**Lynch v Lynch 1**

**Issues**

I consider that these alternatively stated submissions can be accepted or rejected in accordance with the single de-

terminant of whether a person, now born, can successfully bring action against his or her mother for antenatal injury

caused by negligence.

**Rules**

1. Grodin v Grodin (US)

a child's mother bears the same liability for injuri-ous negligent conduct resulting in prenatal injuries as would a third person.

1. X & Y v Pal

A doctor owes a duty of care to an unborn child who has suffered prenatal injuries caused by the doctor’s breach of the duty of care

1. Hahn v Conley

a grandfather was sued for damages in respect of injuries caused to a child struck by a motor vehicle whilst the child was crossing the road after a responsive call from the grandfather that he was "over here"

**Application**

Following the authority in *X & Y v Pal*, the court holds that ‘a child now born can sue for breach of a duty of care which extends to default occurring prior to birth.’ The court rejects the defendant’s argument that the cause of action of the child is barred when the person who owed the duty of care of the child now born is his or her own mother. The defendant argues that because the mother and her fetus do not have the coincidence of identities, thus they could not be identified as separate persons. The court rejects the defendant’s argument. Instead, the court argues that there is no unity of personality of the unborn infant and the mother. Therefore, applying the test in X & Y v Pal , the court argues thatunborn child could be considered as a particular part class of persons of which the mother could owe the duty of care to [page5]. Therefore, there is no bar for the now born baby to bring a claim against her own mother on the prenatal injuries caused by the mother’s negligence.

Relating to the unity of the mother and her unborn child, the court observes, in the obiter dicta, that there is no requirement that ‘birth occurs in order for exercisable rights to accrue’ [page6]. The court also argues the foreseeability test, that injuries should be foreseeable for the duty to be owed, should be satisfied in the case of the mother and her unborn child.

The court distinguished the present case from Hahn v Conley, which allows a grandson to sue a grandfather for negligence because the facts in two cases are different. However, the court’s obiter shows that the discussion of blood relations does not bar the cause of action in this case [page5]

The court dismissed the statute on civil liability from driving because the legislature does not affect the judgment on common law.

**Conclusion** Yes

**Raito**

1. Pregnant woman are liable in negligence to their unborn child once born.
2. The pregnant woman owes a duty of care to her unborn child because the unborn child is considred a particular classed of person to whom she can owe the duty to.
3. A child’s cause of action against the mother regarding the child’s prenatal injuries caused by the mother’s negligence will not be barred.
4. A child’s cause of action against the mother regarding the child’s prenatal injuries caused by the mother’s negligence will not be barred because the negligent act and the injuries occurred when the child was not yet born.

**Lynch v Lynch 2**

**Application # first draft**

The court affirms the authority of X and Y v Pal but considers whether a matter of public policy would rebut the duty of care owed by a mother to her unborn child in the case of prenatal injuries from the mother’s negligence.

To consider the matter of public policy, the court narrowed the legal issue in the case to whether the duty of care would arise when a mother was driving and refused to consider a wider issue of whether the duty of care could be found in other activities that the mother would participate in, such as competitive sports.

After narrowing down the scope of the analysis, the court rules that, in the case of driving, the public policy is clearly stated by Parliament in the Third Party Insurance Act which ‘ensure that persons who were injured as  
a result of the negligent driving of vehicles were properly compensated and that their claims were not open to be defeated by the impecuniosity of the defendant.’416a

The court also discussed the public policy of

Appellant Accept X and Y. but argue on ‘public policy’

Accept Watt v Rama

Court – we will focus on ‘driving’ and not other activities

Can a mother ever not be liable ?

* Cannot use foreseeability to explain
* Use policy
  + Reject Policy against imposing liability on other activites but focus on driving only
    - Mother be under scrutineis
    - How aobut competitive sprots
  + Policy for imposing liability
    - Social policy in driving in Thrid party insurance act
      * required that all owners of motor vehicles obtain a third party policy indemnifying the owner and driver of the motor vehicle against all liability “in respect of the death of or bodily injury to any person caused by or arising out of the use of the motor vehicle in New South Wales ...”. 415g
      * In short, the scheme was introduced to ensure that persons who were injured as  
        a result of the negligent driving of vehicles were properly compensated and that their claims were not open to be defeated by the impecuniosity of the defendant. 416a
    - Lamont J (in *Montreal Tramways v Leveille* [1933] 4 DLR 337 at 345): 416e
    - no considerations of justice 416f
  + Policy against imposing liability
    - Certainly those arguments of social acceptability and natural sentiment, which the English Law Commission (the  
      Law Commission, *Report on Injuries to Unborn Children* (No 60) 1974) found persuasive against the introduction of a statutory provision enabling a  
      child generally to sue his or her mother in respect of ante-natal injury have  
      little relevance where the cause of action is negligence in the driving of a motor vehicle. 416d

Reject that the unborn cannot be regarded as having an existence independent of the mother pior to birth (415a) because X & Y legal rights accrue only if and when the person is born

**Application #second draft**

The court affirms the authority of *X and Y v Pal* but rejects the appeal that the mother should not owe the duty of care to an unborn child in the case of prenatal injuries from the mother’s negligence because of a public policy consideration. The court argues that the relevant question in the present case is narrow as it only concerns whether the duty of care would arise when a mother was driving. The court refuses to consider a broader issue of whether the duty of care could be found in other activities that the mother would participate in, such as competitive sports.

After narrowing the scope of the legal issue in the present case, the court points out that there is clear social policy in in the Third Party Insurance Act which ‘ensures that persons who were injured as  
a result of the negligent driving of vehicles were properly compensated and that their claims were not open to be defeated by the impecuniosity of the defendant.’[416a]. The court gives weight to this clear legislative policy regarding driving and concludes that the duty of care owed by the pregnant woman should be imposed in order to satisfy the policy. Apart from the clear social policy indicated and implemented by the Act, The court mentioned two other policies to support its ruling, such as the policy to compensate and relieve the injured child [416E], and the principle of justice not to single out and deny access to justice to children who suffered prenatal injuries [416F].

**Application #third draft**

The court affirms the authority of *X and Y v Pal* but rejects the appeal that the mother should not owe the duty of care to an unborn child in the case of prenatal injuries from the mother’s negligence because of a public policy consideration. The court limits the scope of the case only to the activities of driving, which has a clear social policy, indicated in the Third Party Insurance Act, to compensate for injuries from the negligent driving of vehicles [416a]. Based on this policy consideration, and the principle of justice [416E], [416F]. The court rejected the appeal and ruled that pregnant women are liable to their unborn child once born only for negligent driving [417A].

**Ratio**

1. pregnant women are liable to their unborn child once born only for negligent driving.
2. pregnant women are liable to their unborn child once born only for negligent driving because there is a clear policy in favour of compensating injuries from negligent driving in NSW.
3. pregnant women are liable to their unborn child once born only for negligent driving because of the principle of justice.

**Bowditch v McEvan**

**Application**

To answer whether a mother owes a duty of care to her unborn child who, now born, had suffered prenatal injuries as a result of the mother’s negligent driving, the court was asked to consider two different approaches taken in Lynch v Lynch, and, a Canadian case, Dobson v Dobson.

The court points out several distinctions between Lynch and Dobson. Lynch is considered pragmatic, whereas Dobson is sentimental and eloquent. Lynch focuses on the liability of a pregnant woman, whereas Dobson is concerned with the liability of a mother.

In Dobson, especially Cory J’s opinion, the special relationship between a mother-to-be and her foetus is considered ‘as determining the outcome of the appeal.’ This special relationship and Dobson’s focus on a mother and not a pregnant woman lead Cory J to appeal to the morality and social expectations that imposing such duty to the mother would fetter her autonomy and harm her psychologically. The court in the present case, however, rejects Cory J’s appeal to morality and social expectations, and agrees with McHugh J in Perre v Apand that ‘ideas of justice and morality should be invoked only as criteria of last resort when more concrete reasons, rules or principles fail to provide a persuasive answer to the problem.’ [page6]

Moreover, in term of policy regarding negligent driving,…..

**Ratio**

Pregnant women are liable to their unborn child once born only for negligent driving because of the policy of the legislated scheme of insurance.

Matters of policy and perceptions of what the community expects from its legal system demonstrate that ideas of justice and morality emanating from the personal perception of judge should only be invoked as criteria of last resort.

If policy reasons are to be the basis for a refusal to impose a duty of care, and if the policy reasons are clearly discernable policy, the court should follow the policy rather than what any particular court might judge to be fair, just or reasonable

Where a woman has no rights of autonomy or privacy, whatever their content, which would be disregarded if a duty of care were imposed in circumstances where the special relationship with the foetus does not of itself subsist then there is no basis for declining to impose a duty of care.

**Bowditch v McEvan**

The court was asked whether to depart from Lynch and followed a ration in Dobson that if the duty of care owed by pregnant women existed, such duty should be imposed by the legislature and not the court. The court rejected Dobson’s approach because the policy in favour of imposing the duty of care is clear in Australia, and the court can directly extend the legislative policy. Moreover, the extension of the duty of care could be appropriately determined [10] and the foreseeability of harm could be well defined [11]. Thus, the court does not have to wait for the legislature to impose the duty. The duty can be imposed by common law.

The pressing issue that arose in the case is the relevancy of ‘the compulsory third party insurance cover ensuring recovery under any judgment given.’ [8]. The court referred to existing authorities both support and reject the consideration of compulsory third party insurance to determine the scope of a tortious duty of care. However, the court agreed with the view that the relevancy of the insurance should be disregarded in delimiting the scope of negligence.

The court also pointed out that the decision in Lynch is plainly right and so must be followed, and rejected to look at other cases the respondent offered.

There is also a compelling requirement of fairness in favour of imposing the duty of care [12].

The court refused to consider other activities that pregnant women can perform [13].

**Raito**

**CAL**

**Issues**

First, even if there was a duty of care, and even if it was breached, it has not been shown that the breach caused the death.

Secondly, even if there was a duty of care, it was not breached.

Thirdly, there was no duty of care.

Whether there is a narrow duty of care on the part of the Licensee to take the reasonable care selected prospectively by Mr Scott and the Licensee as the means by which Mr Scott's interests in not facing the risks of driving the motorcycle while intoxicated could be protected, given the Mr Scott's vulnerability and to the capacity of the Proprietor and the Licensee to influence event.

**Law**

Sullivan v Moody, to conclude that the law of negligence creates a duty in the present circumstances "would subvert many other principles of law, and statutory provisions, which strike a balance of rights and obligations, duties and freedoms."

**Application**

The court rejects the narrow duty of care.

1. Mischaracterisation of the ‘arrangement’
2. The scope duty of care is too narrow that seems biasedly selected based on a certain causation, and too indeterminate
3. he duty on the Licensee would have prevented Mr Scott from acting in accordance with his desire to ride his wife's motorcycle home.20 This conflict does not arise
4. Lack of coherence with other torts.
5. **[***Lack of coherence with law of bailment.*
6. Lack of coherence with legislative regimes in relation to alcohol

**CAL**

**Obiter**

**Issue**

Do publicans owe a duty to take care not to serve customers who have passed a certain point of inebriation? And do they owe a duty to take positive steps to ensure the safety of customers who have passed that point after they leave the publican's premises?

**Rule**

Cole (HC)

* Ratio (4-2) there was no breach of duty of care
* No ratio(2-2-2) on whether the publicans owe a duty to take care…

Cole (SCNSW)

* Ratio “no duty of care owed by the licensee save in exceptional cases."

Farah Construction

Jordan House Ltd v Menow

**Application**

1. Stare decisis
   1. There is no ratio in Cole because of the 2-2-2 position on duty of care (the majority agreed that there was no breach).
   2. What Blow J did in Trial court was correct
      1. Blow J followed ration in Cole (SCNSW), saying that “no duty of care save in exceptional cases."
      2. By following the ratio, Blow J followed Farah because the ratio of the appellate court was not plainly wrong.
      3. Note [50] sort of saying that Farah was not revolutionary, because the principle in Farah has been recognised in relation to decisions on the common law for a long time in numerous cases before.
         1. What principle ? comity
   3. the CA’s approach was wrong
      1. The CA did not follow Farah because it ignored Cole (SCNSW) without rejecting Cole (SCNSW) as ‘plainly wrong’
      2. However, the CA could get away from Farah if the CA can distinguish the present case from Cole (SCNSW) by saying that CA’s case is the exception case.
2. No duty of care
   1. hard to tell whether someone is drunk / the use of breathalysers in pubs is awkward [53]
   2. how to exercise autonomy and responsibility when it comes to drinking- for Parliament to decide on such paternalist issues [54]
   3. Legal coherence [55]
      1. legal coherence arises where legislation compels a publican to eject a drunken customer but the tort of negligence requires the person's safety to be safeguarded by not permitting the person to drive or to walk along busy roads, and hence requires the person to be detained by some means
3. reject Jordan House Ltd v Menow [56]
   1. distinguished from the Canadian case because the licensee in Jordan

knew of the plaintiff's"somewhat limited capacity for consuming alcoholic stimulants without becoming befuddled and sometimes

* 1. Fundamentally the reasoning is unconvincing because of its failure to take into account and analyse the considerations of principle referred to above, particularly the consideration of legal incoherence.