CASE COMMENTS AND NOTES

INJURIES TO UNBORN CHILDREN

I. INTRODUCTION

In common law countries, the tort of negligence has engulfed most other torts and has consistently widened the ambit of liability. This has been a policy development[1] implemented by judicial decision in response to social pressures. One of the contemporary pressures is to include the unborn child as an eligible plaintiff on birth.

The unborn child has long been recognized and protected by the law although not given the status of an independent legal entity until born alive. The unborn child may take property under a settlement, will, or intestacy. He is a life in being for the perpetuity rule. In a property case, he can be a party to an action, or at least be separately represented.[2] He is a dependant under the Fatal Accidents Acts,[3] and Workmen's Compensation Acts.[4] Terminating his living existence constitutes the criminal offence of abortion, or child destruction, unless permitted under the Abortion Act,[5] for example, to preserve the life or health of the mother, or to avoid substantial risk of serious handicap, or threat to existing children. Causing the death of the child by criminal negligence in delivery constitutes manslaughter[6] though presumably the child must be alive, or capable of being born alive, apart from the negligence. The child is born, and therefore has an independent existence, at that point of time that the doctors would, as a clinical or medical matter, so describe the situation, and at the latest, at the point of complete severance and separation from the mother.

Ordinary principles of tort liability—foresight of injury which is not too remote—would inexorably suggest liability. The negligent driver who has an accident but does not thereby place a pregnant woman or her loved ones in danger, or potential danger, owes no duty to mother and child even though the mother may be shocked and the unborn child consequently injured.[7] The chance that your victim will be a pregnant woman is statistically calculable, and it is a fairly common risk, much higher than the chance of meeting a blind man.[8] You take your victim as you find him. The regeneration of the human species implies the presence on the highway of many pregnant women.[9] The child may

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[1] *Donoghue* v. *Stevenson* [1932] A.C. 562; *Hedley Byrne & Co.* v. *Heller & Partners Ltd.* [1964] A.C. 465; *Home Office* v. *Dorset Yacht Co.* [1970] A.C. 1004; *Watt* v. *Rama* [1972] Vict. 353 at 361-382.

[2] *Villar* v. *Gilbey* [1907] A.C. 139 at 144; Wright, *Children en Ventre sa Mère,* (1935) 13 Can. Bar Rev. 594.

[3] *The George and Richard* (1871) L.R. 3 A. and E. 466, 24 L.T. 717. Fatal Accidents Acts, 1846 (Imp.) 9 & 10 Vict., c. 93; 1864 (Imp.) 27 & 28 Vict., c. 95; 1959 (Imp.) 7 & 8 Eliz. 2, c. 65.

[4] Workmen's Compensation Acts, 1925 (Imp.) 15 & 16 Geo. 5, c. 15; 1927 (Imp.) 17 & 18 Geo. 5, c. 15; 1943 (Imp.) 6 & 7 Geo. 6, c. 6.

[5] Abortion Act, 1967 (Imp.) c. 87. Most countries have reached a similar position by judicial decision or statutory enactment.

[6] *R.* v. *Senior* (1832) 1 Mood. 346, 168 E.R. 1298.

[7] *Bourhill* v. *Young* [1943] A.C. 92.

[8] *Haley* v. *London Electricity Board* [1965] A.C. 778; *The George and Richard, supra,* n. 3.

[9] Per Gillard J., *Watt* v. *Rama, supra,* n. 1 at 374.

be directly injured, or the mother may be injured in such a way that consequential injurious effects fall upon the child, such as harm occasioned to the child as a result of difficulty in delivery. Also, injury to the child may have consequential injurious effects upon the mother.

The pregnant woman injured in an accident may receive damages for the physical and diagnosable emotional injury, such as worry about the unborn child, premature birth, and difficult delivery.[10] Increasingly, damages are coming to be looked upon as a means of compensating family loss.

Glanville Williams has said:[11]

> Assuming that the courts are now ready to regard an unborn child as protected by the law of negligence, this protection will be of little avail if too narrow a view is taken of the ambit of foreseeable risk. The sensible attitude is that the reproduction of the human race is part of the order of nature which ought to be foreseen as a possibility by the negligent defendant. If this opinion is not acted on, then we certainly need, for this situation, a doctrine of transferred negligence to allow the mother's protection to embrace the child.

The medical man attending a pregnant woman must appreciate that any negligence on his part may result in a claim, not only by the woman herself, but also by the child when born.[12]

II. PROOF

In *Duval* v. *Seguin*, Fraser J. rightly said:[13]

> Some of the older cases suggest that there should be no recovery by a person who has suffered prenatal injuries because of the difficulties of proof and of the opening it gives for perjury and speculation. Since those cases were decided there have been many scientific advances and it would seem that chances of establishing whether or not there are causal relationships between the act alleged to be negligent and the damage alleged to have been suffered as a consequence are better now than formerly. In any event, the Courts now have to consider many similar problems and plaintiffs should not be denied relief in proper cases because of possible difficulties of proof.

In *Duval* v. *Seguin*,[14] a 31 week foetus was injured in a road accident and born prematurely at 34 weeks. The child was a spastic suffering from permanent cerebral defect. Fraser J. found that the retardation and physical disability were the direct result of the accident caused by the negligent driving of the defendant. But the doctrine of *res ipsa loquitur* would be quite inappropriate having regard to the state of medical science, and would be far too inhibiting a constraint upon the medical profession.[15]

Five per cent of born children have some congenital abnormality, fortunately, in most cases, trivial. But only two per cent of the five per cent can be attributable to a definite environmental agent.

III. ANTENATAL INJURY

Abnormality is likely to arise from drugs, infections, and hereditary disease. Few drugs have not been suspected, at some time, of causing fetal damage. The use of LSD is strongly suspected of causing such results, while thalidomide is now clearly established as a causal factor. Venereal disease and rubella are the classic examples of dangerous infections, and hereditary factors may involve radiation, haemophilia, or mental illness.

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[10] *Mitchell* v. *Shirley* (1972) 14 J.P. 165.

[11] Williams, *The Risk Principle*, (1961) 77 L.Q.R. 179 at 189.

[12] *Right to Damages for Prenatal Injuries*, (1973) 13 Medicine, Science and the Law 143.

[13] (1972) 26 D.L.R. (3d) 418 at 434.

[14] *Id.*

[15] *Montreal Tramways* v. *Leveille* [1933] S.C.R. 456, [1933] 4 D.L.R. 337, 41 C.R. (Can.) 291 (child born with club feet); Thurston, *Injury to the Unborn Child*, (1973) 137 Justice of the Peace 433.

The Law Commission drew particular attention to the following situations:[16]

(a) Trauma experienced by the mother, with the result that the child is born with brain damage or as an epileptic or with physical deformity of some kind.
(b) The mother, and perhaps the child, is injured in such a way that complications arise at birth and the child is thereby injured.
(c) The mother takes drugs, for example, thalidomide, which injures the child, or a dangerous and defective oral contraceptive which leads to a handicapped child.
(d) The mother takes an abortifacient which injures but does not abort the child.
(e) A parent is negligently irradiated, with adverse consequences for the child.
(f) The mother is negligently infected, for example, with rubella, with adverse consequences for the child.

IV. DEFENDANT NOT LIABLE TO MOTHER

The defendant may not be liable to the mother, perhaps because she was a trespasser or had voluntarily assumed the risk as a result of an exemption clause. Nonetheless, the unborn child should be entitled to have a cause of action and to recover damages despite his physical identification with the mother, because *ex hypothesi,* he is potentially an independent legal person. As an involuntary passenger, he is presumably not a trespasser. He did not give authority to the mother to exempt liability on his behalf and it would be impossible for the occupier to exempt liability to the unborn child. Presumably by appropriate contractual indemnity, an occupier would be able to secure an indemnity from the mother in the event of the child succeeding against him.

If the mother were at fault herself, not only might her own damages from the defendant be reduced accordingly, but, if her negligence contributed to the injury suffered by the unborn child, the defendant could obtain a contribution from her. Contributory negligence on the part of the mother ought not to affect the claim of the child against the doctor; but the doctor should be able to seek indemnity or contribution against the mother. For example, she may be negligently exposing the child to risk in trespassing; or she may negligently not follow the drug manufacturer's instructions; or she may negligently take an abortifacient. The mother may be wholly to blame. Self-medication is always a risk and therefore the doctor must be alive to the possibility of an ignorant or negligent mother.

There can be no logical reason for preventing a child suing his own parent, though there is an undoubted risk of family discord. In practice, in the absence of insurance, such a claim would be unlikely to be pursued. Suppose a woman is advised not to have a child because she is a haemophilia carrier, or is suffering from venereal disease, but, nonetheless, deliberately has a child, born handicapped. Is the mother liable? Could it be argued by a defendant that the foetus was injured at an early stage and could and should have been lawfully aborted, and, therefore, the cause of the injury cannot be attributable to the defendant? Provided that the circumstances were fully explained to the mother, and abortion made available if she wished, the responsibility must rest exclusively with her. The doctor cannot be liable, for he has done all that could be expected of him. But it may involve the proposition that the mother may, in effect, find herself under a duty to abort.

V. PRE-CONCEPTION TORT

The fact that the defendant committed the tort before conception cannot matter, as for example: a manufacturer negligently putting a dangerous drug on the market; a doctor negligently prescribing a dangerous and ineffective

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[16] *Injuries to Unborn Children,* English Law Commission Working Paper No. 47, ss. 6-14 (1973).

contraceptive pill to non-pregnant women; a radiographer negligently X-raying a potential parent—such acts of negligence resulting ultimately in an injured foetus. The cause of action cannot arise until the damage is caused, but the damaging act may, on principle, take place at any time.[17]

VI. STILLBORN

Suppose it is admitted or established that the negligence of the defendant injured the foetus, but the foetus dies before being born alive. The general view seems to be that no cause of action should arise in such circumstances. The unborn child has conditional legal personality maturing on birth. Juridically, it would involve recognizing the foetus as a legal person, as distinct from the object or potential object of legal protection. Pain and suffering could not be established; loss of prospects in life would be rather artificial. Damages would accrue to the estate, *i.e.*, third persons, namely the parents. So, on balance, it seems right that the foetus must become a living person before being able to sue. Damages for the living plaintiff are awarded in respect of injury suffered since birth, nothing for injury while in the womb. The child injured before birth, and born alive, but surviving only a very short time, would have a cause of action under the Law Reform (Miscellaneous Provisions) Act.[18]

The injury takes place before birth, but the creation of a living independent plaintiff upon birth crystallizes the claim against the defendant. Before birth there is a potential claim. This is a juridically acceptable concept. The principle of relating back applies on the creation of the new independent legal entity.[19]

VII. DAMAGES

In *Duval* v. *Seguin*[20] the spastic plaintiff recovered damages under the heads of: stay in hospital after birth, medical operation, limited employment prospects, and restricted amenities.

VIII. INSURANCE

In Britain, the passenger in a motor vehicle must be compulsorily insured. Is the unborn child a passenger? The driver knows or ought to know that there is an unborn child in the vehicle. The driver may be the mother herself. Surely there should be adequate insurance coverage. If the child can sue for negligence, then that liability should be subject to compulsory insurance.

IX. JUSTICE

In *Watt* v. *Rama*, Winneke C. J. and Pape J. said:[21]

> In the present case the act or omission of the defendant occurred while he was driving

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[17] S. v. *Distillers Co.* [1970] 1 W.L.R. 114, [1969] 3 All E.R. 1412, was a case in which the drug thalidomide was used before birth and, one imagines, in many cases before conception. The case was settled on the basis of no admission of liability and 40 per cent of the damages agreed between the parties or decided by the court. *See* Prevett, *Actuarial Assessment of Damages*, (1972) 35 Mod. L. Rev. 140 at 257, 260-267. In England the Dangerous Drugs and Disabled Children Bill, 1973, (not proceeded with because of the setting up of the Royal Commission on Civil Liability) had provided (clause 2(2)): "A person who suffers injury or loss as a result of the use by his parents or either of them of any medicinal product or drug sold in breach of the said warranty shall be entitled to claim in respect of such injury or loss, notwithstanding that such use occurred before his birth." Perhaps it would have been desirable to add at the end "or conception".

[18] 1934 (Imp.) 24 & 25 Geo. 5, c. 41.

[19] *The George and Richard, supra*, n. 3; *Smith* v. *Fox* [1923] 3 D.L.R. 785, 53 O.L.R. 54; *Watt* v. *Rama, supra*, n. 1.

[20] *Supra*, n. 13.

[21] *Supra*, n. 1 at 360-361.

> a motor car upon a public highway, and it was, we think, then reasonably foreseeable that such act or omission might cause injury to a pregnant woman in the car with which his car collided and might cause the child she was carrying to be born in an injured condition. In such a case he would be bound to take the woman as he found her, if sued by her, and her pregnancy would be just as much a physical condition in his victim as would be the case of a person having an egg-shell skull. If it might reasonably have been foreseen that the pregnant woman might be injured by his carelessness, it must follow that the possibility of injury on birth to the child she was carrying must equally be taken to have been reasonably foreseeable. . . . Those circumstances, accordingly, constituted a potential relationship capable of imposing a duty on the defendant in relation to the child if and when born. On the birth the relationship crystallized and out of it arose a duty on the defendant in relation to the child. On the facts, which, for present purposes must be assumed, the child was born with injuries caused by the act or neglect of the defendant in the driving of his car. But as the child could not in the very nature of things acquire rights correlative to a duty until it became by birth a living person, and as it was not until then that it could sustain injuries as a living person, it was, we think, at that stage that the duty arising out of the relationship was attached to the defendant, and it was at that stage that the defendant was, on the assumption that his act or omission in the driving of the car constituted a failure to take reasonable care, in breach of the duty to take reasonable care to avoid injury to the child. On this view the fact that damage was done to the embryo or foetus before birth, if such was sought to be established, was not an independent element in the plaintiff's cause of action, but merely an evidentiary fact relevant to the issue of causation. It must be plain in all cases where the principle of *Donoghue* v. *Stevenson* is invoked that the facts establishing the breach of duty occurred before the plaintiff's cause of action accrued, for *ex hypothesi* the cause of action did not arise until the damage was suffered, and the prospective plaintiff may not have been in existence when the facts which prove the breach of duty occurred. Whether, as a matter of expression, you say . . . that this is to be explained by postulating a continuing duty, or merely projecting the relationship of duty into the future, or whether you regard it as possible to establish a breach of duty as at birth by reference to an act antecendent to the accrual of the cause of action, may be open to debate, but it has no bearing on the precise question we are called upon to answer, namely, whether the defendant owed a duty of care to the infant plaintiff.

Whether the defendant caused the injury as the anxious father was taking the mother to the maternity hospital or when the proud father was bringing the mother and baby back from the maternity hospital cannot be of any relevance.[22]

Although the child claiming in respect of antenatal injury would normally sue in negligence, the right to sue would have to cover tort generally and breach of statutory duty. To refuse to recognize such a right would be manifestly unjust and unreasonable.[23] If the abnormal child can, after birth, sue the doctor, the risk of the pregnant mother becoming untreatable must be borne in mind. The medical profession must be answerable for its mistakes, but it must not be placed in an unreasonable or impossible position. Ultimately society must fully provide for social casualties, without regard to negligence.

The Law Commission proposal is:[24]

> Whenever a plaintiff has suffered antenatal injury caused by the fault of the defendant he shall be entitled to recover damages from the defendant and those damages should not be reduced by any negligence on the part of the mother. Where a plaintiff suffers antenatal injury caused by his mother's negligence he should be entitled to recover damages from her. A plaintiff's claim for antenatal injury should not be extinguished or limited by any contract entered into by his mother [or presumably father too] or by his mother's voluntary assumption of risk.

—ALEC SAMUELS*

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[22] *Watt* v. *Rama, supra,* n. 1 at 373-374.

[23] Per Fraser J., *Duval* v. *Seguin, supra,* n. 13 at 434, echoing Lamont J. in *Montreal Tramways* v. *Leveille, supra,* n. 15. *See also Bonbrest* v. *Kotz* (1946) 65 F. Supp. 138.

[24] *Supra,* n. 16 at s. 34.

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