Title: Tuesday, April 19, 2005 Private Bills Committee
Date: 05/04/19
Time: 8:07 a.m.
[Dr. Brown in the chair]

The Chair: Good morning, everyone. We'll call the meeting to order. Everyone should have received copies of a notice of the meeting today, an agenda, the Parliamentary Counsel's report, the minutes of the April 12 meeting, and the *Hansard* transcript of the April 12 meeting. If you don't have any of those materials, then please talk to Florence, and we'll arrange to get you copies.

The first order of business this morning is the approval of the agenda as circulated. Could I have a motion? Dr. Swann. All in favour? Any opposed? That's carried.

The next item of business is the approval of the meeting minutes from the last meeting of the committee on Tuesday, April 12, 2005. Those have been circulated. Could I have a motion to adopt the minutes as circulated? Mr. Johnston. All in favour? Any opposed? Carried.

Item 4 is Bill Pr. 1, Bow Valley Community Foundation Act. The sponsor has advised that she won't be here. Ms Tarchuk is not intending to be present today, but we have the petitioner and petitioner's counsel available. So could we have them in?

Ms Dean: Just before we bring in the petitioner and petitioner's counsel, I just wanted to highlight briefly the purpose of this bill and to summarize my report briefly.

The Bow Valley Community Foundation Act will incorporate a nonprofit community foundation to service the Bow Valley corridor. The foundation will be empowered to receive money or other donations in trust and will be entitled to disburse those funds to agencies or organizations in the community that have objectives similar to the foundation.

Committee members are probably aware that there is precedent in Alberta for community foundations to be incorporated by private act. A couple of examples are the Calgary Foundation, the Edmonton Foundation, and also the Milk River and district community foundation. Committee members would have received a copy of a couple of those statutes for reference in their materials.

Finally, there was a letter of objection to this bill that was received in our office, that was circulated to you. It's self-explanatory. The author of that letter could not be discerned, so we could not contact that person.

There you are. Thank you.

[Mr. Dlin and Mr. Phillips were sworn in]

The Chair: Did you want to ask a question, Mr. Johnson?

Mr. Johnson: I'll follow up later.

The Chair: Welcome, Mr. Phillips and Mr. Dlin. Perhaps the committee members could just introduce themselves.

[The following members introduced themselves: Mr. Agnihotri, Dr. Brown, Ms DeLong, Mr. Elsalhy, Mr. Groeneveld, Mr. Johnson, Mr. Johnston, Mr. Liepert, Mr. Lindsay, Mr. Lukaszuk, Mr. Mitzel, Dr. Morton, Mr. Oberle, Mr. Prins, Dr. Swann, and Mr. Tougas]

Ms Marston: Florence Marston, assistant to the committee.

Ms Dean: Shannon Dean, Parliamentary Counsel.

The Chair: Mr. Dlin, are you going to present the petition? Are you going to make the presentation?

Mr. Dlin: Sir, with all due respect, Mr. Phillips is one of the originators. It's his intent to present the bill this morning and to address any questions. My involvement was relatively limited.

The Chair: Would you like to proceed, then, Mr. Phillips?

Mr. Phillips: Thank you, Mr. Chairman, members of the Standing Committee on Private Bills, ladies and gentlemen. A group of Bow Valley citizens got together about a year ago to investigate the feasibility and practicality of creating a community foundation. This was done with the encouragement of our mayor and our town council, and the result of this investigation is the private bill that now is before this committee.

We discovered that over the last few years there's been a dramatic growth in community foundations all across Canada. They are having a profound impact on the communities and on how the communities fund their charitable causes. They make the community more self-reliant and less dependent on tax-related support. These community foundations are having a dramatic and lasting effect on the programs and services they support.

There's also a very high interest expressed by individuals who are deciding to direct their charitable gifts to their community foundations. Through the use of endowment funds the community foundations take a long-term view of funding and thereby give the programs and services they fund a more stable and long-lasting source of funding for their projects. This allows them to plan and budget their projects much better and farther in advance, which tends to make them more efficient and get better value for their money.

8:15

It's not the purpose of these foundations to further dilute the current charitable funds available for a community but rather to find new charitable funds by soliciting new long-term sources. This is achieved by providing potential donors with a new outlet for long-term, permanent endowments. With our aging population more and more individuals are seeking ways to permanently endow their communities. Community foundations provide the partnership of these individuals and those who understand the community and its needs. This combination provides an outstanding way to help build a community that is a good place to live, work, and play.

In view of these findings our group decided to proceed with the development of a community foundation for the Bow Valley. The mission statement of our foundation is "to help the community and its people by encouraging and facilitating philanthropy and funding for charitable activities through the creation and administration of endowment funds." From our deliberations and investigations of other community foundations as well as discussion with and written information from the Community Foundations of Canada we decided that our foundation should be broadly community based, have a commitment to community service, be designed to be long lasting both in fact and in appearance, be transparent, accountable, nonpolitical, and with no overhead being charged to any of the endowments.

Overhead is to be raised separately so that donors know where their donations will be used. The foundation and its structure must be such that donors are fully confident that their wishes and the terms under which their donations are made will be carried out over the very long term.

We considered the ways available to us to form this foundation, those being incorporation as a not-for-profit corporation under applicable federal or provincial legislation, registering under the provincial societies legislation, or applying for incorporation by special act of the Alberta Legislature by means of a private bill. Even though it is the most difficult of the options available, we

chose the latter as we believe that the public image of a community foundation as a special, permanent institution is best served by going to the elected government for the recognition provided by a private bill of the Legislature.

We also believe that the rigid requirements in such founding legislation safeguard the integrity of the foundation and can be very reassuring to potential donors that the board and the foundation are held accountable to public scrutiny. It also assures donors that the rules under which the foundation operates will not be changed without extensive public scrutiny as well as detailed scrutiny by the Legislature and the Standing Committee on Private Bills.

The bill before you sets out how the foundation is to operate and how it is to be structured. In its drafting three acts of the Legislative Assembly of Alberta were used as precedents, those being the Edmonton Community Foundation Act, the Medicine Hat Community Foundation Act, and the Milk River and District Foundation Act. Various sections were taken from each of these acts to create a community foundation that we felt met all the criteria elaborated earlier in this presentation.

For example, the procedure for appointing the board of directors has been designed to assure, as best one can, a board that is broad based both in knowledge of areas of funding needs in the community and of funding sources in the community. For transparency we have included making the annual meetings open to the public and having the annual financial information printed in the local newspapers. I won't go into all the parts of this private bill, but if you have any questions, I'll of course try and answer them as best I can.

We now request that you find in our favour and that our private bill, Pr. 1, Bow Valley Community Foundation Act, proceed. Thank you.

The Chair: Mr. Dlin, do you have anything to add?

Mr. Dlin: Nothing to add, sir.

Ms Dean: Just one comment, Mr. Phillips. We talked at length about the other options you had available rather than a private act when we had discussions earlier this year. From your comments I understand that you are aware that if you have any changes in your corporate governance provisions that are set out in the statute, you'll have to come back before the committee to petition for another bill that will amend this act.

Mr. Phillips: Yes, I am. That was one of the reasons I wanted it, because that way the rules can't be changed without very serious consideration. They have to be shown to be needed.

Thank you.

Dr. Swann: I'll just ask: what were your other considerations in making this the process of choice for you?

Mr. Phillips: Going with the private bill? As I said in here, this foundation and most community foundations are designed for the very long term. It's not a short-term charitable situation. You're looking at endowments. It takes a long time to build endowments, but once the endowments are there, they're going to be there permanently.

Now, when people pass away and leave a foundation, they want to be fairly confident that the rules under which their foundation is going to be run are going to survive into the long term. We felt, by far, that this was the best way to assure that so that people who are making the donations would feel the same.

The Chair: Mr. Johnson.

Mr. Johnson: Yes. Mr. Phillips, I've often wondered in these foundations just what restrictions there might be in terms of the geography or the area served. Can you just give me some idea of what area is served? I know that it's the Bow Valley Foundation, but is it only the organizations in that particular area? If someone wanted to make a contribution, say, from an area not even close, would those be accepted?

Mr. Phillips: Yes, they would. We've defined the Bow Valley as a fairly restricted area. Most of these foundations, being community-based, are fairly restricted. But there is provision where – even if somebody within the area wanted to donate, but they wanted the benefit to go outside the area to a specific project on their donation, this is also provided for. So there is that flexibility.

Mr. Johnson: Thank you.

The Chair: Are there any other questions?

Thank you both, gentlemen.

Mr. Phillips: Thank you very much for your time.

The Chair: Gentlemen, just to let you know, we will be deliberating on the matter a week from today. So we won't be making a decision today.

Mr. Phillips: Very good. Thank you very much. We'll be advised in due course after those deliberations.

The Chair: Immediately thereafter. Yes.

Mr. Phillips: Thank you very much.

8:25

The Chair: Before we proceed with the next matter, Parliamentary Counsel has some comments regarding the report which she has made.

Ms Dean: Thank you, Mr. Chair. Just briefly I want to highlight the purpose of this bill just to give it some background for the committee members. This bill will grant a right of civil action to Brooklynn Rewega to allow her to file an action against her mother for injuries sustained in a single-vehicle accident while her mother was pregnant.

I have provided my report to the committee on this bill, and attached to my report were four things. The first thing was an excerpt from the United Kingdom legislation which is referred to in my report as well as the petitioner's counsel's submissions and Ms Corbett's submissions. This United Kingdom legislation is public legislation that provides for a motor vehicle exception to the common-law principle of maternal tort immunity for prenatal conduct.

I've also attached to my report a summary of the 1999 Supreme Court of Canada decision in Dobson and Dobson, and that is the leading case with respect to this issue in Canada, where it was held that a mother cannot be held liable in tort for alleged prenatal negligent acts.

I've also attached an excerpt from the parliamentary authority *Erskine May* which addresses the criteria to be considered when determining whether a private bill should be introduced as a public bill.

Finally, in the last document are the comments that have been provided from the Department of Justice.

You will note that Mr. Nolan Steed, director of constitutional law, is here, and he can respond to any questions with respect to those comments.

You will also have been provided with submissions from the petitioner's counsel, a submission from Ms Corbett, who is the legal counsel for the defendants in the litigation that's going on right now in the courts. You will also have been provided with the 2004 transcripts when this bill was heard last year by the committee in the previous Legislature.

Just briefly, this is essentially the same bill from 2004. Last spring the committee made a determination to defer consideration of that bill to the fall sitting, and by virtue of the election the bill died on the Order Paper, so the petitioner has brought forward the bill again.

Those are my comments, Mr. Chair.

The Chair: Thank you.

Mr. Agnihotri: Why do we entertain this type of case when the case is already in the court?

Ms Dean: Perhaps these are questions that you may want to pose to the petitioner's counsel.

Mr. Agnihotri: Before you accept the petition, can't you say no, you don't want to deal with this?

The Chair: Basically anyone is free to make a petition to the Private Bills Committee.

Mr. Agnihotri: Thank you.

The Chair: Mr. Elsalhy.

Mr. Elsalhy: Sorry. Can I just ask you what the word "tort" means? I have no idea what it means.

The Chair: A tort is a personal wrong committed by one person against another that bears some sort of legal culpability: basically, an assault, an accident which is preventable in which there is negligence, or something of that nature.

I guess we can proceed to call in the petitioners.

[Ms Corbett, Mr. Rewega, Ms Saccomani, and Mr. Steed were sworn in]

The Chair: Okay. Mr. Oberle, you're the sponsor of the bill, and I understand that you wanted to make some introductory remarks.

Mr. Oberle: Yes, if I could, Mr. Chair. Thank you. Good morning, everyone. Today is another milestone, I suppose, in the long and difficult journey of the Rewega family. It's been four and a half years since the car accident and four years since Brooklynn was born. Of course, those are the subject of the bill before us.

The petitioners are asking us to recommend a bill to the Legislature, and we're all aware that it has implications. There's no doubt about that. It's attracted much attention both in the Legislature and in the media. In the introductory package that we were given, a Petitioner's guide to Private Bills procedure, there's a paragraph: "Sometimes a situation may arise that is unique and so exceptional that an application of the general laws of the province might be perceived to create a miscarriage of justice." I submit that we are probably faced with such a situation here.

To echo the Parliamentary Counsel's comments this morning, I just want to stress – and I ask all of us to focus – that we're not being asked to determine cause here or assign blame or assess liability. We're being asked to provide access to the courts, where such matters can be adjudicated.

So I'll conclude my remarks with that, Mr. Chair, and you may proceed.

The Chair: Thank you. Perhaps we could just introduce the parties representing the petitioners.

Ms Saccomani: Yes. Good morning, everyone. My name is Rosanna Saccomani. I am the lawyer representing Brooklynn Rewega and her family. This is her father, Doug Rewega. Seated in the gallery are Lisa Rewega, Brooklynn's mother; Brooklynn, of course; and a young friend who is helping this morning.

Ms Corbett: Good morning. My name is Sandra Corbett. In the action that Brooklynn Rewega has commenced against her mother, Lisa Rewega, I act for Lisa Rewega and the owners of the Rewega vehicle, George and Tina Rewega.

Mr. Steed: Good morning. My name is Nolan Steed. I'm with the Department of Justice.

8:35

[The following members introduced themselves: Mr. Agnihotri, Dr. Brown, Ms DeLong, Mr. Elsalhy, Mr. Groeneveld, Mr. Johnson, Mr. Johnston, Mr. Liepert, Mr. Lindsay, Mr. Lukaszuk, Mr. Mitzel, Dr. Morton, Mr. Oberle, Mr. Prins, Dr. Swann, and Mr. Tougas]

Ms Marston: Florence Marston, assistant to the committee.

Ms Dean: Shannon Dean, Parliamentary Counsel.

The Chair: Is the petitioner prepared to proceed now? Is it Ms Saccomani?

Ms Saccomani: Yes. I wanted to make a brief . . .

The Chair: Just before you commence, because we have three different parties that we're going to hear submissions from, I'm going to ask you to keep the submissions from the petitioner to approximately 15 minutes, if you could. We're kind of tight for time this morning. Thank you.

Ms Saccomani: Thank you very much, Dr. Neil Brown, for having us here this morning. I'd like to thank Shannon Dean and Florence Marston for their ongoing direction and assistance in this matter. A special thanks to Frank Oberle for his sponsorship of this bill and for his thoughtful introductory remarks and to all of you for your warm reception here.

I know that many of you sit as newly elected members to the Legislature, and I know that others of you are seasoned veterans, but regardless of the experience in the political arena that you bring, I know in my heart that every one of you came to the Legislature at great personal expense and sacrifice to your families with the hope and expectation that you could make the lives of ordinary Albertans, ordinary children like Brooklynn Rewega and their families a little better. I think that's the hope you have in your hearts, and that's why you have sacrificed so much. I daresay that none of you are here to maintain the status quo or simply to push paper.

Now, you are a reasonably intelligent group of individuals, and we ask you through this Private Bills Committee to consider some legislation, yes, that hasn't been done before, but that is not a bar to your consideration of it. The guidelines are simply guidelines, and as Mr. Oberle said in his introductory remarks, we should really consider whether there is a remedy here and whether there is a miscarriage of justice.

Before I go to the merits of my submission, I would ask that Brooklynn's father, Doug Rewega, make a very brief statement to you.

Mr. Rewega: Good morning. I'd like to thank you all for being here this morning to hear Brooklynn's story, and I'll keep it fairly short. As you're aware, over four years ago my wife and unborn daughter were involved in a motor vehicle accident in northern Alberta. The day of the accident was December 31, 2000, the last day of the year. I remember thinking what an exciting time it was for us. Lisa and I had been married for approximately seven years and had saved enough money to buy a home and start a family, you know, being new parents and looking forward to all the wondrous things that that would bring: raising a child, him or her throwing baseballs, riding bikes, teaching her things that should come naturally.

December 31 was a Sunday. My wife left for church at approximately 9:30 in the morning, travelling to High Level. I was busy with our family business that morning in particular. Two hours later I received a phone call that would change our lives particularly. Twelve hours later as the new year was ringing in, I was pacing in the hospital in Edmonton here, wondering if my wife and daughter were going to survive the accident. Lisa suffered multiple injuries. She had a broken neck, pelvis, pubic bone, and numerous lacerations. The doctors at the time hadn't expected her or my daughter to survive.

Brooklynn was born prematurely on April 24, 2001. She has cerebral palsy and epilepsy and is blind. Doctors have now confirmed that that was due to the lack of oxygen to the brain during the events of this accident.

As you can see, my daughter is a beautiful girl. She's the joy of our lives. She knows us. She loves bath time, the outdoors. She generally loves people. She's very good natured. Just a beautiful child. She does, however, with the complications in her life require 24-hour care seven days a week. She suffers from multiple seizures. They are so random that we don't know when and how they occur. There are medications that are helping at this point. She will never be able to walk, talk, or feed herself.

My wife was discharged from the hospital approximately seven months after the accident. She's confined to a wheelchair. My father being retired at the time and my mother actively working, my mother took early retirement to help with our situation. We'll be forever grateful to all our friends and family that supported us through this time. Brooklynn is and always will be a priority in our lives. Nothing comes between that.

I guess that for the record you should know that our claim was initiated after a representative of the automobile insurance company in question called us and suggested that we retain a lawyer. He told us on the phone in November and December that the insurance company in question had accepted the claim. They simply wanted to review Brooklynn's and Lisa's case, medical records, to ensure that everything was in order, and then they'd be able to properly assess damages.

Six months after our lawyer filed the claim, the insurance company lawyer sent Rosanna a copy of the Dobson case. It was at this time that they first announced that they'd be taking steps to strike out our claim, and the legal battles began. From what we understand, it will take years to decide whether the claim can even remain in the courts on Brooklynn's behalf. This does not include the time that it will take to argue the case on its merits.

Today we're not here to ask you for a handout. As Mr. Oberle has said, we're here simply to ask you for a law that puts our child in the same position as every other citizen, and that is for the opportunity to have access to the courts.

On behalf of Brooklynn we thank you for your kind consideration.

Ms Saccomani: I think that it's very important to spend a moment to just tell you what the law is in this country. As you know from the summary that we've submitted to you so far, in 1993 the Supreme Court of Canada for the first time said that an unborn child born alive, born viable, could sue a third party for injury sustained while in the womb of its mother. That is called the Montreal Tramways case. It's an important case, and it's been cited in many other jurisdictions world-wide.

The second case you should know about is the Deziel case in 1953 of the Supreme Court of Canada. That case said that children could sue their parents just as any third parties when the parents have conducted themselves in such a way to injure the child. That was a 1953 decision.

In 1993 Ryan Dobson was born. You've heard about the Dobson case. His mom was not driving properly; she crashed into another car. The child was born prematurely with cerebral palsy. The matter at some point went to the trial court of Nova Scotia. The trial court judge sided with Ryan Dobson against the insurance company. The trial judge said that Ryan Dobson had a claim and that while the privacy and autonomy rights of the mother should be respected, in a motor vehicle situation where a driver of a motor vehicle has a duty of care – that means owes a responsibility to all other motorists on the highway – that duty of care should also be extended to the unborn child. That would not infringe on the mother's rights to autonomy. The trial judge found in favour of Ryan Dobson.

8:45

The insurance company appealed to the Court of Appeal of Nova Scotia. That appeal was heard, and again it was decided in favour of Ryan Dobson. An intelligent panel of knowledgeable individuals, judges, came to the conclusion, again, that Ryan Dobson had a case and that based on the earlier reasoning in the trial judgment, yes, the privacy and autonomy rights of the mother were not infringed given the fact that she owed a duty of care to other motorists using the highway. So they created and said that in motor vehicle situations there should be an exception. That was, as we understood, the law.

In 1998 the Supreme Court of Canada heard this decision and heard the case and rendered a decision in 1999. It was a split decision. Justice Cory on behalf of the majority said that, no, the Supreme Court of Canada and the judges could not impose a duty of care on the mother because in other cases, such as drinking or using cigarettes or abusing drugs, the mother's rights to privacy and autonomy would be infringed. They did not want to enunciate a standard that all pregnant women would have to follow. However – and this is a big however – it did say that in motor vehicle accident situations there could be an exception, and they expressly invited the Legislatures of this country to consider legislation in the realm of motor vehicle accidents.

The Supreme Court of Canada discussed the United Kingdom Congenital Disabilities Act, and they used that as an example of legislation that could be drafted that would protect the rights of a child born because of injuries sustained prenatally in a car accident situation. That was in 1999.

There were two judges who dissented in that decision, and those

two judges basically said that the courts should create the motor vehicle exception because insurance is mandatory. We all have to drive with insurance, and the reason insurance companies exist and the reason we carry insurance is in the event of a catastrophe. If, because we fall asleep, our house burns down, the gas is left lit, we have entitlement to pursue insurance. It's the same way with car accidents. If I am driving or if any of you are driving and you have your grandchild beside you and you, looking at a tree, don't see the stop sign and crash into another vehicle, the law allows you and has always allowed, since 1933, your grandchild or your child or your neighbour or your wife to make a claim against you for your negligence. That's why we have insurance.

If on this particular day Doug had been driving the vehicle and Lisa had been sitting beside him, we wouldn't be here. There would not be an issue. The basic thing is that the law would allow Lisa to bring an action on behalf of her child against Doug. If Lisa had been driving and the child was one minute old and Lisa was taking the child to the hospital for care, there would be an action. The only citizen in this country that does not have an action in this situation is a child who is born with injuries sustained prenatally, and as I say, the Supreme Court of Canada has invited legislation in this regard.

In the submissions you have, the Supreme Court of Canada decision is not highlighted. Last night I put together a very small package, and I took all the excerpts from the Supreme Court of Canada decision. There are 10 different references. I've highlighted them all.

What Justice Cory says is that if there's legislation introduced in the area of motor vehicle accidents, we ought not to intervene. I'm going to quote to you exactly from that passage. It's at the top of page 21. Then at page 24 Justice McLachlin, who is now the Chief Justice of the Supreme Court of Canada, said that legislation such as this is laudable and that it should be the Legislatures, not the courts, that come up with legislation like this. The reason that the courts don't come up with it is because the courts are not result-oriented. The courts do not look on a legal principle matter and whether or not insurance exists, but you as a Legislature can do that. As I said, that's why we have insurance in the first place.

My friend at the Department of Justice has submitted a brief, which I read last night, and he said, basically, that it would be unfair to retroactively enact legislation because it would affect the insurance industry's position. Either way it affects somebody's position. It either affects Brooklynn's position, as I say, and as you heard Doug testify, the representations by the insurance representative initially were that the claim would be accepted. They simply wanted the medical documentation to make sure everything was in order and in order to assess damages.

As an officer of the court – and I took the oath – that same representation was made to me in December of 2002 by the insurance company representative. At that time they did not want to fight it. They simply wanted the medical records of Brooklynn and Lisa Rewega because we were all under the understanding that the law was that Brooklynn could bring an application and could bring a claim just like any other citizen would be entitled to do and that her case would be looked at in the courts just as every other citizen is entitled to look at the medical records to see whether or not her injuries were caused by the accident, and if so, what are the damages.

The Chair: Ms Saccomani, you are nearing your 15 minutes. Could you just sum up or if you have any other submissions, please. Do you have anything else?

Ms Saccomani: I have so much more. What I'm going to urge you to do, in conclusion, is to please take a moment to read the brief before you. This is, I think, your first sitting as members of this committee. I would really urge you to please read through the brief. Take your time. Don't consider anything that we've said here; read the facts themselves. Read the law itself. And please have the courage to make some law or to at least recommend to your fellow members of the Legislature what should be done in this case.

Thank you.

The Chair: Thank you very much.

Ms Corbett, could we call on you?

Ms Corbett: Thank you. Good morning, Mr. Chair, and members of the committee. I will do my best to strive to highlight the comments that I have for you today, addressing the issue of whether or not the committee ought to recommend the private bill.

First of all, I think we all need to understand that the plaintiff, Brooklynn Rewega, has not yet exhausted legal remedies available to her in the courts. In fact, it appears that they indeed have abandoned any potential appeal of Madam Justice Moreau's decision to strike the statement of claim. The appeal that is before the courts right now, just for the committee's edification, is our appeal of Madam Justice Moreau's decision that the vicarious liability that she said could still stand against the vehicle owners.

So these petitioners come before you today and have not pursued their claim beyond the Queen's Bench level to, for example, the Court of Appeal or the Supreme Court of Canada. I think that's a very important point because they're coming before you as the Legislature to ask you to do something through what I might term the back door instead of pursuing and exhausting their legal remedies, as they should do in circumstances like this.

I think Mr. Steed comments on this in his brief, and I'll just touch on this. I think it's very important that in Canada we have a public body of law and certainty for all citizens of Canada to know what the law is. If the legislative committee in this particular case were to consider the permission of a private bill, I think you could argue that you could have all kinds of litigants who haven't pursued their legal remedies because they don't want to or for whatever reason they allege that they might be tied up in litigation and coming before this committee.

The committee could be confronted with these kinds of applications. Then all of the sudden you have different kinds of law applicable for different people. I don't think that's what the rule of law in Alberta and Canada is all about. I mean, we live in the world where everyone knows the law, and there's a public law, not private laws applicable to individuals. So I think I just wanted to touch on that.

8:55

Another point that Ms Saccomani makes on the part of her clients and that she emphasizes over and over again, not only in the facts of this case but also in talking about the Dobson case, is that it somehow is a dispute between the child and an insurance company. I challenge you to look at the style of cause that lists the parties to that action because there's no insurance company listed there. The parties are the Dobson family.

She also describes that case as being a dispute. If you look at the introductory comments, they were trying to determine a question of law. I mean, is that a dispute? Perhaps, because you have a question that you want the Supreme Court of Canada to answer for you because there's no law in it. I think, fairly speaking, that's simply a question of law that we all needed an answer to and that the Supreme Court of Canada spoke to in Dobson.

Ms Saccomani also suggested that Dobson was a split decision. Let's not forget that the split was seven in the majority and two in the dissent out of nine Supreme Court of Canada judges. It wasn't a 5-4 split. It was a pretty weighty majority in favour of the decision that was made in Dobson.

I also had some concerns about Ms Saccomani's suggestion that the reason we all carry insurance – i.e., motor vehicle insurance – is so that if we have an accident, someone will be compensated. If you look at the provisions of our Insurance Act, the reason we have motor vehicle insurance is so that if you're in a car accident, you don't have to sort of face financial ruin if you injure someone. You are entitled through your Insurance Act and the provisions of the Insurance Act to have a lawyer paid for you to look after your interests in the litigation so that you don't have to be out of pocket, and if ultimately you're found responsible, for example, for rear-ending someone and causing them some broken leg or broken arm, it's not coming out of your pocket. It's coming out of the pocket of the insurance company that you paid premiums to.

When Ms Saccomani says: well, in fire insurance situations you're entitled to coverage. Well, fire insurance situations are different. You're the insured. You're making the claim against your policy. It's not a circumstance where someone else is suing you, and you're being protected by your insurance company because you pay premiums. I think that's a really, really important thing, and I think it's something that gets lost in translation here. I mean, my job here is to represent as defendants the interests of Lisa Rewega and the vehicle owners. Clearly, in this circumstance, the interests of Lisa Rewega are to get some more money. That's understandable, but that speaks to another issue that I'll speak to a little bit later. But I think that's really important, and that shouldn't get lost in the translation here as to the reason why we all carry insurance and why we all pay insurance premiums.

Another issue, I think, that I'd like to touch on – and I just want to comment on this. There's some reference in Ms Saccomani's brief to the insurance company here trying to take advantage of what she calls a legal and technical loophole or that the Dobson decision isn't intended for the insurance company's benefit. That's true. It's not; it's intended for the benefit of the mother of a child, and Dobson is very, very clear about that. That's who I act for in this lawsuit. That's who my client is: the mother of this child. And for the benefit that we're speaking to, it's for Lisa Rewega's benefit. If you look at Dobson, page 15, paragraphs 46 and 47, they talk about these kinds of issues.

> The imposition of tort liability . . . would carry psychological and emotional repercussions for a mother who is sued in tort by her newborn child. To impose tort liability on a mother for an unreasonable lapse of prenatal care could have devastating consequences for the future relationship between a mother and her born alive child.

It just goes on and on.

> Litigation would have detrimental consequences, not only for the relationship between mother and child, but also for the relationship between the child and his or her family.

Those are the kinds of concerns that the Supreme Court of Canada had when they were speaking about the issue of prenatal negligence and whether or not a mother should be held liable.

I think, as well, that there's an argument that Ms Saccomani is making: well, this child, had she been injured by anyone else, could have had a right of action. That's true. But what that doesn't recognize is that in this particular case the whole point is that this child was in utero, inside of her mother, when the motor vehicle accident happened.

Again, if you look at the Dobson decision, they spend a lot of time talking about the issue. I think they have some really sound comments on that issue. They talk about there being no relationship in the world that you can compare between the mother and a child inside her. What other relationship in the world between two people is as interdependent as that? For that very reason – and if I can refer you to things like page 10 of the Dobson decision, paragraphs 26, 27, 29 – they talk about the fundamental difference between a mother-to-be and a third party defendant. They talk about the relationship between a pregnant woman and her fetus as being of fundamental importance to the future mother and born-alive child, to their immediate family, and to our society.

The relationship they refer to – and I think we'll all agree – is one of complete dependence. Accordingly, the consequences of imposing tort liability on a mother raise much different considerations than would be raised in circumstances if you're dealing with a third party just because of that very intense relationship that these parties have with one another, which is a very unique one. I do invite you to read what the Supreme Court of Canada says about that because I think they say things that we can all agree with. Certainly, anyone who's had a wife that's had a child or whatever can agree with those kinds of comments.

In terms of just very briefly touching on what Dobson says – I mean, Dobson says that there can't be a duty of care here because there are reasons of public policy. That speaks to why this is inappropriate for a private bill. I mean, there are significant issues of public policy. I don't have the time in my 15 minutes to address all of those issues, but I do invite you to take a look at the Dobson case because I think that the Supreme Court of Canada very fairly canvasses all the numerous public policy issues that arise out of potentially imposing tort liability.

Just touching on the United Kingdom act that Ms Saccomani refers to, indeed they have created an exception through the public law, not through the private law, and I think that's a very important distinction. If the Legislature in its infinite wisdom decides that this is an appropriate exception, then the Legislature should do that publicly with appropriate public consultation.

I think the other issue to touch on here is that Dobson was decided in 1999. I think that each of the Legislatures is fortunate enough to have able Parliamentary Counsel, able departments of Justice to assist it, yet not one single Legislature in Canada has enacted the kind of legislation that the Supreme Court of Canada speaks of in Dobson to permit children in utero to sue their mothers for alleged negligent driving.

I should also add that the Supreme Court of Canada touches on the insurance issue very quickly because that's the Australian rationale. They touch on it, and they say: "Well, no. Wait a minute here," and this is really important, "We're dealing with tort liability." I don't mean to get into legal principles, but in tort you have ideas like negligence, and they're between two parties. So if you're in a car accident, the issue is decided in tort. It matters not whether you have insurance, and it shouldn't matter to this committee whether or not there's insurance here. I mean, I suspect that we wouldn't be here today if there wasn't insurance, but I think that's a whole other issue.

I might also add, and I'll touch on this, that in Alberta we have a mandatory government requirement that each of us carry a minimum of $200,000 in liability insurance. That's the law. Now, many of us don't carry only $200,000, but some of us might because that's all you're required to carry. We've got a piece of litigation here, a statement of claim that seeks $2.4 million for the child and $120,000 for the father. I mean, I'm not in a position to disclose anything about limits, but clearly, based on what the mandatory limits are in Alberta, assuming that those were in place, this is a claim that's well in excess of limits.

So what next? Does that mean that if the child gets a judgment

that's in excess of policy limit, she's going to execute against her mother in terms of bringing action? Because it's the Public Trustee that gets involved. So I think that's something that we all have to consider here: how is that in the best interest of the mother in this particular circumstance?

I think there's another important issue as well to touch on, and the Supreme Court of Canada talks about this. I'm just going to touch on it briefly. I think what we're dealing with here – and it's not a problem that's uncommon to Alberta, to any Canadian provinces – is a really pressing societal issue, and that is that there is not enough money out there to help children who have special needs.

9:05

The Chair: Ms Corbett, you have about two minutes.

Ms Corbett: Okay, I'm going as fast as I can. I've got this point and one more.

I think that's a really important point. That's an important point from the perspective of that's something that's all of our responsibility as taxpayers. If, you know, we believe that children who have special needs need to be provided with funds of some kind, those kinds of funds have to come from us. We as taxpayers and as legislators have to make the decision that that's a laudable and important goal. That should extend to children – all children – who have special needs, not just children who are injured in a motor vehicle accident while in utero, but all children.

The other and final point I want to make – and I'm not going to dwell on it – is that I had a concern that Ms Saccomani's submission suggested that it was a fait accompli; i.e., no question that this young child's situation needs resulted solely from this motor vehicle accident. I think that you need to understand that there's a question there. I understand that that's not within the purview of this committee to decide that issue, but you need to understand that it's not just a final question.

Those are the highlights of my submissions that I'd like to make, and I do thank you all for your attention.

The Chair: I know committee members have questions for the parties, but in the interest of expediency I'm going to ask Mr. Steed to proceed with his submission, and then we'll have an opportunity for questions for any of the parties.

Mr. Steed: Thank you, Mr. Chairman. It's no doubt that these are highly sympathetic circumstances. Any situation where a child is born with limitations or disabilities is very unfortunate, and the greater the limitation, the greater our sympathies are for both the family and for the child. Although I haven't got any exact figures, I suspect that most children who are born in this province in circumstances where they have limitations or disabilities are not in a situation where they can sue or recover damages. There may be genetic, environmental, or totally nonnegligent circumstances that resulted in these children's disabilities. It is these children who have to rely on their families and on government programs to support them in their disability.

For example, the government enacted last year the Family Support for Children with Disabilities Act, which created certain benefits. If this lawsuit that's under appeal is not successful and if this private bill is not passed, the applicants will find themselves, like those other families, reliant on the government programs for severely disabled children.

In 1999 the Supreme Court of Canada made it clear that a mother is not liable to a child born with disabilities when these disabilities are caused by her negligent actions prior to the birth of her child. The court found that to impose these potential liabilities on a pregnant woman would be a severe intrusion into the lives of pregnant women. It would involve intrusions into the bodily integrity, privacy, and autonomous decision-making of that woman. As well, this liability would have potential damaging effects on the family unit. These are the grounds upon which the Supreme Court made its decision.

The court made it clear that the social policy concerns were of such significance and magnitude that they were more properly the subject of debate and actions by Legislatures across the country. They did, however, imply that there may be some Charter of Rights concerns that would limit the scope of action by a Legislature. The Charter of Rights concerns were based on the privacy and rights of autonomy of pregnant women. However, they also made it clear that laws that restrict the liability of mothers to damages which occurred in vehicle accidents where the liability was restricted to the amount covered by insurance could probably be enacted by Legislatures without unduly intruding on the autonomy of pregnant women.

The issue of maternal liability of prenatal negligence does not often arise. In fact, in the 1999 Dobson case the court said that this was the first case in which the courts had to examine this issue. It's likely because of the infrequency of this issue arising that there have not been, to my knowledge, any Canadian jurisdictions who have enacted legislation on maternal tort liability of prenatal negligence following the Dobson decision.

Alberta has not enacted any legislation in that regard. It is, however, open to the Alberta Legislative Assembly to address this issue of maternal liability in the future. If it were to happen that the Legislative Assembly addressed this issue, it would need to address such larger policy issues as the following. Should the law be left as set out by the Supreme Court of Canada and, therefore, let the government programs provide support for these disabled children, or should the law be changed to allow children disabled prior to birth by the actions of their mothers to sue for damages?

It would also need to consider whether imposing liability on pregnant women would intrude upon their privacy and autonomy. Would imposing this liability have a damaging effect on the family unit? What impact would prenatal maternal liability have on insurance rates? Would it be appropriate to limit the prenatal maternal liability to circumstances only involving motor vehicle accidents and where the damage limit is restricted to the amount of the insurance coverage? Those are issues which the Legislature would want to address if this legislation were considered in the future.

This range of issues does not so obviously arise in the consideration of the current private bill since in this situation it's the mother who is in part requesting this bill, and it is restricted only to this particular case. I do note that this bill does not limit liability to the amount of the insurance available in this case. Therefore, the mother could potentially in the future, if this bill were passed, be at personal risk.

Certainly, passing this bill would not legally bind the Legislative Assembly with regard to any future consideration of application of maternal liability to everybody else. However, it could be seen as unfair to pass this bill and not do the same for others in similar circumstances, circumstances which have occurred in the past or circumstances which may occur in the future. In other words, if the benefit of this bill is extended now, it could be seen as unfair to not extend the benefit to all similar circumstances past and future. To that extent, a precedent might be seen as being created here. You should be mindful of the larger policy issues, which I already mentioned, that go beyond this particular case.

Caution is also recommended because of two unique aspects of

this private bill. First, this matter has not been fully litigated. To provide a remedy here, where the judicial remedy has not been fully exhausted, may encourage others to apply for private bill remedies before exhausting their judicial remedies. While the judicial process may not be as fast as some would like, particularly those seeking a remedy, that same pace of judicial remedy applies to all litigants. Therefore, all litigants could invoke an alleged slow judicial process to justify asking for a private bill to obtain a speedier remedy.

The second unique aspect of this bill is that it would apply retroactively. That is, it changes the law as it existed on a day in the past. After the Dobson decision by the Supreme Court it was clear what the law was. The law on December 31, 2000, clearly was that there was no maternal liability for prenatal negligence. It was this law that applied to both the driver and the insurer on December 31, 2000. If the law on that date was that a pregnant woman could be liable, then the risk to the insurer would have been greater, and there is the possibility that the cost of covering that risk would have been higher. I will admit that since these claims are highly infrequent, I can't say whether it would have any substantial impact on premiums.

Caution should be exercised in enacting retroactive legislation. It can be done, but the impact on all the parties should be fully weighed. Creating a retroactive benefit that did not exist in law will often create a corresponding retroactive burden that did not previously exist in law. As well, in enacting retroactive legislation, the impact on the confidence people have in the certainty of the laws of the province should also be weighed. If laws are too frequently changed retroactively, then individuals and businesses lose confidence in the certainty of Alberta laws.

In conclusion, I'd acknowledge that this private bill could be passed. However, it is recommended that caution be exercised and that the consequences of passing the bill be fully weighed. Thank you, Mr. Chairman.

9:15

The Chair: Questions? Mr. Lukaszuk, I've got you first.

Mr. Liepert: Excuse me, Mr. Chairman. I wanted to ask a process question.

The Chair: Are you on a process?

Mr. Lukaszuk: No.

Mr. Liepert: Could I ask a process question, Mr. Chairman? We've heard some 40 minutes of legal counsel, and I have to say that I'm probably no clearer now than when I started. I would ask, in order to accommodate as many questions as possible, that our legal counsel, when answering questions, be as brief and as succinct as possible in order to get as many questions in.

The Chair: Thank you.
Mr. Lukaszuk.

Mr. Lukaszuk: Thank you, Mr. Chairman. I will beg for your indulgence. I have about three or four questions for the petitioner's counsel. Madam Saccomani, even though Madam Justice Moreau struck the statement of claim at the level of the Court of Queen's Bench, I note that you haven't appealed that order to either the Alberta Court of Appeal or even further, to the Supreme Court of Canada. I would like to know why.

Ms Saccomani: Because the Dobson decision and the Supreme Court of Canada made it clear that I would lose. The Dobson decision said that I cannot sue the mother. The thread of the balance that Justice Moreau allowed was an action against the registered owners, and that is a thread. My friends filed their factum last week saying that it should be thrown out, that there's no way that the registered owners could be liable if the driver is not liable. So we're hanging on a thread.

Mr. Lukaszuk: So you're conceding that if you were to proceed any further through the judiciary, you would lose.

Ms Saccomani: Right.

Mr. Lukaszuk: Then my next question is: why aren't you pursuing the claim against the vehicle owners?

Ms Saccomani: We are. That's what the remaining issue is. Justice Moreau said, if you read the last page of her decision, that she wasn't going to strike the claim because there is a thread of hope there, and it's a thread.

On that point, it's not that other people will choose to come to a Private Bills Committee rather than going to court. We don't have that option here. We're saying: can we get to court? The additional time that it takes – Brooklynn still has to have her case in court. That's going to take five, six, seven years. I've been a lawyer for 20 years. This is my 21st year. It's going to still take years. The question is: can we take off two or three years in a preliminary issue of law? This is a preliminary issue that will take several years to decide over and above all of the other years that every other litigant in this situation has to go through.

Mr. Lukaszuk: Going back to the Dobson case, is it your argument that the duty of care and hence maternal tort liability only arises where the person found at fault is covered by the insurance policy? That is to say, does the duty of care and maternal tort liability change simply by virtue of the fact that the defendant is capable of satisfying a judgment?

Ms Saccomani: The duty of care is a common law principle. The court said that it would not use common law principles to decide this. That's why it sent it to the Legislature. The Legislature doesn't have to use common law principles. It can go based on public policy rationales. That's why the Supreme Court of Canada said, following the United Kingdom example: look at what the United Kingdom did. The United Kingdom enacted legislation that allows for a single, only one, exception, and that is motor vehicle accidents and because there is mandatory insurance in place. So, yes.

But not to the duty of care. There is no duty of care in a legislation situation. The duty of care is – I apologize for bringing in legal principles because I know it's confusing. I know it's frustrating. But what I'm trying to say is: that's why the Supreme Court of Canada did not find in favour of Ryan, because they weren't going to find a duty of care. The exception was over and over made that it could be done by the Legislatures in a motor vehicle situation. The fact that our Legislature did not since 1999 take steps to enact that legislation should not penalize Brooklynn. She has the right to have this legislation heard now. It is a rare and exceptional case.

Mr. Lukaszuk: In follow-up to your answers, your argument then is that a person's liability and a person's duty of care changes with respect to his or her ability to satisfy a potential judgment against him. That is, if a person is uninsured, in the very same circumstances he may have a lesser duty of care and lesser degree of maternal liability than a person in identical circumstances who just happens to be insured.

Ms Saccomani: You've got to remember that in a situation when you're driving, you owe a duty of care to everybody, to all the other motorists. That's why motor vehicle accidents are different than a mother drinking or taking drugs; right? You can't drive, Mr. Lukaszuk, the way you want on the highway; you have to drive responsibly. Here in a motor vehicle situation where we do have mandatory insurance, we do say that the victims of accidents caused by the inadvertence of another driver should be compensated. That's why we have insurance.

You know, Ms Corbett made the point that Lisa Rewega is her client. I'd like to know where she takes her instructions from and who – of course, I mean, it's an insurance company. That's not even an issue here. Yes, in the Dobson case in the Supreme Court of Canada it was Dobson versus Dobson, but the Supreme Court of Canada did talk about insurance over and over in this case.

So to answer your question: does a duty of care arise only if there's insurance? Absolutely not.

The Chair: Mr. Lukaszuk, is that all?

Mr. Lukaszuk: No. I have one more question. The parliamentary procedure in history dictates that private bills be introduced only in matters where significant public policy is not affected by said bill. Yet if you're relying on the dissenting justices in Dobson or in Dobson overall, by virtue of the fact that Dobson was heard by the Supreme Court of Canada would indicate that there was a matter of public policy because one of the thresholds of the Supreme Court of Canada to hear cases is that they must touch upon significant public policy. Otherwise, cases are not brought before that very same court.

So I'm wondering: are you arguing that there is a significant public policy issue at hand? Hence perhaps this is not a forum at which to stage this particular argument. And if it is, perhaps this should be a government bill. At one point perhaps this should be debated on the floor of the Legislature as a government bill brought forward by a Minister of Justice.

Or are you arguing that this isn't a matter of public policy? But if it isn't, how would you then explain the virtue of Dobson and the matter being heard before the Supreme Court of Canada?

Ms Saccomani: When the Supreme Court of Canada grants leave to consider a bill, they look at the national implications of the decision. It's not that it has to be a public policy. There are many decisions that go before the Supreme Court of Canada that have nothing to do with public policy.

The guidelines that you're referring to are generally noncontentious matters. I understand that, but they are simply guidelines. I think that you look at the overall direction and spirit of what the private bill is supposed to do, and that's to provide a remedy where none exists.

So to answer your question: should this be a matter that the Department of Justice and the Minister of Justice consider through a public bill? We have submitted a public bill. It's attached to the brief. I mean, I did submit a copy to Ms Dean. The Minister of Justice has our public bill. It appears under tab 4 in the document you're going to receive today. There is a public bill that we're asking that the Legislature concurrently consider so that other children in very rare accidents like this, because we are talking about very rare accidents, be protected.

I don't know if that helps you, Mr. Lukaszuk. I'm not sure exactly what more I can say other than that I think we're doing the right thing, and that's what we're here motivated to do.

Mr. Lukaszuk: Thank you.

The Chair: Mr. Oberle?

Mr. Oberle: Yes. Thank you. Mr. Steed, in your presentation you talked about caution – and point well taken – that we must be careful in initiating retroactive legislation. It's not unique. It's not unprecedented that Legislatures enact retroactive legislation. In this particular case you talked about reversing or causing harm to the insurance company who would find themselves retroactively in a different position than they thought they were in. My question to either you or to Ms Corbett: did not the insurance company think that they were liable in the first place? They accepted the claim and, I believe, offered a settlement initially. Is that not the case?

9:25

Mr. Steed: I can't comment on the belief of the insurance company. It may in fact be that they were not aware of the case. It may be a local office kind of problem. I'm not sure. I know that the Supreme Court of Canada said that this was the first time that the issue had been addressed. So prior to that there was no law in place at that time.

Maybe Ms Corbett could comment on the position of the insurance company.

Ms Corbett: I can. I'm not certain what Ms Saccomani was referring to when she indicated that the insurance company accepted the claim. One would have to wonder why they then retained my services to defend the claim being brought against the driver of the vehicle, Ms Rewega, and the vehicle owners.

When I received the file, just for the committee's edification, I wasn't certain, myself, what the law was and then proceeded to do some research and located the Dobson case. I was aware of that other case from Winnipeg where the court had made a woman have treatment. I think we all remember that. She was doing drugs and such while she was pregnant, and she was forced into treatment. The Supreme Court of Canada heard that case. I was aware of that, but I wasn't aware, actually, of the Dobson case before being involved in this piece of litigation. So when I became aware of it, I provided a copy to Ms Saccomani, and there we went.

In terms of the settlement that was offered, indeed the insurance company has offered a $200,000 settlement. You know, I think we all have to understand that insurance companies can give instructions to make an offer of settlement in order to resolve files. Offers of settlement are made on a without prejudice basis. This one was made that way. Just so everybody understands, that means that you're making an offer without prejudice to your position on liability, causation, and all of those other complex things. It's a way to try and expedite resolution of the matter so that we're not tied up in what my friend calls endless litigation.

The offer that was made was rejected by Ms Saccomani and her clients: the infant plaintiff, Brooklynn Rewega, and her father.

Does that assist you?

Mr. Oberle: It does. Thank you.

I guess sort of a follow-up question for Ms Saccomani. You were offered a $200,000 settlement, and the claim as indicated by Ms Corbett is considerably beyond that. I can't comment on whether that's a lot. I have no idea what the care requirements are here. If you're successful in this and ultimately you do receive a claim, what happens to that money?

Ms Saccomani: The money goes to the office of the Public Trustee.

Any settlement must be approved by the office of the Public Trustee before it's accepted. As I indicated, I have been doing this work for 20 years. In cases of this magnitude and the extent of these injuries, there are awards between $5 million and $13 million that are being made by the courts. Our offer of settlement in counter is less than the limits of the policy, for your information.

Mr. Oberle: Thank you.

Ms Saccomani: So we have made an offer I would consider a fraction of what it's worth in reply.

Mr. Oberle: Thank you. Those are all of my questions.

The Chair: Ms DeLong.

Ms DeLong: My question's already been asked. Thanks.

The Chair: Dr. Morton.

Dr. Morton: Thank you, Mr. Chair. A question for Ms Corbett. One of the grounds that you suggested for not proceeding with the private member's bill was that the claimants have not exhausted all legal remedies. You disagree with Ms Saccomani's point that in the face of Dobson pursuing further litigation is just a waste of time?

Ms Corbett: Well, we can all think that pursuing further litigation is a waste of time. I remind you, for example, that there was a case – I mean, the law can change. I don't know whether or not the Supreme Court of Canada would change its mind in circumstances like this.

But if I could remind you of a circumstance that resulted in the Legislature having to enact legislation, it relates to a case called Duncan estate and Baddeley. For many years there was no claim that an estate was entitled to make for loss of income. One fine day a clever and creative plaintiff's counsel took that issue to the Court of Appeal, with the result that those provisions in the Survival of Actions Act were then struck down, and the law was changed until the Legislature, again, changed the law back to what it was before.

So I think that it behooved Ms Saccomani in this case to pursue that remedy in the Court of Appeal. I don't think that you can come before this committee and suggest that you've pursued and exhausted all legal remedies when, in fact, you haven't launched an appeal. I guess my point is that you just never know what can happen in the courts. The law can change. I mean, the law is an ever-changing body of . . .

Dr. Morton: Indeed, it is. But given the Supreme Court being so explicit about this being a [inaudible] matter, it's rather hard to imagine that they'd change their mind just four years after deciding this case.

My second question is with respect to retroactive application. My question is to Mr. Steed. In the context of private bills is it not the case that private bills often do have retroactive application precisely because they address an issue where the existing law fails to address an injustice?

Mr. Steed: I don't have a lot of experience with private bills. That could be, and it may be that that retroactivity is in circumstances where there's no real impact on other parties. I don't know.

Dr. Morton: Okay. Then a question to Ms Saccomani. Obviously, the statutory law in the United Kingdom addresses these specific circumstances by creating an exemption in the context of a motor vehicle accident. Is that correct?

Ms Saccomani: That's correct.

Dr. Morton: Is there a similar policy or statutory exemption in Australia?

Ms Saccomani: In Australia they have express legislation that would cover this situation, and that's why the Court of Appeal in something called Lynch found in favour of the child.

I just wanted to add that on the issue of retroactivity the example that is given to petitioners such as ourselves in making this application cites a limitation. Somebody misses a limitation, and they petition this Legislature for a private bill allowing a claimant to proceed notwithstanding that they missed the limitation period. That is a significant case. That goes far beyond anything we're asking for here today.

Dr. Morton: Okay. Do either you or Ms Corbett know what the statutory law is in the various 50 United States?

Ms Saccomani: It varies state to state in the United States.

The Congenital Disabilities Act was attached to the original documentation that I sent to Ms Dean, Parliamentary Counsel, with my submissions. The public bill that I've drafted for the consideration of the Minister of Justice is attached under tab 5 of these documents. As well, in this document is just a notice that the insurance industry for 2004 made a record $4.2 billion. That's in response to Mr. Steed's question as to what effect the premiums would be.

The other thing you should know is that this province spent all of last year and the year before discussing auto insurance reform. We were before this committee last year. The bill was deferred to the fall so that the government could have some time to consider the ramifications of a bill like this. I would have expected the insurance industry to have raised during their public debates and their discussion on auto insurance reform the effect a bill like this would have. It was completely silent. I think that speaks to the fact that it would have no ramifications because these accidents occur so rarely and so infrequently.

Ms Corbett: Dr. Morton, I was just going to address your question with respect to Australia and the United States. If you refer to Dobson, the only legislation that they refer to is that from the United Kingdom. What they suggest – now, I haven't done a comprehensive search of all the legislation, but I can't imagine that the Supreme Court of Canada would not have cited had there indeed been legislation in either Australia or the United States.

If you look, for example, on page 12 of the Dobson decision, the Court refers to American case law, noting that there's no judicial consensus in the United States, bearing in mind, of course, that they have federal and state jurisdictions there. Then if you look at the comments that the court makes with respect to Australia – for example, on page 21 of the decision they speak of the Australian High Court adopting what the Supreme Court of Canada ultimately rejects, which is an insurance-dependent rationale as opposed to one that relies on the legal principle of tort law.

I just wanted to address that point because, like I said, I can't imagine that the Supreme Court of Canada wouldn't have quoted from that legislation had there been such legislation to quote from at the time of Dobson.

9:35

Dr. Morton: Okay. Thank you.

Do any of the three lawyers, the three of you, dispute the claim that the plaintiff here would have succeeded in the absence of the Dobson decision, in other words that the law of Canada prior to the Supreme Court's decision in Dobson recognized a right of action in the context of motor vehicle accidents and the right of the injured in utero child to sue?

Ms Corbett: I don't think, sir, that the issue had been considered in Canada previously. If you look at the United Kingdom, wherefrom we derive our common law, in fact there was no such claim allowed, which is why they had to, for example, enact the exception that they did indeed enact in the Congenital Disabilities Act.

Dr. Morton: How do you explain, then, the trial court and Court of Appeal decisions in the Dobson case, which both ruled in favour of the child?

Ms Corbett: I guess that I don't really explain those. I just note that there was a question of law that was asked and that the trial decision and the Court of Appeal decision answered that question of law ultimately differently than the Supreme Court of Canada asked the question. So I'm not sure that there was, indeed, some definitive answer to the question of law until the Dobson case.

Ms Saccomani: It wasn't a final decision. You have to know that in all these different cases, I mean, there are all different kinds of facts that come before our courts every day and sometimes not in Alberta. Sometimes we look to Ontario, we look to Halifax, or we look to B.C. for guidance. I think that had this accident happened before the Supreme Court of Canada decision in Dobson, in 1998 for example, we would have been looking at the Nova Scotia Court of Appeal as the highest authority in our country on this issue.

Dr. Morton: A final question, then, to Mr. Steed. Did you state that the passage of this private member's bill would not bind this Legislature or any other Legislature to pass public legislation in the future?

Mr. Steed: That's correct. There would be no legal, binding nature to that. I did go on to state that it does create a kind of a precedent.

Dr. Morton: A perception. You said a perception of a precedent.

Mr. Steed: Yeah.

Dr. Morton: Okay. Thank you.

The Chair: Mr. Lindsay.

Mr. Lindsay: Thank you, Mr. Chairman. To Ms Saccomani in regard to the statement of claim. It talks about the defendant's vehicle having a number of problems with it. Were those conditions ever substantiated, and were any charges ever laid by the police in that regard?

Ms Saccomani: No, and we haven't got there yet because my friends are in the process of trying to strike the whole thing out. We're hanging on a thread, if you will.

Ms Corbett: Actually, just so we're clear, the appeal that we have commenced is based only on vicarious liability. We recognize that there may still be a claim against the vehicle owners for failing to maintain the vehicle, et cetera, et cetera. The issue would simply be whether or not there are any facts that substantiate that. So the appeal is very narrow and doesn't seek to strike the statement of claim as against the maintenance issue, that the owners have an obligation to keep their vehicle maintained properly.

Ms Saccomani: But, Mr. Lindsay, you should know that the maintenance issue is one that we plead in every statement of claim because we don't know the facts all the time. I mean, the real issue is the issue of liability of the owners if the driver is not legally responsible.

Mr. Lindsay: Thank you.

The Chair: Anything further, Mr. Lindsay?

Mr. Lindsay: No, thanks.

Mr. Johnston: My question was very similar to Mr. Lindsay's. It was regarding the negligence. If I understand, it was possibly or allegedly a defective motor vehicle in this case. It hasn't been proven?

Ms Saccomani: No, it hasn't been proven. But, really, we have no evidence of that. It's a standard clause that lawyers put in claims where there are owners that are different than drivers. I don't have any evidence to that effect today. It's something that we plead as abundance of precaution, but if that were the only basis that we had to proceed, I don't know that we would really go anywhere.

Mr. Johnston: Was this a single-vehicle accident?

Ms Saccomani: Yes. It was a single rollover vehicle accident near High Level. The mother was ejected from the vehicle and went through the windshield.

Mr. Johnston: Okay. Thank you.

Mr. Lukaszuk: Ms Corbett, what is the actual limit of the public liability or the liability on this particular insurance?

Ms Corbett: Unfortunately, Mr. Lukaszuk, I can't disclose that information.

Mr. Lukaszuk: Okay.

Ms Corbett: I don't have instructions to disclose that. I mean, all I can tell you, sir, is that the mandatory limits are $200,000 as per the Insurance Act. Sorry.

Mr. Lukaszuk: Fair enough.

Then to Ms Saccomani. Ms Saccomani, you're pursuing a claim according to the statement of claim for slightly in excess of $2.5 million. Without much expertise in the field, just looking at potential future loss of income for that child, I imagine it would exceed an amount of $2.5 million notwithstanding the potential cost of care. Any particular reason why you are asking for that particular sum and not a sum that perhaps would be more reflective of actual costs and losses?

Ms Saccomani: Our intention is to be modest with this claim, and that's reflected in the offer of settlement that we have made to the insurance company, which is less than what the limits are.

Mr. Lukaszuk: Then as follow-up: is there a potential that the mother herself could be exposed to future litigation outside of the scope of the insurance policy?

Ms Saccomani: Absolutely not. I mean, the family lives together. As the Supreme Court of Canada said, any sum would help the family as a unit, as a whole. It would be self-defeating. As a matter of record I can tell you that I have instructions to let this committee know that the petitioner would sign an undertaking, a waiver if you will, that any sum would not exceed the insurance limits.

Mr. Lukaszuk: Well, I'm intrigued now because you're representing the interests of the child.

Ms Saccomani: That's right.

Mr. Lukaszuk: The interests of the child are not those of the mother.

Ms Saccomani: Absolutely.

Mr. Lukaszuk: So you're limiting the child's ability to recover actual losses, which probably will include potential or future loss of income and future care and any other potential damages that may have been incurred, to protect the interests of the mother, who is a respondent in this case. Do I sense a conflict here? Are you trying to represent both parties?

Ms Saccomani: Absolutely not. I represent the child, the child who is taken care of by the mother. Mr. Lukaszuk, the Supreme Court of Canada has clearly said that we cannot exceed the limits of the insurance company, and the position I've taken is completely consistent with the direction of the Supreme Court of Canada, which is that the mother should not be exposed or liable for anything over her insurance company limits.

Mr. Lukaszuk: What authority do you base that decision on?

Ms Saccomani: The Supreme Court of Canada.

The Chair: Ms Corbett, did you have any . . .

Ms Corbett: Yeah. I guess I have a concern about that representation that's being made by Ms Saccomani and in response to Mr. Lukaszuk's question. You know, this is a tort action. Okay? The judgment for this child at the end of the day, if the child is entitled to a judgment, will be for the full amount of any damages that were caused by this motor vehicle accident, whether that be for loss of future earning capacity, cost of future care. Mr. Lukaszuk points out fairly that that could be in excess of $2.4 million. It's certainly in excess of the $200,000 mandatory insurance that we all know about in the Insurance Act.

At the end of the day when a judgment is awarded in favour of an infant plaintiff, the Public Trustee in this province steps in for every settlement. When I settle a child's claim, I pay the money to the Public Trustee's office because the Public Trustee is there to protect children. At the end of the day I would think that it would be the Public Trustee who would be responsible for making decisions as to whether or not, for example, they would then garnish Ms Rewega's wages for the outstanding judgment.

That brings to bear all of the issues that the Supreme Court of Canada talks about, about how detrimental those kinds of things can be to a familial relationship. I mean, this is a relationship between mother and child, not a relationship between strangers. So I think Mr. Lukaszuk raises some excellent questions on that issue, and I think we need to understand that it's the Public Trustee that steps in here because the Public Trustee's interests are those only of the child.

Ms Saccomani: Of course, they have not had the benefit of speaking with the Public Trustee's office as I have over the course of the last several years. It is not in the Public Trustee's office to exceed the insurance limits. On that basis that is why an offer of settlement has been made to the insurance company for less than the auto insurance limits.

If I understand your point, Mr. Lukaszuk, it would be better to deny the child any compensation than to risk hitting the limits of the auto coverage.

9:45

Mr. Lukaszuk: Even though I'm not here to answer questions, I will tell you that it is my position that it is your role to represent the best interests of the child, and that is to maximize the child's ability to recover damages which it may or may not have sustained in a given car accident. What I'm sensing or what I'm asking you is: are you purposefully lowering the value of the claim which you have filed in the Court of Queen's Bench to protect the interest of the defendant, being the mother, or are you maximizing on the true value of this claim?

Even though I have little, if any, expertise in the realm of assessing the value of a personal injury claim, intuitively I know that $2.4 million does not reflect the future cost of care and the potential future loss of income of an infant child. Hence my question to you is: are you truly representing the interests of the child or not mitigating them by trying to sustain the family relationship intact? Then, perhaps, is that collusion?

Ms Saccomani: The family relationship is intact. This is a man and wife who have been married for 13, 14 years. They're very much committed to each other and to the raising of their child with or without the help of this committee or any auto insurance. Whether the child receives $900,000 or receives no money, the family is committed to making sure that that child has the best wheelchairs possible, the best care possible, the best massage therapists possible, et cetera.

What I'm trying to say is that we are simply trying to advance a claim that's reasonable and logical. We've had discussions with the Public Trustee's office in making my offer of settlement to the insurance company lawyer. That was done in consultation with the Public Trustee's office. So, no, we're not in collusion. Whenever you have a lawsuit, you do exchange offers of settlement given the risk of proceeding forward and the years of litigation ahead. It's not collusion. It's not trying to do anything but the best for this child, and that's why we're all here today.

The Chair: Any further questions? Mr. Tougas.

Mr. Tougas: Yes. I just have one question from something you said earlier. If this case went all the way through the courts, did you say that you would expect to lose?

Ms Saccomani: If I pursued my claim against Lisa Rewega, we would lose, yes. When I filed my statement of claim, I was not aware of the Dobson case. The insurance company was not aware of the Dobson case. My friend was not aware of the Dobson case. We understood the law to be, as enunciated in 1933 and 1953, that

this child had a cause of action against her mother for her negligent driving and that the insurance company would step forward. That's what we understood.

When the Dobson case was given to me in May or June 2003, that was news to me. We went the first route, which is Masters level. We won there. We went to the second route, and the judge said: "No. Dobson's absolutely clear, Ms Saccomani. You cannot proceed against the mother." And it is. Dobson is absolutely clear. It would strike any action against the mother based on the decision here. But it did invite the Legislatures – and that's why we're here, because we already know the outcome. That's why we're here.

We have a thread of hope against the owners. It is a thread of hope, and we will continue. My friends, if they lose in the Court of Appeal, I'm sure they'll try to go to the Supreme Court of Canada, and that will take years. All we're trying to say is: why do we have to go through all those steps? Why can't Brooklynn be like every other citizen and just have the merits of her case heard? That's what we're trying to say. She gets no advantage. There is absolutely no advantage. There is no precedential value here because there aren't many Brooklynn Rewegas in this country. One, two, perhaps.

The Chair: Any further questions? No?

Well, thank you very much, all of you, for appearing today. We will not be rendering our decision or deliberating today. We have scheduled another time next week, so following those deliberations, we will be in contact with you.

Ms Corbett: Thank you, sir.

Ms Saccomani: I would just say that given the seriousness of what there is here and if you can't reach a decision next week, we would prefer that you defer to it to the fall, that you take some time, that in consultation with the Department of Justice, the Minister of Justice, perhaps you consider a public bill, and that you look at the whole picture. We're not here to take advantage. We're not here to rush this matter through, so you might want to consider that.

The Chair: Ms Dean, you have a final comment?

Ms Dean: Ms Saccomani, this morning you brought materials for distribution to the committee.

Ms Saccomani: I did.

Ms Dean: So we will distribute those.

Ms Saccomani: Sure. Thank you very much.

Ms Dean: Thank you.

Ms Corbett: Thank you very much.

The Chair: Is there any other business to come before the committee today? Anyone?

Well, let me just conclude by saying that we have received not only some additional submissions today but a considerable amount of material through Parliamentary Counsel. We've received some materials from the Justice department, we've received some case law, and I would just urge all members, before we deliberate on these matters, to please review those. It's quite important. There are some really significant issues that we need to deal with here in terms of public policy and law.

As I mentioned at our initial meeting, we're acting not only in our capacity as legislators in this committee, but we're acting as a quasi-judicial panel, so it's really crucial that we all have a grasp of what the implications and the facts are in this case. So please take the time to go through those materials.

Dr. Morton: Could you repeat that quick sort of executive summary of what that quasi-judicial capacity is?

The Chair: In the case of a Private Bills Committee we take on a capacity not simply as lawmakers but also as a quasi-judicial body, and that's why we hear both the petitioner and any other interested parties. We hear both sides of the issue. So the principles of natural justice would apply to our deliberations; that is, to hear both sides and not to have any bias. Basically, those are the two main principles of natural justice.

We also have to take into account the broader implications, as a quasi-judicial body, of what we have in front of us. That's why I want to make sure that everyone has an opportunity to go through those materials and review them. I would advise reviewing the transcript as well of everything that was said today here.

Mr. Lukaszuk: Mr. Chair, through you to Ms Dean: could you provide me, and if any other members are interested, with the transcripts of the QB and Court of Appeal from Nova Scotia and the three dissenting decisions from the Court of Appeal on the Supreme Court matter in question?

Ms Dean: The Dobson case has been provided in your materials.

Mr. Lukaszuk: Are there dissenting decisions in there as well?

Ms Dean: I believe so, but I will confirm that. If that's not the case, I will ensure that the complete decision is circulated. Just for clarity, this appeal came out of New Brunswick, not Nova Scotia. Just so everybody's clear.

Mr. Lukaszuk: Do we have the inferior courts' decisions as well?

Ms Dean: No. But I can arrange for those for you.

Mr. Lukaszuk: Could you?

Ms Dean: Sure.

The Chair: Anything further?

I'll accept a motion to adjourn then. Mr. Liepert. All in favour? Carried.

[The committee adjourned at 9:55 a.m.]