Introduction

Sonja Grover


To link to this article: https://doi.org/10.1080/13642987.2017.1319700

Published online: 02 Jun 2017.
INTRODUCTION

Sonja Grover
Faculty of Education, Lakehead University, Thunder Bay, Ontario, Canada

This special issue of *The International Journal of Human Rights* titled ‘The notion of maternal immunity in tort for pre-natal harms causing permanent or temporary disability for the born alive child: human rights controversies’ presents a range of views on the legal principle/notion of maternal tort immunity and its legal viability. As is evident in the various papers, what are identified as the underlying issues/questions and how precisely they are framed is in fact critical in determining (i) the proper scope and direction of the analysis of maternal tort immunity’s legal supportability and (ii) to what degree, if any, social policy considerations, human rights law (domestic and international) and/or constitutional considerations are relevant to that analysis. What is clear in any case is that careful consideration of the issue of maternal tort immunity compels a more thoughtful analysis of what it means to be treated fairly by the law and to be regarded as a legal person (whether plaintiff or respondent in tort) equal before and under the law in this particular context and hopefully also more generally. Here follows a brief description of the various papers in the order in which they appear in this volume.

Miriam Cohen’s paper argues that international human rights norms should have formed at least part of the context for the Supreme Court of Canada’s analysis of the issues in the *Dobson v Dobson* case (the leading Canadian case on maternal tort immunity) but did not. She holds that instead the Court imported, in her view, an irrelevant public policy framework to decide the question of whether the born alive child had an action in tort against his mother for careless prenatal harms causing permanent injury or instead the mother was properly shielded by maternal tort immunity. Cohen considers certain pertinent comparative law and the importance of decision making in *Dobson* being informed, in part at least, by international child rights law perspectives even if the ultimate outcome in the case would not have changed. She also addresses various post Dobson developments such as Canada becoming a party to the Convention on the Rights of Disabled Persons.

Shauna Van Praagh and Angela Campbell suggest that the majority, concurring and dissenting opinions in the Supreme Court of Canada decision of *Dobson v Dobson* convey distinctive images of the pregnant woman: respectively, the ‘expectant mother’, the ‘autonomous woman’ and the ‘woman as caregiver to her child’. Each image, the authors explain, focuses our attention in a different way on a woman’s multiple identities and correlated socially constructed perceived responsibilities, if any, to her unborn ‘child’ and to her child post birth. Van Praagh and Campbell then take the intriguing approach of considering surrogacy as a way to disentangle, for purposes of analysis, maternity and pregnancy (since the surrogate is not the ‘intending mother’ but assumes the circumscribed onerous role rather of carrying the child to term and giving birth). This
consideration of surrogacy allows for better foregrounding of the child’s potential interests and rights and their intersection with those of the mother. Van Praagh and Campbell consider what lessons can be drawn from the surrogacy example and how courts have approached the child’s interest in that context regarding the need for and possibility of a more nuanced legal analysis of competing rights and interests where the mother has injured her born alive child through careless prenatal harms.

Mariette Brennan considers the *Dobson v Dobson* case in detail as well as some developments in the Canadian law on the issue of maternal tort immunity post the Supreme Court decision in *Dobson* (such as Alberta’s statutory provision removing maternal tort immunity in negligent driving cases). Brennan, in addition, examines international human rights approaches to the issue of maternal tort immunity in various other common law countries; namely Australia, the United Kingdom and the United States. This in order to consider potential international law guidance on the issue of the legal legitimacy of maternal tort immunity and whether or not the Canadian Supreme Court decision in *Dobson* ought to be revisited.

Sonja Grover examines the question of legal personality of the born alive child and what rights, if any, to a remedy in tort attach in consideration of international child rights and other human rights law where the mother has caused injury to the born alive child through prenatal mechanisms. Also considered in her paper is the ‘born alive rule’ and the problematic role it played in the majority decision in *Dobson v Dobson*. In addition, certain issues are examined regarding the constitutional rights implicitly at issue in the Dobson case under the Canadian Charter of Rights and Freedoms.

Laura Westra considers the legal status of the pre-born in civil and common law and certain relevant case antecedents of these current perspectives. Westra takes the position that the pre-born is a developing human life with certain basic human rights and that there is abundant scientific evidence for the continuity between the pre-born and the born human; what she terms her ‘continuity thesis’. This continuity she argues – referring to certain adverse events experienced by the unborn prenatally – is evidenced by

the established fact that exposures from conception result in grave and irreversible harms, not only to the infant when born, but also to the child, the adolescent, adult, and aging person, involving considerable costs not only to the affected individuals and their families, but also to society as a whole.

She considers the implications of this continuity thesis and its supporting scientific evidence for legal considerations regarding tort liability of various parties, including the mother, for causing careless prenatal harms.

Jason P. Blahuta’s paper raises important and interesting questions about various new and potential emerging medical technologies (such as the artificial womb) which may have harmful effects in some instances that may or may not have been foreseeable. These new technologies therefore will likely have implications for tort analysis and consideration of when maternal liability, if any, should apply. He addresses, in addition, the potential for genetic engineering/manipulation of humans pre-birth having adverse consequences in certain cases, as well as various possible epigenetic impacts that may, at times, manifest as harms for the born alive child. Blahuta examines also the very notion of ‘disability’ and the complexities that flow from differing perspectives on what constitutes disability which must be taken into account in tort analysis regarding ‘harms’ that persist post live birth.