



Abortion Rights
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Canada's only national political pro-choice advocacy group

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Position Paper #56

Fetal Insurance Law – Alberta's 'Rowega' Law

Should children be able to sue their mothers for injuries they suffered in the womb?

Background

In 2004, the family of Brooklyn Rowega, from Rainbow Lake, Alberta, lobbied on her behalf to have Alberta enact a law that would allow lawsuits to be filed for injuries a fetus sustained in the womb. Brooklyn Rowega herself is blind and suffers from brain damage and cerebral palsy, the probable result of an accident four months before her birth when her mother Lisa lost control of her car and was thrown through the windshield. A 1999 Supreme Court decision prohibits children from suing their mothers for injuries suffered while in the womb, which prevented Lisa Rowega from claiming compensation from her insurance for the costs of Brooklyn's care. The Alberta government enacted the *Maternal Tort Liability Act* in 2005, which created an exception to maternal tort immunity by imposing liability on insured pregnant women for the negligent use of a motor vehicle¹.

Similarly, Cynthia Dobson of Moncton, New Brunswick, was sued by her child's guardian. While pregnant, Cynthia lost control of her vehicle, colliding with another car. Her son, Ryan, was born prematurely and had cerebral palsy². The insurance company would not cover the child's injuries, so the family arranged for Ryan to sue his mother and the insurance company. The case was dismissed in 2000, on the grounds that it could restrict the rights of pregnant women, as women could be at risk for lawsuits for any activity resulting in injury to a fetus, including working or engaging in sports.

Position

This issue revolves around human rights and equality for pregnant women and transgender people, as well as the lack of governmental support for disabled persons.

¹ *Maternal Tort Liability Act*, M-7.5 2005.
http://www.qp.alberta.ca/570.cfm?frm_isbn=9780779761616&search_by=link

² *Dobson (Litigation Guardian of) v. Dobson*. 2001 NBCA 26 (N.B. Court of Appeal)

The Alberta law, while arguably not interfering with the bodily integrity of a woman (she would not be imprisoned as result of fetal injury), a woman's financial situation (as the child's compensation cannot exceed the mother's insurance) or psychological stress during pregnancy (as she is already under obligation to drive carefully), it *does* violate a woman's bodily integrity.³ Allowing a woman or transgender person's child to sue them for injuries suffered in the womb suggests that a woman and fetus are two separate entities. Persons are not allowed to sue themselves, and this law allows the equivalent of that. The fetus is part of a pregnant woman and belongs to her, so an injury to the fetus is an injury to the woman personally. Since a fetus does not have legal standing or legal personhood, it cannot be treated as a separate individual under the law. Doing so creates a kind of "retroactive" personhood for fetuses that violates women's equality rights under the *Charter of Rights and Freedoms*, by limiting her rights in favour of fetal rights. You cannot have two competing sets of rights in one body.

Although the Alberta law is very narrow, it still risks turning pregnant women into a separate class of persons with lesser or restricted rights. Because only women can get pregnant, women cannot participate as equals in society unless they can control their reproductive capacity and are not disadvantaged by it through law or policy. That means that any kind of law or public policy that regulates or handicaps pregnancy amounts to discrimination against women, a violation of their equality rights under the *Charter*. Similarly, deficiencies in law or public policy should not place extra burdens on pregnant women that are not experienced by others – that is why, for example, all pregnancy-related care including abortions must be accessible and fully funded.

Yet, this issue highlights the lack of supports in our society for families and persons with disabilities. Hard cases make bad law – rare tragedies like that of Brooklyn Rowega and Ryan Dobson should not be resolved by a specific law, which then applies to everybody. Unfortunately, tragedies happen every day, and most of them are not actionable under law, especially if they are our own fault. The law cannot be the catch-all solution to fix everyone's problems. The provinces and territories must ensure that Canadians with disabilities have the supports they need throughout their lives to secure their equality and inclusion in society. Fortunately, in the years since the Dobson and Rowega cases, numerous government programs have arisen, as well as charitable organizations and educational awareness, to assist those with disabilities live full, equal, and happy lives.⁴ Of course, more can always be done.

³ Ali, Kristin. "Defining the Standard of Prenatal Care: An Analysis of Judicial and Legislation Responses." (2007). McGill University. <http://mhlp.mcgill.ca/texts/volume1/pdf/ali.pdf> (page 5)

⁴ 1. Cerebral Palsy Association in Alberta (www.Cpalberta.com).
2. *Accessibility for Ontarians with Disabilities Act, 2005* (amended multiple times to ensure buildings, websites, and business are compliant). On April 27, 2017, the Nova Scotia Legislature passed a new accessibility law, the *Accessibility Act*, the third province to pass a law regarding accessibility for those with disabilities.