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# **The Legal Characterization of Pregnancy and Mothering**

## ***Does Mother Know Best?***

The most obvious distinction between women and men is a woman's ability to become pregnant and to grow a new person within her body. This is also the female attribute that has been used to justify unequal and discriminatory treatment of women right up to the last decade of the twentieth century.<sup>1</sup> Of course, law does recognize the physical reality of pregnancy and provides for it. We have employment standards and labour code maternity leave provisions that explicitly address the need to accommodate the childbearing work of women.<sup>2</sup> At its best, the law in Canada recognizes the autonomy of the woman who is pregnant, upholding her right not to have her bodily integrity interfered with in the name of the foetus. At its worst, a pregnant woman is treated as a capricious creature who is a threat to the foetus and who needs to be mandated by law to undertake a particular course of action for the benefit of the foetus. But even at its best, the law does not fully comprehend the reality of pregnancy for most women.

The Supreme Court of Canada held that “those who bear children and benefit society as a whole thereby should not be economically or socially disadvantaged” and that it would be “unfair to impose all the costs of pregnancy upon one half of the population.”<sup>3</sup> Chief Justice Dickson is correct that it is “obvious” that women should not be made to bear a disproportionate cost of creating the next generation. However, analyzing women's situation in this way assumes that women can be restored to a position of full equality, just like men. In essence, the law is serving to reinforce the idea of the mother as an autonomous individual who should not be burdened by responsibility towards another.

Yet the reality for women is that *they are* the ones who are pregnant, they are the ones who are doing the work of creating that future generation, and that

work does create burdens that only women bear. One woman described her experience like this:

When I became pregnant I became aware in a much more concrete way of what the limitations were... and how being a mother was different from being anything else... I had a very idealistic notion that being a parent would be a totally collective activity with my husband and myself. It immediately became apparent to me that *I* was the one who was pregnant... the first part of my pregnancy wasn't very easy. I felt the inequality of the situation there, and I felt it was just going to get worse. (McMahon, 1995: 80)

What we must aim for is not to erase the contribution of mothers by attempting to make them the same as fathers, but rather to find a way to recognize the costs and contributions that women make through pregnancy and ensure that they do not create disadvantage.

In this article, I propose to demonstrate the way that the law characterizes mothers and the work of mothering through an examination of legal discussions of pregnancy. I will consider the way that this aspect of mothering is handled by the law, contrasting it with the experience women have of this step on the path of motherhood. I will demonstrate that there is a lack of congruency between what the law says about mothers and what many women experience as mothers. There is little clear, public discussion by mothers of what mothering means to them, or of how their work as mothers could be supported and recognized in a meaningful way in contemporary North American society. Within this context, policy continues to be formulated and court cases continue to be decided that have a direct effect upon women who are mothering, often with the result that these policies and cases do not reflect the lived experience of the mothers who are touched by them.

I will highlight five themes that recur in the legal treatment of pregnancy. The minimization of the physical experience of the woman during her pregnancy, the tendency to rely upon a medicalized model of a normal life event, the tendency to cast the woman into a position of conflict with her foetus, the tendency to ignore the context within which a pregnant woman is carrying the foetus, and finally the tendency to overvalue the foetus and undervalue the pregnant woman are all hallmarks of the legal treatment of pregnancy. Each of these approaches contributes to what I will argue is a basic lack of support for women's mothering that starts during pregnancy and continues after the birth of the child.

At its most basic, the reality of pregnancy is physical. The mere presence of the embryo, and later the foetus, triggers hormonal changes in the pregnant woman's body, and its growth brings about the more obvious physical changes such as increasing girth. Each pregnancy is unique. Accompanying the physical changes, and in fact directly connected to them, is the evolving relationship of

the woman to the new life that is developing within her. As the pregnancy progresses, her commitment to the foetus evolves also (Bergum, 1989).

The very physical experience of pregnancy shapes and creates the mother. "Pregnancy is experienced not so much as a presence of a separate entity in the womb but as an alteration of the entire body" (Ashe, 1988: 549); it is an experience of undifferentiation not easily expressed in language. "Even to speak of the pre-birth period as one of mother-child "interdependence" does not begin to do justice to the experiential reality of pregnancy as a state of being that is neither unitary nor dual, exactly; a state to which we can apply no number known to us. Pregnancy discloses the truth of paradox" (Ashe, 1988: 551). For many women the physical experience is transformative; it creates a unique relationship to the future child that continues even after birth. "So profound are the alterations that occur in the process of pregnancy that a woman may find herself to be, in some senses, a 'different person' at the end of the pregnancy from the one she was at its start" (Ashe, 1988: 550).

In contrast to this dynamic developing relationship that women experience, most public characterizations of pregnancy tend to treat it as static. A woman simply *is* pregnant, and a woman and her foetus are one.<sup>4</sup> Often the accompanying language describes this as a natural state.<sup>5</sup> This serves the normative purpose of discounting the value of the pregnant woman's experience and her active involvement in the process of nurturing the new life (Greschner, 1990).

The silence of courts and policy makers about the physical realities of pregnancy and the very real contributions of the pregnant woman to the existence of the future child amounts to a denial of these contributions. In *D.F.G.*, a recent Supreme Court decision dealing with a pregnant woman whose solvent-sniffing addiction posed a risk to her foetus, the majority made only a brief reference to the physical aspect of pregnancy. In the context of reviewing the "rights" of the foetus, Madam Justice McLaughlin said that allowing a foetus to sue its pregnant mother-to-be would change the law by treating the foetus and its mother as separate juristic persons. This, she noted, "is belied by the reality of the physical situation; for practical purposes, the unborn child and its mother-to-be are bonded in a union separable only by birth" (181).

In two earlier cases dealing with abortion,<sup>6</sup> the Supreme Court failed to acknowledge the physical aspect of pregnancy in anything but the most general of terms. The various judgments note that delays causing late term abortions could be physically harmful and emotionally stressful to a woman seeking to end her pregnancy but they do not really recognize the physical demands created by the simple fact of being pregnant.<sup>7</sup> Such a situation is simply described as a "predicament" (*Daigle*, 1989). The minority judgements in such cases go further than simply ignoring the bodily contribution of women to the development of the foetus, to the point of actively dismissing what women experience. Justice Major in *D.F.G.* notes that incarcerating the mother could

“so easily” prevent harm to the foetus and the imposition upon her is “fairly modest”.<sup>8</sup> McIntyre and LaForest JJ in *Morgentaler* minimize the physical aspect by saying that the right to “security of the person” can’t include the mere physical fact of being pregnant, but must include some other underlying right (469). The Justices state that an infringement of a woman’s security of the person must be something more than mere “stress and anxiety” (471). Judges in the lower courts in the *Daigle* case spoke flippantly of the “inconvenience” to her of being compelled to continue the pregnancy (641).

The minimization of women’s creative and active physical involvement in their pregnancies can be attributed to a reliance on the medical model of pregnancy that dominates our discourse in law. Evolving medical knowledge about the development of the foetus, as well as the ability to intervene in the birth process, tend to break into discrete events, a process which ordinarily occurs, uninterrupted, within one woman’s body. As Ashe concludes,

The emphases on separability and discontinuity operate to obscure precisely those features of female reproduction which differentiate its process most clearly from that of the male reproductive experience. That is, they define a resemblance to the experience of men, who, after the act of “sperm donation”, however accomplished, experience neither the continuous bodily process constituting the development of a human child nor the bodily identity with that child, which are felt by women who desire or accede to pregnancy and birth. (1988: 541)

The medical model removes the power of women with respect to their pregnancies and places it the hands of doctors or, in some cases, the state. The model allows women to be depicted as self-interested or incompetent.<sup>9</sup> The standards of medicine become the norm against which a pregnant woman’s behavior is judged and a woman who decides against the norm of medical science is cast as irrational and selfish. A woman who defies the truth of medical knowledge becomes a bad mother, one who has declined to put the perceived needs of the foetus ahead of her own concerns.<sup>10</sup>

Lisa Ikemoto speaks of the dominance of the medical model, and the reliance of the state upon it, as forming part of the “practice of controlling women with respect to conception, gestation and childbirth in ways that express the dominant cultural notions of motherhood” (1992: 1207). She terms this the Code of Perfect Pregnancy and notes that what were previously social norms are increasingly becoming institutionalized legal duties, with a corresponding regulation of pregnant women. The responsibility of a Good Mother of course includes the notion of sacrifice. According to Ikemoto, “under the Code, women bear the responsibility of “motherhood” but are not deemed entitled to the authority to define it” (1992: 1207).

The state itself may also rely upon medical knowledge to regulate the behavior of pregnant women either through criminal prosecutions or by

allowing civil actions. In this way, medical knowledge, about fetal development as well as the effects of drugs and alcohol on the foetus, provides “the reason for directing state power at women and casts such use of power in a reasonable light.” (Ikemoto, 1992: 1303) The minority in *D.F.G.* placed undue reliance on the state of medical knowledge. Major J. found that the primitive medical knowledge upon which the ‘born alive’ rule was based had been taken over by technologies that now “can clearly show us” the condition of the foetus (205). The implication is that with such clear information about the foetus, others are now in a position to make decisions that had previously only been sensible for the pregnant woman to make. According to Major J., there is no need to defer to her judgment.

Julia Hanigsberg also demonstrates that the bodily integrity and medical decision making of women are systematically accorded less respect than that of men. In cases where patients sought to decline life-sustaining medical treatments, men’s decisions were most likely to be upheld while women’s were not. “An analysis of the language of these judgments shows that men are depicted as subject to a medical assault; women are depicted as vulnerable to medical neglect. This language suggests that the integrity of male bodies is self-evident while intervention in female bodies is expected” (1995: 385). In the case of pregnant women who are terminally ill, some states expressly remove the right to make decisions with respect to life support that are otherwise available to competent adults (King, 1989).

Perhaps the most troubling aspect of the removal of authority from women that the dominance of the medical model effects, is that it allows a pregnant woman to be viewed simply as the means to an end, as a fetal container (Greschner, 1990). The development of technologies that allow the viewing of the foetus also support an understanding of a pregnant woman and her foetus as essentially separate.<sup>11</sup> This separation of woman and foetus underlies the most common feature of legal and social discourse with respect to pregnancy, both of which often cast a woman and her foetus into a position of conflict. When cases involving pregnant women end up before the courts, they have been brought there by a contest which pits the interests of the woman against those of some other party, whether the foetus itself, a future father or the state. As Madam Justice McLachlin noted in *D.F.G.* the simple fact of allowing an action to be brought, may create a conflict between the pregnant woman as an autonomous decision-maker and her foetus (182).

Women can of course experience feelings of conflict with the new person that is developing within. How a woman experiences her pregnancy will depend on how she feels about it, and can vary from pregnancy to pregnancy, as well as throughout a single pregnancy. What pregnant woman hasn’t resented the (not so) little intruder by the time it has occupied her body for 40 long weeks. A woman whose pregnancy is unwanted may be even more likely to perceive a conflict with the foetus (Ashe, 1988). Nonetheless, women’s experience of this conflict is different from the way it becomes characterized in

court decisions. Ambivalence is not the same as an unrestrained contest of rights.

The main feature of court decisions dealing with pregnancy is the notion of the mother and the foetus as separate entities with separate interests. However it is most often the case that a woman and her foetus do not have interests in conflict, but rather in common. She does not benefit from her drug abuse anymore than the foetus does. Both will be better off when she is in a position to be able to accept the responsibilities of mothering, and both would benefit from more support during pregnancy and after the birth of the child. Women who are making decisions that will impact their foetuses do so from a position of connectedness. At the most elemental level there is the connection between the foetus and the pregnant woman. But she also exists within a social milieu where she must make her decisions while considering the needs of foetus, other family members and herself.

In contrast with the way that many women experience a sense of connection to the foetus developing within them, the legal and political discourse is premised upon a conflict between them. In cases that end up in litigation, this notion of conflict arises because remedies are being sought within the context of the litigation. Remedies are based upon rights, but the notion of rights is not suitable in this context. Greschner describes rights as “trumps attached to individuals,” but the notion of separate individuals underlying the concept of rights is not consonant with how women think of themselves and is an utterly inappropriate descriptor of a pregnant woman (1990: 652). Furthermore, the assumption that a woman and her foetus are in conflict implies an assumption that women need to be controlled to keep their foetuses from harm (Hanigsberg, 1991). As many authors have noted, creating rights for a foetus has the effect of erasing the mother. (Greschner, 1990; Hanigsberg, 1991)

Courts in Canada have not ultimately found that foetuses have rights, even though the arguments have often been made. In *D.F.G.*, the majority held that it could not make the radical extension to the law requested by the agency because it was beyond the power of the court to make a change that would “seriously intrude on the rights of women.” But even the majority failed to acknowledge the pregnant woman’s knowing of her foetus. Rather it simply stated that she is an autonomous individual upon whose bodily integrity the Court may not infringe. The majority recognized that the interests of the woman and the foetus are not antagonistic, and that it cannot protect the foetus without impairing the liberty of the mother. Although the majority reached the right result in its decision, it lacked the recognition of the interconnectedness that is a real part of the experience.

The minority judgment in *D.F.G.*, in contrast, is premised upon the notion of a conflict between the pregnant woman and her foetus. It is clear that the woman in this case is viewed as the enemy of her foetus (203). The language deplores her “abusive behavior towards her foetus,” while ignoring her connection to it by asserting that she may choose to have an abortion “at any time.” The

judgment also presumes a choice where in fact there may be none. Choice requires that there be genuine possibilities to choose among and that there be no external influences controlling the decision-making. Access to abortion, even in Canada, is limited by late gestational age, and economic, geographic or political factors. Furthermore, addictions or violent spouses may limit the ability of a pregnant woman to exercise free choice. Often in such situations women don't have the physical or emotional resources and support to make a decision and simply remain pregnant by doing nothing. In such a case, the woman may not have made an explicit choice to be pregnant (Baylis, 1997-98).

In nearly every case discussed here the courts have failed to take account of the circumstances within which the women concerned were attempting to live out their pregnancies. The implicit reliance by the courts on the norm of the "good mother" means that they are in essence applying a universal standard that ignores circumstances. (Ikemoto, 1992) The indigence, addiction, or ongoing abuse which many women survive while pregnant is often left undiscussed, or simply unmentioned. Yet in almost all the cases which have ended up before the courts, the circumstances of the pregnant women have been less than ideal both for the women themselves and for the future child.<sup>12</sup> In each of these cases, both the mother and the child would have fared much better if some regard had been given to the mother's circumstances and if the facilities or programs existed to provide her with adequate support. All of the cases demonstrate a lack of support for the future mothers and future children. It is clear this is an area of law that could be developed in a more positive way.

In all of the cases discussed here, there is rhetoric and argument about the rights or the personhood of the foetus. The effect of the debate continuing to be cast in this manner is that the foetus is glorified while the value of the mother herself, as well as of her contribution to creating the new human being, is minimized. The law supports a tremendous interest in the baby as a future person. In *D.F.G.*, Major J. is emphatic about the state's interest in the foetus. He stated that "the state has an *enforceable* interest in ensuring, to the extent practicable, the well-being of the unborn child" (192).

It is no surprise that the judgment of Major J. in *D.F.G.* strikes a cord in caring people. A concern for the future of a child exposed to a harm that could be avoided is common to many and does form a suitable foundation for social policy. Unfortunately, the only way that is conceived of to avoid the harm is to impose a tremendous burden upon the mother. None of the judgments in any of these cases considers other possible ways of avoiding the harm without laying the blame and the burden exclusively upon the mother.<sup>13</sup> In our culture and in our laws we expect the most from a mother; she should be self-sacrificing. We hold mothers and pregnant women to a higher moral standard than we require of other members of society. Very often women want to make such sacrifices, and more often they actually do. But this should not be compelled by external forces. In the context of her relationship with the foetus the mother will strive for a balance:

Mothers have attention to the needs of both the foetus and the self. In all relationships, not just mother and child, there must be attention to the needs of both partners in the relationship. In mothering however there seems to be a readymade rule that says that the needs of the child always come first. Such a rule needs qualification and reconsideration. The child's needs are important, but if there is no attention to the needs of the mother as well, both the child and the mother will suffer. (Bergum, 1997: 146)

It is clear that law and policy must be directed at ensuring positive outcomes for pregnancy, but it must be appropriately focussed.<sup>14</sup> Canada could go a long way to improving children's prospects and women's equality by focussing policy and spending on women and children.<sup>15</sup> One author has stated that "concern about fetal welfare may reasonably be described as bizarre in a jurisdiction that makes only the most limited provisions for prenatal care, for post-natal and infant care, and for the provision of housing and nutrition for children after birth" (Rodgers, 1993: 91). Another has argued that "protecting and caring for the foetus means protecting and caring for the pregnant woman—through adequate housing, nutrition, education, medical care and freedom from physical and emotional abuse." (Overall, 1989:103)

### **Conclusion**

The legal and social response to pregnancy is an instance of the general legal and social response to mothering. In minimizing the value of the work done by mothers, whether the actual physical sacrifice of growing a new life or the longer-term physical and emotional work of raising strong children, the law diminishes motherwork. In accepting the medicalized view of a woman and her foetus as separate and in conflict, the law fails to take account of the relation and corresponding dependencies that are at the core of mothering. By ignoring the myriad circumstance in which women bring their children to birth (and in which they continue to raise them after birth), the law fails to provide the supports that would help to insure the best possible outcome for these children who have historically been valued so greatly as foetuses.

Because of each of these attitudes, crystallized in the law, but free-floating in society, women's contribution in bringing new humans to birth, to life, becomes invisible. Pregnancy and mothering are constructed as natural, and thus not worthy of notice. No legal and social support is required. The legal and social characterization of pregnancy reflects a devaluation of women's mothering and an attempt to prescribe a model of the perfect mother for all without backing it up with real support that might make it more possible.

Support for mothering is essential for the benefit of the children, the mothers and society generally. Julia Hanigsberg has a clear prescription:

The way to help fetuses [and children] is conceptually simple—help



women. By treating women as rational, moral decision-makers and as people worthy of state support (as the state seems to imply fetuses are) women and their children will be helped.... By directing its powerful resources at making women's lives better, the state would not only help women and fetuses, but it would also help children. For in its myopic concentration on fetuses, children go by the wayside. What happens to the child apprehended *en ventre sa mere*? When a child is apprehended *in utero*, then taken away from its mother once born and put into an already overburdened foster care system within which it may be shunted from home to home, who has been well served? (1991: 68)

In 1999, the Supreme Court of Canada handed down its decision in the case of *Dobson v. Dobson*.<sup>16</sup> In the reasons of the majority, many of the concerns and criticisms that I have leveled against the legal and social characterizations of mothers have been addressed. The majority is quite clear that women's autonomy and liberty must be respected and that women can be trusted to act in the best interests of their foetuses. The court feared that the application of an objective standard would allow judges to dictate a woman's behavior according to their own notions of proper conduct, failing to recognize the great disparities in financial situations, education, access to health services, and ethnic backgrounds of pregnant women. Most importantly perhaps, the court recognized that a lack of support for mothering (in the specific context of caring for children with disabilities) made the job of caring more difficult. Women, it held, are in the best position to determine the best that they can do to promote the well-being of their future children.

Perhaps we can view the *Dobson* case as a sign of change, as the beginning of a recognition of the value of mothering and of its important impact upon mothers, both at an individual level and in terms of their position within society. Maybe we can begin to accord respect to women for their motherwork and move towards a situation where women's equality does not only mean the right to be just like a man. Maybe we are finally beginning to recognize, as Greschner says, that "it is not the case that foetuses do not have a voice; it is simply that their voices—mothers' voices—are the ones that patriarchy does not want to hear" (1990: 654).

<sup>16</sup>It wasn't until 1989 that the Supreme Court held that discrimination on the basis of pregnancy was indeed discrimination on the basis of sex and that accordingly it was impermissible. The court stated that to hold otherwise would undermine the purposes of anti-discrimination legislation by "sanctioning one of the most significant ways in which women have been disadvantaged in our society" *Brooks v. Canada Safeway Inc.* [1989] 1 S.C.R 1219 at 1238 *per* Dickson C.J.C. Hereinafter *Brooks*. See also Turnbull (1989).

<sup>2</sup>In Ontario in 1997, the Court of Appeal recognized the particular circumstances of a woman who has been pregnant, given birth and potentially established breastfeeding for an infant. The Court held that her entitlement to leave time that was not available to adoptive mothers or any fathers was not contrary to the equality provisions of the Charter. *Re Schafer et al and Attorney General of Canada*, (1997) 35 O.R. 3d 1 (C.A.).

<sup>3</sup>*Brooks* at 1243, *per* Dickson C.J.C.

<sup>4</sup>*Winnipeg Child and Family Services (Northwest Area) v. G. (D.F.)* (1997) 31 R.F.L. (4<sup>th</sup>) 165 (S.C.C.) hereinafter *D.F.G.* at 180 *per* McLachlin J. By way of contrast, Wilson J in *Morgentaler, Smoling and Scott v. The Queen* (1988), 44 D.L.R. (4<sup>th</sup>) 385 (S.C.C.) hereinafter *Morgentaler*. at 499 specifically notes the “essentially developmental nature of the gestation process” remarking that both camps in the abortion debate fail to take account of this. She goes on to argue that acknowledging the developmental view of the foetus would support unrestrained access to abortion in the earlier stages of a pregnancy and a more restrictive approach in the later stages.

<sup>5</sup>The limits of the language we have, and the lack of a language of our own, mean that any attempt to think or speak about mothering is coloured by the ideologies of the owners of the language. When policy is made affecting mothers, or cases decided about mothers, the outcomes are shaped by the way in which the questions are asked in the first place. As Marie Ashe has put it:

Law-language, in its long history of “essentialist” error, has traditionally failed to recognize differences among women. In so failing, it has denigrated our cultural activity, our individual self-namings as—among other things—mothers or non-mothers. To the degree that it has departed from that error, law-language at the present time, in the context of issues relating to discrimination based on sex or gender, tends towards the “egalitarian” error involved in denials of the singularities of female bodily experience. That error, holding nature in contempt, would destroy the best work of female bodies as well as that of female minds. (1988: 559)

<sup>6</sup>*Morgentaler and Tremblay v. Daigle* (1989), 62 D.L.R. (4<sup>th</sup>) 634 (S.C.C.) hereinafter *Daigle*.

<sup>7</sup>Madam Justice Wilson in *Morgentaler* showed the greatest recognition that interference with a woman’s decisions about her pregnancy constitutes a direct interference with her physical person, although the judgment of Dickson C.J.C. and Lamer J. also states at one point that “forcing a woman, by threat of criminal sanction, to carry a foetus to term unless she meets certain criteria unrelated to her own priorities and aspirations, is a profound interference with a woman’s body and thus a violation of security of the person.”

<sup>8</sup>The minority also described the detention of Ms. G. as “treatment not punishment.”

<sup>9</sup>The words of the minority in *D.F.G.* are even more patronizing. Mr. Justice Major says women “must accept some responsibility” for their fetuses and characterizes as “reckless” a pregnant woman who is addicted to a substance which may cause harm to her foetus.

<sup>10</sup>There are many cases of forced caesarians both in Canada and the United States. See for example *Re Baby R.* (1988) 53 D.L.R. (4<sup>th</sup>) 69.

<sup>11</sup>Ashe lists such technologies as laparoscopy, amniocentesis, chorionic biopsy, ultrasound scanning, and fetal monitoring as contributing to the tendency to see the foetus and the woman as separate and sometimes antagonistic entities (1988: 539-40). This is captured by Vangie Bergum:

As we more frequently take a technological look at the woman and the foetus as separate entities it becomes credible for the foetus to become the patient and for the woman to be seen as the human incubator. From the point of view of women’s experience of pregnancy such notions are totally foreign, in fact, repugnant. Pregnancy is not experienced as one versus the other (that is one plus one); rather, it is one with the other (two in one)—an altogether different relationship. The technological world of medicine does not understand this distinction. Technological fragmentation easily separates woman and foetus, biology and culture, public and private, mother and child—and in doing so easily destroys, or at least disregards, the relational impulse. (1997: 144)

<sup>12</sup>In *Re Children’s Aid Society of the City of Belleville, Hastings County and T.* (1987) 59 O.R. (2d) 204 (Fam. Ct.). Linda T. was poor. She also wished to avoid medical assistance during her pregnancy. Without looking any further, the judge proclaimed that “her attitude is not conducive to the safe and healthy delivery of the child” and ordered her confined for three months under the Mental Health Act for observation, with objective of keeping her until child was born. In *Re children’s Aid Society for the District of Kenora and J.L.*, (1981) 134 DLR (3d) 249 (Ont. Fam. Ct.) although the judge noted Ms. L.’s homelessness and alcoholism, as well as the fact that she was beaten by her common law partner, he found that the fetal alcohol syndrome suffered by the child had been “willfully inflicted by her mother, who refused to seek help for her alcohol problem despite the entreaties of the doctor.” A similar disregard for the mother’s circumstances is evidenced in *J.M. v. Superintendent of Family and Child Services.* (1983) 35 RFL (2d) 364 (B.C.C.A.) aff’g *sub nom Re Superintendent of Family and Child Services and McDonald* (1982) 135 D.L.R. (3d) 330 (B.C.S.C.). Ms. MacDonald was a member of the Nisga Nation. She came from a family of drug abusers, and had herself been addicted to heroin since the age of 12. The judge also noted that Ms. MacDonald’s common law partner seemed “to totally dominate” her. Notwithstanding this, the judge concluded that Ms. MacDonald had abused her baby “during the gestation

period” by her continuing use of methadone (on her doctor’s recommendation).<sup>13</sup> Major J. in *D.F.G.* sees the situation thus: “If our society is to protect the health and well-being of children, there must exist jurisdiction to order a pre-birth remedy preventing a mother from causing serious harm to her foetus. Someone must speak for those who cannot speak for themselves.” He does not consider that we could also protect the health and well-being of children by eradicating poverty and the horrific conditions within which many members of Aboriginal communities live in Canada.

<sup>14</sup>In considering cases like *D.F.G.*, we must ask ourselves the questions posed by Laura Shanner in her comment on the case. She urges us to “consider why an Aboriginal rather than a Caucasian woman became the test case defendant; why solvent sniffing (associated with poor communities) rather than cocaine, alcohol or tobacco (also associated with higher socioeconomic groups) was the teratogen of concern; why addiction treatment facilities were not immediately available to a pregnant, chronic substance abuser who responsibly agreed to seek help; and why our protection of offspring is more often focussed on the fetal period than on the underlying health of women prior to conception or on the conditions of poverty in to which many children are born (1997-98: 753).

<sup>15</sup>In comparison with other OECD countries, Canada’s rate of infant mortality of 6.1 per 1000 is somewhat high. More than two thirds of the infant deaths occurred in first four weeks of infant’s life and of these 60 percent were caused by respiratory distress syndrome, short gestation and low birth weight, all factors associated with poverty. A modest investment in the health and well-being of pregnant women, and infants and their mothers, would yield benefits to children that could last a lifetime *Health Canada Fact Sheet: Infant Mortality*, *supra* note 161 at 1-2; *Healthy Parents, Healthy Babies*, *supra* note 204 at 3,4, 33.

<sup>16</sup>*Dobson v. Dobson*, [1999] 2 S.C.R. 753.

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