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Dobson: Fleshing out the Cross-Currents of Public Interest in Private Rights

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0. Introduction

When the Athenians met with the Spartan colony of Melos to discuss its surrender during the Peloponnesian War, Thucydides recorded an important insight into Athenian justice at the outset of the *Melian Dialogue*. Speaking to the Melians, the Athenians noted:

[W]e on our side will use no specious pretences ... [s]ince you know as well as we do that, when these matters are discussed by practical people, the standard of justice depends on the equality of power to compel and that in fact the strong do what they can and the weak suffer what they must.¹

Right, as the world went and goes, is only in question between equals in power. Offensive as the Athenian proposition was in the context of coercion and in light of massacre that followed, the observation about justice is not anachronistic. While our responses to injury have evolved, justice between contractors, property owners and social transactors depends, for its operation, on the assumption of equality between them.

In the private law of torts, we observe this assumption centrally. Our legal system does not indemnify against interpersonal injuries because they are wrong in the abstract. It responds to injuries because they represent an infringement of the rights of the one by the actions of another. We do not punish misbehaviour in torts. We ask how the misbehaviour has wrongly encroached onto the rights of the person subject to that behaviour. We ask what the wrong doer owes specifically to the person whose rights have suffered from her wrong and we ask that she restore those rights. The only moral scheme under which that conception is sustainable is one in which equality obtains between the rights of the wrongdoer and the sufferer of the wrong. In stark contradistinction to the Melian experience, justice assumes our equality, at least where our rights are weighted equally in the law. The assumption of equality is foundational: it initiates our understanding of how juridical rights contend with one another in dispute.

¹ Thucydides, *History of The Peloponnesian War*, trans. by Rex Warner (London: Penguin Books, 1954) at 401-402.

In the case under review, the issue is compounded, I will argue, by a general disorientation with respect to the foundational assumption of equality between private law litigants. In *Dobson v. Dobson*,² the court is mystified in its treatment of the tortious claim by broader political forces that obscure the juridical exchange and, therefore, the carriage of justice between the claimants.

I argue that the mystification occurs in three ways: through i) the misappropriation of the duty of care as applied to the litigants, ii) the miscarriage of the “consecrated principles”³ of tort law as applied to the facts and iii) the misguided affinity to invalid modes of legal analysis in negligence law. All three processes conspire to ignore the transactional equality⁴ that animates the legal relationship between the litigants and to deny the nuanced reality of their interaction for the purposes of litigation. The Supreme Court of Canada, in spite of marked jurisprudential evolution, continues to be confronted by these obstacles in its treatment of novel claims for tort duties where no recognized cause of action is available.

I. The Case

In her twenty-seventh week of pregnancy, Cynthia Dobson lost control of her vehicle and struck an oncoming driver, John Carter, injuring both him and her unborn child, Ryan Dobson. The accident impelled Ryan’s premature delivery and rendered him severely and permanently injured, both physically and mentally. It is alleged that the accident was attributable to Mrs. Dobson’s negligent driving and that she therefore owes a duty of care to her injured born alive child in the same way that she owes that duty to John Carter. Mr. Carter’s ability to sue in tort is not controversial. Justice Cory, writing for the majority of the Supreme Court of Canada, restricts the issue in following way: “[s]hould a mother be liable in tort for damages to her child arising

² *Dobson v. Dobson* (1999), 174 D.L.R. 1

³ Benjamin Nathan Cardozo, *Selected Writings of Benjamin Nathan Cardozo: The Choice of Tycho Brahe*, ed. by Margaret E. Hall (New York: Matthew Bender, 1947). Justice Cardozo uses this term in reference to a section of the Swiss Civil Code of 1907. I will elaborate *infra* on his usage.

⁴ This term is used by Lorraine E. Weinrib & Ernest J. Weinrib, “Constitutional Values and Private Law in Canada,” in Daniel Friedmann & Daphne Barak-Erez, eds., *Human Rights in Private Law* (Oxford: Hart Publishing, 2001) at 67.

from a prenatal negligent act which allegedly injured the foetus in her womb?”⁵ The court holds that she should not. Based on a two-staged⁶ analysis, the majority reasons that, even where a *prima facie* duty of care could be found to exist between a pregnant woman and her unborn child, it would be negated by substantial policy considerations concerning the woman’s fundamental rights to autonomy and privacy.

II. Analysis: Locating the Duty of Care in *Dobson*

i. The Issue of Bilateralism

Analysis of negligence in tort law was given scope in the foundational case of *Donoghue v. Stevenson*⁷. Lord Atkin proffers an important joist in the general conceptual framework that animates common law duty. Lawyers can build on their arguments as to whether or not a duty exists in a certain situation, anchored in the idea of foreseeability: a duty of care obtains only where the potential injuries are reasonably foreseeable to the acting party. However, an important corollary to this assertion is that the rights of the potentially injured party are made vulnerable by the action in question. No duty in negligence can be found *in absentia* of an at-risk right. And no liable breach of duty can be found *in absentia* of a damaged right.

In *Palsgraf v. Long Island Railroad Co*⁸, United States Chief Justice Benjamin Cardozo fleshes out this correlativity in duty some four years prior to *Donoghue*: “[n]egligence is not actionable unless it involves the invasion of a legally protected interest, the violation of a right.”⁹ Foreseeability is thus cross-anchored to another important joist in building a general conception of the law of negligence: duty in negligence begins to take shape where the parties to a harm are viewed relationally. For the plaintiff’s injury to take on legal significance relative to the

⁵ *Dobson*, *supra* note 2 at para. 11.

⁶ The test was comprehensively articulated in Britain in *Anns v. Merton London Borough Council*, [1978] AC 728 (HC) and confirmed in Canada in *City of Kamloops v. Nielsen* (1984), 10 DLR (4th) 641. At para. 19, Cory J sets down the *Anns* test found in *Kamloops*: to impose a duty of care, “the court must be satisfied: (1) that there is a sufficiently close relationship between the parties to give rise to the duty of care; and (2) that there are no public policy considerations which ought to negative or limit the scope of the duty, the class of persons to whom it is owed, or the damages to which a breach of it may give rise.”

⁷ *M’Alister (or Donoghue) v. Stevenson* [1932] AC 562 (HL)

⁸ *Palsgraf v. Long Island Railroad Co.* 162 NE 99 (NY CA 1928)

⁹ *Ibid* at 341.

defendant's action, that injury must be the direct consequence of the action. The action is tortious only where the harm done and the harm suffered are not merely concomitant, but fully indistinct. Only on this latter view can we call the harm foreseeable.

Fortified by the relational component, foreseeability takes shape in the discussion of rights and the obligations they intimate. Duties obtain between parties that can be reasonably connected by their tendency to be implicated in the same injury: whether effecting it or being affected by it. Those parties gain normative coordination relative to one another and the law then treats them bilaterally: the defendant is not expected to foresee *a* harm that could result from her actions generally, but *the* harm that could befall a class of potential plaintiffs specifically. If a member of that class suffers the harm, the defendant will be held accountable for it. Cardozo J tells us that a wrong—and thus a duty to avoid it—can only be conceived in relation to its effect on—and derivation from—an antecedent and correlative right. The wrong is relationally coherent: it constitutes both the creation of risk and the resultant injury.

Cory J misses this important dimension of bilateralism when he glosses the duty question in his analysis of the first stage of the *Anns* test¹⁰. He conflates the problem of finding duty into the problem of imputing legal personality into the foetus so that it can be seen as a “distinct legal entit[y]” from the expectant mother.¹¹ Assuming that it can, Cory J proceeds, “without deciding,” onto “the more relevant analysis for the purposes of the present appeal,” the policy considerations involved.¹²

The problem is that, on the assumption that the foetus is a legal person, Cory J does not decide on the dimensions of the relationship that extends from that legal personhood. His analysis of the duty question is stilted by the paradigmatic approach to the foetus and mother as “separate legal entities,” rather than an exploration of the special relationship to which that separation gives rise. He finds it clearly foreseeable that many actions of the mother could import injury to the

¹⁰*Dobson supra, supra* note 5.

¹¹*Ibid* at para. 20.

¹²*Ibid.*

foetus because of their physical unity; but he fails to explore foreseeability in its essentially relational conception. For example, the question is left unanswered as to how any wrong on the mother's part could import the violation of the foetus' rights. Equally uncertain is what rights, if any, the foetus could be said to possess. In their absence, we are unable to make the further determination of how these rights contend with those of the mother when we make an evaluation about negligence. In assuming, without deciding on its relational dimensions, that a duty of care exists, Cory J gives himself room to assess the duty on terms unilaterally relevant to one or the other party in separation. As Justice Major points out in his dissent, Cory J thus also gives himself enough rope to suspend the duty question and suffocate the negligence claim:

At issue is the relationship between the rights of a pregnant woman and the rights of her born alive child. A one sided emphasis on either side of this relationship necessarily misses the subject-matter it is attempting to analyze.¹³

Cory J fails to heed Cardozo J's cautionary tale about the correlation of rights and wrong, articulated eloquently by Ernest J. Weinrib in his comment on *Palsgraf*: "the content of the plaintiff's right has to be the object of the defendant's duty."¹⁴ To examine the question of duty outside of the juridical relationship described would be a failure, on the part of law, to hold parties' juridical rights in equal esteem. Already at this first stage of analysis, in abandoning the bilateral treatment of the claimants, we see a fundamental violation of the transactional equality that is expected to inform their relationship. When the court conceives of a duty whose object is not the subject matter of the foetus' rights, it conceives also of the possibility to breach that duty without the violation of those undefined rights.

III. Where *Dobson* Went Wrong: Locating the Departure from "Consecrated Principles"

In assuming legal personality and then disposing of the question of duty without examining how the rights of the foetus and the mother interact within the special unity that they share, the court distorts the basic reality of that special relationship and the ethical considerations

¹³ *Ibid*, at para. 125.

¹⁴ Ernest J. Weinrib, "The Passing of *Palsgraf*?" (2001), 54 *Vanderbilt Law Review* 803, at 805.

that arise from it. I submit that this distortion was a reaction, on the part of the court, to the novelty of the claim. In reference to the relationship, Cory J emphasizes that there is no other that “can serve as a basis for comparison.”¹⁵ In the absence of controlling authority, the jurist is put into the precarious position of freedom: free, because he or she resorts to his or her own faculties in interpreting what the law demands in the particular situation, precarious, because there may be uncertainty as to what those demands are. Cardozo J describes the position thus:

The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant, roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles.

Cardozo’s preoccupation with the consecrated principles, “la doctrine et la jurisprudence,” as he refers to them¹⁶, speaks to the law’s own guiding preoccupation with reason. We do not merely study statutes in law school, nor do we study judges’ holdings in isolation. We do not study rules. We study reasons. And from them, we anticipate a fuller understanding of what the law is: what we can expect from it and what it does expect from us. Cardozo’s preoccupation with doctrine and jurisprudence speaks to our common preoccupation with the rule of law, and to our common confidence in its coherence.

At some formative moment in the development of Western thought, justice seekers became unwilling to settle their disputes under the shade of palm, at the notorious whims of the prophetess Deborah. They consented instead to governance by impartial jurists who are tasked with the application of a set of coherent and rationally defensible principles in resolving disputes and thus deciding the law. While an exhaustive list of those principles is beyond our command, the endorsement of coherence and defensibility represents our commitment to an idea of law that

¹⁵ *Dobson*, *supra* note 5 at para. 25. Cory J grapples with two doctrinal precedents: McLachlin J held in *Winnipeg Child and Family Services (Northwest Area) v. D.F.G.*, [1997] 3 S.C.R. 925 at para 27 that “the law has always treated the mother and unborn child as one,” in stark contrast to the ruling in *Montreal Tramways Co v. Leveille*, [1993] S.C.R. 456 that, while a fetus is not a legal person, certain rights accrue and may be asserted by the infant upon being born alive and viable.

¹⁶ Cardozo J praises Swiss Civil Code of 1907, which prescribes that, in the absence applicable statute and customary law, the judge is “to draw his inspiration..from the solutions consecrated by the doctrine of the learned and the jurisprudence of the courts—par la doctrine et jurisprudence.” Cited in Cardozo, *supra* at 164.

is internally intelligible: that contains within it its own justifications and unifying conceptions.¹⁷

While our points of entry into the law's inherent normative concerns are limited, there are some common exoteric descriptions that serve as indices.

i. The issue of restoration

The fact that the law of torts, for example, compels a liable defendant to pay a damaged plaintiff points us toward a crucial normative concern: restitution. From the standpoint of corrective justice, the defendant has violated an *ex ante* balance in the rights held by herself and the plaintiff. She must therefore pay the plaintiff to restore the antecedent equality that she disturbed.¹⁸

Cory J seems to miss the centrality of restitution in his own normative description of tort law: "The primary purposes of tort law are to provide compensation to the injured and deterrence to the tortfeasor."¹⁹ He focuses on two elements that do not draw a normative connection between the plaintiff and the defendant. If we are only concerned with compensation in isolation, the plaintiff could be restored from a public trust. Similarly, in the pursuit of deterrence, the defendant could be punished by paying into that, or some other, public trust. Indeed, she could be incarcerated for misfeasance in tort if the object is to discourage others from engaging in her misconduct. In failing to treat the plaintiff and defendant bilaterally, both of these normative concerns belie the dedicate principles of tort law and neither intimate a reason for why *this* defendant must pay *this* plaintiff.

Is Cory J the knight-errant, freely roaming in search of his own ideals of justice? The analogy may be overdrawn. But it does seem as if the court is mystified by the controversy

¹⁷ For a full description see Chapter 3 of Ernest J. Weinrib, *The Idea of Private Law* (Cambridge: Harvard University Press, 1995). For a more focused discussion on tort law, see also Ernest J. Weinrib, "The Special Morality of Tort Law" (1989), 34 McGill LJ at p. 408.

¹⁸ For a richer and fuller discussion of Aristotelian corrective justice with respect to private law and to the nexus between corrective justice and the Kantian impermissibility of self-preference, from which can be gleaned a moral description of negligence law more generally, see Ernest J. Wienrib, "Toward a Moral Theory of Negligence Law," *Law and Pholosophy*, Vol. 2, No. 1 (April 1983), 37-62.

¹⁹ *Dobson*, *supra* note 5 at para. 48.

imported by the subject matter: the clash of women's rights with fetal rights and all the implications about reverence for life and respect for autonomy that they make. The problem is that, in their mystification, the judges lose touch with the underlying equality that animates private law litigants.

ii. The underlying issue of equality

The court explores two possibilities in its consideration of public policy: both examine the relationship between mother and foetus unilaterally. The first, noted by Justice McLachlin in her concurring opinion, holds the woman liable for any behaviour that might reasonably injure the foetus. In their physical unity, it brings the most mundane activities—the quality of her diet, how much or how little physical exercise she attends to, how strenuously she works—under legal scrutiny and, in effect, suspends her fundamental right to control her body.²⁰ On this view, the autonomy and privacy interests of pregnant women are unilaterally expropriated by the affirmation of fetal rights.

In reaction to this possibility, the court negatives any duty of care that may be found to exist between the mother and the foetus for harm done in utero. While concerns about the woman's autonomy rights are compelling and have a place in the consideration of the negligence claim, when applied unilaterally to the mother, the court offers no reason why the rights of the injured born-alive child are justifiably trammled.

The question of justification is central. Abandoning bilateralism carries far-reaching implications for justice. "If private law reasoning referred only to what was normatively relevant to one of the parties, it would provide no basis for regarding a decision about liability as fair to both of them."²¹ Recall that for the Melians, fairness was only in question between equals. If the rights of both parties to the action are not held equally, then the rights of the one can be trammled by the other, who suffers what she must. Accordingly, if public policy imbues the

²⁰ *Ibid* at para. 27.

²¹ Weinrib & Weinrib, *supra* note 4 at 67.

mother's rights with superiority, the rights of the fetus are not at issue because they are not violated in the legal sense. They are simply annexed by his legal superior.

The court reasons from the premise that actionability for *in utero* harm would establish a state of inequality, where the rights of the mother are subjugated to the rights her unborn child. Cory J references Ian Kerr, who warns of the danger to the woman's liberty in finding actionable pre-natal injuries for ordinary activities "such as rollerblading...spraying weed killer on her crops, sailing, lighting fireworks for her children on Canada day."²² The question of actionability does not turn, however, on the justiciability of the fetus' rights or the autonomy of the mother's choices. It turns on the questions of when is it acceptable to limit the mother's freedom and to what degree. The test for negligence, derived from Lord Atkin's general conception of foreseeability and proximity, and informed by Justice Cardozo's identification of the plaintiff class, does not hold the pregnant woman to be malfeasant for choosing to rollerblade or light fireworks on Canada day. It does, however, hold her to liable for the damage she causes when she rollerblades negligently—at high speeds on a crowded street—or when she handles fireworks while intoxicated near picnickers on a crowded beach. It is not the choice to engage in these activities that is tortious; it is the way in which she engages in them. If she does so negligently, and causes damage to a member of the group that she put at risk, she is liable to restore that member's loss, be it her neighbour's or her fetus'. The effect of the current law is that she is free to engage in negligent behaviour and cause harm to her unborn child in any circumstance under a blanket immunity arising from the condition of her pregnancy.

The reason that the two stage test invoked by the court is incongruent with finding negligence is that it is superimposed onto the relationship that the negligence concerns. It does not act to negative a duty of care arising from the fetus' rights, but rather acts to elaborate, positively, on the freedom of the expectant mother to effect harm where others cannot. In its concern for ensuring equality between the pregnant woman and her societal counterparts (the

²² *Dobson, supra* note 5 at 60.

non-pregnant woman or the man), the court has elevated the pregnant woman to a superior position and disrupted the transactional equality that “is the most deeply ingrained and pervasive relational principle of private law.”²³ In this disruption, the fetus’ rights are subjugated to the mother’s autonomy, not only in situations where a non-pregnant woman would be free from liability in negligence (rollerblading on a deserted street), but also where the non-pregnant woman would be held liable (driving negligently). On this distinction, it is ironic that Cory J holds that it should be left to the legislature to implement a tort duty between pregnant women and their unborn children. In removing such a duty from the common law, he has elaborated positively on the freedom of pregnant women to act negligently in the absence of any legislation to direct him toward that political initiative. He has also, in his concern for equality, unbalanced the equilibrium that pervades the private law and shifted the law’s concern from the juridical relationships that connect its litigants to the policy considerations that imbue them with political capital.

IV. Locating *Dobson* in the development of contemporary tort law

In the aftermath of *Dobson*, a series of negligence cases were handed down by the Supreme Court of Canada that attempted to clarify its analysis of duty in tort. The effects were that the two-stage test was further bifurcated at the first level and that the focus was front-loaded back into the legal relationship, now informed by policy considerations. The duty can still be negated at the second stage for residual policy reasons, but the centrality of the test remains entrenched in the relational analysis.

In *Cooper v. Hobart*²⁴, the court glosses *Donoghue v. Stevenson*, discussed above, and treats Lord Atkin’s derivation of duty from reasonable foreseeability and a “close and direct” relationship between the parties as pertinent to the first stage of the test: foreseeability and “proximity” are required to establish the duty. Where the traditional negligence analysis is

²³ Weinrib & Wienrib, *supra* note 4 at 67.

²⁴ *Cooper v. Hobart* (2001), 2006 DLR (4th) 193 (SCC)

suffused with the language of rights, however, the proximity criteria refer only to *interests*—“expectations, representations, reliance, the property or other interests involved.”²⁵ Questions of policy are still incorporated in the broad sense, at the level of inquiry into proximity.

In *Syl Apps Secure Treatment Centre v. B.D.*²⁶, Justice Abella states that “where an alleged duty of care is found to conflict with an overarching statutory or public duty, this may constitute a compelling policy reason for refusing to find proximity.”²⁷ Abella J confirms that policy can still negative duty in mitigating the element of proximity.

Dramatically absent from both the reformulation of the test and its confirmation in *Syl Apps Secure Treatment Centre* is any discussion about the interaction of rights in the particular claims. In *Syl*, the court finds that no *prima facie* duty exists for doctors and social workers treating a child in the state’s care, to the child’s family. In this finding, Abella J observes that the child’s “interests” are the subject of statutory protection. She notes that, even where a *prima facie* duty could be found, it would be negated at the second stage due to its creation of the “potential for a chilling effect on social workers, who may hesitate to act in pursuit of the child’s best interests for fear that their approach could attract criticism – and litigation – from the family.”²⁸ While the move back to the relationship is seen as a positive paradigmatic shift on the part of the court, the fear is that policy continues to infuse the relationship without observance to rights, nor to the equality that rights import or the bilateralism on which they insist in their invocation by a wrong. When the court removes itself from the language of rights to anchor claims about duty and policy, it borders dangerously on conceiving of liability itself as a policy consideration, against which other policy considerations can be balanced. The effect is exacerbated by the possibility of negating liability on the basis of its weight relative to a heavier policy. On this view, liability is effectively being determined strictly: on the nature of the behaviour as

²⁵ *Ibid* at para. 34.

²⁶ *Syl Apps Secure Treatment Centre v. B.D.*, 2007 SCC 38

²⁷ *Ibid* at para. 28.

²⁸ *Ibid* at para. 50.

something that is either more or less important than the policy against which it is being balanced, rather than on the injuries that it effects.

This result is contrary to the objects of the modern shift in analysis toward focusing on the bilateral relationship. The determination of liability on the basis of policy is unilateral in two ways: first, in focusing on the nature of the behaviour and its effect on the world, rather than on the particular person subject to that behaviour, it elevates observance of the defendant's actions without similar consideration to the plaintiff's suffering. Secondly, in detaching liability from the specific constraints of the relationship, it opens the possibility of finding negligence in the abstract, which we know, from the discussion above, to be incorrect. If the law is going to take from the defendant and give to the plaintiff, the legally relevant question is not what ought I to owe? Rather, it is what ought I to owe *to you*? This latter question treats legal obligation relationally: it concerns duty with the connection between who owes and who is owed. It also expresses the immutability of liability from its relational form. The determination of negligence cannot be seen as a mere policy choice if it is to enjoy the legal force of remedy.

i. *Dobson* today

Decided by today's court, the 1999 decision in *Dobson* would likely hold. The integration of the policy concerns would simply apply at the second sub-level of the first stage. The unique and unitary nature of the relationship between plaintiff and defendant would act to colour the question of proximity such that no duty could obtain where the closeness of obligor and obligee are taken for granted as inseparable. Autonomy and privacy considerations would find their way into the proximity inquiry in a similar way that they did at the second stage of the prior test. In light of current jurisprudence, the constitutional concerns about equality and liberty may have also played a larger role in justifying an omission to establish duties between mothers and unborn children.

In *Hill v. Hamilton-Wentworth Regional Police Services Board*²⁹, Chief Justice McLachlin finds a prima facie duty of care owed by investigating police officers to suspects in criminal investigations. After finding a *prima facie* duty of care to exist between the investigating police and the specific suspect *in absentia* of any negating policy considerations, McLachlin CJ finds it necessary to add: “The tort is consistent with the values of the Canadian Charter of Rights and Freedoms and fosters the public's interest in responding to failures of the justice system.”³⁰ The policy question is not one that is going away soon. Indeed, it is an important question, given the proper scope.

V. Conclusion

The former President of the Supreme Court of Israel, Aharon Barak, has called public policy “the channel through which constitutional values flow into private law.”³¹ If that is true in a legal system such as ours—that attempts to reconcile the private law with constitutional values—the relevant qualification seems to be that they flow equitably between users of the private law system. If the central private law relationship is not to be eroded by the flow of constitutional interests, those interests must inform and entitle both sides of the relationship bilaterally and proportionally. For, if transactional equality is washed away in the flow of public policy, so too, history warns us, will be justice. Moreover, if justice is to flow with the currents of constitutionality, its stream must be adjoined firmly between banks of equal magnitude. Only that way is justice contained instead of inundating the one bank while drying out the other.

²⁹ *Hill v. Hamilton-Wentworth Regional Police Services Board*, [2007] 3 S.C.R. 129.

³⁰ *Ibid* at para. 21.

³¹ Weinrib and Weinrib, *supra* note 4 at 64.