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THE LAW COMMISSION

PUBLISHED WORKING PAPER

NO: 47

INJURIES TO UNBORN CHILDREN

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INJURIES TO UNBORN CHILDREN

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INJURIES TO UNBORN CHILDREN

INTRODUCTION

Terms of reference

1. Under the provisions of s. 3(1)(e) of the Law Commissions Act 1965, the Lord Chancellor has asked us to advise him what the law in relation to ante-natal personal injuries should be. In accordance with our usual practice, we are publishing this Working Paper for general consultation.

2. The questions which are raised by this request for advice come within a fairly narrow compass but they raise points of great social interest and concern. In this Working Paper we shall set out our provisional views as to what the law ought to be and we shall welcome comments upon these views.

The apparent need for legislation

3. Whilst claims for damages for ante-natal injuries have been made in other jurisdictions there is no English authority on the subject.[1] We have, therefore, a clean

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1. In 1939, a case occurred at Liverpool Assizes, see (1939) 83 Sol. J. 185. A ladder fell upon a pregnant woman. The fall was caused by the defendant's negligence, and as a result of the accident, the child was born the next day and lived only one day. The defendant paid £100 into Court when the parents brought a claim for damages for loss of expectation of life as administrators of the child's estate and this they accepted in settlement of their claim. See Winfield, "The Unborn Child", (1942) 4 University of Toronto Law Journal, 278; reprinted in (1942) 8 Cambridge Law Journal 76 (at p. 83).

sheet upon which to write. We ought, however, at the very beginning of this Working Paper, to state the reasons which have led us to believe that this question ought to be dealt with by legislation at as early a date as possible.

Reasons why early legislation is desirable

4. The reasons which have led us to conclude that early legislation is desirable are:-

(a) In the absence of any English authority there is a doubt whether a child has a cause of action at all for personal injuries caused before birth. There is American and Irish authority that no action would lie but more recent authority in favour of a cause of action. One cannot forecast in what circumstances the question will arise in the future but most claims for damages for personal injuries are, as we have pointed out in Published Working Paper No.41,[2] compromised and do not result in litigation. Because a decision against an infant plaintiff on this question would result in the total defeat of his claim, the doubt will, we think, be bound to have an impact upon the terms of settlement of any claims which are made in the future until it is resolved by litigation or legislation.

(b) Although recent decisions in other common law jurisdictions have been in favour of permitting a cause of action in respect of ante-natal injury the bases upon which the cause of action has been held to be founded have varied. Whilst in most American states the current has set strongly in favour of the recognition of such a

2. See Published Working Paper No. 41, para. 8.

cause of action, the reasoning has been founded on the recognition of the foetus as a legal entity separate from the mother.[3] On the other hand, a recent decision of the Supreme Court of Victoria,[4] in holding that a child could recover damages for brain injury allegedly caused in a road accident seven and a half months before birth, founded its decision primarily on the basis that a claim in negligence can be brought by a living plaintiff in respect of a disability with which he was born, even though the disability was caused by the earlier negligent conduct of the defendant.[5]

(c) The cost of law reform should not fall upon an individual litigant if this can be avoided. Thus where a doubt exists as to what the law is on an important topic such as this, there is a strong case for resolving that doubt by legislation.

(d) The fact situation which will give rise to the first claim litigated to judgment cannot be foreseen, but, whatever it is, the decision upon it will almost certainly leave a number

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3. In America this has led a court to allow a cause of action for the wrongful "death" of an eight month old viable foetus stillborn as a consequence of injury. See White v. Yup (1969) 458 P. 2d. 617

4. Watt v. Rama [1972] V.R. 353.

5. Although Gillard J., whilst he stated his adherence to the principle of the action accruing only to a person in being, was prepared, if necessary, to base his decision on the American formula.

of ancillary questions unanswered. It is, we think, desirable that as many of these questions as can be foreseen should be answered before they arise.

(e) Any decision of the courts would have to take the form of a development of existing legal principles, whereas legislation offers the opportunity of starting with a new principle based upon the social factors involved.

The form of this paper

5. In a Working Paper of this kind it would have been our usual practice to set out, as the starting point, an analysis of the authorities on the subject and our opinion as to how the Courts would decide the questions with which we are dealing. In view, however, of the fact that litigation which is still pending on some of these very issues has provoked much controversy in Parliament and elsewhere, we feel it would be appropriate to depart from our normal practice and cast this paper in a different form. There is an absence of any direct English authority on this question, but it has come before the Courts in other jurisdictions. In the annexed Appendix we have attempted, for the sake of convenience, to summarise some of these decisions.

I. TYPES OF ANTE-NATAL INJURY

Introductory

6. Whilst, as we have said,[6] we do not consider that we ought to be greatly influenced by the different ways in which this branch of the law has developed in other jurisdictions

6. See para. 4(b) and (e) above.

it is, we think, useful to look at them to furnish examples of the various types of ante-natal injury which have led to legal action. In seeking to draft legislation to fit future fact situations it is helpful, at least in outline, first to consider what those situations are likely to be.

7. We do not pretend that these examples culled from the reports of litigation in other jurisdictions are exhaustive and we shall, on consultation, particularly welcome medical and pharmaceutical advice on other possible types of injury and their effects.

(a) Trauma

8. The most fruitful source of litigation has been trauma inflicted on a pregnant woman; thus it was alleged that the disability of a child born crippled resulted from injury sustained by his mother in a railway accident,[7] that the cause of a child being born with club feet was his mother's involvement when pregnant in a tramcar accident,[8] and that a child's brain damage and epilepsy was caused seven months before birth when his mother was involved in a road accident wherein she was rendered a paraplegic.[9] Many similar allegations have been made in American courts. In these cases the allegation is that the foetus itself has been injured as a direct result of the accident.

9. Another situation which we think might arise is where a pregnant woman is injured and because of her injury complications occur at childbirth causing the child to be born with a disability. If the injury to the mother was caused before conception it might still, in certain circumstances,

7. Mabel Walker v. Great Northern Railway Company of Ireland (1891) L.R. Ir. 69.

8. Montreal Tramways Co. v. Lēveillē [1933]4 D.L.R. 337.

9. Watt v. Rama [1972] V.R. 353, p. 356.

be considered the proximate cause of the child's disability.[10]

(b) Injury caused during childbirth

10. There has been a number of actions brought in American Courts where a child's disability at birth has been alleged to have been caused by negligent treatment during childbirth. A child born deaf and dumb and subject to seizures was alleged to have been so disabled by the negligence of the physician attending at child birth.[11] Another case was reported in the New York Times, Nov. 19, 1964,[12] where a mother and her son recovered damages for medical negligence; it was alleged that the baby's birth was delayed by pressing towels against his head until the obstericians arrived, so cutting off the baby's oxygen supply and causing irreparable brain damage.

(c) Drugs

11. It is clear that drugs taken by a pregnant woman can cause injury to the foetus causing the child to be born crippled.

(d) Abortifacients

12. Gordon records medical cases where injury to a child has been caused by abortifacients.[13] We know of no claim

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10. We consider this situation later; see para. 38 below.

11. Lewis v. Read 41 N.J. 121, 193 A. 2d. 255 (1963).

12. Cited by David A. Gordon, "The Unborn Plaintiff" (1965) 63 Mich. L. Rev. 579. In this article the author treats the whole subject of ante-natal injuries in considerable detail and with particular reference to the American cases.

13. See Gordon, op. cit. pp 618-619.

founded on their use.

(e) Irradiation

13. There is no doubt that irradiation can have a detrimental effect on the foetus. In two American cases claims have been brought arising out of the negligent diagnosis of a pregnancy as a tumour of the womb resulting in X-ray treatment injuring the foetus. In one[14] the child was born feeble-minded and crippled, surviving thirteen years but dying before the action was brought; in the other[15] the child, a microcephalic idiot, was alive at the time the action was brought. Irradiation furnishes another example of the situation to which we have referred[16] where injury to the mother, or perhaps the father, before the intercourse leading to conception can result in the child being born disabled.

(f) Diseases

14. Certain diseases such as German measles entering the foetal environment may have serious effects upon the child. There is, therefore, a possibility of ante-natal injury being caused by negligence resulting in the infection of a pregnant woman.[17]

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14. Smith v. Luckhardt 299 Ill. App. 100, N.E. 2d. 446 (1939).

15. Stemmer v. Kline 128 N.J.L. 455, 26 A. 2d. 489 (1942).

16. See para. 9 above.

17. An example of a claim for damages for negligent infection is afforded by the case of Evans v. Liverpool Corporation [1906] 1 K.B. 160; the plaintiff claimed damages for the infection of three of his children with scarlet fever due to the negligent discharge of his other child from hospital by the defendant physician; the claim in fact failed on other grounds.

II. SHOULD THERE BE A CAUSE OF ACTION?

A cause of action should lie

15. It is our provisional view that where a child is born with a disability which was caused by someone's fault occuring before birth, he should be entitled to recover damages from that person. If a manufacturer produces a defective product, then, in certain circumstances, he is liable to the ultimate consumer.[18] If a child suffers injuries through the use of such a defective product, it is no defence that the child was not born, or was not even conceived, when the product was manufactured. If the damage were sustained by a child en ventre sa mère we believe that the same result should follow. A duty of care at common law is owed to anyone who is within the foreseeable area of risk, and a claim for damages for negligence may be brought for a breach of that duty even though the person bringing it was not in existence at the time. The foreseeable area of risk does not only encompass persons in being at the time, and therefore the fact that the events causing personal injury took place prior to the coming into existence of the injured person ought not to be allowed to deprive him of a cause of action. We consider later the question whether there are any circumstances in which conduct before conception should give an action to a child subsequently born.[19]

"Natural justice"

16. In considering what the law ought to be it is not wrong to appeal to general principles of justice and, in this respect, we find ourselves in agreement with the views expressed by Lamont J., speaking for the majority of the Supreme Court

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18. See, e.g., Grant v. Australian Knitting Mills [1936] A.C. 85
19. See paras. 38-39 below

of Canada in Montreal Tramways Co. v. Léveillé[20], where, we believe for the first time, it was accepted that an infant plaintiff should be able after birth to recover damages for ante-natal injuries:-

> "If a child after birth has no right of action for pre-natal injuries, we have a wrong inflicted for which there is no remedy, for, although the father may be entitled to compensation for the loss he has incurred, and the mother for what she has suffered, yet there is a residuum of injury for which compensation cannot be had except at the suit of the child. If a right of action be denied to the child, it will be compelled, without any fault on its part, to go through life carrying the seal of another's fault and bearing a very heavy burden of infirmity and inconvenience without any compensation therefor. To my mind, it is but natural justice that a child, if born alive and viable, should be allowed to maintain an action in the Courts for injuries wrongfully committed upon its person while in the womb of the mother."[21]

III. A CAUSE OF ACTION BASED ON FAULT

The provisional legislative proposal

17. It is our provisional view that whenever a plaintiff has suffered ante-natal injury caused by the fault of another he ought to be entitled to recover damages.

The definition of "fault" in this context

18. In this context the definition of fault presents complications. Whilst the tort of negligence is the fault most likely to ground a claim for ante-natal injury it is not the only one. It is, therefore, necessary to consider the different ways in

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20. [1933] 4 D.L.R. 337. This decision was based on the application of the principles of civil law to a Quebec statute.

21. Ibid., p. 345.

which at law fault can cause personal injury and also to examine the various matters by which the defendant's fault can be affected.

(a) Negligence

19. The tort of negligence has been defined as "the breach of a legal duty to take care which results in damage, undesired by the defendant, to the plaintiff".[22] Legislation must, if a child is to be able to recover damages for ante-natal injury at all, be so framed that negligence by the defendant causing damage to the child plaintiff will be covered.

(b) Breach of statutory duty

20. Where a statutory duty is imposed upon someone and that duty is broken whereby injury is caused to a person, that person can, in the case of some statutes, bring an action in tort for damages. In these cases the plaintiff must show that the duty imposed by the statute was owed to him and that its breach caused his injury. The relationship between plaintiff and defendant is sometimes created by the statute itself so that, for instance, the occupier of a factory owes the statutory duty imposed on him by certain electricity regulations to "persons employed", with the result that a fireman injured by the occupier's breach cannot recover damages for that breach.[23] It is obvious that where such statutory duties have been imposed, they have not explicitly included a foetus within the ambit of the duty of care. However, in most statutes which impose a duty upon a person, Parliament has given no indication whether a cause of action

22. Winfield and Jolowicz on Tort, 9th Ed., p. 45.

23. Hartley v. Mayoh & Co. [1954] 1 Q.B. 383.

in tort arises upon breach of that duty, but the Courts have read into them the implication that an action in tort was intended to be given to anyone within the protected class who was injured by the breach. Professor Street writes of this tort:-

> "Many of the decided cases can, for the most part, be regarded as judicial decisions of policy whether breaches of certain provisions should be compensated for in damages."[24]

If it is to be the policy of the law to provide a remedy to a child for ante-natal injury caused by the defendant's breach of his common law duty of care, we can see no reason why injury caused by his breach of statutory duty should not similarly give rise to a cause of action.[25]

(c) Trespass to the person

21. Inadvertent injury is covered by the tort of negligence and trespass means today, in tort, intentional trespass in the form of assault, battery or false imprisonment. We think that any definition of a right of action for ante-natal injury must include injury caused by intentional trespass to the mother whether in the form of a battery or other intentional harm.[26] We can see no reason why, if injury caused by inadvertent acts is compensated, injury caused by intentional acts to the mother should not have the same

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24. Street, The Law of Torts, 5th Ed., p. 261.

25. "The tort of breach of statutory duty thus has a resemblance to the tort of negligence in which the plaintiff must similarly prove the breach of a duty owed to him and consequent damage, and the breach of statutory duty is therefore sometimes called 'statutory negligence'." Winfield and Jolowicz on Tort, 9th Ed., p. 140.

26. As in Wilkinson v. Downton [1897] 2Q.B. 57.

consequence so far at the child is concerned.

(d) Matters affecting the defendant's liability

22. In any claim for damages for personal injury several ways are open for the defendant to escape or limit liability and each require separate consideration in the context of a claim for ante-natal injury.

23. A defendant may not be liable either because he was never in breach of any duty, e.g., where an occupier establishes that the injured person was a trespasser,[27] or because, though he is guilty of negligence, his liability is excluded either by the plaintiff's voluntary assumption of risk or because his liability has been excluded or limited by contract. The defendant's liability may also be reduced by contributory negligence on the part of the plaintiff. Where a claim by the mother would have been met by one of these arguments, should a plaintiff unborn at the time of the defendant's relevant conduct be in a better position than the mother?

(i) Where a defendant would not be liable to the mother

24. For a claim for damages in negligence or breach of statutory duty to succeed a plaintiff must show that the defendant owed him a duty, that the defendant was in breach of that duty, and that damage was caused by that breach. If the plaintiff fails to show that he was owed a duty by the defendant he fails in his claim; if, although owed a duty, he fails to show that the defendant was in breach of duty, he

27. The whole question of the duty of care owed by an occupier to a trespasser is under consideration by the Law Commission. See Herrington v. British Railways Board [1972] 2 W.L.R. 537: [1972] 1 All E.R. 749.

similarly fails. Examples of a situation where no duty was owed can arise either by the application of the rules as to foreseeability or because the plaintiff fails to bring himself within a specified class.[28] An example of a situation where there was no breach of duty would be where a defendant, driving carefully, collided with and injured a pedestrian. In this situation it appears that the facts that negative any breach of duty as against the mother equally negative any breach as against her unborn child. But, in a different sort of case, the result might be different. A drug manufacturer who exercises all reasonable care to ensure that a drug shall not be dangerous to the mother who takes it might nevertheless be held to be negligent so far as damage to the foetus was concerned. Similarly an X-ray which could not possibly cause any harm to the mother might seriously injure the foetus. We suggest that when it comes to draft legislation these points should be borne in mind, so that the absence of a duty to the mother, or the fact that there was no breach of duty as against her, should not necessarily lead to the conclusion that the child itself, when born alive, cannot maintain an action.

(ii) Contractual exemption or limitation of liability: Volenti non fit injuria

25. Legislation framed as we suggest would probably mean that an exemption clause in a mother's contract would not extinguish or limit the plaintiff's claim. It is our provisional view that this would be correct and we think that it should, if necessary, be provided in any legislation that a claim for ante-natal injury should not be affected by any contract entered into by the mother of the plaintiff. We

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28. If there was no duty owed to the mother it does not necessarily follow that no duty was owed to her unborn child.

think also that the defence volenti non fit injuria should be treated in the same way as contractual exemption and that a mother's voluntary assumption of risk should not be allowed to negative a defendant's liability if his negligence causes injury to her unborn child. The analogy between contractual exemption and voluntary assumption of risk is very close.

(iii) Mother guilty of contributory negligence

26. The doctrine of identification[29] has no longer any place in the English law of tort. If a child is injured partly through the negligence of the defendant and partly through the negligence of the person in charge of the child the defendant is liable for the whole damage. Accordingly, where a child, in his grandfather's charge, was crossing a road, and the grandfather, startled by the approach of the defendants' omnibus, released the child's hand so that the child was run over, the defendants were held liable, although it was found that there was contributory negligence on the part of the grandfather.[30] It is arguable that in the case of a mother and unborn child, physical identification being complete, a defendant should be able to rely upon the mother's contributory negligence. Nevertheless, our provisional view is that these situations are not sufficiently dissimilar to justify a departure from the normal rule.

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29. Under this doctrine, a passenger in a vehicle, or a child in the care of an adult, was identified with the driver or guardian; the negligence of the latter was imputed to him, so that he would lose his cause of action against a negligent third party. The rule was effectively overturned by the House of Lords in Mills v. Armstrong, The Bernina (1888) 13 App. Cas. 1.

30. Oliver v. Birmingham & Midland Motor Omnibus Company Ltd. [1933] 1 K.B. 35.

(e) The mother's liability to her unborn child

27. If a child is born with a disability due to his mother's negligent act or omission during pregnancy it seems at first sight socially unacceptable that he should have a cause of action for damages against her. On analysis, however, this situation is no different in principle from the case where, by her negligence, a mother causes injury to a baby in arms, in which case, as the law now stands, a cause of action would lie.

28. There are perhaps three fact situations in which the question of a mother's liability to her child for ante-natal injury might arise. We examine them in turn.

(i) Injury caused by the mother's negligence in the ante-natal regime

29. There is a wide range of rash conduct during pregnancy by which a mother may cause injury to her unborn child either by failing to heed medical advice or by herself taking unjustified risks of physical injury.

(ii) Injury caused by the mother's negligent driving

30. The situation perhaps most likely to arise in practice is one where a pregnant mother by the negligent driving of a motor car causes injury to the child she is bearing.

(iii) The mother as third party

31. A child may suffer ante-natal injury due to the negligence both of his mother and of someone else. A pregnant woman at work might be injured due both to her own negligence and the negligence or breach of statutory duty of her employer

or she might be injured when visiting premises due both to her own negligence and the occupier's breach of the common duty of care and, in either case, in addition to her own injury her unborn child might be injured as well. In these circumstances both mother and child would have a cause of action against the defendant, the mother's claim being reduced on account of her own negligence. Assuming that there is no identification of the child's claim with the mother's, the defendant could then bring third party proceedings for contribution against the mother in respect of her own liability to the infant plaintiff.[31] In this situation the mother would, in effect, be paying, out of her own pocket, damages to her own child for ante-natal injury. Once again there is, we think, in principle no difference between this situation and one where a living child is injured partly by the defendant's negligence and partly by the negligence of his mother, but, in practice, defendants do not often bring third party proceedings against parents, if for no other reason than that the parents are unlikely to be insured.

32. In a claim for damages caused before birth it is more likely that, mother and child being one, the mother will suffer injury as well as the child and will, therefore, be put in funds which will be available to meet the third party claim. If a mother were 50% to blame and liable to contribute 50% of her child's damages, the damages in each case amounting to £1000, the result would be that her child would recover £1000 and she nothing. In other circumstances the mother might well be substantially out of pocket. This result, though at first sight startling, is not perhaps unacceptable, and is in accord with the general principles governing contribution within the family.

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31. We assume that, as a matter of fact, in most cases the mother's contributory negligence in respect of her own claim against the tortfeasor will involve her in a breach of her own duty of care to the child.

(iv) Provisional view on the mother's liability to her unborn child

33. It is our provisional view that none of these examples calls for specific legislation. The first situation[32] is closely comparable to that which arises when a mother negligently injures her child when washing or dressing it. We know of no case where a claim has been brought on the child's behalf in these circumstances even after the break up of a marriage and believe that actions in respect of ante-natal injuries caused by a mother are so unlikely that they can be ignored. In the second and third examples our provisional view is that there is no strong case for putting a plaintiff with ante-natal injuries into a different position from any other plaintiff.

The provisional Legislative Proposal - restated

34. The legislative proposal we made in paragraph 17 above can now be restated and expanded. It is that wherever a plaintiff has suffered ante-natal injury caused by the fault of the defendant he should be entitled to recover damages from the defendant and that those damages should not be reduced by any negligence on the part of the mother. Where a plaintiff suffers ante-natal injury caused by his mother's negligence he should be entitled to recover damages from her. A plaintiff's claim for ante-natal injury should not be extinguished or limited by any contract entered into by his mother or by his mother's voluntary assumption of risk.

Transitional Provisions

35. Any legislation which we eventually propose will not, we assume, have retrospective effect. It should probably provide specifically that it does not affect claims arising prior to its comming into force.

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32. See para. 29 above.

IV. SOME ANCILLARY PROBLEMS

The stillborn child

36. So long as legislation is framed in relation to a living plaintiff there can be no question of any claim arising on behalf of a stillborn child. Difficulty could only arise if a general principle was laid down based on the fiction that a foetus was an independent legal entity. As the law now stands there might be some practical difficulty in a case where there was doubt as to whether a foetus ever achieved an independent life of its own. A life, however brief, followed by death caused by an actionable injury would result in the vesting in the child of a cause of action for loss of expectation of life which would survive to his estate. In Published Working Paper No. 41[33] we reached the provisional conclusion that claims for damages for loss of expectation of life in their present form should be abolished and that, in whatever form they might take, they should not survive to the estate of a deceased victim. On consultation there has been wide approval for the total abolition of loss of expectation of life as a separate head of damage and almost universal approval of the proposal that such claims should not survive to a deceased's estate. If loss of expectation of life as a separate head of damage is abolished, no difficulty will arise in the situation we are here considering; in a life so short that there is doubt as to whether it ever began no damages for non-pecuniary loss in the form of pain and suffering could possibly accrue.

Physical injury to the mother causing the child to be injured during childbirth

37. The physical condition of a mother may be the cause of injury to her child during birth. If the deformity is the result of tortious injury occurring during pregnancy then, on

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33. See Published Working Paper No. 41, paras. 64-66.

our proposal,[34] no difficulty would arise and the child would recover damages. If the injury to the mother preceded conception, we think that the rules as to remoteness of damages and foreseeability could be left to determine liability.

Damage caused to the foetus because of an act or omission affecting the mother or father before conception

38. It is possible that a negligent act or omission (e.g. in giving X-ray treatment) could affect the reproductive functions of the father or mother before the act of intercourse which gives rise to conception and, as a result, the child then conceived could be born deformed or disabled. Another situation which has occurred to us as a possibility is one where a contraceptive pill proved not only ineffective but also so affected the mother that the child conceived, because of its ineffectiveness, was born injured. We have reached no conclusion as to whether such situations as these call for specific legislative provisions, and, if they do, what form such provisions should take. On this subject we shall particularly welcome the assistance of the medical and pharmaceutical professions. We can ourselves see a possible distinction between a case of physical injury before conception (when the risk to a child born subsequently might well be known) and one of a negligently manufactured contraceptive pill. X-ray treatment might equate with one or other of these examples, depending whether the affected parent knew or ought to have known of the risk to the child.

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34. See para. 34 above.

Medical treatment during childbirth

39. We have considered whether any hypothetical difficulty might arise out of a possible conflict in respect of the well-being of the mother and of the child during childbirth, but we think it preferable to postpone consideration of this problem until we have consulted the medical profession.

Insurance

40. We have considered the terms of s. 145 of the Road Traffic Act 1972, which provides that the required policy must cover

> "any liability which may be incurred...in respect of the death of or bodily injury to any person..."

There is little doubt that "any person" would include a child claiming in respect of ante-natal injury in accordance with our provisional proposals so that no amendment to s. 145 would be necessary.

Criminal Injuries

41. If legislation is enacted to give a right of action for ante-natal injury, the Criminal Injuries Compensation Scheme should be amended accordingly.

Products Liability

42. We have not in this Paper been concerned with questions as to whether any strict products liability should attach to the sale of drugs.

APPENDIX

THE DEVELOPMENT OF THE LAW IN OTHER JURISDICTIONS

A. Jurisdictions in the United States of America

1. The decisions prior to 1946 were nearly all against the existence of a cause of action. Two reasons were usually given: first, that the defendant could owe no duty of care to a person who was not in existence at the time of his "negligent" act, and, secondly, that the difficulty of proving a causal connection between the act and the damage was too great and there was too much danger of fabricated claims. After 1946 the trend set strongly in favour of the recognition of such a cause of action. The basis of these more recent decisions has been the recognition of the unborn child as an entity separate from the mother, either from the time it was viable or from conception.

2. Two major problems remain to which American courts have, as yet, evolved no clear and consistent answer. The first concerns the stage of development which a foetus should have attained before an action may lie.

> "Most of the cases allowing recovery have involved a foetus which was then viable, meaning capable of independent life, if only in an incubator. Many of them have said ... that recovery must be limited to such cases, and two or three have said that the child, if not viable, must at least be 'quick'. But when actually faced with the issue for decision, almost all of the jurisdictions have allowed recovery even though the injury occurred during the early weeks of pregnancy, when the child was neither viable nor quick."[1]

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1. Prosser, Torts, 4th ed., 1971, p. 337.

The second question is whether the child must be born alive or whether an action may be maintained for its wrongful death. Prosser[2] comments:

> "This may turn on the construction of a wrongful death statute, as to whether such an infant is the kind of 'person' intended by the legislature; but there are also obvious difficulties of proof of causation and damages, and some possibility of double recovery, since the mother has an action of her own for her miscarriage."

3. A convenient summary of the American decisions may be found in the report of White v. Yup[3] before the Supreme Court of Nevada, which gives a full list of the decisions reached up to that date in other American jurisdictions.

4. The effect of the cases listed may be summarised as follows. The states that now allow recovery for prenatal injuries are : California, Connecticut, Georgia, Illinois, Louisiana, Maryland, Massachusetts, Mississippi, Missouri, New Hampshire, New Jersey, New York, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Washington and West Virginia. Alabama and Michigan deny recovery.

B. Jurisdictions other than those of the United States of America

Ireland

1. In Mabel Walker v. Great Northern Railway Company of Ireland[4] the plaintiff's mother was involved in an accident while travelling on the defendant's railway, one of the

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2. Op. cit., p.338.
3. (1969) 458 P. 2d. 617 at 620-621.
4. (1891) L.R. Ir. 69.

alleged consequences of which was that the plaintiff was born a cripple. The case came before the Irish Queen's Bench Division on demurrer (so that only the point of law was considered) and the unanimous opinion of the four judges was that no cause of action lay. O'Brien C.J. based his decision on the ground that, as the defendant did not know of the existence of the unborn child, it could owe no duty of care towards it. In his judgment, Johnson J. held that as a foetus was not "in esse" no legal duty could arise towards it.

Canada

2. The decision of the Supreme Court of Canada in Montreal Tramways v. Léveillé[5] turned on the interpretation of a Quebec statute by the application of the civil law. The mother, when seven months pregnant, was injured when descending from a tram and two months later gave birth to a girl who was born with club feet. Damages were awarded in the sum of 5000 dollars and an appeal was heard on -

(i) the right of action for the prenatal injury;

(ii) whether there was evidence on which the jury could reasonably find that the deformity was a result of the accident; and

(iii) on the charge to the jury.

3. By a four to one majority it was held that the child had a good cause of action.

4. The dissenting judgment of Smith J. was concerned almost wholly with the paucity of medical evidence connecting the club feet with the accident. Two judgments have to be

5. [1933] 4 D.L.R. 337.

mentioned, that of Lamont J., with which Rinfret, Crocket and Cannon JJ. agreed, and that of Cannon J. (Rinfret J. and Crocket J. did not give separate judgments). The core of Lamont J's judgment is to be found in the following two sentences:

> "If a right of action be denied to the child it will be compelled, without any fault on its part, to go through life carrying the seal of another's fault and bearing a very heavy burden of infirmity and inconvenience without any compensation therefor. To my mind it is but natural justice that a child, if born alive and viable, should be allowed to maintain an action in the courts for injuries wrongfully committed upon its person while in the womb of its mother."[6]

5. Cannon J felt that the cause of action arose when the damage was suffered and not when the wrongful act was committed. Injury was one of the essential elements of responsibility and, without injury, no action would lie. The plaintiff's right to compensation came into existence only when she was born with a bodily disability and it was then that she commenced to have rights. It could be said that her rights were born with her. The plaintiff had to establish that her mother's fall two months before her birth caused her disability, i.e., she had to establish a chain of causation between the wrongful act and the injury. Cannon J. then went on to discuss the French law relating to causation where the result was impossible to foresee at the time when the wrongful act took place. He concluded that the jury were entitled, on the evidence, to find that the chain of causation had been established.

South Africa

6. The case of Pinchin and another v. Santam Insurance Co. Ltd.[7] before the Witwatersrand local division of the Supreme Court raised the legal question whether an action law for prenatal injuries to a foetus and the medical question whether on

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6. At 345.

7. 1963 (2) S.A. 254 (W).

the facts a chain of causation had been established between the injury sustained by the pregnant woman and the child's being born with cerebral palsy. Hiemstra J decided as a matter of law that the action lay but decided that the plaintiff failed on the facts. The Appellate Division dismissed on appeal from this decision without deciding whether the decision on the point of law was correct or not.[8]

7. Hiemstra J's judgment referred to the Canadian case and an article by Professor Winfield,[9] but bases itself on the extension of a civil law fiction to personal injury claims:

> "The point remains whether the fiction having its origins in D.1.5.7. and 26 must with any good reason be limited to the law of property. Why should an unborn infant be regarded as a person for the purposes of property but not for life and limb? I see no reason for limiting the fiction in this way, and the old authorities did not expressly limit it. It is probably because the state of medical knowledge at the time did not make it possible to prove a causal link between prenatal injury and a post-natal condition, that it did not occur to them to deal with this situation. Would there be an action in the case of dolus? It seems impossible to deny it. If one can visualise a mind so evil as to allow the intentional administration of a drug like thalidomide, in order to produce a misshapen infant, our law would be archaic and inflexible if it should refuse an action. Once it is conceded in the case of dolus, there is no ground in principle to deny it in a case of culpa. Foreseeability creates no difficulty. It is not unforeseeable that a pregnant mother may be travelling on the highway."[10]

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8. 1963 (4) S.A. 666 (A.D.).

9. (1942) 8 C.L.J. 76.

10 1963 (2) S.A. 254 (W) at 259.

Australia

8. The case of Watt v. Rama[11] came before a full court of the Supreme Court of Victoria late in 1971 and is reported in the January 1972 issue of the Victoria Reports.

9. It arose out of a motor-car accident in which a pregnant woman was rendered a quadraplegic. Seven and a half months later she gave birth to the plaintiff, who suffered brain damage and epilepsy allegedly caused in the accident. The infant plaintiff sought damages. The point of law, whether the defendant owed a duty of care not to cause injury to the plaintiff, who at the time of the accident was unborn, was argued before the full court. For this purpose the following allegations were assumed:

(i) that the defendant's negligence caused the accident;

(ii) that as a result of the accident the unborn child suffered damage; and

(iii) that as a result of the damage the infant plaintiff was born with brain damage and epilepsy.

There are two judgments, one of Winneke C.J. and Pape J., and one of Gillard J.

10. Winneke C.J. and Pape J.[12] began their survey of the authorities by referring to the many American decisions. They found them of little assistance, and as it was difficult to extract any clear statement of principle from them, they did not base their decision on them. They then considered Walker's case, Montreal Tramways v. Léveillé and Pinchin v. Santam Insurance Co., before turning to various dicta and a

11. [1972] V.R. 356.

12. At 353.

number of textbooks and articles. They concluded that "the real question posed for our decision is not whether an action lies in respect of pre-natal injuries but whether a plaintiff born with injuries caused by the pre-natal neglect of the defendant has a cause of action in negligence against him in respect of such injuries." To answer this question they thought that resort must be had to the fundamental principles of the tort of negligence. As in the present case the act or omission of the defendant occurred while he was driving a motorcar on a public highway, it was 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 was bound to take the woman as he found her. If it might be 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 be reasonably foreseeable. The circumstances 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 crystallised and out of it arose a duty on the defendant in relation to the child.

11. Gillard J. concluded, from an examination of the authorities, that the tort of negligence allowed a lapse of time between the injuria and damnum, i.e., between the fault and the damage caused thereby. In the context of the present case damnum was suffered when the plaintiff was born. The question was whether there could be injuria. The test to determine the existence of a duty of care in road traffic cases was whether the victim was one of a class which could reasonably be foreseen to be within the area of potential risk should the driver not exercise reasonable care. The plaintiff could fall within such a test. The next question was whether the application of this test was affected by the fact the

plaintiff suffering damage was en ventre sa mère. He held that this was merely a matter of evidence. It might affect proof of damage but could not affect the question whether a duty was owed. His decision therefore was that when the tort was complete there was a plaintiff in being to whom a duty of care was owed. The damage suffered was not too remote in law because the disability at birth was a reasonable and probable consequence of the defendant's conduct and ought reasonably to have been foreseen by him had he applied his mind to the question. Alternatively, Gillard J. was prepared to contemplate the use of the fiction that the plaintiff was a legal person at the time of the defendant's fault, so that damnum and injuria were contemporaneous; in this he relied on the analogy of property and criminal law. He expressly declined to base his decision on this point.