

# Women, the Unborn, the Common Law and the State

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## Introduction

Moral philosophers and legal academics have extensively argued the claim that the in vivo embryo and foetus have no rights. Historically, the debate was limited to resolving conflict between the right of the woman to life and personal liberty (including the right to bodily integrity and individual autonomy) and the interests of the unborn in life. In general, the Common Law stated that the unborn had no legal personality and therefore no legal rights. Yet, in truth the law has always been ambivalent toward the in vivo foetus. Even before the passing of the first English statute regulating abortion in 1803, Lord Ellenborough's Act<sup>1</sup>, the English Common Law was ambivalent toward the in vivo foetus. Under the early English Common Law it was not a crime to procure an abortion before the event of "quickening", however, it was after that time.<sup>2</sup>

Since the development of the new reproductive technologies (NRTs)<sup>3</sup>, the interests of the unborn have become more diverse to include the interests of the in vitro embryo (and possibly in the future will include the interests of the pre-conceived). The interests of the unborn are juxtaposed against the similarly diverse interests of potential parents, other existing persons and arguably, the State. Unfortunately, the moral debate as to the status of the in vitro embryo and pre-conceived entity is in disarray and unhelpful to the legal scholar, practitioner or

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<sup>1</sup> 43 Geo.3c.58.

<sup>2</sup> Quickening was defined by Blackstone as when "the infant is able to stir in the mother's womb"; Blackstone, W, *Commentaries on the Laws of England*, pp 129-130. This is a subjective assessment by both a pregnant woman and a medical professional but is thought generally to occur at about 10-14 weeks of gestation and is of no real clinical significance.

<sup>3</sup> The advent of new technology has made the ultimate choice of choosing the qualities of one's baby possible. The new reproductive technologies (NRTs) include: (1) procedures intended to assist infertile couples to conceive (e.g. gamete intra-fallopian transfer, in vitro fertilisation which is combined with artificial insemination), (ii) procedures intended to assess or promote the health and well being of the unborn after conception (e.g. pre-implantation embryo assessment and pre-natal diagnosis after implantation including genetic screening and sex selection for therapeutic and social reasons) and (iii) the use of gametes or foetuses in research (e.g. genetic manipulations).

the courts. In the result the legal status of the in vitro embryo remains confused and unclear.

Nonetheless the Common Law and State law has steadfastly evolved in Australia and other comparable common law jurisdictions to regulate not only abortion but also the NRTs and scientific research using in vitro human embryos.<sup>4</sup> It is of no surprise that many legal dilemmas have arisen since the enactment of such law. This confusion and controversy will continue to present at an increasing rate as a result of the increasing deployment of these technologies and continuing scientific advances. The now obvious inadequacies of enacted law will, in the short term, necessarily be supplemented by the Common Law. Thus, the Common Law remains relevant.

This paper will critically describe the legal status of the in vivo embryo and foetus under the Common Law and enacted law. From this I will draw conclusions about the coherency of the Common Law and enacted law and highlight the preferred role of the courts in dealing with morally fraught issues. I will conclude that the Legislature is better able than the courts to define the legal status of the in vitro embryo. However, I will argue that the overriding legislative interest in existing persons is unnecessary to protect the right of a woman to life and to personal liberty when it is the in vitro embryo that contests the interests of existing persons.

For this purpose, I have chosen to examine Abortion Law in Australia and the Common Law of comparable common law jurisdictions dealing with the rights of the in vivo and in vitro unborn. This paper will be divided into five parts. The first part will be introductory and include a brief description of the phenomena of the new reproductive technologies (NRTs). I will also consider the moral argument based upon the right of a woman to personal liberty that seeks to define the moral value of the in vivo embryo and foetus. This moral argument is consistent with what I will articulate as the objective of the Common Law - to protect the right of the existing woman to life and to personal liberty. It is an irony that enacted law undermines this objective. The moral debate as to the status of the in vitro embryo (or preconceived entity) is complex and largely unresolved at this time and will not be explored from a moral point of view. However, it is sufficient that at the outset to any moral or legal debate, to establish that the in vitro embryo cannot contest the right of the existing woman to life or

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<sup>4</sup> *Crimes Act 1958* (Vic.) ss. 65 and 66; *Crimes Act 1900* (NSW) ss. 82, 83 and 84; *Crimes Act 1900* (ACT) ss.42, 43 and 44; *Criminal Code Act 1899* (Qld.) ss. 224, 225 and 226; *Criminal Code Act 1924* (Tas.) ss.134 and 135; *Infertility Treatment Act 1995* (Vic.), *Reproductive Technology Act 1988* (S.A.) and *Human Reproductive Technology Act 1991* (W.A.).

personal freedom. That is, the vitro embryo is extra corporeal. Thus, the moral or legal status of the in vivo entity is not relevant to identifying the moral or legal status of the in vitro embryo.

The second part will focus upon the current state of Abortion Law in Australia, the Australian cases dealing with applications for an injunction against termination of pregnancy (as influenced by the English Common Law) and the foetal wardship case of *re F (in Utero)*<sup>5</sup> decided by the House of Lords.<sup>6</sup> I will conclude that at Common Law when a conflict arises between an existing woman's right to life or personal liberty and the interests of the unborn the common law rule should and does apply as a strict rule of law. Logically this will only apply in the case of the in vivo foetus. I will also define what is the preferred and proper role of the courts and of the State when dealing with such conflicts of interest.

The third part will analyse the recognition by the Common Law of the succession rights of the in vivo embryo and foetus and the right of a child to compensation for an injury sustained in utero in England and Australia. It will become apparent that the nasciturus exception is a legal fiction and as such, should only be narrowly applied. I will also argue that the recent development within the Common Law when dealing with the child who was injured in utero is coherent and that this coherency is not dependent upon a rigid application of the common law rule as articulated in part two but upon the principles of Tort Law. However, I will also suggest an alternative approach, which I will further develop in part four.

In part four, I will begin by describing the Common Law's attempt to determine the legal status of the in vitro entity. From this analysis I draw upon my conclusions in part two (that the common law rule should be regarded as a strict rule of law and that any divergence from this is a matter best left to the state and the democratic process) to submit that when the in vivo or in vitro unborn does not contest the interests of an existing person's right to life or personal liberty a judicial balancing exercise will be at the least adequate to resolve conflict between any other interests. For example when lesser interests such as succession interests or the right to one's own unique individual identity are in issue the unborn should be put on the same

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<sup>5</sup> [1988] Fam 122 –145.

<sup>6</sup> The emergency English and American Caesarian section cases would also be suitable for analysis; *Re S* (adult: refusal of treatment) (1992) 9 BMLR 69; *Re MB* (an Adult: medical treatment) (1997) 38 BMLR 175 (CA); *St. George's Health Care NHS Trust v S*, *R v Collins, ex p S* [1998] 3All ER 673; *Roe v Wade* 410 US 113; *Jefferson v Griffin Spalding County Hospital Administration* (1981) 274 S.E. 2d. 457; *Re A.C. D.C. Ct. App*, 533 A 2d. 611 (1987).

footing as that of existing persons. In my conclusion, I will further argue that the better solution is for the State to take a proactive role in regulating the application and use of the NRTs. In addition I will make some suggestions as to how the State ought to respond to the phenomenon of the NRTs.

## **Part 1 -The Scientific and Moral Background**

### **The Significance of the NRTs**

Jonathan Berkowitz and Jack Snyder described the distinction between the early and the new reproductive technologies as, on the one hand, the “when” and “if” to become pregnant, and on the other, the “how” to become pregnant and with the “what” of pregnancy.<sup>7</sup>

Unlike the surgical technology that makes abortion possible, the NRTs do not just impact upon the existence of the potential parents but potentially upon the unborn and arguably all of humanity. We can now better appreciate the marvel of the developing foetus and appreciate it as a human entity. Arguably, this creates an awareness of the interests of the unborn and creates at the least morally optional duties toward the unborn when its interests do not contest the right to life or personal liberty of an existing woman. With de-selection techniques, we can redefine normality and alter the sex ratio and perhaps in the future we will be able to genetically enhance or alter humanity and human experience and in the future redefine humanity and concepts of good health. Thus, we can now intervene in a way that is not necessary for the survival of the individual or humanity. Thus, an individual woman’s use of the technology will go beyond herself and her individual right to life and personal liberty, more and more as biotechnology advances.

### **One Moral Point of View**

The moral debate surrounding abortion has typically been suspended between two extreme views - the view that the unborn has full moral status and the view that it has no moral value.<sup>8</sup> However, I intend to examine what I consider to be the most rational moral argument and this is a point of view that considers abortion to be permissible on the

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<sup>7</sup> Berkowitz, J, and Snyder, J, “Racism and Sexism in Medically Assisted Conception” (1998) 12(1) *Bioethics* 42, p42.

<sup>8</sup> Thompson, J, “A Defence of Abortion”, in Dworkin, R, (ed) *The Philosophy of Law*, Oxford University Press, Oxford, 1977; Harris, J, *The Value of Life*, Routledge & Kegan Paul, London and New York, 1985, Ch. 1 p.7-27 & Ch. 8 p.157-173

ground that the right of an existing person to bodily integrity cannot be contested by the interests of the unborn.

The in vivo and in vitro embryo are both human and physical entities that have the potential for human life. Thus, all moral arguments that apply to the in vivo embryo have been assumed to apply to the in vitro embryo - even when cryopreserved. This assumption is wrong for the simple physical reality that the in vitro embryo is extra corporeal.

### **The Middle Ground as a Defence to Abortion: the Right to Bodily Integrity**

The right to individual autonomy in the physical context I prefer to articulate as the right to personal liberty or right to bodily integrity. "This right has an in built moral significance and has much to offer attempts to resolve the conflict of interests between existing persons and the unborn. It is logical that the free use of one's body depends upon the fact that one's body is one's own".<sup>9</sup> To explain this further, consider the following examples.

Consider an existing person with a meaningful existence (to him or her and/or society) in need of a kidney transplant, without which they will certainly die. Let us say that I am HLA compatible with this person. I have no familial or social relationship to the potential recipient but we share some genetic markers and, a biological relationship could be said to exist. Kidney transplants are life saving and a kidney donation will have no long-term implications upon my own health if I agree to become a live kidney donor. There are of course the immediate risks of general anaesthesia and of the actual surgery. This scenario invites the question: do I have a duty to allow my body to be used for the benefit of the potential recipient? Such a duty would be regarded as onerous even if a true familial or social relationship were to exist between a potential recipient and myself. Alternatively it is not obvious that such a moral duty exists.<sup>10</sup>

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<sup>9</sup> Walsh, P, lecture handout, M.A. Medical Law and Ethics, King's College, London, 1997-98.

<sup>10</sup> Such a duty has not been recognised by the courts of the Common Law jurisdictions, even when a familial relationship did in fact exist between the parties and the tissue donation (a bone marrow transplant) would have been life saving; *McFall v Shrimp* (1978) 10 PaD&C 3d 90 (Pa Ct Comm Pl) (no duty to donate bone marrow to a dying cousin); Overall, C, *Human Reproduction. Principles, Practice and Policies* (1993) Oxford University Press, Toronto, Ch. 1. "Reflections on Reproductive Rights in Canada", in Dworkin, note 8, Ch.2. Overall refers to the original s.251 of the Canadian Criminal Code. This section implicitly attributed to the foetus a right to the use and occupancy of a woman's uterus. In January 1988 the Supreme Court removed these impediments to the right to abortion. The original situation was described as a

Now, consider the in vivo foetus, who as yet has no meaningful existence and, who if denied the use of its mother's womb will die. For the pregnancy to be successful the embryo must form a physical attachment to the mother that will allow it to benefit from the mother's body and to grow to term. The biological relationship between the embryo or foetus and mother is both genetic and physical. Without the use of the mother's body the foetus will die. The pregnancy poses no long-term risk to the mother's health. However, pregnancy does pose a small but appreciable risk to the mother. This maternal foetal circumstance invites the question: does the mother have a duty to allow the foetus the use of her body until it is ready to be born? Intuitively, it is less obvious that the mother does not owe such a duty. Moral intuition however, does not explain why such a moral duty should or should not exist.

On close analysis, the differences between these two examples are not so great. Alternatively, imagine that the donor in the first example is also the mother of the potential recipient. In addition, the foetus in comparison to the existing person is non existing in the sense that it has no conscious appreciation and can not appreciate the value of life nor understand the nature of any act done to it, harmful or otherwise.<sup>11</sup> It is arguable the biological relationship between foetus and mother is meaningless at least to the foetus (as it surely must be between two strangers who are HLA compatible).

If we do not accept that we have a moral duty to donate parts of our bodies to existing others with a meaningful existence with end stage organ failure (whether we have a relationship with them or not) then it is clearly inconsistent to assert that the pregnant woman has a duty to allow the foetus to use her body - even if we accept she has a biological relationship with the foetus.

This point of view is also argued to deny the existence of a moral duty to donate blood. Blood donation does not invoke the "yuk factor" as easily. On this point of view the utility of a moral duty to donate blood to save the life of another is outweighed by society's interest in and the utility of according great weight to each individual's right to bodily integrity. Thus, the duty to donate blood is supererogatory.

We should also be concerned about the scope of a parent's moral duty to an existing child. The existence of a cohesive society probably

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"profound interference with the woman's body and thus a violation of security of the person".

<sup>11</sup> As the foetus has no conscious appreciation of life, to deny it life is not to harm it albeit it might be to deny it the benefit of life. Medical opinion is divided as to the conscious appreciation of pain felt by the foetus during termination.

depends upon the charitable acts of a parent to a child. However, the duties of a parent to a child are optional in that the child is not physically attached to them and that to accept a duty that threatens their very life or liberty must be voluntarily assumed for this reason and the reasons I have argued above. In reality strong biological urges result in many parents accepting many supererogatory duties.

In this part I have indicated my preference for the point of view that it is rational to resolve conflict between the existing woman's right to life and bodily integrity and the interest of the in vivo embryo or foetus in life in favour of the woman on the basis that the right of existing persons to individual autonomy is of primacy.

In the following parts it will become evident that the merit of this argument has been accepted by the Common Law though undermined in part by enacted law. Other conflicts that arise between the unborn entity (whether in vivo or in vitro) and existing persons that do not contest the existing person's right to life or their personal freedom are not the same issue and can not be resolved upon this point of view. Other moral arguments concerned with the permissibility of abortion are also similarly limited. How such conflicts can be resolved is a moral debate that goes beyond the scope of this paper.

## **Part 2 -The Law of Abortion in Australia, the Injunction Cases and *Re F (in Utero)***

This part will briefly describe the crime of abortion in Australia .The Civil Law applications for injunctions against termination of pregnancy in Australia will also be described. The Civil Law in this context, in each jurisdiction, is governed by the Common Law. Finally, the foetal wardship case of *Re F (in utero)*<sup>12</sup> decided by the House of Lords will be described. This part will highlight the ambivalence of enacted law to a woman's right to life and personal liberty and the civil law court's preference for observing the right to individual autonomy and recognition of the limited role of the courts when the right to personal liberty is in issue.

### **(i) Australian Statute Law**

In all states and territories other than Western Australia it is a crime to "unlawfully" administer any poison or noxious thing, to use any instrument or other means with intent to procure a miscarriage. In each jurisdiction, the legal test for when abortion will not be unlawful is

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<sup>12</sup> [1988] Fam. 122- 132; *Re F (in Utero)* (CA) [1988] Fam. 132 -145.

different; it may be defined by the common law (Victoria, New South Wales, and the Australian Capital Territory) or legislation will either provide for a statutory defence (Queensland and Tasmania) or explain the circumstances when abortion will not be unlawful (South Australia, the Northern Territory and Western Australia). In 1998 Western Australia repealed the old statutory provisions and now refers to the grounds for lawful abortion as stated by the Western Australian health legislation.

In most Australian jurisdictions enacted legislation that describes the crime of abortion share three characteristics. First, the statutes provide that a woman's life or physical or mental health must be at serious risk of harm for an abortion to be lawful.<sup>13</sup> Secondly, persons other than the pregnant women are given authority to determine an abortion as lawful.<sup>14</sup> Thirdly, legislation in South Australia, the Northern Territory and Western Australia hint at a gradual acquisition of the legal status of the embryo and foetus, giving it greater legal protection as it develops.<sup>15</sup>

In practice, abortion is commonly performed and prosecution rare. This is due to the difficulties of knowing a woman's true reason for requesting an abortion and establishing that a defendant medical practitioner lacked the requisite honest and reasonable belief that an abortion was justified to avoid serious danger to a woman's health. However, abortion is clearly not available upon demand.

The notable exception to these formal restrictions of a woman's right to autonomy is the new Western Australian legislation. The *Acts (Amendment) Act 1998* (WA) repealed ss199-201 of the Western Australian Criminal Code and replaced it with the new s199. Section 199 provides that it is unlawful to perform an abortion unless the abortion is performed by a medical practitioner "in good faith and with reasonable care and skill" and the performance is justified under

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<sup>13</sup> In Victoria the relevant case is *R v Davidson* (1969) VR 667 (Supreme Court), as per Menhennitt J. In New South Wales the law is represented by an important district court ruling established in the case of *R v Wald* (1972) 3 DCR (NSW) 25. In Queensland, a code jurisdiction, the relevant case is *R v Bayliss and Cullen* (1986) 9 Qld. Lawyer Reports 8 (District Court) as per McGuire J. held that the Queensland statutory defence authorised abortions that also satisfied the Menhennitt ruling.

<sup>14</sup> In Victoria the Menhennitt ruling does not appear to impose a requirement that the abortion is performed by a medical practitioner in order for it to be lawful.

<sup>15</sup> In South Australia, the legislation refers to "a child capable of being born alive" a point that legislation defines as at 28 weeks gestation but which might arguably be at any time from 22 weeks gestation given technological advances in neonatal care. In the Northern Territory and Western Australia, legislation distinguishes between a pregnancy of less than and greater than 14 and 20 weeks respectively.

the new s334 of the *Health Act 1911* (WA). Section 334 (3)(a) provides for abortion prior to 20 weeks gestation, at the request of the pregnant woman, provided the woman has received counselling.

**(ii) Australian Civil Law: Application to the court for an injunction restraining a pregnant woman from having an abortion by the putative father of the foetus in question; *K vT*; *Attorney-General (ex rel Kerr) v T*<sup>16</sup>; *Attorney General (Qld)(Ex rel Kerr) vT*<sup>17</sup> and *In the Marriage of F*.**

In *K vT*<sup>18</sup>, the relationship between the parties had consisted of casual sexual relations. This case reached the Full Supreme Court of Queensland. The facts and result of this case mirror the English case of *C vS*<sup>19</sup>, which affirmed *Paton v British Pregnancy Advisory Service*.<sup>20</sup> In *Paton v British Pregnancy Advisory Service*, Sir George Baker P held “in England and Wales the foetus has no right of action, no right at all, until birth<sup>21</sup>...The foetus cannot in English law, in my view, have any right of its own until it is born and has a separate existence from its mother. That permeates the whole of the civil law of this country ... and ... in America, Canada, Australia and I have no doubt others”.<sup>22</sup>

In *K v T*, the putative father was opposed to abortion and he offered to provide the woman with financial support for the duration of the pregnancy and then for her to give the baby up for adoption. The application was refused at first instance for three reasons. Firstly, the court’s power to protect vulnerable subjects of the Crown did not extend to foetuses because the foetus lacks legal personality, unless and until it is born alive.<sup>23</sup> Secondly, it was not appropriate for the court to intervene to protect the putative father’s *future* legal rights to apply for custody of the child once it was born.<sup>24</sup> Thirdly, even if

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<sup>16</sup>[1983] 1 Qd R 404 Full Supreme Court of Queensland (Campbell CJ, Andrews SPJ and Connolly J)

<sup>17</sup> (1983) 57 ALJR 285(HCA)( Gibbs CJ).

<sup>18</sup>[1983] 1 Qd R 396, Supreme Court of Queensland (Williams J)

<sup>19</sup> [1988] QB 135.

<sup>20</sup> [1979] 1 QB 276.

<sup>21</sup> [1979] 1 QB 276 at 279.

<sup>22</sup> [1979] 1 QB 276 at 279 at 289.

<sup>23</sup> *K vT* [1983] 1 Qd R 396 at 400-401, citing *Paton v BPAS Trustees* [1979] 1 QB 276 at 279 per Sir George Baker P and *Watt v Rama* [1972] VR 353 per Winneke CJ and Pape J at 360.

<sup>24</sup> *K vT* [1983] 1 Qd R 396 at 401-402.

abortion would have been unlawful in this case under Queensland law, the applicant lacked standing to bring an application for an injunction of a possible breach of the Criminal Law, which was a matter for public officials.<sup>25</sup>

The applicant sought the help of the Attorney General of Queensland who in an appeal to the Full Supreme Court of Queensland the Attorney General joined the proceedings. The Full Supreme Court rejected the appeal but held that the court could intervene but only in cases of a possible breach of the Criminal Law in exceptional circumstances (the repeated commission of a crime because of lack of an adequate penalty in the Criminal Code or in the case of an emergency) and that this was not such a case.<sup>26</sup> The Supreme Court also held that the foetus lacks legal personality and that it can not be protected using the court's *parens patriae* jurisdiction as this did not extend to the foetus.<sup>27</sup> Application to appeal to the High Court was dismissed by Gibbs C.J. for the same reasons as given by the Supreme Court.<sup>28</sup>

*In the Marriage of F*<sup>29</sup> the injunction was sought by the husband to restrain his estranged wife from having an abortion. This case was heard before the Family Court of Australia before Lindenmayer J. The facts and result of this case mirror the English case of *Paton v British Pregnancy Advisory Service*.

*In the Marriage of F*, Lindenmayer J dismissed the application for the reasons that there were no common law rights that would support the application. Lindenmayer J held that the right to procreate was not absolute and was informed by the woman's rights to bodily integrity.<sup>30</sup> Secondly, he concluded that the foetus lacked legal personality or could not have rights until it was born and that a foetus

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<sup>25</sup> *K v T* [1983] 1 Qd R 396 at 402-403.

<sup>26</sup> *Attorney-General (ex rel Kerr) v T* [1983] 1 Qd R 404 at 405-406.

<sup>27</sup> *Attorney-General (ex rel Kerr) v T* [1983] 1 Qd R 404 at 423 relying on *Paton v B.P.A.S.* [1979] 1 QB 276 at 279 per Sir George Baker P.

<sup>28</sup> Gibbs CJ held that it would be inappropriate for the court in the circumstances of the case to grant an injunction. Gibbs CJ also affirmed that the law does not regard a foetus as a person whose existence can be protected by the courts, because it lacks legal rights until it is born and has a separate existence from its mother; *Attorney General (Qld)(ex rel Kerr) v T* (1983) 57 ALJR 285 at 286 relying on *Paton v BPAS* [1979] 1 QB 276 at 279 per Sir George Baker P.

<sup>29</sup> (1989) 13 Fam LR 189.

<sup>30</sup> *In the Marriage of F* (1989) 13 Fam LR 189 at 193, relying on *Paton v BPAS Trustees* [1979] 1 QB 276 at 282 as per Sir George Baker P.

has no common law rights that could be enforced by the applicant on its behalf.<sup>31</sup>

Finally, Lindenmayer J, while recognising the Family Law Courts had the power to grant an injunction in accordance with the best interests of a child, held that in the circumstances it would not be proper in this case.<sup>32</sup> Lindenmayer J also stated that s 70C(1) *Family Law Act 1975* (Cth) did *not* extend the court's jurisdiction to the unborn child and he held that the term "child" in that section referred only to a living child.<sup>33</sup>

Lindenmayer J justified his conclusion by expressing his concern for the rights and welfare of the pregnant woman: that an injunction would force her to proceed with a pregnancy she did not want, it would compel her "to do something in relation to her own body which she does not wish to do", which "would be an interference with her freedom to decide her own destiny".<sup>34</sup>

### **(iii) Foetal Wardship:**

The same concerns can be detected in the foetal wardship case of *Re F (in Utero)*<sup>35</sup>; *Re F (in Utero)*.<sup>36</sup> Also, the courts role as defined in the injunction cases was similarly defined in *Re F (in Utero)*.

In *Re F (in Utero)* a local authority was concerned that a pregnant woman who was mentally disturbed and who lived a nomadic existence posed a threat to the well-being of her unborn child .The authority applied *ex parte* for leave to issue a summons making the foetus a ward of the court. The applicant assumed that the *Mental Health Act* (1983) (Eng.) did not apply. The English courts for the first time considered the question: did the court have the power to protect a foetus *by making it a ward of the court*, and if it did, should wardship jurisdiction be exercised in the circumstances then before the court?<sup>37</sup>

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<sup>31</sup> *In the Marriage of F*, note 33, at 192 relying on *Paton v BPAS Trustees* [1979] 1 QB 276 at 279 per Sir George Baker P; *K v T* [1983] 1 Qd R 396 at 401, *Attorney General (Ex rel Kerr) v T* [1983] 1 Qd R 404 at 406-7; *Attorney General (Qld)(Ex rel Kerr) v T* (1983) 57 ALJR 285 at 286.

<sup>32</sup> *In the Marriage of F*, note 33, at 194-5.

<sup>33</sup> *In the Marriage of F*, note 33, at 194-5.

<sup>34</sup> *In the Marriage of F*, note 33, at 198.

<sup>35</sup> [1988] Fam. pp 122- 132.

<sup>36</sup> (CA) [1988] Fam. pp 132 –145.

<sup>37</sup> *Re F (in Utero)* per Hollings J at 129 B; May L.J. at 134 G, Balcombe L.J. at 141 F.

At first instance, Hollings J and in the Court of Appeal, May LJ, Balcombe LJ and Staughton L.J held that the court had no wardship jurisdiction over the unborn and even if they were wrong on this point they considered that as the foetus had no existence independent of its mother, the court could not exercise the rights, powers and duties of a parent over the foetus without restricting the liberty of the mother-to-be.<sup>38</sup>

Hollings J and all three judges of the Court of Appeal also held that the court had no jurisdiction on the basis that the provisions granting the court's wardship jurisdiction did not envisage the unborn as s 42 *Supreme Court Act 1981*(U.K), was framed in terms of "a minor" and that in the light of s 1 *Family Law Reform Act 1969* (U.K), s 1 *Guardianship of Minors Act 1971*(U.K) and s 85 *Children Act 1975* (U.K) a "minor" could only be a person in the sense that he or she has been born.<sup>39</sup> The Court of Appeal also held that the restriction of a pregnant woman's liberty was a matter for the Parliament.<sup>40</sup> Balcombe LJ held that " under a system of Parliamentary democracy it is for the Parliament to decide whether such controls can be imposed, and if so, subject to what limitations or conditions".

In both the High Court and the Court of Appeal, concern was expressed for the pregnant woman's right to personal freedom. Hollings J concluded that "it is [the need to compromise the interests and welfare of the mother] above all, quite apart from what I think is the legal situation [regarding the question as to whether or not the court's wardship jurisdiction extends to the unborn] that has convinced me that there is no jurisdiction and should be no jurisdiction, in respect of an unborn child".<sup>41</sup> In the Court of Appeal,

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<sup>38</sup> *Re F (in Utero)* (1988) Fam. 122-145 at 131 F-H; The conclusion that the rights and welfare of the pregnant woman should outweigh the interests of the unborn was also supported by the decision of the European Commission for the protection of Human Rights and Fundamental Freedoms in the case of *Paton v United Kingdom* (1980) 3 E.H.R.R. 408. The Commission, referring to the European Convention for the Protection of Human Rights and Fundamental Freedoms art. 2 (1); "everyone's right to life shall be protected by the law", held that on its true construction article 2 was apt only to apply persons already born and could not apply to a foetus on the basis that the rights of an existing person could not be compromised by the rights of the unborn in and of itself, but also because such an understanding of the law may imply that the rights of existing persons [to life] were subject to "further limitations"; *Paton v United Kingdom* (1980) 3 EHRR 408, at p.413, para. 8.

<sup>39</sup> *Re F (in Utero)* (1988) Fam. 122-145 per Hollings J at 131 H -132 A-E; per May LJ at 138 G; per Balcombe LJ at 141 G and 143 A.

<sup>40</sup> *Re F (in Utero)* (1988) Fam. 122-145 per May LJ 139 A; Balcombe LJ at 143 D 144 A-C and Staughton LJ at 145 A-B.

<sup>41</sup> *Re F (in Utero)* (1988) Fam. 122-145 at 131 F-H.

May LJ said “But in the case of the unborn child the only orders to protect him or her which the court could make would be with regard to the mother herself ... All these would be restrictive of the mother herself ... Until the child is actually born there must necessarily be an inherent incompatibility between any projected exercise of wardship jurisdiction and the rights and welfare of the mother”.<sup>42</sup> Balcombe LJ disapprovingly cited the US case of *Jefferson v Griffin Spalding County Hospital Administration* that had significantly infringed upon the personal liberty of pregnant women.<sup>43</sup> Staughton LJ held “The orders sought by the local authority ... are orders which seek directly to control the life of both mother and child”.<sup>44</sup>

Concern was also had by May LJ as to the implications of such orders upon the relationship between mother and child should an order be made to restrict the personal liberty of the woman to protect the interests of the unborn as well as the practical difficulties of enforcing such an order.<sup>45</sup>

### **Discussion:**

State law may restate or modify the Common Law. Australian abortion statutes that criminalise abortion override the common law rule as stated in *Paton v British Pregnancy Advisory Service* - that the unborn has no legal personality. Indeed, one may ask: how is it that the state authorities of most of the common law jurisdictions have chosen to criminalise abortion, to recognise the interests of the in vivo embryo and foetus in life and in the result compromised the existing woman’s right to life and personal freedom? Presumably the law’s interest is based upon the foetus’s potential to become a legal person.<sup>46</sup>

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<sup>42</sup> *Re F (in Utero)* (1988) Fam. 122-145 at 135 G-H.

<sup>43</sup> *Re F (in Utero)* (1988) Fam. 122-145 at 143 H; *Jefferson v Griffin Spalding County Hospital Administration* (1981) 274 S.E. 2d. 457 - The Supreme Court of Georgia concluded as a matter of law that a foetus of 39 weeks was a viable human being and entitled to the protection of the Juvenile Code of Georgia and as such the welfare principle was applicable - that the interest of the child, in this case, yet unborn, was of paramount importance. Thus, the mother was taken into the custody of the relevant authorities and the department was to have full authority to make all decisions relating to the treatment including consenting to the surgical delivery of the child.

<sup>44</sup> *Re F (in Utero)* (1988) Fam. 122-145 at 144 G.

<sup>45</sup> *Re F (in Utero)* (1988) Fam. 122-145 per May LJ at 138 F-G.

<sup>46</sup> Indeed, as mentioned before, the abortion law of South Australia, the Northern Territory and most recently Western Australian, also hint at a gradual acquisition of legal status by the embryo and foetus, giving greater protection against abortion as it develops. Also the English *Infant Life Preservation Act (1929)* and the *Offences Against the Persons Act (1861)*.

This phenomena also pertains to modern society's moral ambivalence (the sum of disparate moral views) toward the unborn, and that the need for a legal solution became imperative for the peace, welfare and good government in many jurisdictions.<sup>47</sup> Hence, this state of affairs led to legislation, which as a product of the democratic process and the principle of representative and responsible government must be accepted *or* fought against on the same basis.

However, despite the fact that abortion statutes in Australia formally protect the unborn foetus from "abortion on request" (Western Australia excepted) and in some jurisdictions also provide increasing legal protection as it develops the civil law courts will not readily act to prevent possible breaches of the Criminal Law on the basis that under the Common Law the unborn has no legal personality. The courts do admit to such authority in exceptional circumstances yet, the courts have indicated that this role is preferably that of the prosecuting authorities.<sup>48</sup>

*Re F* and the injunction cases explain the court's reticence, in the context of abortion and safety of the unborn foetus, to do other than regard the woman's rights as paramount notwithstanding the foetus is "viable". The court's arguments are framed in terms of the woman's right to liberty. The extension of such authority is viewed by the courts as compromising the rights of existing persons to life and their personal freedoms in favour of the unborn. Thus, the courts have indicated that the scope and limits of the court's authority in this context remains a question best left to the Parliament.

It is clear that the civil courts accept the criminalisation of abortion and observe the role of the state prosecuting authorities. This is a product of the functions of the Civil Courts but also indicates a clear understanding by the courts that the interests in conflict are so controversial and morally fraught that they are political and thus, are matters best left to the democratic process.

### **Part 3 -The Common Law concerning the in-utero embryo's succession rights and right to compensation for injury sustained in utero**

This part will describe the attempt of the common law jurisdictions to simultaneously recognise both the common law rule and the interests

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<sup>47</sup> Consider the incidence of unlawful interference with private property and of assault, battery and homicide in the modern world by those who contest the practice of lawful abortion.

<sup>48</sup> *Attorney General (ex-rel Kerr) v T* (1983) 1 Qd. R. 404 ; *Attorney General (Qld) (Ex rel Kerr)* (1983) 57 ALJR 285 at 286.

of the in vivo embryo and foetus in circumstances other than that of abortion. These in vivo cases will be divided into two groups: (i) the succession cases and (ii) the cases concerned with the right of a child to compensation for injury incurred when it was in utero. This part will conclude by arguing that the nasciturus exception is a legal fiction that should only be applied narrowly in the interests of legal certainty and that to deploy the principles of Tort Law in the cases concerned with the right of a child to compensation for injury sustained in utero is coherent with the general common law rule.

### **(i) The Succession Cases and the Nasciturus Exception:**

There is a well established exception to the common law rule that the unborn has no legal personality and no legal rights. It is referred to as the nasciturus exception. Certain Latin versions of the rule refer to “a child about to be born”.<sup>49</sup> This exception exists as part of the law of succession, a branch of Property Law. The Nasciturus exception accepts that a gift to a class of children living at a particular date is held to benefit a child *en ventre sa mere* and the unborn child may even be a party to an action. This principle has been developed so that a child born posthumously may claim as a “dependant” under the *Fatal Accidents Act 1976 (The George and Richard*<sup>50</sup>) and also under the *Workers Compensation Act 1897; Williams v Ocean Coal Ltd.*<sup>51</sup>; and have a right to seek provision under legislation providing for testator family maintenance; *V v G*<sup>52</sup> ; and count as a “life long being” for the purposes of the rule against perpetuities (*Long v Blackwell*<sup>53</sup>).

Thus, it would seem an unborn child shall be deemed to be born whenever its inheritance rights or interests as a financial dependant require it. This legal exception is a legal fiction. Lord Justice Fletcher Moulton in *Schofield v Orrell Colliery Co Ltd*<sup>54</sup> identified the approach as “a peculiar fiction of law by which a non-existing person is taken to be existing”. It was also noted to be a fiction in *Elliot v Joicey*.<sup>55</sup> Alternatively, this exception may be capable of justification

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<sup>49</sup> Whitfield , A, “Common Law Duties to Unborn Children” (1993) Med.L.Rev. 28, p 31.

<sup>50</sup> (1871)L.R. 3A.&E. 466.

<sup>51</sup> [1907] 2 KB 222.

<sup>52</sup> [1980-1] 2 NSWLR 366.

<sup>53</sup> (1797) 30 E.R.1119.

<sup>54</sup> [1909] 1 KB 178

<sup>55</sup> [1935] A.C. 209 (H.L.).

by appeal to the principles of Property Law or the law of succession and perpetuities. Such an exercise is beyond the scope of this paper.

**(ii) *Watt v Rama* (tort)**

There is another exception to the common law principle, the right of a child to damages for an injury sustained when a foetus. Historically, the existence of this exception was denied in that it was regarded as inconsistent with the common law rule. That a duty was owed to the unborn foetus was first argued in *Deitrich v Inhabitants of Northampton*<sup>56</sup> and Holmes J refused to recognise the claim. In the Irish case of *Walker v Great Northern Railways of Ireland*<sup>57</sup> it was decided that the statement of claim disclosed no cause of action as counsel failed to plead any contract of carriage with the unborn. Of course, this was prior to the case of *Donoghue v Stevenson*.<sup>58</sup>

The first exception, however, continued to raise the question “why [can an unborn be] a human being under the Civil Law in some circumstances but in general or other circumstances be a non-entity under the Common Law”.<sup>59</sup> Not surprisingly, the first exception came to be used by way of analogy to justify why a child has a right to compensation for an injury inflicted when in utero; *Villar v Gilbey*<sup>60</sup>; *Bonbrest v Kotz*<sup>61</sup>; *Montreal Tramways v Leveille*<sup>62</sup> per Lamont J who said “the fiction of the civil law must be held to be of general application” (Rinfret J concurring). In the result a foetus has long been held to have a potential or contingent interest which matures and becomes enforceable upon its birth.

The judgment of Cannon J in *Montreal Tramways v Leveille* attempted to truly analyse the legal problem, as identified by Holmes J in *Deitrich v Inhabitants of Northampton*. Cannon J asked “[Can] ... we assume ... that a man might owe a civil duty and incur a conditional prospective liability in tort to one not yet in being?”<sup>63</sup> Cannon J’s analysis appears in translation (from the original French)

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<sup>56</sup> (1884) 138 Mass.14 (Mass. Sup. Jud.Ct.)

<sup>57</sup> (1891) 28 L.R. (Ir.) 69 (Q.B. Ir.)

<sup>58</sup> [1932] AC 562 (Scot.)

<sup>59</sup> *Bonbrest v Kotz* 65 F.Supp. 138 at 141 per McGuire J (U.S. District Court D.C.).

<sup>60</sup> [1907] AC 139 per Lord Loreburn.

<sup>61</sup> 65 F. Supp. 138 U.S. D.C. D.C.

<sup>62</sup> (1933) 4 DLR 337 per Lamont J at 346.

<sup>63</sup> (1884) 138 Mass.14 (Mass. Sup. Jud.Ct.) at 16.

in the judgement of *Watt v Rama*<sup>64</sup>: “The cause of action arose when the damage was suffered and not when the wrongful act was committed ... the plaintiff’s right to compensation came into existence only when she was born with a bodily disability with which she suffered. It was only after birth that she suffered the injury and it was then that her rights were encroached upon and she commenced to have rights”.<sup>65</sup>

This analysis was consistent with the principles of Tort Law established in 1932 in the case of *Donoghue v Stevenson*. This approach was next considered and developed in *Watt v Rama*. In this case, the in utero injury arose out of a motor vehicle accident in which a pregnant woman had been injured by the faulty driving of the defendant. The plaintiff argued that a civil duty was owed to the unborn. As expected the defendant argued that the plaintiff infant was not a legal person at the time of the injury and that the defendant owed no duty of care.

The court held that the issue was “not whether an action lies in respect of pre-natal injuries but whether the plaintiff born with injuries caused by the prenatal neglect of the defendant has a cause of action in negligence in respect of such injuries.”<sup>66</sup> That is, the court had to consider whether or not on general principles an unborn child injured in utero, that is, injured at a time when the Common Law does not recognise it as a legal person, stands on the same footing as an existing or legal person who is injured.

In *Watt v Rama* the majority of the court concluded the damage was suffered by the plaintiff at that moment, in law, that the plaintiff achieved legal personality and inherited the damaged body for which the defendants (on the assumed facts) were responsible.<sup>67</sup> The events prior to birth were mere links in the chain of causation between the defendants’ assumed lack of skill and care and the consequential damage to the plaintiff”. This reasoning suggests that the damage was suffered at the time of birth or when the child became a legal person. This reasoning is also the stuff of legal fiction.

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<sup>64</sup> (1972) VR 353.

<sup>65</sup> *Watt v Rama* (1972) VR 353 at 357.

<sup>66</sup> *Watt v Rama* (1972) VR 353 (tort) per Winnecke CJ and Pape J at 357- 358.

<sup>67</sup> *Watt v Rama* (1972) VR 353 (tort) at 360-361; The majority defined the relationship of the defendant to the plaintiff in utero as “contingent or potential” which would “crystallise” or “ripen into a relationship imposing a duty” when the plaintiff’s identity as a legal person became defined by birth. At that stage the majority resolved the act of neglect could be identified as the breach of duty and the intra-uterine damage actually incurred as “merely an evidentiary fact relevant to the issue of causation of damage”.

Gillard J approached the problem differently. He first deployed the famous case of *Donoghue v Stevenson*<sup>68</sup> as applied in *Grant v Australian Knitting Mills Ltd*<sup>69</sup> and stated that: “it would be immaterial whether at the time of fault the victim was in existence or not, so long as the victim was a member of a class which might reasonably and properly be affected by the act of carelessness”.

Gillard J also accepted the principle emerging from the first exception; “there is a rule of law which recognises that an unborn child may possess rights”. Accordingly, he justified this statement by way of analogy from other Common Law cases and from cases under the Fatal Accidents Act and Workman’s Compensation Acts.<sup>70</sup>

### **(iii) X v Pal**

In *X v Pal*<sup>71</sup> the NSW Court of Appeal agreed that at Common Law an action could be brought by a child injured in utero. Y (the child) was born with congenital syphilis and other congenital deformities. X (the mother) argued both the neonatal infection and the abnormalities were caused by the defendants’ failure to carry out ante-natal tests for syphilis. On the facts, at first instance the abnormalities were not proved to be due to syphilis. However, it was accepted that the neonatal infection was a result of maternal transmission. The Court of Appeal rejected the argument that no duty was owed to the unborn as it was not a legal person. The court argued that the correct approach was to ask if the defendant was in breach of a duty of care owed to a class of persons and if so whether the injured was a member of that class.<sup>72</sup> Clarke JA said “if one accepts that there may be within that class persons who are not born when the careless conduct occurs there is no need to resort to artificial concepts or to be unduly troubled by the child’s lack of legal personality at the time of that conduct”.<sup>73</sup>

Clarke JA argued it was difficult to see why the unborn child of a pregnant woman “should not be within the category of persons to whom the doctor was in a relevant relationship of proximity”.<sup>74</sup>

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<sup>68</sup> [1932] AC 562 (Scot.).

<sup>69</sup> [1936] AC 85.

<sup>70</sup> *Watt v Rama* (1972) VR 353(tort) at 375 and 376.

<sup>71</sup> (1991) 23 NSWLR 26.

<sup>72</sup> *X v Pal* (1991) 23 NSWLR 26 at 37.

<sup>73</sup> *X v Pal* (1991) 23 NSWLR 26 at 38.

<sup>74</sup> *X v Pal* (1991) 23 NSWLR 26 at 44.

**(iv) *Lynch v Lynch***

In *Lynch*<sup>75</sup> a pregnant woman whilst negligently driving a truck was involved in an accident. Her child was subsequently born suffering from cerebral palsy proven to be caused by the mother's negligent driving. In *Lynch* the NSW Court of Appeal held that it was foreseeable that the unborn child could be injured by the mother's negligence. The court rejected the argument that a distinction should be made between an injury caused by the mother and an injury caused by a third party and allowed for recovery of damages for prenatal injury against the baby's mother.

The court in its finding referred to the compulsory insurance of passengers that applied in NSW. This result is consistent with s 2 *Congenital Disabilities (Civil Liabilities) Act 1976* (Eng).

The Court of Appeal however expressly left open the question whether or not an action could arise against the mother in other circumstances, but did express concern that such actions would require the courts to scrutinise the mother's conduct for years prior to the birth of the child.<sup>76</sup>

**Discussion**

The objective of the policy of the common law rule as we have seen is to protect the right of existing persons to her life and personal liberty. The legal logic and moral reason, in this purportedly harsh rule of the Common Law is clearly the recognition that the unborn has no separate existence from its mother until it is born and that in order to protect the foetus, the interests and welfare of the pregnant woman must necessarily be compromised. This is consistent with the moral logic that the free use of one's body is dependent upon the fact that one's body is one's own. Thus, it is submitted that it is a just rule when it is invoked to protect the rights of an existing person to life and personal liberty.

The common law rule if applied in circumstances that do not threaten an existing person's right to life and personal liberty is indisputably harsh and the courts acknowledge this. Thus, the courts have tried to negate this harshness by creating the fiction of the nasciturus rule and more recently by appealing to the principles of Tort Law.

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<sup>75</sup> *Lynch v Lynch* (unreported) December 12 1991) NSW (CA).

<sup>76</sup> *Lynch v Lynch* (unreported) 12<sup>th</sup> Dec. 1991 NSW (CA) as per Clarke JA, transcript p 6-7.

Legal fictions are tools used by the courts to ensure a just outcome, when strict application of legal principles would create injustice. However, use of a particular fiction created in one area of the law into another is likely to create legal anomaly and uncertainty. For example, if a fiction, created within the context of Property Law was to be applied in the area of Tort, it would be inconsistent with the principles of Tort Law.<sup>77</sup> Alternatively, it cannot be said that an unborn child can be a party to an action for damages not yet revealed. Thus, it is preferable that this fiction is applied narrowly. Perhaps as narrowly as to similar fact cases only. As we shall see in part four, the Latin versions of the exception envisaged finite biological variables that the NRTs have clearly exceeded.

In *Watt v Rama* the majority felt that the relationship between plaintiff and defendant had to be defined to limit any assumption that the child's right to compensation said something about the legal status of the unborn in the context of abortion. For the majority a duty of care was owed to the child per se but was contingent upon it being born alive and thus, was metaphysical. Also, that the harm was said to occur at the time the child was born.

Andrew Grubb argues that the reasoning of the majority in *Watt v Rama* is difficult to sustain.<sup>78</sup> He says it is not at all clear that the plaintiff as a legal person had been injured. For Grubb, she was already injured at birth. Grubb argues that the objective of the law of negligence is to compensate plaintiffs who are made *worse* by the defendant's negligence and that the relevant question is: did the defendant make the plaintiff legally worse?<sup>79</sup> Grubb also argues that the reasoning of *Watt v Rama* means the courts will have to assume that the infant would have been born healthy and may even have to face up to the question whether or not pure economic loss is recoverable in these circumstances. Grubb argues the courts should just accept that these circumstances create an action for pure economic loss.<sup>80</sup>

Grubb's reasoning is very formalistic and is a good example of how a general application of the common law rule would create injustice. Grubb's suggestion also raises more questions than it answers. The only well recognised exception to the rule of non-recovery for

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<sup>77</sup> Grubb, A, "Frozen Embryos: Right of Inheritance" [1997] *Med. L. Rev.* 121, p123.

<sup>78</sup> Grubb, A, "Law Update -Pre-natal Injury at Common Law" (1991) *Dispatches* (Centre of Medical Law and Ethics, King's College, London) 8, p 9-10.

<sup>79</sup> The law of negligence compensates plaintiffs that have been made worse by the defendant's negligence. A person who is injured but who has not been made worse is not *legally* injured; *Mc Kay v Essex Area Health Authority* [1982] 2 All ER 771.

<sup>80</sup> Grubb, A, "Law Update -Pre-natal Injury and Negligent Mothers" (1992) *Spring Dispatches* (Centre of Medical Law and Ethics, King's College, London) 4, p 5.

economic loss is that it was caused by reliance on a negligently made statement or advice.<sup>81</sup> Furthermore establishing reliance will be problematic.

The reasoning of Gillard J is however to be preferred and is consistent with the principles of Tort Law. Gillard J held that a duty of care was owed to the child as a member of a class of person who reasonably might be affected by the careless act of the defendant but not the unborn child per se. For Gillard J, no duty is owed to the unborn per se but to the relevant class. It is upon the live birth of the child when the child becomes a legal person that the child becomes capable of being recognised as a member of the relevant class. At the time of birth the injury is also appreciated and identifies the infant as one with a cause of action.

By analogy, the plaintiff in *Donoghue v Stevenson* could not be immediately recognised as a member of a class of persons who might reasonably be affected by the conduct of the defendant. She was initially a mere member of the general public. She was only capable of being recognised as a member of the relevant class when she consumed the impugned bottle of ginger beer. It was not the injury that identified her as such but rather the act of consumption. The injury identified her as one with a cause of action. It was mere temporal coincidence that she was injured at the time of consumption. Alternatively, the law of negligence does not require that the injury occur at the time of commission of the negligent act or even that the injury be appreciated at the time the injury actually occurs.

Thus, determine the correct basis to the second exception which Gillard J applied in *Watt v Rama* when he appealed to the principles of Tort Law. Adrian Whitfield QC argues the duty imposed by the law of negligence is a duty *not to injure by want of reasonable care* and harm must be restricted to that which is sustained by a legal person.<sup>82</sup> It is no matter, if at the time of the negligent act the plaintiff is not capable of being identified as a member of the relevant class of persons. Nor is it relevant that the injury is not appreciated or incurred until some time after the commission of the negligent act. What matters is that the plaintiff at some stage is capable of being recognised as a member of the relevant class of persons (and implicitly

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<sup>81</sup> *Lonhro v Tebbit* [1991] 4 All ER 973.

<sup>82</sup> Whitfield, A, note 49, p 40 - Whitfield also suggests that the reasoning of Gillard J is consistent with the principles of Tort Law and is preferable. He articulates the principles of Tort Law as “ (i) the essence of the tort of negligence should be expressed not as a duty to exercise reasonable care to avoid risk of causing injury, but as a duty not to injure by want of reasonable care (*Dorset Yacht Co.Ltd. v Home Office* [1970] A.C. 1004 at 1052 as per Lord Pearson) [and] (ii) that harm, in the legal sense must in the context of tort, be restricted to that which is sustained by a legal person.”

is also a legal person) and harm is sustained by a legal person This approach has subsequently been approved by Phillips J in *de Martell v Merton and Sutton Area Health Authority*<sup>83</sup> at first instance and by the Court of Appeal.<sup>84</sup>

It was unfortunate that Gillard J also went on to offer his second line of reasoning based upon analogy.

That the principles of Tort Law are workable is one argument in support of this approach. This Tort Law approach would also be applicable when determining the tortious liability of a third party involved in the procedure of in vitro fertilisation or any other NRT. Admittedly, it would also be applicable to the giving of advice about the NRTs and if any negligent statement of advice was made, could lead on to a claim for recovery of economic loss if reliance could be established. The mother's reliance and the duty of care toward both the mother and the unborn by the doctor may be sufficient to establish reliance.<sup>85</sup>

Concern may be had for the potential for maternal tortious liability during pregnancy, and parental tortious liability pre-conceptually. These questions were identified but not addressed in by the NSW Court of Appeal in *Lynch v Lynch* and the UK Court of Appeal in *Burton v Islington Health Authority* and in *de Martell v Merton and Sutton Area Health Authority*. These questions give rise to difficult questions of policy concerning family relationships but are unlikely to be faced by an English court by virtue of the *Congenital Disabilities (Civil Liability) Act 1976* (UK). In the absence of legislation the Australian courts would be well advised to stay its hand and to regard the issue of imposing restrictions upon pregnant women as a matter best left to the Legislature for the reasons given in *Re F (in Utero)*.<sup>86</sup>

However, if the basis of the common law rule is recognised as only recognising an existing person's right to life and their personal liberty there is no need for the courts to resort to such creativity to protect the unborn child's right to compensation for injury sustained in utero. Alternatively, protecting the foetus's interests when there is no

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<sup>83</sup> [1992] 3 All ER 820; Phillips J. identified the principles of Tort Law as "...[a] careless act carrying foreseeable risk of harm to another is not of itself a breach of duty owed under the law of negligence. The negligence occurs at the moment the act causes the harm" and "[i]t is at that moment [the harm is suffered] that the question arises: is the victim who sustains the harm someone the defendant is under a duty not to harm?", at 830.

<sup>84</sup> [1992] 3All ER 833; the Court of Appeal however, failed to express its preference for this over the development of the first exception by analogy.

<sup>85</sup> See *X v Pal* (1991) 23 NSWLR 26 at 44.

<sup>86</sup> [1988] 2 All ER 193 as per Balcombe LJ at 200-201.

compromise of the rights and welfare of existing person's to life and personal liberty cannot affect a woman's right to a lawful abortion.

#### **Part 4 - The Frozen Embryo Cases:**

In this part I will describe the court's attempt to define the legal status of the frozen embryo the question of the legal status of the frozen embryo is a difficult issue and has been raised in several jurisdictions around the world.<sup>87</sup> The question of the legal status of the in vitro embryo was first raised in Australia in April 1996, when the Western Australian Government hurriedly enacted legislation to extend the storage period for frozen embryos, and most recently *In the Matter of the Estate of the Late K and In the Matter of the Administration and Probate Act 1935 ex parte The Public Trustee*<sup>88</sup> in the Tasmanian Supreme Court before Justice Pierre Slicer.

#### ***In the Matter of the Estate of the Late K and In the Matter of the Administration and Probate Act 1935 ex parte The Public Trustee***

The facts of the Tasmanian case were as follows. Five embryos resulted from G and S's participation in an IVF programme, three were implanted into G resulting in the birth of a first son. S died soon after. He died intestate. The evidence was that G intended to have the remaining two embryos implanted in the near future. The Public Trustee applied to the court for guidance as to what was the legal status or rights of the remaining two embryos. That is, were the frozen embryos "children" within the meaning of the *Administration and Probate Act 1936* (Tas), and if so, were they living at the date of S's death or would they become children of the deceased upon their being born alive? In Tasmania there is no enactment that limits the storage period for frozen embryos.

Slicer J first recognised that the nasciturus exception was a legal fiction. He then held that the embryos were not "children" within the meaning of the Act. However, he determined that the embryos once

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<sup>87</sup> For example, *Davis v Davis* (1992) 842 S.W. 2 D 605 (Tenn. Sup. Ct.) - frozen embryos were regarded by the court as occupying a *suis generis* status, somewhere between being a "person" and a kind of "property", and vested joint decision making in the gamete providers; *Paraplaix v CECOS*, Trib. gr.Inst. Creteil, 1<sup>st</sup> August, 1984, GazPal, 1984 II 560; *Piers v Centre Hospitalier Regional de la Grave*, (unreported, Trib. gr. Inst.Toulouse, 11<sup>th</sup> May 1993); "The Rios Case", (1985) 24 *J. Family Law*, 27-45; *York v Jones* [1989] 717 F.Supp 42; *Hetch v Superior Court of the State of California for the County of Los Angeles (W E Kane real party in interest)* (1993) 20 Cal Rptr 2d 275.

<sup>88</sup> (1996) 5 Tas. R. 365.

born “are cloaked with the legal fiction and deemed to have been born as of the date of death ... a child, being the product of his father’s semen and mother’s ovum and implanted in the mother’s womb, subsequent to the death of the father is, on birth, entitled to a right of inheritance afforded at law.<sup>89</sup> Thus, a frozen embryo could acquire inheritance rights.

Slicer J then postulated a situation following sexual intercourse but before fertilisation when a man dies and a child is subsequently born. He concluded that such a child should be treated in the same way as a child already conceived - and so why not the frozen embryo?

Furthermore, he concluded that the fiction was not inapplicable because,

“an in vitro child, born posthumously, is at birth the biological child of the father and the mother, irrespective of the date of implantation, and in all other respects (except time) identical to a child en ventre sa mere then the legal principles applicable to the child en ventre sa mere should like wise be afforded to an in vitro child. If a child en ventre sa mere is not regarded as living (in terms of law) but has contingent interests dependent upon birth, then in logic, the same status should be afforded”.<sup>90</sup>

Slicer J clearly focused upon the embryo’s consanguinity and that it was extra corporeal and compared it with that of a child en ventre sa mere whether or not the conceptus was fertilised or implanted and concluded that for the purposes of the law the frozen embryo was identical with the child en ventre sa mere not yet implanted in the womb. Slicer J did not acknowledge the competing interests of the frozen embryos and the potential existing beneficiaries of S’s estate. Slicer J also failed to recognise the fact that the distribution of S’s estate would in the result remain potentially contingent upon the live births of the two frozen embryos stored. Slicer J assumed that there would only be one child born in the result of the exercise to implant both embryos into the womb of G. However, he failed to recognise that not all in vitro embryos are the genetic sum of the mother and her husband/partner and may be the genetic sum of the mother and a donor or two gamete donors and that it is common practice that

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<sup>89</sup> *In the Matter of the Estate of the Late K and In the Matter of the Administration and Probate Act 1935 ex parte The Public Trustee* (1996) 5 Tas. R. 365 at 7.

<sup>90</sup> *In the Matter of the Estate of the Late K and In the Matter of the Administration and Probate Act 1935 ex parte The Public Trustee* (1996) 5 Tas. R. 365 at 6.

several, often more than two embryos will be stored at any one occasion of egg harvesting.

Slicer J dismissed the value of legal certainty required by the law of inheritance<sup>91</sup> and said “the court is not required to pay attention to such practical details”.<sup>92</sup> Slicer J was also prepared to ignore the significance of the temporal limits of the nasciturus exception and the temporal convenience that modern assisted reproductive technology can provide to recipients including the possibility of surrogacy. In short, he paid no attention to the implications of his reasoning.

## Discussion

The advent of the NRTs have created new potential for conflict between the interests of the in vivo and in vitro entities and the rights of existing persons that do not contest the existing person’s right to life or personal liberty. The in vitro embryo cannot logically even challenge such rights of an existing person as it exists extra-corporeally.

However, other lesser rights of potential parents, for example, the right to predetermine the sexual identity or preference of their progeny, not yet conceived, implanted or born may conflict with the unborn’s interest to not have its potential capped or its individual identity predetermined. State law regulating abortion will of course create opportunity for existing persons to abort an unborn on the basis of sex alone or other reason.<sup>93</sup>

Thus, in the context of modern human reproductive technology the potential for injustice against the extra corporeal foetus under a general application of the common law rule is considerable. This potential for injustice against the in vitro embryo does not explain why existing legal fictions used in the context of the in vivo unborn’s inheritance rights or rights as a financial dependant should be applied to the unborn when it is in vitro.<sup>94</sup>

The outcome of *In Re the Estate of the Late K* is not undesirable, but it deploys the simplistic reasoning of an analogy. The nasciturus

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<sup>91</sup> see, NSW Law Reform Commission, *Report on Human Artificial Insemination*, (1986) Report No. 49, p 102.

<sup>92</sup> *In the Matter of the Estate of the Late K and In the Matter of the Administration and Probate Act 1935 ex parte The Public Trustee* (1996) 5 Tas. R. 365 at 6.

<sup>93</sup> This combined with the added difficulties of successful prosecution effectively ensure this issue is for the time being resolved.

<sup>94</sup> Morgan, D, “Rights and Legal Status of Embryos” (1996) 4(7) *Australian Health Law Bulletin* 62, p 64.

exception does not envisage the infinite possibilities of the NRTs. Moreover, this approach does not address the generic legal question: what is the legal status of the frozen embryo?

Derek Morgan admits it appears inconsistent to conclude that a frozen embryo that is, for example, given a right not to be allowed to perish or inheritance rights can after implantation be the subject of a lawful abortion.<sup>95</sup> However Morgan concludes that this is only puzzling if one equates the in vivo embryo or foetus with the in vitro embryo.

Alternatively, it only appears problematic if one fails to appreciate the limited objective of the common law rule. It is a general application of the common law rule and reckless deploy of the nasciturus exception that has no regard for the nature of the rights in contest that will result in potential for injustice and legal uncertainty. The common law rule is a rule that should be confined to the circumstances when the right of an existing person to life or personal liberty is in contest with the interest of the unborn in life. In addition, the nasciturus exception can only practically be applied to the in vivo entity, where the variability of outcome can be anticipated and is limited. This is clearly not the case in Tasmania as there is no enactment that limits the storage period for frozen embryos.

So, *In Re the Estate of the Late K*, what are the interests in conflict, should the interests of the in vitro embryo be protected, and if so, how? Surely conflict existed between the right of existing beneficiaries and the interest of the frozen embryo of G and S to share in S's estate. Clearly, the right of existing potential beneficiaries to inherit property is not strong in the sense that the right to life is, notwithstanding the possibility of an inheritance, of considerable value. It is a future right contingent on the free choices to be made by others. If we accept that the in vitro embryo also has the same right to inheritance except that it is further contingent on it being born alive it might be claimed, the right of a frozen embryo is lesser than the right of existing beneficiaries. However, I would suggest that the competing rights of both are essentially very minor and that any difference between them is nominal and thus, in the interests of justice the inheritance rights of the embryo(s) ought to be recognised as equal to that of existing potential beneficiaries. The NRTs are a reality as proven by the increasing number of children born of IVF in Australia each year and their interests are just as real.

It is arguable that in such cases the chances of success of assisted conception and safety of repeated attempts should be a material

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<sup>95</sup> Morgan, D, note 94, p 64.

factor.<sup>96</sup> The weight given to the rights of each entity will thus be influenced by factors such as the existence of any State or Federal law regulating the use of NRTs, the number of embryos stored, the safe or legal storage period for cryopreserved embryo and the technical, medical, economic and ethical considerations and the possibility for surrogacy arrangements. In addition the intentions of gamete donors could be ascertained by the courts and their testimonies inform the courts in their decision. In the case of a deceased person involved in the creation of an in vitro embryo, presumably evidence as to their intentions/ wishes in the event of an untimely death will be important. Thus, the Common Law would be able to achieve similar results in similar cases that would be consistent in the legal sense, though they may well be inconvenient. In the UK, the Parliament has sought fit to provide a more efficient certainty, which in turn creates a different type of injustice.<sup>97</sup> There is and always will be tension between the principle of justice and legal certainty.

This approach, though detailed transcends the lack of logic seen in the Tasmanian case of attributing or denying that the unborn has interests that ought to be protected by the law on the basis of its consanguinity, or potential of becoming en ventre sa mere or more generally for life - however likely or remote or, by application of a legal fiction created and recognised in different circumstances.<sup>98</sup> These distinctions are an inappropriate use of the Nasciturus exception create potential for uncertainty and injustice. For example, against the IVF child born of donor gametes and against IVF children actually born and existing beneficiaries, legal certainty is denied. The human embryo and foetus, regardless of its consanguinity, stage of development or potential for life is a human entity deserving of respect that requires existing persons to consider its interests as equal when it is not contesting their right to life or personal liberty. This gives rise to the question: what protection ought the law give to the unborn?

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<sup>96</sup> Clinicians often cite a “take home baby rate” - currently quoted at approximately 25% in the more successful clinics.

<sup>97</sup> *Human Fertilisation and Embryology Act 1990* (Eng) s 28 (6) (b). In the UK, a posthumous child born of IVF, cannot under statute law, be a beneficiary of its deceased father’s estate, regardless of when it was implanted in relation to the death of the father - that is, even if it was implanted prior to the death of the father or the father expressly intended for the resultant child to inherit.

<sup>98</sup> *Re F (in Utero)* Counsel for the local authority argued that wardship should be extended to at least the viable foetus; at 133 B. However, Balcombe LJ held that there was no logic in why jurisdiction to protect the foetus should start at a time when the foetus is capable of being born alive, at 142 B-C.

## Part 5 Conclusion

In England and Australia, at Common Law, in circumstances when the right of an existing person to life or personal liberty have been in conflict with the interests of an *in vivo* foetus the courts have rigidly applied the common law rule. In contrast, in the United States, the courts in civil cases have determined that the State has an interest in protecting the life of the unborn and have accordingly entered into a balancing exercise, balancing the right of existing persons to life and personal liberty against the interests of the unborn in life. In the result the right of existing persons to life and personal liberty in my opinion has been unjustly compromised.<sup>99</sup> This situation in the United States which threatens the existing woman's right to life and personal liberty, in my mind justifies referring to the decision in *Paton v B.P.A.S.* as a rule of law rather than a principle. Thus, I submit that the right of an existing person to life and personal liberty cannot be contested by the unborn at Common Law. This legal argument is supported by the reality that in order to protect an *in vivo* embryo or foetus the mother's actions must be controlled and that the right of an existing person to life and bodily integrity should be paramount. This point of view or the common law rule has a compelling moral logic as argued above.

In common law jurisdictions when the interest of the unborn has been in conflict with a right of an existing person that is less than that of the right to life, bodily integrity and individual autonomy, the *nasciturus* exception and pre natal injury precedents have been applied or developed. This is typical of the piecemeal approach of the Common Law and such cases are limited to similar fact cases. In circumstances when a child is injured *in utero* the application of the principles of Tort law does place the child injured *in utero* on an equal footing with existing persons. In other circumstances a balancing exercise would not only recognise the interests of the unborn but would also be capable of both just results and legal certainty, accepting the tension that exists between these two principles of law.

Recent advances in biotechnology promise more and more choice for potential parents and certainly the interests of the unborn will be

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<sup>99</sup> See *Re F (in Utero)* per Hollings J at 129 B; per May LJ at 134 G, and per Balcombe LJ at 141 F; *Re A.C.* D.C. Ct. App, 533 A 2d. 611 (1987) - The Appeals Court of the District of Columbia approved the decision of the court at first instance, ordering surgical intervention for the protection of a 26 week old foetus. The mother was terminally ill and the operation placed her life at risk, probably threatening her life span by a couple of hours. The Appeals Court of the District of Columbia applied *Roe v Wade* 410 US 113, and held that the special circumstances of the mother's inevitable death justified her right to freedom from bodily intrusion being subordinated to the interests of the unborn child and the State.

contentious, if only because they create morally optional duties as opposed to duties based upon actual rights but also because they will be morally contentious in and of themselves. For example, the right of the unborn (including the pre-conceived) to achieve its own unchallenged potential sometimes referred to as the right to our own unique identity and less controversially, the right not to be harmed and to freedom of sexual identity. Such interests will be juxtaposed against a potential parent's right to autonomy *as a parent* (as opposed to individual autonomy *as an individual*). This right might even be argued to be derived from the right to freedom of reproduction and thus be a fundamental human right.<sup>100</sup> Undeniably, the balancing exercise will be difficult.

There are no simple solutions. Blanket prohibitions upon genetic manipulations that are “harmful” to a child seem uncontroversial. Yet, definitions of “harm” are value dependant.<sup>101</sup> Furthermore, a blanket prohibition will create potential for injustice, for example, the right to select against an incurable debilitating disease.

Certainly the decision *In re the Estate of the Late K* has raised a whole range of legal and ethical problems and has produced calls for Federal reform and harmonisation of the various states' laws. Undoubtedly, the issues are many and overwhelming and go beyond defining the proper use of human embryos in research and the succession rights of a frozen embryo.<sup>102</sup> These questions are testimony to society's moral ambivalence to the unborn or perhaps concern for a woman's right to life and personal liberty.

I submit, in general, the legal status of the unborn when its interests are not in conflict with an existing person's right to life or personal liberty should be regarded as equal to that of existing persons. However, as

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<sup>100</sup> This conflict of interest arises today in regard to sex selection in favour of birthing only male offspring. Another example may arise when and if homosexuality is identified with a high level of accuracy as genetically predetermined and genetic engineering is possible.

<sup>101</sup> I refer to the debate on the right of Deaf individuals or individuals who suffer from achondroplasia to optimise their chances to ensure their, as yet unborn or even pre-conceived, child will be congenitally deaf or a dwarf and also the ethical debate about cochlea implants.

<sup>102</sup> Some issues suggested by Derek Morgan, note 94, p 67, include, the legal significance of consanguinity, how long can embryos be stored for, should “owners” of embryos be allowed to move embryos from one jurisdiction to another for the purposes of increasing their opportunity for the preservation of the embryo, posthumous implantation or implantation into a surrogate, the rights of gamete providers over an embryo, rights to compensation in the event embryos are “converted”, lost or even misappropriated and the right of children born of assisted reproduction to genetic information - both non-identifying and identifying.

such interests and morally optional duties will be legally and morally contentious, the balancing exercise difficult and there always be a need for legal certainty I would further promote the democratic process and Federal Legislation over the judicial process.

The government must be proactive in this politically sensitive area by firstly monitoring ongoing advances in biotechnology, promoting public debate, canvassing informed opinion and openly proposing legislation whilst at the same time reviewing the relevance of existing legislation that seeks to regulate the NRTs. It is true, that addressing these issues will be a costly and time consuming exercise, resulting in detailed legislation. However, the biotechnological phenomena of the new reproductive technologies is not going to retreat, indeed, it is advancing at a rapid rate. These costs and difficulties have to be faced to achieve the benefits to be had. The democratic process will, in part, address the difficulties. As Derek Morgan says, legislation “would also be a further powerful symbol of who Australians are and who they want to be”.<sup>103</sup> Federal legislation would also promote equality between individuals living in different parts of the country to access the NRTs. A Federal Law would also preclude the vagaries of the Common Law. Thus, it is recommended that these questions are best answered by the Federal legislation.

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<sup>103</sup> Derek Morgan, note 94, p 68.