decision was referred to and quoted from several times in the legislative debates surrounding Bill 45 to show how the bill satisfied the Court's requirements. Mr. Oberle, the member who introduced Bill 45, pointed out that "[t]he Supreme Court has invited, in fact encouraged the Legislatures to venture into this area provided that it's restricted to car accidents and to the level of the mother's insurance, and that's what this legislation does."[14] Thus, a close reading of *Dobson* reveals that the *MTLA* does not undermine the Court's decision in *Dobson* but rather affirms it insofar as the legislature, according to the Court, is the proper forum for deciding this question of social policy.

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8 *Kamloops (City of) v. Nielsen*, [1984] 2 S.C.R. 2.

9 *Dobson*, *supra* note 2 at para. 79.

10 *Ibid.* at para. 70.

11 *Ibid.* at para. 36.

12 *Congenital Disabilities (Civil Liability) Act 1976* (U.K.), s. 1(1), cited in *ibid.* at para. 35.

13 *Dobson*, *ibid.* at para. 81.

14 Legislative Assembly, *Alberta Hansard*, No. 44 (16 November 2005) at 1682 (Frank Oberle).

II
The Constitutionality of the *Maternal Tort Liability Act*

As a matter of social policy, it is the legislature's prerogative to pass laws that affect the bodily integrity, privacy, and autonomous decision-making of pregnant women. However, legislation like the *MTLA* is subject to *Charter* scrutiny, and may be deemed invalid by the courts if it is found to be unconstitutional.[15] To determine whether this *Act* is consistent with the *Charter*, I will discuss whether it violates the liberty rights of the pregnant woman, which are guaranteed under section 7.

A. Life, Liberty and Security of the Person

Section 7 of the *Charter* provides that "everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."[16] The case that initially interpreted section 7, the *Motor Vehicle Reference*, held that a violation of section 7 could be either procedural or substantive.[17] In so doing, the decision left open the possibility of expanding the scope of section 7, but at the same time failed to offer a clear direction for its development. Since the *Motor Vehicle Reference*, the Court has commented more specifically on the content protected under section 7 by addressing the scope of "life, liberty and security of the person" on the one hand, and the meaning of fundamental justice on the other.

The Supreme Court of Canada first addressed the *Charter* rights of the pregnant woman in the *Morgentaler* decision, where the concurring judges in the majority offered different ways of interpreting "life, liberty and security of the person".[18] In this landmark case on abortion, the Court, by a majority of five to two, held that the restriction in the *Criminal Code* requiring abortions to be approved by a therapeutic abortion committee of an accredited hospital was unconstitutional. The five judges in the majority agreed that the legislation caused a health risk to pregnant women, depriving them of security of the person. They disagreed, however, on whether "life, liberty and security of the person" extends beyond health and safety. Chief Justice Dickson, writing for the majority, argued that state interference with bodily integrity and serious state-imposed psychological stress, at least in the criminal law context, constitutes a breach of security of the person.[19] Justice Wilson, in a concurring opinion, argued that section 7 encompasses more than physical and psychological security; the right to liberty contained in section 7 guarantees to every individual a degree of personal autonomy over important decisions intimately affecting their private lives.[20]

The latter, more generous interpretation of section 7 was followed in *Rodriguez*, a more recent Supreme Court decision.[21] In *Rodriguez*, a terminally ill plaintiff challenged the constitutionality of the *Criminal Code* prohibition on assisted suicide. While her claim was not successful, eight of the nine judges of the Court held that this prohibition, preventing the plaintiff from controlling her body, deprived her of security of the person insofar as it failed to respect her personal autonomy.[22]

Assuming therefore that Justice Wilson's wider view of "life, liberty and security of the person" reflects the Court's current approach to section 7, would such an interpretation support the constitutionality of the *MTLA*?

To answer this question, it is first necessary to determine whether the legislation as a matter of tort law is sufficient to trigger scrutiny under section 7 of the *Charter*. Both *Morgentaler* and *Rodriguez* address the constitutionality of criminal law matters, as does most section 7 jurisprudence.[23] However, section 7 should not be seen as a check upon the criminal law alone. While imprisonment—a consequence of breaching criminal legislation—is one way in which liberty and security of the person can be infringed,

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15 *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 SCR 573.

16 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (U.K.)*, 1982, c. 11. s. 7.

17 *Reference re Motor Vehicle Act (British Columbia) s. 94(2)*, [1985] 2 S.C.R. 486 [*Motor Vehicle Reference*].

18 *R. v. Morgentaler*, [1988] 1 S.C.R. 30 [*Morgentaler*].

19 *Ibid.*, Dickson C.J. at 56.

20 *Ibid.*, Wilson J. at 171.

21 Wilson J.'s approach to section 7 in *Morgentaler* was also applied by the Supreme Court in *Godbout v. Longueil (City of)*, [1997] 3 S.C.R. 844 at para.65 [*Godbout*].

22 *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519 at 588–89, 617–19, 630–31 [*Rodriguez*], Peter Hogg, *Constitutional Law of Canada* (Scarborough: Carswell, 2003) at 981 [Hogg].

23 Hogg, *ibid.* at 977–78.

it is not the only way; the Court in *Malmo-Levine* reaffirms that "[l]iberty accordingly means more than freedom from physical restraint."[24] This wider reading of section 7 is manifest in *Blencoe v. British Columbia,*[25] and *Chaoulli v. Quebec (Attorney General)*,[26] both of which are recent Supreme Court decisions analyzing section 7 outside of the criminal law context. Given this jurisprudential trend, the *MTLA* is not *prima facie* outside of the scope of section 7; the Court's willingness to invoke section 7 in civil matters suggests that the *Act*, as a matter of tort law, could trigger constitutional scrutiny under section 7.

Whether the legislation actually is constitutional under section 7 depends on a two-pronged analysis. Any legislation that is challenged under this provision must breach two conditions: first, the complainant must prove a violation of life, liberty and security of the person; and second, the complainant must prove a violation of fundamental justice. The first part of the analysis hinges upon whether holding a pregnant woman liable for negligent driving causing prenatal injuries to her subsequently-born child violates a pregnant woman's security of the person in any of three ways discussed by the Court in *Morgentaler*: (i) interfering with her bodily integrity, (ii) imposing state-induced psychological stress, or (iii) depriving her of personal autonomy.

The first two questions are not difficult to answer. First, this legislation does not interfere with the bodily integrity of a pregnant woman; it imposes neither imprisonment nor detainment.[27] Rather, the legislation requires her to compensate the child for the prenatal injuries she caused through negligent driving, limited to the amount of her insurance coverage. Second, the legislation would not cause the pregnant woman psychological stress, as she is already subject to a duty to drive carefully under ordinary negligence law; imposing a duty to act reasonably—the standard for assessing negligence—is not sufficiently restrictive to cause an individual serious psychological stress. Moreover, pregnant women need not fear financial burdens as a result of liability because the child's compensation cannot exceed the mother's insurance coverage. In response, an argument could be made that the *Act* does violate a pregnant woman's bodily integrity insofar as it effectively divides her body into what is her own and what is the child's. This account of violating bodily integrity is more conceptual or metaphysical than the physical standpoint from which the courts have assessed bodily and psychological intervention, and may thus be overly speculative for the purposes of adjudication.

The third question—whether it would violate her right to personal autonomy—is more difficult to answer. Section 7 of the *Charter* protects a sphere of personal autonomy wherein individuals may make inherently private choices free from state interference. This protected sphere does not, however, guarantee unbridled freedom;[28] rather, section 7 protects activities that are central to an individual's human dignity.[29]

In dissent in *Dobson*, Justice Major suggests that the freedom to drive negligently is not a fundamentally personal activity central to the autonomy of a woman. He argues that the pregnant woman's autonomy is not violated because

> [s]he was not legally free to operate a motor vehicle without due care. She did not have the freedom to drive carelessly. Therefore, it cannot be said that the imposition of a duty of care to her born alive child would restrict her freedom to drive.… [T]he values enshrined in the *Canadian Charter of Rights and Freedoms* do not grant pregnant women interests of any kind in negligent driving.[30]

Justice Major articulates this point forcefully and succinctly, but in so doing fails to address possible countervailing viewpoints. One objection to Justice Major's argument is the way in which he characterizes the right or interest at stake. Instead of construing the interest as a right to drive negligently, the right can be alternatively described as the right to choose when and where to drive. In many parts of Canada outside of large urban centres, driving is the only mode of transportation reasonably available. Purchasing groceries, getting to work, and going to the doctor are all necessary tasks requiring the use of an automobile. Characterizing the decision to drive in poor weather conditions, for example, as negligent, may thus restrict a pregnant woman from making "basic choices going to the core of what it means to

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24 *R. v. Malmo-Levine; R. v. Caine*, [2003] 3 S.C.R. 571 at para. 85.

25 [2000] 2 S.C.R. 307.

26 [2005] SCC 35.

27 See e.g. *Winnipeg Child and Family Services (Northwest Area) v. G.(D.F.)*, [1997] 3 S.C.R. 925.

28 See e.g. *Godbout*, *supra* note 21 at para. 66.

29 See *ibid.*

30 *Dobson*, *supra* note 2 at paras. 113–114.

enjoy individual dignity and independence."[31] Imposing a duty of care upon a pregnant woman towards her fetus and subsequently-born child might impose an unfair choice upon her: she may have to choose to stay at home or risk incurring liability for choosing to drive.[32]

That being said, the Alberta legislature has designed the liability provision of the *Act* to minimize hardship on women. Women who are deemed liable under this legislation for the negligence caused to their child in the womb are not expected to provide compensation out of pocket; rather, the legislation aligns with the *Dobson* ruling by restricting recovery to the mother's insurance coverage. This way, pregnant women need not fear additional financial burdens from this legislation and should not be deterred from driving or performing routine activities during their pregnancy. The effect of the legislation amounts to providing financial assistance to women who have children with special needs. Even if women of child-bearing age were faced with increased insurance premiums, this potential consequence of the legislation does not affect their dignity by limiting their basic choices.

Yet from a strictly legal standpoint, the legislation does impose an additional burden on pregnant women. While this burden is not a financial one—since the *Act* restricts the maximum damages to the amount of the mother's insurance coverage—the *Act* still creates the possibility of deeming a pregnant woman negligent for damages caused to herself as the carrier of the fetus and subsequently-born child. Because of this special biological relationship, only the pregnant woman could be considered legally negligent to herself and face this kind of liability. As Justice Cory states in *Dobson*, the "unique relationship between a pregnant woman and her fetus is so very different from the relationship with third parties. Everything the pregnant woman does or fails to do may have a potentially detrimental impact on her fetus."[33] Justice Cory cites the reasoning of the Supreme Court of Illinois to emphasize that the "relationship between a pregnant woman and her fetus is unlike the relationship between any other plaintiff and defendant".[34] Ultimately, Justice Major wants to treat the pregnant woman like everyone else by imposing the standard duty of care to drive carefully, but then treats her differently by imposing a duty that could not be imposed on anyone else.

In response to this objection, an argument could be made that this additional burden is justified because the pregnant woman has chosen to carry a fetus to term, and should therefore be responsible for performing this activity prudently and diligently. The fact that only women are the targets of this legislation may be more a question of moral luck or biological reality—only women can bear children—rather than a question of undue state intervention into a woman's sphere of personal autonomy. Moreover, the right to drive negligently or, alternatively, the right to choose when and where to drive, is not a right that is so fundamental to personal autonomy that it merits section 7 protection. While driving may be a necessity for most pregnant women, there is no reason why they need to do so negligently.

On the one hand, it seems that creating the possibility for children to sue their mothers for negligent driving threatens the personal autonomy of pregnant women because they are faced with the possibility of self-imposed liability; but on the other hand, this burden is mitigated by the fact that the legislation insulates pregnant women from financial responsibility by shifting the costs of recovery to the insurance company. Given that the legislature explicitly followed the recommendations set out by the majority in *Dobson* for creating a sufficiently narrow exception to maternal tort immunity that not only shields mothers from financial responsibility, but also assists them financially, it seems unlikely that the *Act* would be successfully challenged for violating the personal autonomy of pregnant women under section 7 of the *Charter*.

In the event that the courts did find that the *Act* interferes with the life, liberty and security of pregnant women, they would turn to the second step of section 7 to determine whether the *Act* violates the principles of fundamental justice.

B. The Principles of Fundamental Justice

The principles of fundamental justice are not exhaustive, and are simply defined in the *Motor Vehicles Reference* as being found in the "basic tenets of our legal system".[35] In any given case, it is

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31 *Godbout*, *supra* note 21 at para. 66.

32 Imposing unfair choices upon individuals in the context of liberty is discussed by the Supreme Court in *Godbout* (*ibid.* at para. 68).

33 *Dobson*, *supra* note 2 at para. 27.

34 *Stallman v. Youngquist*, 531 N.E.2d 355 (1988), cited in *Dobson*, *ibid.* at para. 37.

35 *Motor Vehicle Reference*, *supra* note 17 at 503.

important to clearly identify the relevant principles of fundamental justice because, otherwise, the court may dismiss the claim altogether.[36] Laws that satisfy these principles are 1) not vague, 2) not over-inclusive, and 3) not arbitrary.[37]

1. *Vagueness*

Chief Justice McLachlin, in *Canadian Foundation*, stated that a law is unconstitutionally vague if it "does not provide an adequate basis for legal debate" and "analysis"; "does not sufficiently delineate any area of risk"; or "is not intelligible".[38] The *MTLA* mirrors the Supreme Court's recommendation in *Dobson* in setting out specific conditions that make this right of civil action reasonably intelligible. The legislation, as a limited exception to maternal tort immunity, is clearly defined: "[a] mother may be liable to her child for injuries suffered by her child on or after birth that were caused by the mother's use or operation of an automobile during her pregnancy"[39] and such liability is limited to her automobile insurance coverage.

It could be argued, however, that the *MTLA* is vague in its description of the activity that is subject to liability—the "use or operation of an automobile". An automobile could be "used" for driving but it could also be "used" as a "hotbox" (an enclosed space in which to concentrate marijuana smoke). Both activities could result in prenatal injuries to the fetus, and potentially lead to a claim under this *Act*. But if we read the legislation as a whole, the section limiting liability to insurance coverage suggests that the legislature meant to restrict the "use and operation of an automobile" to those activities that are covered by insurance. This interpretation sufficiently informs the meaning of "use of an automobile" so that it is clear enough to avoid a challenge on the grounds of vagueness.

2. *Over-inclusiveness*

Yet even if the *Act* is clear, it might still be too broad. Legislation may be unconstitutional if it is over-inclusive or overbroad, meaning that it uses means that go beyond what is necessary to accomplish the law's objective.[40] From the legislative assembly's debates, the purpose of the *Act* is clear: to provide compensation to children who sustained prenatal injuries as a result of their mother's negligent driving while ensuring that no financial burden is placed on the mothers. The *Act* achieves this purpose by limiting the exception to maternal tort immunity to the negligent use or operation of an automobile by mothers who are insured under a contract of automobile insurance. By contrast, had the *MTLA* not specified that the exception is limited to the "use or operation of an automobile" but granted a general exception for "negligent activity occurring in motor vehicles", an applicant could claim under the *Act* for prenatal injuries caused by his or her mother's abuse of drugs in a motor vehicle, rather than only those caused by the mother's negligent driving, as the law intended. In this case, there would be no question of vagueness—a total exception for all activities in motor vehicles is clear—but such an exception includes far more activities than is necessary to achieve the law's purpose of providing compensation for prenatal injuries suffered as a result of their mother's negligent driving. Likewise, had the *Act* not specified that only mothers with automobile insurance are excluded from maternal tort immunity, both insured and uninsured mothers would be subject to liability, contrary to the intention of the *Act* to impose no financial burden on mothers. As written, however, the *Act* is narrowly defined: there is a clear connection between the purpose and the scope of the exception.

3. *Arbitrariness*

In dissent, Justice McLachlin (as she then was) explained in *Rodriguez* that, "[a] particular limit will be arbitrary if it bears no relation to, or is, inconsistent with the objective that lies behind the legislation."[41] The *Act* achieves the objective of compensating children who sustained prenatal injuries because of their mother's negligent use or operation of an automobile by creating an exception to

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[36] *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, [2004] 3 S.C.R. 657 at para. 66.

[37] For a discussion of arbitrariness, vagueness, and overbreadth as examples of principles of fundamental justice, see generally *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, [2004] 1 S.C.R. 76 [*Canadian Foundation*]; *Morgentaler*, *supra* note 18; *Rodriguez*, *supra* note 22.

[38] *Canadian Foundation*, *ibid.* at para. 15.

[39] *MTLA*, *supra* note 6, s. 4.

[40] Hogg, *supra* note 22 at 1016.

[41] *Rodriguez*, *supra* note 22 at 619–20, McLachlin J. (as she then was), dissenting.

maternal tort immunity and by turning to automobile insurance to compensate these children. Yet the debates of the Alberta legislature reveal that several members were concerned about whether this solution properly advances the objective. By offloading the costs associated with compensating children who sustain chronic prenatal injuries to insurance companies, plaintiff compensation is restricted to the amount of the tortfeasor's insurance coverage, which differs from family to family. One member of the legislature pointed to the inherent unfairness of the *Act*: "Some people have only a $200,000 liability limit, and others have $2 million or more. Yet in the latter case a claim for 10 times more compensation could be made by a child who has suffered injuries that are similar to the child who can only make a claim up to $200,000."[42]

A solution that would actually advance the objective of providing compensation to families with children who have special needs would be the creation of a fund that would assist all families in this situation, and not just those who have automobile insurance whose children were injured from negligent driving. Such a measure was proposed by another member of the legislature who was concerned about the limited effect of this *Act* and reminded the Assembly that Justice Cory himself suggested the creation of a fund to cover prenatal injuries as one possible policy initiative a legislature might take.[43]

While these concerns are legitimate and pose serious challenges to the desirability of the *Act*'s insurance scheme, they may not be enough to deem the *Act* arbitrary. The *Act* may not provide the best solution to all families with children who sustain prenatal injuries, but it does allow some children to recover some compensation that would not otherwise be available because of the ruling in *Dobson*. To this extent the insurance scheme and the narrow exception to maternal tort immunity do advance the objective of compensation.

On the whole, given the careful design of the *Act*, *viz.* its explicit characterization as a limited exception to maternal tort immunity, its strict application to the motor vehicle context, and its restriction of liability to the mother's automobile insurance coverage, it is unlikely that the courts would find a violation of a pregnant woman's personal autonomy. Even in the event that an interference was found, the *Act* might not constitute a section 7 violation for it does not seem to violate principles of fundamental justice such as vagueness, overbreadth, or arbitrariness.

III
The Constitutionality of a General Standard of Prenatal Care

When the Alberta legislature was debating Bill 45, there was concern that it may be expanded in the future. While the *MTLA* is designed as a narrow exception to maternal tort immunity, one member pointed out that it may not necessarily retain its current incarnation: it could be modified or amended by the legislature in the future to provide more robust measures for attaining its objective of compensating children for injuries sustained *in utero*.[44] The current rationale could invite litigation or legislation that might expand liability to all negligent acts of pregnant women, including acts not covered by insurance, such as drug and alcohol abuse, or refusal to undergo certain medical procedures (such as caesarean delivery or anti-retroviral therapies to reduce the risk of perinatal HIV transmission). In the interests of protecting the fetus, the legislature may decide to extend liability beyond the context of negligent driving to allow scrutiny of almost any act or omission of a pregnant woman. If this happened, the child would have a civil right of action to recover for negligence even in situations where there is no insurance to cover the damages award.[45]

A. Life, Liberty and Security of the Person

Legislation lifting the common law ban on claims against mothers for negligent prenatal care would, however, be subject to *Charter* analysis. Given the particularly intimate relationship between the mother and the fetus, all of the mother's actions could potentially harm the fetus, and thus all of her actions could be legally evaluated for their effects on the fetus. Justice McLachlin (as she then was) states in *Dobson*:

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42 Legislative Assembly, *Alberta Hansard*, No. 52 (30 November 2005) at 2023 (Raj Pannu).

43 *Ibid.* (Bruce Miller), citing *Dobson*, *supra* note 2 at para. 48.

44 Legislative Assembly, *Alberta Hansard*, No. 44 (16 November 2005) at 1685–86 (Bill Bonko).

45 Diana Ginn, "A Balancing that is Beyond the Scope of the Common Law: A Discussion of the Issues Raised by *Dobson (Litigation Guardian of)* v. *Dobson*" (2001) 27 Queen's L.J. 51 at 88 [Ginn].

> Virtually every action of a pregnant woman—down to how much sleep she gets, what she eats and drinks, how much she works and where she works—is capable of affecting the health and well-being of her unborn child, and hence carries the potential for legal action against the pregnant woman. Such legal action in turn carries the potential to bring the whole of the pregnant woman's conduct under the scrutiny of the law. This in turn has the potential to jeopardize the pregnant woman's fundamental right to control her body and make decisions in her own interest.[46]

In this passage, Justice McLachlin (as she then was) refers to Justice Wilson's remarks in *Morgentaler* to remind the Court that section 7 of the *Charter* prevents the law from interfering with a pregnant woman's right to control her body.[47]

An expanded form of the *MTLA* could therefore be seen as a breach of "life, liberty and security of the person". But this is not enough to be a violation of the section as a whole. The impugned legislation must also violate the second part of section 7 which requires legislation to be in accordance with the principles of fundamental justice.

B. The Principles of Fundamental Justice

Expanding the legislation does not seem to have an effect on the level of over-inclusiveness or arbitrariness, but it may introduce too much vagueness.

1. *Over-inclusiveness*

Removing the tortious immunity of pregnant women in the context of prenatal care may not be too broad a measure. Since the objective of the expanded legislation would be to provide compensation to all children injured *in utero* through another's negligence, the legislation necessarily requires that all negligent individuals—including pregnant women—be held liable for the injuries they cause. There seems to be no "halfway measure" that could be relied upon to fully achieve the legislation's purpose.[48]

2. *Arbitrariness*

But while removing maternal tort immunity does not seem to be over-inclusive, there is some question as to whether it is arbitrary. One could argue that the legislation is arbitrary because in most cases allowing children to recover for their prenatal injuries by suing their mothers just as they would any other third party would result in merely shuffling money back and forth, taking it away from the mother as tortfeasor only to give it back to her as the child's caregiver. In these cases, it could be argued, the means used by the legislation is not connected to its goal of providing compensation to injured children. But where the mother and child are estranged, this measure need not be arbitrary. For example, in situations of adoption there could be a real difference in financial support for the child; after adoption the biological mother has no more obligation to the child than the general duty of care that all persons have towards one another, so allowing the child's adopted parents to sue on his or her behalf could provide them with additional money for the child's care. Therefore, while such legislation might not be an ideal means of compensation for prenatal injuries, it is not arbitrary since in some cases it could provide children with financial support that they would not otherwise have.

3. *Vagueness*

An expanded form of the Alberta legislation may be found to be vague by the courts because it would be difficult to determine what conduct would count as negligent. Consider the following situations in which a pregnant woman may easily find herself:

> Is she to be liable in tort for failing to regulate her diet to provide the best nutrients for the foetus? Is she to be required to abstain from smoking and all alcoholic beverages? Should she be found liable for failing to abstain from strenuous exercise or unprotected sexual activity to protect her foetus? Must she undertake frequent safety checks of her premises in order to avoid falling and causing injury to the foetus?[49]

By raising these questions in *Dobson*, Justice McLachlin (as she then was) argues that there is no rational limit to the types of claims that may be brought if such a tortious duty of care were imposed upon

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[46] *Dobson*, *supra* note 2 at para. 85.

[47] *Ibid.*

[48] For an analysis of over-inclusive legislation, see *Rodriguez*, *supra* note 22 at 614.

[49] *Dobson*, *supra* note 2 at para. 28.

pregnant women. It would be unclear what activities would count under this duty, which indicates it is overly vague. Because the legislation is so vague, Teresa Foley has expressed concern that a judge would have an inappropriate amount of discretion to apply his or her own views of proper maternal behaviour, and may fail to consider the

> great disparities in the financial situations, education, access to health services, and ethnic backgrounds of each pregnant mother.... Maternal prenatal civil liability might have the effect of defining women solely by their reproductive capacities, reducing women to 'baby machines' whose sole purpose is to produce the perfect child.[50]

Like the Chief Justice, Foley is concerned that the vagueness of the standard of prenatal care will lead to an undue restriction on the personal autonomy of pregnant women protected by section 7 of the *Charter*.

Yet these critics might be underestimating the interpretive nature of adjudication. Courts are well equipped to decide what constitutes negligent behaviour, because the duty of care is a principled way of approaching negligence by invoking the reasonable person as the standard for judging negligent conduct. As the Chief Justice states in *Canadian Foundation*,

> the law has long used reasonableness to delineate areas of risk, without incurring the dangers of vagueness. The law of negligence, which has blossomed in recent decades to govern private actions in nearly all spheres of human activity, is founded upon the presumption that individuals are capable of governing their conduct in accordance with the standard of what is "reasonable." ... The reality is that the term "reasonable" gives varying degrees of guidance, depending upon the statutory and factual context. ... In each case, the question is whether the term, considered in light of principles of statutory interpretation and decided cases, delineates an area of risk....[51]

Just because the standard may be subjective—what is reasonable to the private citizen may not be reasonable to a judge—does not necessarily mean it is vague. The common law method allows the court to flesh out the standard through the adjudication of particular cases, and in this way the standard becomes clearer and more defined.

Foley addresses this notion by arguing that even if the court established criteria for circumscribing the duty of care, with a gross negligence standard or an illegal behaviour test, for instance, the duty would remain overly vague. Under a gross negligence standard, where the mother must know or ought to know that her action posed a serious threat to the life or health of the fetus, the court would still have difficulty assessing her conduct because what constitutes a serious threat is unclear; some people may argue that smoking during pregnancy counts as a serious harm to the fetus, while others would regard it as a risk, but not a serious one. She also objects to the illegal behaviour standard that would impose negligence upon a pregnant woman for engaging in illegal activities that cause prenatal harm to her subsequently-born child. While this standard may solve the problem of vagueness, it triggers the problem of arbitrariness because it would regard a woman as negligent for smoking marijuana during her pregnancy, but not for excessive drinking and causing fetal alcohol syndrome in her baby.[52]

Once again, Foley's difficulty with the reasonable person and gross negligence standards is actually a criticism of adjudication. Foley is concerned that judges will invoke their own private standard of morality instead of applying the law. This concern about activist judges pertains to all areas of adjudication, and can be addressed by emphasizing the authority of the common law over personal standards of morality, and asserting the role of the court as an interpreter of the law rather than the creator of social policy.

Similarly, Foley's concern about arbitrary categories—imposing liability for marijuana usage but not drinking alcohol—is also a general critique of the law, but here it is a critique of the criminal law's prohibition of marijuana and not alcohol. Critiquing the arbitrariness of the criminal law does not provide grounds for discrediting a standard of prenatal care; if the law were changed so that both excessive drinking and marijuana usage were criminal offences, Foley would have no basis for impugning the standard for arbitrariness, and it would offer a bright line against which the courts court determine the appropriate standard of prenatal care.

Despite these problems, vagueness offers the strongest critique of a standard of prenatal care out of the three principles of fundamental justice discussed above. While the Supreme Court's expertise in the law of negligence suggests an ability to establish a reasonable standard of prenatal care, the current make-up of the bench and the Chief Justice's objections to the feasibility of a prenatal standard of care make it likely that the Court would strike down a legislatively-imposed standard of prenatal care for violating the two aspects of section 7, on grounds of personal autonomy and vagueness.

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[50] Teresa Foley, "*Dobson v. Dobson*: Tort Liability for Expectant Mothers?" (1998) 61 Sask. L. Rev. 177 at 190 [Foley].

[51] *Canadian Foundation*, *supra* note 37 at paras. 27–8.

[52] Foley, *supra* note 50 at 191–92.

C. The *Oakes* Test

If a court found that an expanded form of the *MTLA* violated section 7, it would then have to examine the legislation under section 1 of the *Charter* in accordance with the two-step test established in *R. v. Oakes*.[53] First, I will consider the validity of the legislative objective, and second, I will determine whether a reasonable balance has been struck between the legislative objective and the means chosen to achieve that objective.

As discussed above, an expanded form of the legislation would aim at providing compensation to children injured in the womb because of their mother's negligence. Underlying this purpose is the general premise of tort law: individuals should be compensated for injuries sustained as a result of another's negligence. Ultimately, the legislation seeks to protect the fetus and subsequently-born child as a vulnerable member of society, which is a pressing and substantial legislative objective.

The second branch of the *Oakes* test considers whether the impugned legislation is rationally connected to the objective, whether it minimally impairs the right in question, and whether the violation of the right is proportional to the importance of the objective sought to be achieved.

1. *Rational Connection*

If an expanded form of the legislation included all kinds of prenatal negligence beyond motor vehicle accidents, it may not be rationally connected to the objective of protecting the fetus and injured child. Insurance companies may have an obligation to compensate their premium holders for injuries sustained in car accidents, but they do not have an obligation to compensate individuals outside of this context. So if a woman were held liable to her subsequently-born child for smoking or drinking during her pregnancy, the woman would have to pay the damages herself. This requirement might not help the family unit as a whole because the compensation to the child would come from the negligent actor who may also be his or her primary caregiver.

Alternatively, it could be argued that holding a pregnant woman liable for prenatal negligence would be in line with the objective of protecting the fetus and subsequently-born child because the spectre of liability may deter her from engaging in negligent behaviour. Holding these women liable for failing to care for the fetus they have chosen to carry to term could promote the health and safety of the fetus. This argument is discredited by Kary Moss in the context of drug addiction:

> [I]t is not true that the majority of these women are insensitive to their children's needs and simply need reminders of the dangers of drug use. Real resource constraints often prevent these women from securing treatment or proper care during their pregnancies. Even when women can secure treatment, they still may be constrained by the nature of the addiction process itself. Addiction typically involves loss of control over use of the drug and continued involvement with the drug *even when* there are serious consequences. Thus, to treat pregnant addicts as indifferent and deliberate participants is to misunderstand the addiction process.[54]

Even in a situation where the mother is negligent for behaviour unrelated to drug abuse, imposing liability may not protect the fetus because the woman may choose to terminate her pregnancy for fear of liability when she would otherwise have carried the fetus to term. Liability may also discourage pregnant women from seeking medical care when they have acted negligently out of fear that their physician or health care provider will discover their wrongful behaviour.[55] The failure to deter negligence, the potential of increasing unwanted abortions, and the possibility of discouraging prenatal care suggest that imposing liability is not in the child's interests, and so may not be rationally connected to protecting or supporting the child.

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[53] [1986] 1 S.C.R. 103. The purpose of the section 1 analysis is to determine whether the infringement of the *Charter* right in question is justifiable in a free democratic society. Theoretically, it is difficult to conceive of how legislation that violates a principle of fundamental justice under section 7 could be justified as a reasonable limit in a free and democratic society under section 1. The section 1 analysis seems redundant when section 7 already considers arbitrariness, overbreadth, and vagueness, which are effectively the same as rational connection, minimal impairment, and proportionality in section 1. McLachlin C.J. recently confirmed the difficulty with using section 1 to justify violations of section 7 rights in *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9 [*Charkaoui*]. Quoting Lamer J. (as he then was) in the *Motor Vehicle Reference*, she emphasized that courts may resort to section 1 to justify violations of section 7 "but only in cases arising out of exceptional conditions, such as natural disasters, the outbreak of war, epidemics, and the like" (*Motor Vehicle Reference*, *supra* note 17 at 518, quoted in *Charkaoui*, at para. 66).

[54] Kary Moss, "Substance Abuse During Pregnancy" (1990) 13 Harv. Women's L.J. 278 at 287 [emphasis in original, footnotes omitted].

[55] Alexandre-Philippe Avard & Bartha Maria Knoppers, "L'Immunité légale de la femme enceinte et l'affaire *Dobson*" (2000) 45 McGill L.J. 315 at 330 [Avard].

2. *Minimal Impairment*

Courts tend not to strike down legislation on the rational connection test,[56] so it is important to consider whether lifting the prohibition on suing pregnant women for negligence would minimally impair the pregnant woman's personal autonomy guaranteed under section 7. Increasing state funding for social support services would contribute much more to the well-being of those with special needs than a legislatively-imposed standard of prenatal care would, and the pregnant woman's personal autonomy would not be violated.[57] Awareness campaigns publicizing the risks of smoking or drinking during pregnancy, for instance, are another way of protecting the fetus without infringing the pregnant woman's personal autonomy.[58] Faced with these alternatives, courts may claim that it is not their role to second-guess the wisdom of the policy choices made by the legislature, and that while these options may not infringe the liberty interests of the pregnant woman, they may not be clearly or well designed to protect the fetus and facilitate compensation of children who sustain prenatal injuries because of maternal negligence.

3. *Balancing the Salutary and Deleterious Effects*

Out of the three considerations under the second branch of the *Oakes* test, an expanded form of the legislation would most likely fail at the third step, where it must be determined whether the infringement of the right is sufficiently proportional to the importance of the objective that is sought to be achieved. While imposing liability on pregnant women for prenatal negligence may deter some women from this conduct and provide some compensation to the injured child, there are a number of negative consequences attached to such a legislative intervention.

For example, insurers might raise insurance premiums for women of child-bearing age to offset potential compensation costs, or, if faced with a discrimination complaint, raise insurance premiums for everyone. While increased insurance premiums are a problem, this legislation would create the larger problem of shifting what ought to be state responsibility to the insurance industry, thus undermining the principle of social responsibility for those with special needs.[59]

This legislation also forces families to turn to adversarial litigation rather than the state for support. In so doing, the possibility of tort recovery for prenatal negligence creates a tension in the family unit by setting the mother up against the child, thus subverting the social conception of the mother-fetus relationship.[60] Even though the interests of the mother and child were aligned in both the *Dobson* and *Rewega* cases, this may not necessarily be true for all families. The Dobsons and the Rewegas wanted the courts to find the mother negligent because they wanted compensation from their insurance companies. However, if a mother is found negligent for actions that are not covered by her insurance company, the mother and fetus have a conflict of interest. As Avard and Knoppers note:

> Des tensions inévitables risquent de surgir au sein de la cellule familiale et maritale lors de la grossesse. Obligée par la loi d'adopter un mode de vie irréprochable du point de vue de la santé de l'enfant à naître, la femme enceinte risque d'être constamment sous la surveillance étroite de son conjoint et, plus généralement, de l'ensemble de sa famille.[61]

Such scrutiny of a pregnant woman's behaviour may open the door to other kinds of legislation. Given that the abortion debate is resurfacing in the United States, and that there are problems with accessing therapeutic abortions in Canada,[62] this legislation may be seen as prioritizing the security of the fetus over the personal autonomy of the pregnant woman. Allowing children to recover for their mother's prenatal negligence may be seen by the courts as an indication of a change in political attitudes towards the maternal-fetal conflict. The legislatures and the courts may be more inclined to (i) allow actions on behalf of a fetus, not just a born-alive child; (ii) assess the fiduciary duty between the pregnant woman and the

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[56] Hogg, *supra* note 22 at 807.

[57] Ginn, *supra* note 45 at 91–92.

[58] Avard, *supra* note 55 at 333.

[59] For a thorough discussion of policy considerations that militate against lifting maternal tort immunity, see Ginn, *supra* note 45 at 89–91.

[60] Avard & Knoppers, *supra* note 55 at 332–33.

[61] *Ibid.* at 332.

[62] Sanda Rodgers "The Legal Regulation of Women's Reproductive Capacity in Canada" in Jocelyn Downie, Timothy Caulfield & Colleen Flood, eds., *Canadian Health Law and Policy*, 2d ed. (Markham, Ont: Butterworths, 2002) 331 at 342.

fetus; (iii) authorize non-consensual treatment to be imposed on a pregnant woman; and, (iv) reconsider the legality of abortion.

On the whole, allowing a child to recover for prenatal injuries caused by his or her mother's negligent actions may unfairly burden the insurance industry, shield the state from social responsibility, divide families in adversarial litigation, and intrude on the autonomy of pregnant women by subjecting all of their actions to legal scrutiny. These concerns outweigh the benefits of compensation that such tort recovery would provide to injured children. A legislatively-imposed standard of prenatal care would thus be likely to fail at this stage in the section 1 analysis, and render the legislation unconstitutional.

CONCLUSION

By revisiting the Supreme Court's reasoning in *Dobson*, it becomes clear that the decision to allow children to recover for prenatal injuries caused by their mothers' negligence should be made by the legislatures and not the courts. This is not to say that the issue is not justiciable; if a legislature chooses to enact such a duty of care, this legislation would be subject to *Charter* review by the courts. Alberta's *MTLA* is sufficiently narrow and exceptional that it would likely not constitute a violation of section 7 under the *Charter*: it would not infringe the pregnant woman's right to "life, liberty and security of the person" nor would it constitute a violation of the principles of fundamental justice for being vague, overbroad, or arbitrary.

However, such legislation may be seen as a signal to further promote fetal rights, and may encourage litigation beyond the context of motor vehicle accidents and perhaps even outside the application of insurance coverage. Moreover, if the legislature were to propose an expanded version of the *MTLA*—one that eroded maternal tort immunity—such legislation would likely infringe the pregnant woman's liberty interests protected under section 7. A legislatively-imposed standard of prenatal care could subject all of a pregnant woman's actions to legal scrutiny, restricting her freedom in ways in which the freedom of others is not restricted. The all-encompassing nature of a general standard of prenatal care could violate a pregnant woman's personal autonomy and could also violate the principle of fundamental justice that laws must not be vague. These violations may constitute a breach of section 7, on the whole, and would not be saved by section 1 of the *Charter* because the legislation has more negative consequences than benefits. A legislatively-imposed standard of prenatal care would, thus, likely be deemed unconstitutional by the courts. Ultimately, the implicit dialogue between the Supreme Court and the Alberta legislature in the *Dobson* decision and the *Maternal Tort Liability Act* indicates their willingness to work together and protect different stakeholders in regulating this particular incarnation of the maternal-fetal conflict.