



SCOTTISH LAW COMMISSION

(SCOT. LAW COM. No. 30)

LIABILITY FOR ANTENATAL INJURY

REPORT ON A REFERENCE UNDER SECTION 3(1)(e)
OF THE LAW COMMISSIONS ACT 1965

*Presented to Parliament by the Lord Advocate
by Command of Her Majesty
August 1973*



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The Scottish Law Commission was set up by section 2 of the Law Commissions Act 1965 for the purpose of promoting the reform of the law of Scotland. The Commissioners are:—

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SCOTTISH LAW COMMISSION

TO THE RIGHT HONOURABLE NORMAN WYLIE, V.R.D., Q.C., M.P.
Her Majesty's Advocate.

In December 1972 you requested us under section 3(1)(e) of the Law Commissions Act 1965 to consider and advise on the law relating to liability for antenatal injury.

We now have the honour to submit our Report.

J. O. M. HUNTER,
Chairman.

29th May 1973.

LIABILITY FOR ANTENATAL INJURY

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SCOTTISH LAW COMMISSION
LIABILITY FOR ANTENATAL INJURY
PART I: INTRODUCTION

(a) The remit

1. On 13th December 1972 we received your request in terms of s. 3(1)(e) of the Law Commissions Act 1965¹ that we should examine the following questions:

- (a) What is the present law of Scotland regarding liability to make reparation (including payment of solatium if the child fails to survive) in respect of injury caused to a child before birth?
- (b) If the present law gives rights of reparation in respect of such injury, is redress competent when the defender's acts causing the injury occurred prior to the time of the child's conception?
- (c) Should there be liability if there is none under the present law?

As will appear, our conclusions on the first two of these questions in effect supersede discussion of the third.

2. On 29th November 1972, the Law Commission had received from the Lord Chancellor a request, also in terms of s. 3(1)(e) of the Law Commissions Act 1965, to advise him what the law in relation to antenatal personal injuries should be. It will be observed that the terms of this remit differ from those of the remit made to us, and that the Law Commission were not asked to state the present law of England. On 19th January 1973, the Law Commission published Working Paper No. 47 entitled *Injuries to Unborn Children*. Owing to the short time which was available before publication of the Working Paper, the consultation which normally takes place between the two Law Commissions when they are engaged in work on the same or similar areas of law did not take place. While we have taken into consideration the views expressed in the Working Paper, its provisional proposals, and such reactions to it as have been brought to our notice², we have ourselves reached somewhat different conclusions against the different background of Scots law.

(b) The nature of liability

3. Since our remit was received the Government has announced the appointment of a Royal Commission under the Chairmanship of Lord Pearson to consider Civil Liability and Compensation for Personal Injuries and Death. Its terms of reference expressly include liability for antenatal injury and envisage

¹ c.22.

² Including those of leading members of the medical profession who participated in a colloquium at the Royal Society of Medicine on 19th March 1973—by which date our Report was in draft.

consideration of the fundamental basis of liability for personal injuries, without necessarily assuming the continuance of the present system which is essentially based on fault. We have assumed that our remit relates only to liability for antenatal injuries within the context of the existing principles of reparation in the law of Scotland.

PART II: NATURE OF ANTENATAL INJURY

(a) *Causing harm to the child's person*

4. Antenatal injuries may be the product of a variety of causes. Traumatic injury to the mother and, through her, to the child, is the cause which has most frequently been put forward in litigation in other jurisdictions. Thus the child may be harmed physically in a vehicle or factory accident, or as the result of an accident in a place of entertainment, in a shop, or in a private house. A traumatic injury to the mother which occasions physical injury to the child could have taken place before conception, as well as during the period of pregnancy. But the injury might well affect only the child, if occasioned, for example, by failure on the part of doctors or nurses to take reasonable care during labour. Antenatal injuries might be attributable to the mother's own acts, and not simply to those of a third party. Independently of traumatic injuries to the mother, mental distress which affected her only temporarily might well have injurious long-term effects upon the child. The child's injuries may be occasioned by its exposure to X-ray treatment given to the mother, especially in the early period of pregnancy. Irradiation, indeed, of either parent prior to conception could, by its effects upon the parental chromosomes, cause the child to be born with mental or physical disabilities. The injuries to the child may also be occasioned by medicines or by substances contained in the food or drink consumed by the mother, whether before or during pregnancy, or by narcotic addiction on the part of the mother. The child's injuries may also be attributable to its exposure in the womb to diseases affecting the mother, of which German measles and venereal disease are examples. A defect of the foetus may be produced by a gene or genes carried in parental chromosomes: in these cases conception and harm may often coincide, although the defect may not manifest itself in a child at birth but only at a mature age.

5. It will be seen from these examples that antenatal harm to the child may occur in a wide variety of circumstances which may not necessarily be covered by a single principle of law. In many cases the nature and extent of antenatal harm will not be known, at any rate with a reasonable degree of certainty, until after the child is born, and yet the cause of harm may precede, accompany or follow the time of conception. Thus a potentially harmful condition may already exist in a parent's body before the time of conception, for instance if the mother's body has already been affected by drugs or infected by disease. Where immediate physical harm is sustained as a result of a vehicle accident, the harm takes effect after conception. In other situations, such as the communication of hereditary defects or diseases, it seems that the harm may be transmitted at the moment of conception, giving rise to problems which we consider later in this Report¹. We are informed that medical and scientific research, which has

¹ *Infra*, para. 22.

identified a number of "teratological agents", is far from confident that all such "agents" have been identified. Further categories will almost certainly be added in the future¹. Moreover, in many instances medical evidence as to the cause or causes of harm to a child in the prenatal state may be inconclusive. For these and other reasons proof of causation of antenatal harm is likely for the foreseeable future to present formidable difficulties in practice².

(b) *Causing death of the child's parent or other relative*

6. The posthumous child might seek to recover damages for the death of its father or other relative wrongfully caused while the child was still *in utero*. Circumstances can also be envisaged in which a posthumous child might seek to make a similar claim in respect of the death of its mother.

(c) *Causing loss or death of the child*

7. The loss of a child before, at, or after birth represents an injury to a parent³; for example, a mother might claim in respect of a miscarriage or still-birth wrongfully caused by another, while both parents may sue in respect of the death of a child who has been born alive but has subsequently died from harm sustained in the antenatal stage. Although difficult questions of causation and reasonable foreseeability have arisen in such cases, the legal principles to be applied seem reasonably clear⁴.

PART III: SUMMARY OF THE PRESENT LAW

(a) *The child's right to reparation*

8. We know of no authoritative decision in Scotland on the question whether a child has a right of reparation in respect of harm caused to it before birth. We think it probable, however, that under the present law a Scottish court would concede such a right to a child which is subsequently born alive. In our view such a claim would be admitted under the general principles of the law of reparation in Scots law, and we consider that possible objections to the child's right to sue would be met by the application of either or both of the following principles, namely, (1) the principle finally established by *Donoghue v. Stevenson*⁵ and developed more recently in *Watson v. Fram Reinforced Concrete Co. (Scotland) Ltd. and Winget Ltd.*⁶ and in *Dorset Yacht Co. Ltd. v. Home Office*⁷, that the fault or breach of duty persists until the damage is suffered, or at any rate emerges as a wrong at that stage, and (2) the equitable principle, derived originally from Roman law, that, if subsequently born alive, a child *in utero*

¹ Thus high fever during pregnancy has been discussed as a possibility—*New Scientist*, 22nd March 1973, p. 645.

² A fairly comprehensive (if not up to date) medico-legal summary is contained in *The Impact of Medical Knowledge on The Law Relating to Prenatal Injuries* (1962) 110 University of Pennsylvania L.R. 554-601.

³ See *infra*, para. 20.

⁴ In *Bourhill v. Young* 1941 S.C. 395, the Lord Ordinary would have awarded £150 in respect of shock if he had decided the case in the pursuer's favour (p. 407).

⁵ 1932 S.C. (H.L.) 31.

⁶ 1960 S.C. (H.L.) 92.

⁷ [1970] A.C. 1004, especially Lord Reid at p. 1027 and Lord Pearson at p. 1052.

should be regarded in law as having already been born, whenever so to regard it is to its advantage¹. In certain types of case these two principles may be complementary; in other types one principle may more readily accommodate itself to the circumstances than the other. We cannot find in the law of Scotland any support for the view that the child should be viable²—indeed such a requirement would seem to be incompatible with either principle—but we are of opinion that a child would have to be born alive if its claim for damages was to succeed on either ground.

9. We propose to consider these two principles in somewhat greater detail, and in doing so we shall be referring to a number of reported decisions in jurisdictions other than Scotland and England which would probably influence a Scottish court. The information which we have obtained about the position in other jurisdictions has been of considerable assistance to us. We are not qualified to assess the accuracy of all the information communicated to us, but we trust that it provides a reasonably accurate picture of the position in those jurisdictions. For reasons of space this comparative material has been incorporated in an Appendix, but we regard it as a valuable source of information, not only about existing law, but also about currents of legal and social thought in other developed countries.

(i) *The development of the law of reparation*

10. In England the right to reparation, historically at least, has been based on breach by the defender of specific duties developed in the context of various nominate torts. In Scotland, on the other hand, the right to reparation is general³ in its nature, based on the existence of a fault for which the defender is responsible and which has caused foreseeable harm to the pursuer. While it cannot be said that this principle has been applied in all circumstances⁴ it is no longer controlled in Scotland—in principle at least—by any requirement of the existence of a “particular duty”. Some qualifications precariously introduced on analogies with the English law of torts were superseded in cases not covered by existing duty situations by the decision in *Donoghue v. Stevenson*⁵, where the foresight of a reasonable man was accepted as a general test of whether a duty of care existed. This was reaffirmed by the House of Lords in *Bourhill v. Young*⁶, a case where the question at issue was whether the presence of a pregnant woman at the scene of an accident was reasonably foreseeable. Lord Macmillan there said:

“The duty to take care is the duty to avoid doing or omitting to do anything the doing or omitting to do which may have as its reasonable and probable consequence injury to others, and the duty is owed to those to whom injury may reasonably and probably be anticipated if the duty is not observed.”⁷

¹ Usually expressed in Scots law by the brocard *nasciturus pro iam nato habetur quotiens de eius commodo agitur*. See paras. 13–15 *infra*.

² Roman law had no such requirement; and see Bankton, *Institute* I, 2, 8.

³ Bankton, *Institute* I, 10, 41. “That where damage occurs, through any fault of the person who occasions it, the same must be repaired to the person aggrieved.”

⁴ See e.g. *Cameron v. Young* 1908 S.C. (H.L.) 7; *Clelland v. Robb* 1911 S.C. 253; *Kemp & Dougall v. Dargavil Coal Co.* 1909 S.C. 1314.

⁵ 1932 S.C. (H.L.) 31.

⁶ 1942 S.C. (H.L.) 78.

⁷ At p. 88.

In considering the question whether the risk of injury to a child in the womb is a risk which, in relevant circumstances, ought to be taken into account by a reasonable man, we think it necessary to stress that in Scots law the novelty of a claim is not by itself a reason for rejecting it. The law of delict has developed in Scotland by the application of old principles to new situations and represents an adjustment between conflicting interests, having regard to what is thought reasonable at the present time. As Lord Macmillan emphasised in *Donoghue v. Stevenson*¹:

“ . . . the conception of legal responsibility may develop in adaptation to altering social conditions and standards. The criterion of judgment must adjust and adapt itself to the changing circumstances of life. The categories of negligence are never closed. The cardinal principle of liability is that the party complained of should owe to the party complaining a duty to take care, and that the party complaining should be able to prove that he has suffered damage in consequence of a breach of that duty.”

It is our view that, in a variety of circumstances, the reasonable man would take account of the risk of causing injury to a child in the womb². In an era when it has been held that those who carry out excavations in public streets ought in certain circumstances to foresee and provide for the presence of blind persons³, a contrary view hardly seems sustainable. We doubt whether any useful purpose would be served in attempting to specify all the possible circumstances where this duty would arise. An obvious example would be where a doctor, prescribing a drug for a pregnant woman, selected one which was commonly known to have teratogenic effects. But the presence of a pregnant woman within the area of risk must be reasonably foreseeable: otherwise the liability of an alleged wrongdoer for antenatal injuries might well be excluded.

11. One difficulty to be surmounted is that a child is not regarded as having a right to sue until born alive. We concede that this difficulty is a real one, but we do not think that the Scottish courts would find it insuperable. It is not normally a bar to a right of reparation that the negligent act which caused the injury was not contemporaneous with the injury itself. If it were otherwise, there would be no place for actions against manufacturers for damages for injuries caused by defective products on the *Donoghue v. Stevenson* principle. Nor do we think that it would be seriously contended that the manufacturer of a baby food which injured a young child could successfully defend an action of damages on the ground that its manufacture took place before the child's birth or even conception. It is thought that on the same principle there would be liability where an article of food ingested by the mother was contaminated and injured the child while it was still in the womb. Some of the difficulties which might formerly have arisen in such circumstances have been resolved by the House of Lords in *Watson v. Fram Reinforced Concrete Co. (Scotland) Ltd. and Winget Ltd.*⁴. A workman had been injured by a defective machine. Its manufacturers defended

¹ At p. 70.

² cf. the opinion of Lord Justice-Clerk Aitchison in *Bourhill v. Young* 1941 S.C. 395 at p. 438.

³ *Haley v. London Electricity Board* [1965] A.C. 778.

⁴ 1960 S.C. (H.L.) 92; but see the Outer House case of *Ellis v. Charles Brand & Son* 1969 S.L.T. 132.

an action of damages which he raised on the grounds that, if they had been negligent, the negligence had taken place at the time when the machine was supplied to the workman's employers and that more than three years had elapsed between that time and the time when the action was raised. The action, therefore, the manufacturers argued, was time-barred by section 6(1)(a) of the Law Reform (Limitation of Actions, etc) Act 1954¹. The House of Lords rejected this contention and Lord Reid observed²:

"It appears to me that default in the sense of breach of duty must persist after the act or neglect until the damage is suffered. The ground of any action based on negligence is the concurrence of breach of duty and damage, and I cannot see how there can be that concurrence unless the duty still exists and is breached when the damage occurs. Suppose that the damage occurred a year or two years after the manufacture and sale of the article: then undoubtedly the injured person could sue. But how could he sue if the manufacturer could say that his default had ceased a year before the injured person ever came near the dangerous article? Whatever be the true view with regard to the act or neglect, I think that the appellant is entitled to say that the respondents' 'default giving rise to the action' existed at the time when he suffered his injuries."³

In our opinion the same reasoning is likely to be applied by a Scottish court when a child sues for damages in respect of injuries which persist until it is born alive or develop later as a result of harm suffered in the antenatal stage. From the point of view of the child the wrong is complete, injury is sustained and damage is suffered when it is born alive suffering from a defect imputable to the fault of another. When the defect emerges only some time after birth the wrong is complete at that time. In reaching this conclusion we derive assistance from the speech of Lord Pearson in *Dorset Yacht Co. Ltd. v. Home Office*⁴ and particularly from the following passage⁵:

"The form of the order assumes the familiar analysis of the tort of negligence into its three component elements, viz., the duty of care, the breach of that duty and the resulting damage. The analysis is logically correct and often convenient for purposes of exposition, but it is only an analysis and should

¹ c.36.

² At pp. 109-110.

³ A similar approach was adopted by Lords Keith and Denning. Lord Keith said:

"Undoubtedly there was an act of carelessness on the part of some workman when the pin was welded to the strut and the manufacturers would be vicariously responsible for that carelessness. But can it be said that at either date there was an act of negligence in the legal sense? The manufacturers owed a duty to anyone who should handle the machine to take reasonable steps to see that it was safe. They owed a duty not to injure, but until someone was injured there was no breach of duty. Only then could it be said that an act of negligence had been committed. That, I think, necessarily follows from the judgment of this House in *Donoghue v. Stevenson*."—at p. 112.

Lord Denning said:

"I ask myself, therefore, what is the breach of duty which, in cases falling within the principle of *Donoghue v. Stevenson*, gives rise to the action? Is it the *negligence in manufacturing* the article? Or the *putting into circulation* of the faulty article? Or the *doing of damage* to the plaintiff? . . . I think the true principle is contained simply in this: 'You must not injure your neighbour by your fault'. It is the *doing of damage to him* which, in my opinion, is the breach of duty giving rise to the action."—at p. 115.

⁴ [1970] A.C. 1004.

⁵ At p. 1052.

not eliminate consideration of the tort of negligence as a whole. It may be artificial and unhelpful to consider the question as to the existence of a duty of care in isolation from the elements of breach of duty and damage. The actual damage alleged to have been suffered by the plaintiffs may be an example of a kind or range of potential damage which was foreseeable, and if the act or omission by which the damage was caused is identifiable it may put one on the trail of a possible duty of care of which the act or omission would be a breach. In short, it may be illuminating to start with the damage and work back through the cause of it to the possible duty which may have been broken."

Thus in our view, if a child is born with actual or potential defects resulting from harm sustained antenatally, liability may be tested *inter alia* by ascertaining the cause of the defects from the succession of events, and by considering whether the succession of events leading to the damage ought reasonably to have been foreseen by the alleged wrongdoer as a probable result of an act or omission on his part.

12. It follows from what we have said that we consider it unlikely that a Scottish court would at the present day refuse a remedy to a child subsequently born alive merely on the ground that the harm had been sustained by it in the antenatal stage. In our view a Scottish court would be likely to apply the principles derived from the well-known authorities to which we have referred. Moreover, the trend of recent authority, in systems which have affinities with English law, appears to bear out this conclusion. It is unlikely that the law of Scotland, sharing as it also does affinities with systems which have granted redress on alternative grounds of principle, would adopt a less favourable attitude to claims arising out of antenatal harm than that adopted by English common law jurisdictions. The reasoning in *Watt v. Rama*¹ and *Duval v. Seguin*², to which detailed reference is made in the Appendix³, was based on Scottish and English decisions of high authority, and would we think be regarded as persuasive if similar questions were to arise in Scotland. In our view the decision in the Irish case of *Walker v. Great Northern Railway Co. of Ireland*⁴, where the claim of a child plaintiff failed, was based on an unduly narrow concept of the duty of care, and we think that a Scottish court would prefer the grounds relied on in the Victoria and Ontario decisions to which we have referred. We note that the weight of English textbook and academic authority is that the Irish case would probably not now be decided against the plaintiff⁵, because of developments in the tort of negligence since 1891.

(ii) *The equitable principle*

13. Certainly in some fields of law, particularly that of Succession, but also more generally, the law of Scotland has adopted from Roman law the doctrine that, provided it is born alive, a child *in utero* is treated as though it had already been born whenever that is to its advantage. This doctrine is usually expressed in Scots law in the brocard *nasciturus pro iam nato habetur quotiens de eius*

¹ [1972] V.R. 353.

² (1972) 26 D.L.R. (3d) 418.

³ Paras. 4-7 and 8.

⁴ (1891) 28 L.R. Ir. 69.

⁵ See Appendix, para. 3.

commodo agitur—which is a condensation of several passages in the Digest, which for convenience we have incorporated in a footnote with translations¹. The titles in which these passages occur seem to prescribe general rules in the field of private law, while the doctrine was more specifically discussed in such contexts as status, succession and guardianship in connection with the property expectations of a *nasciturus*. The Civil law texts were regarded by the Institutional writers as having application to the law of Scotland. Though the texts were usually cited in relation to the rights of succession of posthumous children, none of these writers suggests that the passages which they cite were to be given a less general meaning than in the Digest. Bankton² states specifically that by the common law of Scotland, as in the Civil law, a child *in utero* is in every respect deemed as already born, in all matters that concern its interest; while Bell³ notes the relevance of the doctrine to the Scottish common law regarding the prospect of a child acquiring legitimate status by legitimation *per subsequens matrimonium*. Stair possibly has *nascituri* in mind when discussing pollicitation.⁴ Forbes⁵, though not accorded institutional authority, expresses the view that the doctrine is to be given a general construction, while Balfour⁶ cites the early decision⁷ that a father may appoint a tutor to his child *in utero*, presumably to protect his property rights. This view is supported by Lord Fraser⁸, although, like other later writers⁹, he discusses the *nasciturus* doctrine mainly in the context of succession. The reported decisions have also been mainly in the field of succession. Nevertheless, whatever may be the position in certain other systems of law, Scotland has never regarded some areas of the law as being the province of common lawyers and other areas as being the province of the civilians, and it would not in Scots law be contrary to principle to extend a doctrine derived from Roman law to fill a gap in authority. We have found nothing in the Institutional writers or in decisions of the Scottish courts to preclude the application of the doctrine in the realm of delict; indeed, Professor D. M. Walker, the author of the most recent textbook on Delict, is of opinion that as the *nasciturus* maxim is accepted in Scots law—even although there seems

¹ (a) Digest 1.5.7 reads (Paulus) “*Qui in utero est perinde ac si in rebus humanis esset custoditur, quotiens de commodis ipsius partus quaeritur; quamquam alii antequam nascatur nequamquam prosit*”. This may be interpreted:—

“A child in its mother’s womb is cared for just as if it were in existence, whenever its own advantage is concerned; but it cannot benefit anyone else before it is born.”

(b) Digest 1.5.26 (in part) provides (Iulianus) “*Qui in utero sunt, in toto paene iure civili intelliguntur in rerum natura esse . . .*”. This means that:—

“Those who are in the womb are, by almost every provision of the Civil law, understood to be already in existence.”

(c) Digest 50.16.231 states “*Quod dicimus, eum qui nasci speratur, pro superstite esse, tunc verum est, cum de ipsius iure quaeritur; aliis autem non prodest nisi natur.*” This may be rendered:—

“When we say that a child, who is expected to be born, is considered as already in existence, this is only true where his rights are in question, but no advantage accrues to others unless he is actually born.”

² *Institute* 1, 2, 7–8 (1 p. 47).

³ *Principles* s. 1642.

⁴ *Institutions* I, 10, 3–4; see also III, 5, 50.

⁵ 2.2.22(1).

⁶ *Practicks* i. p. 116 (Stair Soc. vol. 21).

⁷ *Murray v. Marshall* (1555) Mor. 16226.

⁸ *Parent and Child* 3rd ed. p. 220.

⁹ McLaren *Wills and Succession* 3rd ed. i, p. 696; Trayner *Latin Maxims* p. 503.

to be no direct Scottish authority for applying it in cases of prenatal injury—a child may through its tutor claim damages for injury done to it while still *in utero* provided it is subsequently born alive¹. The same author has recently reiterated the view that a child can recover damages in respect of antenatal injury². We note that the same view has been expressed extrajudicially by Lord Kilbrandon³. We consider accordingly that in some cases the doctrine based on the *nasciturus* maxim provides a useful reinforcement of the principle derived from *Watson*, and one example of its usefulness would be in relation to a claim by a posthumous child arising out of the death of its parent or other relative wrongfully caused while it was still *in utero*.

14. It could perhaps be stated as an objection to employing the equitable principle derived from Roman law that the doctrine incorporates a fiction. The law however for certain purposes recognises rights and duties arising before birth or continuing after death, as when executors are deemed to be *eadem persona cum defuncto*. Moreover, as Lord Macmillan pointed out in *Elliot v. Joicey*⁴ the posthumous child has from the earliest times caused a certain embarrassment to the logic of the law, and it seems not unreasonable to make use of the doctrine at least in cases which are not otherwise so readily covered by the *ratio* of *Watson*. The doctrine lies ready to hand for use where, through a technicality or an anomaly in the law, the refusal of a remedy might cause injustice.

15. There have been two⁵ reported cases in which claims for damages in respect of the death of a father allegedly caused by negligence were litigated on behalf of posthumous children. In *Connachan v. Scottish Motor Traction Co.*⁶, the action was at the instance of a widow and posthumous son who sued in respect of the death of the husband and father who had been killed in a vehicle accident. The Lord Ordinary awarded £1,500 damages to the widow as an individual and £450 damages to her as tutrix of the posthumous son. On appeal to the Inner House it was held that the action failed on the merits, as the pursuer had not succeeded in proving that the accident to the husband and father had been caused by the fault of the defenders. *Leadbetter v. National Coal Board*⁷ arose out of the death of a husband and father as a result of an explosion in a coal mine. Claims were put forward on behalf of the widow and two children of the deceased husband and father. The younger of the two children was a post-

¹ *Delict* i. p. 96. This view was foreshadowed by an earlier article, *The Rights of the Unborn Child to Reparation* (1954) 70 S.L.R. 125.

² *Principles of Scottish Private Law* (1970) i. p. 306.

³ "We may first dispose of an argument that prenatal injuries, injuries to a person not yet born, do not give a ground of action against the perpetrator . . . a legacy 'to the children of A who are alive at the time of my death' will include a child of A *in utero* at the death of the testator . . . There could be no doubt that the negligent automobile driver who injures, whether physically or mentally, both a mother and her unborn child is liable in damages to both." Quoted from his lecture *The Comparative Law of Genetic Counselling* published in *Ethical Issues in Human Genetics* (Plenum Publishing Corporation, N.Y.).

⁴ 1935 S.C. (H.L.) 57 at pp. 70–71.

⁵ It is clear from a scrutiny of Session Papers that *Moorcraft v. Alexander & Sons* 1946 S.C. 466, which has been cited in this connexion, did not in fact involve a claim by a posthumous child.

⁶ 1946 S.C. 428.

⁷ 1952 S.L.T. 179.

humous daughter, in favour of whom the jury made an award of £1,000 damages, which was held on appeal to be not excessive. The claims submitted on behalf of the posthumous children in these two cases were not contested, so that there is no express decision on the matter. The fact, however, that in the twenty years which have elapsed since the case of *Leadbetter* there is no reported instance of such a claim having been challenged, suggests that the validity of such a claim is generally recognised by the legal profession in Scotland. A statutory parallel may be found in s. 21(3)(a) of the National Insurance (Industrial Injuries) Act 1965¹, which provides that for the purposes of the section a legitimate son or daughter born posthumously is to be regarded as having been a child of the deceased man's family at his death.

(iii) *Remedies in other systems*

16. In the absence of direct Scottish authority, we consider that a Scottish court would regard as persuasive decisions relating to claims in respect of antenatal injuries in other systems of law. For instance, apart from decisions in systems derived from English law, there have been cases in the "mixed" systems of Louisiana², Quebec³ and South Africa⁴, which, like Scotland, have legal systems with a Civil law basis, though influenced to a greater or lesser degree by Anglo-American law. In these cases the courts were prepared to support the child's right to sue by reference to the equitable principle derived from Roman law. A like approach is apparent in a number of codified European systems, and indeed Article 2 of the Netherlands Civil Code is in effect a translation of the *nasciturus* brocard into Dutch. We refer in the Appendix in greater detail to the solutions adopted in these systems to deal with the problems of liability for antenatal injury.

17. We have examined the solutions of Western European and Scandinavian systems, as well as of those adopted in the "mixed" systems and in systems derived from English law, and observe that in almost every legal system in which claims arising out of antenatal injury have been considered, the modern attitude has been for the courts to afford a remedy to the child. It is noteworthy in this connection that the judiciary has played an important part in extending existing principles to achieve these results. In some systems the decisions have been founded on principles very similar to one or other or both of the principles on which we rely. In other systems, for example those of the United States of America, the decisions have been based on a fairly wide variety of grounds, but, since 1946, courts in the various jurisdictions of the United States have indicated a strong trend of authority in favour of upholding claims of the nature under consideration in this Report. We refer in the comparative study contained in the Appendix to *White v. Yup*⁵ where a useful summary of the current position in the United States may be found.

¹ c. 52.

² *Cooper v. Blanck* 39 So. 2d 352 (La. App. 1923, unreported until 1949); see Appendix, para. 16.

³ *Montreal Tramways Co. v. Léveillé* [1933]4 D.L.R. 337; see Appendix, para. 17.

⁴ *Pinchin v. Santam Insurance Co. Ltd.* [1963(2)] S.A. 254; on appeal [1963(4)] S.A. 666 A.D.; see Appendix, para. 18.

⁵ (1969) 458P. 2d 617; see Appendix, paras. 9-10.

(iv) *Social considerations*

18. We think that it is legitimate to refer to the strong trend of authority in other jurisdictions when considering an area of law which, to an important extent, involves considerations of social and public policy. In *Donoghue v. Stevenson*¹ Lord Macmillan made the following comments, part of which we have already quoted in another context:

“In the daily contacts of social and business life, human beings are thrown into, or place themselves in, an infinite variety of relations with their fellows; and the law can refer only to the standards of the reasonable man in order to determine whether any particular relation gives rise to a duty to take care as between those who stand in that relation to each other. The grounds of action may be as various and manifold as human errancy; and the conception of legal responsibility may develop in adaptation to altering social conditions and standards. The criterion of judgment must adjust and adapt itself to the changing circumstances of life. The categories of negligence are never closed.”

In *Dorset Yacht Co. Ltd. v. Home Office* Lord Reid stressed the generality of the right to reparation for loss caused by negligence, and considered that it should apply unless there was a justification for its exclusion.² He expressed the view that:

“There has been a steady trend towards regarding the law of negligence as depending on principle so that, when a new point emerges, one should ask not whether it is covered by authority but whether recognised principles apply to it.”

It must surely be significant that the observations by Lamont J. on behalf of the majority of the Supreme Court of Canada in *Montreal Tramways Co. v. Léveillé*³ have received such wide acceptance in other jurisdictions. Lamont J. observed that if a child after birth had no right of action for prenatal injuries, a wrong would have been inflicted for which there was no remedy; and the child would have to go through life, though blameless itself, bearing without compensation a heavy burden of infirmity inflicted by the fault of another. It was in his view clear natural justice to recognise a right of action for injuries inflicted during the prenatal state. This passage⁴ has been expressly relied on by courts in Australia⁵, Canada⁶ and South Africa⁷ when they have first been confronted with the duty to decide whether to recognise liability for prenatal physical injury.

(v) *Conclusion*

19. Our answer, therefore, to the main part of the first question put to us is that, although there is no express Scottish decision on the point, a right to reparation would, on existing principles, be accorded by Scots law to a child for harm wrongfully occasioned to it while in its mother's womb, provided that it was born alive.

¹ 1932 S.C. (H.L.) 31 at p. 70.

² [1970] A.C. 1004 at pp. 1026-7.

³ [1933] 4 D.L.R. 337.

⁴ p. 345.

⁵ *Watt v. Rama* [1972] V.R. 353.

⁶ *Duval v. Seguin* (1972) 26 D.L.R. (3d) 418.

⁷ *Pinchin v. Santam Insurance Co. Ltd.* [1963(2)] S.A. 254 and [1963(4)] S.A. 666 A.D.

(b) *The parents' right to reparation*

20. A further matter raised by the first question put to us is whether the parents of a child whose injuries before birth have caused it to be still-born have a right to reparation in respect of the child's death. It is accepted in Scotland that a woman can recover damages if she suffers a miscarriage—this was, for example, one element in the pursuer's claim in *Bourhill v. Young*¹—and we see no reason why a case of still-birth caused by negligence should produce a different result. So far as we are aware there is no precedent for a claim by a father in such circumstances, and we note that a mutual obligation to support would not have come into existence. If, however, the child were born alive but failed to survive for an appreciable time the situation would be different, and a dependant's claim would appear to be available to the parents subject to existing principles of law. In such actions the main element in the damages would be solatium. A parent's claim for contingent loss of support would appear to be admissible in principle but, even if admissible, would be small in amount.

(c) *Injury caused by acts prior to conception*

21. The second question which we were asked to examine was whether, if the present law gives rights of reparation in respect of injury caused to a child before birth, redress is competent when the defender's acts causing the injury occurred prior to the time of conception. There would appear to be a complete absence of authority on this point in Scots law. If, however, we are correct in thinking that the lapse of a period of time between the occurrence of a negligent act and the injury which it occasions does not by itself exclude a right of reparation, then the fact that the act which harmed the child occurred prior to that child's conception should not in principle affect the child's right of reparation. We say "in principle" because it is clear that a child who sought to found upon a pre-conception act of negligence would often face formidable problems of proof of a direct causal connection between the negligence and the injury.

PART IV: SPECIFIC PROBLEMS

(a) *Inherited defects*

22. Extremely difficult problems arise where a child is born with disabilities attributable to genetic defects or some other inherited condition². Even the quantification of damages presents difficulties in such cases because the child could not easily establish loss or damage by use of the criteria normally applied³. These questions may be raised in litigation, but, in our opinion, they are best left

¹ 1941 S.C. 395 and 1942 S.C. (H.L.) 78.

² These problems are distinct from those which arise in cases where a disease has been communicated to a foetus while *in utero*.

³ For a fuller discussion, see Professor Hans Stoll's article in the *International Encyclopaedia of Comparative Law*, vol. XI *Torts*, sub voce *Consequence of Liability: Remedies* para. 13; G. Tedeschi, *On Tort Liability for 'Wrongful Life'* 1966 1 Israel L.R. 513 at p. 530; Lord Kilbrandon, *The Comparative Law of Genetic Counselling*: Lecture delivered at the Institute of Society, Ethnicity and the Life Sciences, Warrenton, Va. on 13th October 1971, which has now been published in *Ethical Issues in Human Genetics*, by Plenum Publishing Corporation, N.Y.; E. Veitch, *Delicta in Uterum*, (1973) 24 N.I.L.Q. 40.

to the courts to decide on the basis of existing principles of law. We do not think it useful to consider such matters in the abstract, since much would depend on the specific features of any particular case.

(b) *Abortion*

23. An unborn child may be injured in the course of an abortion or attempted abortion. Where the injuries may be imputed to the fault of the person initiating the abortion, questions of civil liability may arise. A claim by or on behalf of a child for antenatal injury so caused could not succeed unless it had been born alive, an event presumably unlikely in such circumstances. If, however, the child were to survive, or survived for a time, the right of the child's tutor or executors to damages would depend, in our view, on the same principles as would apply in the absence of an abortion or attempted abortion. Where the attempted abortion is an illegal one, the question of imputation of fault clearly presents fewer difficulties than in other cases. Where the attempted abortion is a lawful one under the Abortion Act 1967¹, liability to the child could in certain circumstances be incurred, but again only if it was born alive.

24. Under s. 1(1) of the Act of 1967 a medical practitioner is not guilty of an offence under the law relating to abortion when two medical practitioners are of the opinion, formed in good faith:

- (a) that the continuance of the pregnancy would involve risk to the life of the pregnant woman, or of injury to the physical or mental health of the pregnant woman or any existing children of her family, greater than if the pregnancy were terminated; or
- (b) that there is a substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped.

The Act has no direct bearing on questions of civil liability, but we find it difficult to suppose that a medical practitioner would incur any liability to the child or its executors if he had complied with the statutory requirements and had not been negligent in his method of terminating the pregnancy. The Act does not in terms require the mother's consent. However, this is normally obtained and, where given, would seem to preclude any claim on her part for solatium. In our view, abortion presents no special problems which cannot be solved by the application of the general law of reparation to claims by a child for injuries sustained while it was as yet unborn, or to claims by parents in the situations which we have already considered.

(c) *Child's right of action against its parents*

25. A child may suffer injury while in its mother's womb by reason of the fault of a parent. It is now well settled in the law of delict that a child can sue either of its parents². Lord Justice-Clerk Aitchison remarked³ in that case:

"It is easy to figure extravagant cases in which the right of the son to sue the parent may be abused, but the same may be said of many legal rights. I think

¹ c. 87.

² By a majority of 5 to 2 in the Seven Judge case of *Young v. Rankin* 1934 S.C. 499.

³ at pp. 508-9.

the risks of abuse are exaggerated. That such actions may increase in number is a result that is only natural, and to be anticipated, under the conditions of today. But I do not doubt that the exercise of the right will be controlled by considerations of good sense and of expediency, . . . By our decision, we do not say that it is desirable that such actions should be brought, much less do we direct them to be brought. All we decide is that such actions are not excluded by any rule or doctrine in the law of Scotland.”

Indeed, there has been a marked trend in recent years in favour of permitting actions between parties who are closely related to each other. Apart from the decision in *Young v. Rankin*, it has been held that a mother can sue her child¹; and in 1962 Parliament decided that a husband and a wife should be allowed to sue each other². If a child who has sustained injuries antenatally acquires at birth a right of action against the person responsible for the injury, it follows that in appropriate circumstances the child may sue its parent on the ground of fault if such can be proved. The question whether the trend to which we have referred is sound or whether it ought to be reversed in certain limited fields, or even more generally, is one which in our opinion would involve an investigation going well beyond the present reference and which, because of the possible effects on well-settled principles of law in a number of different fields, as well as the important social implications involved, would make wide consultation essential.

(d) *Effects of parents' behaviour on the child's claim*

26. We now examine the legal effect of various aspects of the parents' behaviour on the child's claim. In some cases the responsibility for the injury to the child in the womb will, if it can be proved, rest partly upon the child's mother. For example, a pregnant woman while riding a bicycle may be involved in an accident which injures the child in the womb, and which is occasioned partly by the fault of the mother and partly by the fault of another cyclist. Ordinarily, a child's claim cannot be affected by a parent's contributory negligence³. If this reasoning is extended, the child, when born, will have a right to recover the whole amount of damages from either the mother or a co-delinquent, both of whom are potentially liable to it jointly and severally. The co-delinquent will be able to recover the appropriate proportion of damages from the mother, assuming that she has the means to reimburse him. Another example would be where the mother had voluntarily accepted the risk of injury when she was under no compulsion to do so. The law would then apply the maxim *volenti non fit injuria*, and deny the mother a claim against the person whom she had exonerated from a duty of care in the circumstances. That person, however, would not be able to escape liability in a claim by the woman's child in respect of antenatal injury, because a child could not be said to have assumed a risk voluntarily before its birth. A similar situation would arise if the mother had accepted a contractual limitation or exclusion of liability: the contractual provision would be binding on the mother and not on the child. Even if the contractual provision purported to include the child, it would be of doubtful validity because it is questionable whether the powers of guardianship can be exercised before birth,

¹ *Wood v. Wood* 1935 S.L.T. 431.

² Law Reform (Husband and Wife) Act 1962, (c. 48) s. 2.

³ *Taylor v. Dumbarton Tramways Co.* 1918 S.C. (H.L.) 96.

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except in administering property¹. However, a mother, or in appropriate cases a father, might act on behalf of the unborn child in the same way that an unauthorised administrator (*negotiorum gestor*) acts on behalf of an *incapax* to further his interests. We are disposed to think that the effects of parents' behaviour upon a claim by their child in respect of antenatal harm are—questions of guardianship apart—substantially the same as in situations where the child had suffered injury after birth.

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(e) *Breach of statutory duty*

27. Statutory duties are imposed on individuals in a variety of circumstances; thus it often happens that an injured person has a right of action conferred by a statute as well as at common law. In order to found a claim for breach of statutory duty, a pursuer must establish that he was within the class of persons whom the particular statute was designed to protect. The position of an unborn child, however, seems generally to have been overlooked; consequently, it will depend on judicial decision in each case as to whether a child injured antenatally will be able to found on breach of a particular statutory provision. Sometimes a statute imposes a duty towards a wide class of persons: for example, the Occupiers' Liability (Scotland) Act 1960² is conceived in favour of "persons entering on the premises".³ It may happen that both a pregnant woman and her unborn child sustain injury as a result of an accident in a factory where the mother-to-be is employed. It has been held that any person legitimately present in a factory is entitled to invoke the protection of the Factories Acts, even if he himself is not an employee⁴. It is possible that, in cases such as these, the courts would decide that the class of persons entitled to the protection of the statute was wide enough to include *nascituri*. On the other hand, if the statutory duty were owed only to "persons employed", a *nasciturus* would presumably be excluded from the class⁵. We consider that an unborn child may be entitled to benefit from the protection of a statute in appropriate circumstances, but would suggest that this is a point which should be borne in mind when statutory regulations are being prepared and considered.

(f) *Limitation of actions*

28. We have considered whether any special problems of limitation of actions arise in the field which we have examined, and have reached the conclusion that they do not. Until a child had actually been born there could not be knowledge of material facts of a decisive character relating to the loss, injury or damage sustained by him.

PART V: ADVICE

29. We have reached the conclusion that the existing law of Scotland is adequate to cover the situations to which our remit is related; and that established principles are sufficient to afford a remedy to a child in respect of antenatal

¹ It was held in *Murray v. Marshall* (1555) Mor. 16226 that a father could by will appoint a tutor to his unborn child.

² c. 30.

³ S.1(1).

⁴ *Ward v. Coltness Iron Co.* 1944 S.C. 318.

⁵ Cf. *Hartley v. Mayoh & Co.* [1954] 1 Q.B. 383.

injury. Legislation should only be considered if it is thought that, because there have been no Scottish decisions directly in point, it is desirable to put the matter beyond argument. If such legislation is contemplated, it should do no more than provide, for the avoidance of doubt, that if a person who is born alive sustains damage as a result of injuries suffered at or before birth, or as the result of the death before his birth of anyone in respect of whose death he would ordinarily have a right to sue, he should be entitled to recover reparation as if the damage had been sustained after his birth. Such limited legislation would not preclude the courts from developing the law of reparation for antenatal injury in the light of advancing scientific and medical knowledge and of changing social attitudes.

PART VI: SUMMARY OF CONCLUSIONS

1. The Scottish courts, by applying existing principles of law, would admit the right of a child who has been born alive to recover damages for antenatal injuries which it has sustained by reason of the wrongful act of another (paragraphs 8 to 19).

2. Liability would be incurred whether the defender's act occurred before or after conception (paragraphs 8 to 19 and 21).

3. A mother is entitled to recover solatium in respect of miscarriage or still-birth occasioned by the wrong of another (paragraph 20).

4. In a case where a child has been born alive and has survived even briefly, a dependant's claim is available to both parents, subject to existing principles of law (paragraph 20).

5. The third question put to us—whether there should be liability if there is none under the present law—is therefore superseded (paragraph 1).

6. Legislation should only be considered if it is thought that, because there have been no Scottish decisions directly in point, it is desirable to put the matter beyond argument. If such legislation is contemplated, it should do no more than provide, for the avoidance of doubt, that if a person who is born alive sustains damage as a result of injuries suffered at or before birth, or as a result of the death before his birth of anyone in respect of whose death he would ordinarily have a right to sue, he should be entitled to recover reparation as if the damage had been sustained after his birth (paragraph 29).

7. Claims of a child for reparation in respect of transmitted defects should be left for judicial determination (paragraph 22).

8. Abortion presents no special problems which cannot be solved by the application of the general law of reparation (paragraphs 23 and 24).

9. A child can sue its parents in respect of antenatal injury under existing law. Whether this is desirable is a question which would involve an investigation going well beyond the present remit and would make wide consultation essential (paragraph 25).

10. The effects of parents' behaviour upon a claim by a child in respect of antenatal injury are, apart from guardianship, substantially the same as in situations where the child has suffered injury after birth (paragraph 26).

11. It will be a matter of construction in each case as to whether statutory duties are owed to an unborn child. This possibility should be borne in mind when statutory regulations are being prepared and considered (paragraph 27).

12. No special problems arise in connection with limitation of actions (paragraph 28).

APPENDIX

PART I: INTRODUCTION

1. We are indebted to the following who have supplied much of the information contained in this Appendix:

Mr. J. M. J. Chorus, Juridisch Instituut, University of Amsterdam
Professor A. de Cupis, University of Rome
Professor R. David, Universities of Paris I and Aix-en-Provence
Professor J. P. Dawson, Harvard Law School, Cambridge, Mass.
Professor G. Gorla, University of Rome
Professor H. R. Hahlo, McGill University, Montreal
Professor J. Hellner, University of Stockholm
Mr. H. McN. Henderson, University of Edinburgh
Rechtsanwalt E. Schanze, Johannes Wolfgang University, Frankfurt
Professor F. F. Stone, Tulane University, New Orleans
Professor A. Tunc, University of Paris I
Professor J. Vanderlinden, University of Brussels

PART II: SYSTEMS DERIVED FROM ENGLISH LAW

2. The trend of the older authority was against permitting a child to sue, but this is no longer true today. The *nasciturus* doctrine is not accepted as a general principle in English law or in systems derived from it, though for certain matters which were formerly within the jurisdiction of the Ecclesiastical Courts or Court of Chancery the civilian maxim is applied. Though the maxim seemingly does not extend to actions in respect of prenatal physical injury, American, Australian and Canadian courts have found different grounds on which to found remedies for such injury, and certain American jurisdictions regard a viable foetus, still-born as a result of prenatal injury, as a "person" entitled to sue¹.

(a) *England and Ireland*

3. An Irish case, *Walker v. Great Northern Railway Co. of Ireland*², decided in 1891, concerned a claim on behalf of a child who allegedly suffered prenatal injury as a consequence of its mother being injured when travelling on the defendants' railway. The plaintiff failed mainly, it seems, because the defendants, who had no knowledge of the existence of the unborn child, could not owe it a duty of care. A subsidiary reason seems to have been that the plaintiff was not in being at the time of the accident. Though there have so far been no decided cases in English law concerning the right of a child to sue in respect of prenatal physical injury, the majority of English writers on the law of torts take the view that, in view of developments in the tort of negligence since 1891, the Irish case would not today be decided against the plaintiff. Thus Winfield and Jolowicz on *Tort*³ conclude:

¹ See generally E. Veitch, *Delicta in Uterum*, (1973) 24 N.I.L.Q. 40.

² (1891) 28 L.R. Ir. 69.

³ 9th ed. at p. 611.

“provided that the necessary ingredients of tortious liability can be made out (and this, admittedly, will not always be easy) there seems to be no reason why an action should not lie.”¹

Professor Street writes²:

“And yet can one doubt that a manufacturer who carelessly prepares baby food is answerable to a child injured thereby even though he made it before birth (or even conception)?”

English law does not consider the problem of prenatal injury as covered by the *nasciturus* maxim, but is rather concerned with the “directional” or “particular” duty of care. Thus Professor Glanville Williams summarises the English position³:

“Nearly all legal commentators assume that the choice lies between (1) denying a right of action to the child in respect of prenatal injury and (2) allowing the child to sue in respect of prenatal injury. The fullest discussion in English legal literature is an article by Winfield in the Cambridge Law Journal (1942), and his conclusion was that he could see ‘no good reason why an action should not lie for prenatal injury which results in postnatal harm’.

As this sentence indicates, the problem arises only when the child is born, and the only question is whether its rights should then relate back to a time before birth. To affirm that the rights should relate back is not to make any statement about the position of a foetus that is not born alive.”

(b) *Australia*

4. In *Watt v. Rama*⁴ a Full Court of the Supreme Court of Victoria considered whether the defendant had owed a duty of care not to cause injury to the infant plaintiff, who had not been born at the time of the accident from which its injuries allegedly resulted. In the accident its mother had been rendered quadriplegic, and when, over seven months later, she gave birth to the plaintiff, it suffered brain damage and epilepsy, due, it was alleged, to the accident caused by the defendant’s negligence. There being no English or Australian authority in point, the court considered a wide range of persuasive authority including the Quebec, South African and Irish cases discussed in this Report and also in general terms the broad effect of the American cases, though the court found it impossible to elicit any clear principle from them. This Australian case is as important for its discussion of the duty of care as for its consideration of the question of liability to a child *en ventre sa mère*.

The defence had raised three preliminary points:

- (a) whether in the circumstances set out in the statement of claim the defendant owed a duty of care not to cause injury to the infant plaintiff who was then unborn;
- (b) whether in these circumstances the defendant owed a duty of care to the infant plaintiff not to injure its mother;
- (c) whether the damages claimed were too remote.

¹ In notes 74 and 79 (pp. 610–611) they collect the main citations from books and articles, and observe that Street leaves the question open.

² *Torts* (5th ed.) p. 109n.

³ *Times* 19th January 1973.

⁴ [1972] V.R. 353. An appeal to the Privy Council, which was due to be heard on 26th March 1973, has now been abandoned.

The court unanimously answered the first question in the affirmative, the third question in the negative and found it unnecessary to answer the second question.

5. Winneke C. J. and Pape J. considered that the defendant's culpable act or omission occurred while he was driving his car on a public highway, at a time when he should reasonably have foreseen that he might cause injury to a pregnant woman in the car with which he collided and might cause the child which she was carrying to be born in an injured condition. In their view the question for decision was not whether an action lay for prenatal injuries, but whether a plaintiff born with injuries caused by prenatal neglect by the defendant had a cause of action for those injuries. The fact that damage was done to the foetus before birth was not an independent element in the plaintiff's cause of action but an evidentiary fact relevant to the issue of causation. The judges gave close attention to the duty of care—especially since the defendant's neglect and the plaintiff's injury were not contemporaneous. They observed¹:

“It is the reasonable foreseeability of harm arising from one's conduct which in many types of case not only gives rise to the duty of care to avoid inflicting such harm, but also provides the test for determining whether a person injured by the careless conduct of another falls within the class of persons to whom a duty of care is owed.”

6. The judges' theory of “crystallization” of the essential legal relationship between plaintiff and defendant is summarised in another passage² from their opinions:

“If . . . the circumstances be such at the time when the act or neglect occurs that it should reasonably be foreseen that the person in fact injured thereby might be so injured, then at the time of the injury a relationship giving rise to a duty exists. In the common case where the act or neglect of the defendant and the injury to the plaintiff are for all practical purposes contemporaneous, the duty attaches to the defendant and is breached when the act or neglect occurs. But where the injury does not occur contemporaneously with the act or neglect, the relationship will not necessarily crystallize so as to create a duty at the time of the act or neglect. Where the injury to the plaintiff occurs only subsequently to the time of the act or neglect in circumstances where the plaintiff is not defined at that time, as for example where he is only one of a class, the relationship and the duty to arise therefrom may be said to be contingent or potential but capable of ripening into a relationship imposing a duty when the plaintiff becomes defined. This, in our opinion, is the effect of the decision of the House of Lords in *Donoghue v. Stevenson*, as explained in *Watson v. Fram Reinforced Concrete Co. Ltd. & Winget Ltd.*”

7. Gillard J. would have been prepared if necessary to consider that a child *en ventre sa mère* was a “person”, relying on the fiction *nasciturus pro iam nato*—but decided in favour of the plaintiff on other grounds. Though the plaintiff had averred damage to itself when unborn, this was for the purpose of linking the

¹ p. 359.

² pp. 359–60.

defendant's fault with the physical disabilities suffered by it at and after birth. Proof of breach of a duty of care to the plaintiff's mother was merely an evidentiary step to connect the defendant's act with the plaintiff's disability at birth. The tort of negligence was only complete on the occurrence of damage. In the judge's view it was but natural justice that a person born alive and viable should have redress for injuries inflicted on it *in utero*, and he sought justification in existing principles of law. He found support for this course in many *dicta* of the House of Lords and considered that definitions of duty required qualification in the light of new circumstances. Thus, referring to Lord Atkin's "neighbour" test of duty in *Donoghue v. Stevenson*¹, the judge commented²:

"Having regard to the facts with which the House of Lords was concerned, his Lordship in using the words 'closely and directly' was not necessarily speaking in terms of time or area. The ginger beer could have been consumed at any place by a person, born or unborn, at the time of manufacture. Patently, Lord Atkin was referring to a class of persons who might be injured in the event of their consuming the defective product at any subsequent period to manufacture."

He relied³, moreover, on *dicta* of Lord Thankerton in *Bourhill v. Young*⁴ and Lord Pearson in *Dorset Yacht Co. Ltd. v. Home Office*⁵.

The judge approached the problems for decision following the course adopted by Lord Pearson and concluded that the child plaintiff belonged to a class of persons likely to be injured as a consequence of the defendant's act, and that the defendant ought reasonably to have anticipated at the material time that the unborn plaintiff would be within the area of potential danger and would suffer the injuries which resulted.

(c) *Canada*⁶

8. In the recent Ontario case of *Duval v. Seguin*⁷, Fraser J. held in favour of an infant plaintiff who had suffered physical and mental disabilities as a result of a vehicle accident when it was *en ventre sa mère*. Though the judge had considered the law of Quebec, he decided on the basis that he was dealing with a plaintiff who was already born—and that the cause of action was not complete until that time. In Fraser J.'s opinion there have been many cases since *Donoghue v. Stevenson*⁸ which have established that it is unnecessary that damage should coincide in time or place with the wrongful act or default. On prenatal injuries he observed⁹:

"To refuse to recognise such a right would be manifestly unjust and unreasonable . . . Under the doctrine of *McAlister (Donoghue) v. Stevenson* and the cases cited, an unborn child is within the foreseeable risk incurred by a negligent motorist. When the unborn child becomes a living person and suffers

¹ 1932 S.C. (H.L.) 31 at p. 44.

² p. 365.

³ p. 367 and pp. 371–2.

⁴ 1942 S.C. (H.L.) 78 at p. 83.

⁵ [1970] A.C. 1004 at p. 1052.

⁶ For the law in Quebec, see para. 17 *infra*.

⁷ (1972) 26 D.L.R. (3d) 418.

⁸ 1932 S.C. (H.L.) 31.

⁹ At p. 434.

damages as a result of prenatal injuries caused by the fault of the negligent motorist the cause of action is completed . . . In the instant case the plaintiff sues, as a living plaintiff, for damages suffered by her since her birth as a result of prenatal injury caused by the fault of the defendant . . . I refrain from expressing any opinion as to what, if any, are the rights of a child *en ventre sa mère* or of a foetus.”

(d) *United States*

9. The English common law jurisdictions in the United States started from the firm position that, although in certain circumstances an unborn child might be treated as born so as to take an inheritance, yet for the purposes of the law of delict or tort the *nasciturus* was not a legal person but only part of its mother. However, courts which have considered the question of antenatal injury in recent years have on the whole tended to reverse the earlier policy and have accorded legal personality to *nascituri* so that, in appropriate circumstances, they can recover damages for such injury. This change of judicial policy has been particularly noticeable since 1946, so that today at least twenty one American jurisdictions—including California, New York, Massachusetts, Ohio and Pennsylvania—grant recovery¹. The grounds upon which this is granted are, however, by no means identical, nor is there general consensus as to what they should be. Very often the right to sue depends upon whether the *nasciturus* is a “person” within the meaning of a “wrongful death statute”.

10. The modern position in the United States may be summarised as follows:

- (a) If the unborn child’s property interests were to be protected by the law as being for its own advantage, there seemed little valid reason why its interest in bodily security prior to its birth should not be similarly protected by law against unlawful injury.
- (b) With the advance of modern medical science, it is possible to prove with reasonable accuracy that the injury to the child done while it was *in utero* was in fact caused by the defendant’s conduct.
- (c) In some jurisdictions the view is held that a child possesses a constitutional right to be born free of defects caused by another’s fault; in others such as New Jersey² it is held that an infant has a legally protected interest in beginning life with a healthy body, so that if it is caused to be born deformed as a result of another’s negligence (say in a vehicle accident) while in the antenatal state, it may sue the negligent defendant. Some writers have objected to such approaches on the grounds that a child might sue its mother for failure to adopt proper measures for prenatal care.
- (d) Many jurisdictions have required proof that at the time of the alleged injury the unborn child was capable of life apart from the mother, i.e. that it was “viable”, although latterly there has been a tendency to allow recovery even when the injury was caused at an early stage of pregnancy. Other jurisdictions—such as New York and Pennsylvania—accept that legal personality begins at conception for the purposes of reparation.

¹ For a summary of the current position see *White v. Yup* (1969) 458P. 2d 617.

² e.g. *Smith v. Brennan* 157 A. 2d 497 (N.J. 1960).

- (e) The general view has been that the child must have been born alive to acquire a right of action in respect of antenatal injury, but an increasing number of states have allowed recovery for the benefit of the estate under statutes granting actions for wrongful death even when the child was killed before birth¹.
- (f) So far American courts have refused a remedy in tort for wrongful causing of life, e.g. by rape.
- (g) The main arguments against recognition of the right of a child to sue in respect of antenatal injury have been alleged difficulty of proof and fear of fictitious claims.

11. The problem of causing handicapped life has been considered in United States jurisdictions in at least three decisions, and, as these concern a general principle, we shall mention them briefly.

12. In *Zepeda v. Zepeda*² the plaintiff brought an action against its natural father for causing it to be born with the stigma of an adulterine bastard. The Illinois Court of Appeal seemingly held that, though the complaint alleged the commission of a tort, relief should be refused in the interest of society. The court's approach to physical injury is summarised in the following passage:

"It makes no difference how much time elapses between a wrongful act and a resulting injury if there is a causal relation between them. Let us take the hypothetical case of an infant injured after birth by a defective household device. Suppose, before the child was conceived, a manufacturer negligently made a space heater and sold it to a retailer who retained it in his store. After the infant's birth his mother purchased the heater and used it in the room of her child who was burned because of its faulty preparation. Would there not be a right of action against the manufacturer despite the fact the negligence took place before the child was conceived?³ In the hypothetical case the child was injured after birth. Lest this fact be given undue importance, let us proceed a step further. Suppose a manufacturer prepared and sold a drug for human consumption which had not been adequately tested; that, while it was beneficial for the purpose intended, it proved to be harmful if taken by women in the very early stage of pregnancy in that it arrested the development of infants' bodies, causing them to be born with abnormal arms or legs. Would not a child so born have a right of action in tort? In the second case the child was injured soon after conception. So let us go still further and take a third suppositive case, where the wrongful act also takes place before conception but the injury attaches at the moment of conception. Physicists and geneticists declared that thermonuclear radiation can so affect the reproductive cells of future parents that their offspring may be born with physical and mental defects . . . If a child is born malformed or an imbecile because of the genetic effect on his father and mother of a negligently or intentionally caused atomic explosion, will he be denied recovery because he was not in being at the time of the explosion?"

¹ e.g. *White v. Yip sup. cit.* construing the Wrongful Death Act of Nevada.

² Ill. App. 2d 240 (1963); 190 N.E. 2d 849 (1963).

³ Cf. *Watson v. Fram Reinforced Concrete Co. (Scotland) Ltd. and Winget Ltd.* 1960 S.C. (H.L.) 92 per Lord Denning at p. 115.

However, the court went on to say that there were inadequate averments of mental distress and emotional suffering, and observed that the quintessence of the plaintiff's complaint was that he existed at all. In other words the child would have had to establish that non-existence would have been preferable. Moreover, the court seems to have been apprehensive that very many claims might be made by illegitimate persons if the present claim had been allowed.

13. *Gleitman v. Cosgrove*¹ involved physical defects in the pursuer. When the mother was two months pregnant she had consulted the defendant, a medical practitioner, and told him that a month earlier she had had an attack of *rubella* (German measles). The defendant advised her that this would not affect her child—and repeated this advice three months later. Subsequently Mrs. Gleitman gave birth to the infant plaintiff who suffered grave physical and mental handicaps. The infant plaintiff's parents (who were also parties) asserted that, if the defendant had given the advice which he should have given, Mrs. Gleitman would have sought other medical advice with a view to obtaining an abortion. The Supreme Court of New Jersey held that the infant plaintiff had no cause of action. Proctor J. observed²:

“The infant plaintiff is therefore required to say not that he should have been born without defects but that he should not have been born at all . . . Damages are measured by comparing the condition plaintiff would have been in, had the defendants not been negligent, with plaintiff's impaired condition as a result of the negligence. The infant plaintiff would have to measure the difference between his life with defects against the utter void of non existence . . . This Court cannot weigh the value of life with impairments against the non existence of life itself. By asserting that he should not have been born, the infant plaintiff makes it logically impossible for a court to measure his alleged damages because of the impossibility of making the comparison required by compensatory remedies.”

Weintraub C. J. concluded³:

“Ultimately, the infant's complaint is that he would be better off not to have been born. Man, who knows nothing of death or nothingness, cannot possibly know whether that is so.”

14. *Williams v. State of New York*⁴ was also regarded as, in essence, a claim for damages for “wrongful life”, and also failed. The infant plaintiff's action was against the State of New York seeking to hold it liable for the negligence of a Manhattan mental hospital which had failed to prevent the rape of the mother by the father, who, owing to his mental state, was not responsible for his actions. On this case Tedeschi has commented⁵:

“How could the Manhattan hospital have prevented the unlawful birth and the mental heredity of Christine Williams without preventing her conception as well? And even assuming, for the sake of the argument, that it could have

¹ 49 N.J. 22, 227 A. 2d 689 (1967).

² At p. 692.

³ At p. 711.

⁴ 18 N.Y. 2d 481 (1966); 223 N.E. 2d 343.

⁵ (1966) 1 Israel L.R. 513 at p. 531.

been possible to create that life without those adverse circumstances—the fact remains that a single act had been committed, an act on which the plaintiff relied as her cause of action without it being open artificially to a split so as to advance the plaintiff's case. When a person fathers a child and infects it with a disease by one and the same act, then either the semen was already infected when it came in contact with the ovum, so that the new entity created is diseased from its inception (and this is the true meaning of congenital disease), or the single act results in paternity and in the infection of the mother, which will be transmitted from her to the infant. In the first case it is obvious that there was only one alternative to the new being, either not to exist or to exist with the disease. But in the second case as well no separation can be made between the act of the parent causing paternity and that causing the infection, as we are faced with a single act.”

PART III: THE “MIXED” SYSTEMS—
LOUISIANA, QUEBEC, SOUTH AFRICA

15. There are a number of other legal systems which, like Scots law, have a Civil law foundation, and have been influenced by Anglo-American law—in particular, the systems of Louisiana, South Africa and Quebec.

(a) *Louisiana*

16. As long ago as 1923 the Court of Appeal of Louisiana in *Cooper v. Blanck*¹ relied on Article 29 of the Louisiana Civil Code to give the unborn child legal status as a constructive person, and thus found it entitled to recover for personal injuries under Article 2315. Article 29 reads:

“Children in their mother's womb are considered, in whatever relates to themselves, as if they were already born. . .”

Article 28 provides:

“Children born dead are considered as if they had never been born or conceived.”

Article 2315 in effect codifies *culpa* and specifies who have title to sue. A note² written without knowledge of this decision reached the same conclusion as the court that the words in Article 29 which follow “already born”, and refer to inheritance and appointment of curators, do not restrict the meaning of the Article but merely provide examples.

(b) *Quebec*

17. In *Montreal Tramways Co. v. Léveillé*³ the Supreme Court of Canada, upholding the judge of first instance and the majority of the Court of King's Bench of the Province of Quebec, held the appellants liable for injury sustained by a child in the prenatal state. The mother had been injured by the fault of the

¹ 39 So. 2d 352 (La. App. 1923, unreported until 1949).

² C.A.W. Jr. (1939) 13 Tul. L.R. 634. For another view urging a solution on different grounds, see G. Le Van (1960) 20 La. L.R. 810. This approach disregards the generality of Article 29 for private law in all its aspects.

³ [1933] 4 D.L.R. 337.

appellant's servant which had caused her to fall from a tramcar. She was then seven months pregnant, and gave birth two months later to a child who was born with club feet. Lamont J. with whom Rinfret and Crocket J.J. concurred cited D.1.5.7 and 26 and considered that Article 345 of the Civil Code of Quebec practically embodies the Roman law rule. The Article reads:

"The curator to a child conceived but not yet born, is bound to act for such child whenever its interests require it; he has until its birth the administration of the property which is to belong to it, and afterwards he is bound to render an account of such administration."

Article 608 makes the right to inherit depend on civil existence; Articles 771 and 838 deal with gifts *inter vivos* and by will. It was contended that these later Articles indicated the limits of the rights conceded to *nascituri*, but Lamont, Rinfret and Crocket J.J., after considering French juristic writing and English authority in those limited fields where "Civil law" rules applied, concluded that the generality of the fiction expressed in Article 345 was not restricted by the special cases. Smith J. dissented from this interpretation, and was not satisfied with the medical evidence.

Cannon J. agreed with the conclusion of the majority, but he thought it unnecessary to rely on the *nasciturus* doctrine or on the equivalent Articles in the Code, because in his view the child's right of action commenced at birth. He founded principally on the French Cour de Cassation and Mazeaud's *Traité de Responsabilité Civile*¹. Cannon J. considered (as freely translated)²:

"The pursuer had to prove that the mother's fall, two months before the birth of the child caused the disability of the latter, that is to say to establish a chain of causation between fault and damage. If the damage is the consequence of the unlawful act, the negligent party must make reparation even if the consequence was unforeseeable at the time of his fault."

(c) *South Africa*

18. In *Pinchin v. Santam Insurance Co. Ltd.*³ Hiemstra J. granted absolution from the instance because the plaintiff had failed to prove that the plaintiff child's cerebral palsy was due to the antenatal injury inflicted on the mother, and his decision was sustained on appeal without discussion of his opinion upholding on relevancy the right of a child to recover damages for prenatal injury. In reaching this conclusion he relied upon the passages in the Digest referred to earlier in this Report,⁴ on Professor R. G. McKerron's treatise on *Delict*⁵ and on Professor McKerron's main authorities—*Montreal Tramways Co. v. Léveillé*⁶ and Professor P. H. Winfield's article "The Unborn Child"⁷.

Hiemstra J. observed⁸, on the meaning of "person":

¹ 1931 ed. g. 1673.

² p. 368.

³ [1963(2)] S.A. 254; on appeal [1963(4)] S.A. 666 A.D.

⁴ See footnote to para. 13 of the Report. The reference in the case report to D.1.5.96 should presumably read D.1.5.26.

⁵ 5th ed. p. 139 (now 7th ed. pp. 158-9).

⁶ *sup. cit.*

⁷ (1942-4) 8 Camb. L.J. 76. It may be as well to stress that the law has developed at least in Germany and in the United States since Winfield wrote.

⁸ p. 256.

“The Léveillé case is particularly important, not only because it is a judgment of the highest Court of the Dominion of Canada, but because it is squarely based on the Roman law and on the Quebec Civil Code.”

In the following passage he set out the main ground for his opinion¹:

“For our law it seems unnecessary to complicate the matter with the question of viability. 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 postnatal 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.”

PART IV: CIVIL LAW SYSTEMS

19. It might have been supposed that codified systems based on the Civil law would have adopted generally a formulation of the *nasciturus* doctrine. While Swiss law (2 Z.G.B. Art. 31) and Austrian law (Art. 22 A.G.B.G.) do so, and the Japanese Civil Code—largely inspired by European law—expressly applies the rule to delictual damages (S.721), this did not happen in France, Germany or Italy, where the codifiers specifically applied the doctrine only to a number of specialised cases. As a result judges and authoritative writers have subsequently sought to generalise from particular code provisions, or have otherwise sought to provide redress for antenatal injury to a child who has come into existence. It is of some significance, therefore, to observe that even in leading codified systems a creative response to such problems has depended on activity by judges and jurists to meet new situations which went beyond a narrow construction of the written provisions of the law. Further, it is relevant to note that the Ethiopian Civil Code of 1960—drafted largely on the French model—substantially reintroduces the general *nasciturus* doctrine (Article 2) in preference to the fragmentation of the Code Napoléon; while the Greek Civil Code (of 1946) though largely based on the German Civil Code (B.G.B.) seemingly also reintroduces the generalised right of a child after conception (Article 36). Moreover, in the Netherlands, the relevant code provisions are in effect a statement of the Latin brocard in the terms in which it was accepted into the common law of Scotland.

(a) Belgium

20. It is a well-established principle of Belgian law, derived from Roman law, that a child after conception has the same rights as a born child provided that it

¹ At p. 259.

is born alive and viable, and in so far as its own interests so require. This principle, though mainly considered in the context of succession, was extended in the 19th century to the field of "quasi-delictual" liability. The general rules applicable to such liability apply. Thus damage, fault and causation must be established unless Article 1384 applies, when fault may be presumed for injuries caused by a thing in the defender's custody. Although the Belgian courts have not as yet considered the thalidomide type of case, some Belgian lawyers are of opinion that, unless some special defence were applicable, e.g. *vis major* or *damnum fatale*, a *nasciturus* would recover under Belgian law for prenatal injury caused by a drug under the ordinary principles of reparation.

(b) *France*

21. The Code Napoléon did not expressly state the *nasciturus* doctrine as a general rule, though the fiction was expressly applied to matters of legitimacy, succession and donation. Subsequently, however, the courts have come to regard the particular instances in the Code as justifying the extension of the rule to other situations where the interests of a *nasciturus* are involved. Thus in 1971 a post-humous child recovered damages for the death of its father while it was *in utero*¹. There do not appear to have been any later decided cases. The leading French commentators (whose authority is comparable in weight to institutional writers in Scots law) seem to be generally agreed² that the *nasciturus* doctrine is of general application in French law, but they have illustrated it only with cases of reparation for causing the death of a person liable to support a *nasciturus*. In French law, for a *nasciturus* to acquire rights, it must not only be born alive but must also be born viable. The Code refuses to recognise as persons children whose life must necessarily be brief because of their physical state at birth. For legal purposes, e.g. succession, death erases completely the short life of the unviable child. Challenge to the personality of the deceased child on the grounds that it was unviable depends on delicate and debatable questions of medical evidence. To avoid controversies of this kind other codified systems, e.g. those of Austria, Germany, Italy and Switzerland, recognize the legal personality of a child who is born living, even if it is not viable.

(c) *Federal Republic of Germany*

22. The B.G.B. (Civil Code) did not in general adopt the *nasciturus* doctrine. Article 1 provides that legal capacity begins with birth, though Article 1923 gives a *nasciturus* who is born alive rights of succession and Article 844 imposes a duty to compensate a child for the culpable killing of a person who has a duty to support it (albeit the child was *in utero* when the death took place)³. In 1949 the Schleswig Oberlandgericht⁴ held a defender liable for communicating

¹ Trib. gr. instance Paris 8 juin 1971, Gaz. Pol. 1972.1.162; earlier cases are referred to in the leading treatises.

² Marty et Renaud *Droit Civil* (2nd ed.) tome 1, vol. 2 p. 18 who refer also to Civ. 4 janv. 1935.1.5, note de M. Rouast, S. 1936.1.17, note de M. P. Esmein Ch. réun. 8 mars 1939, S. 1941.1.25, note de M. Battifol; D.C. 1941.J.137, note de M. Julliot de la Morandière. See also Colin et Capitant (4th ed.) i. p. 174.

³ Also in the case of vehicle accidents under provisions of the Strassenverkehrsgesetz.

⁴ O.L.G. Schleswig 18th October 1949; N.J.W. 1950 388. Medical opinion does not, however, support the assumption of simultaneous conception and infection.

venereal disease to a child, allegedly at the time of procreation; and in 1952¹ a Senate of the Bundesgerichtshof (Supreme Court) held a hospital authority liable to mother and child for negligence in giving a woman a blood transfusion contaminated by syphilis before she became pregnant, as a result of which she and her subsequently conceived child were infected. The Court did not consider or discuss the legal capacity of the *nasciturus* or of a child not yet conceived: the *ratio* of their decision was that the pursuer had sustained harm by having been born a diseased, syphilitic person. This state had resulted from the negligence of the hospital authorities in administering an infected blood transfusion to the child's mother. Prenatal injury causing postnatal damage did not, in the court's opinion, require examination of the legal capacity of a *nasciturus*. The decision itself has apparently remained unchallenged during the past twenty years, and the legal argument before settlement of the "Contergan"² cases concentrated on the more general problems of the liability of producers. Some jurists have, however, construed the 1952 decision to imply the partial legal capacity of a *nasciturus*³, and the Bundessozialgericht (the final federal court in questions of social administration) has also considered⁴ the case of a child who, in consequence of injury to its mother while it was in a foetal state during the military occupation of Germany, had been born with permanent physical defects. The court granted state support on the grounds that, though the text of the law did not expressly mention a *nasciturus*, social justice required the court to fill the gap in the legislative provisions. Authoritative writers have also discussed problems of liability when reproductive organs have been affected by disease or by radiation, as a result of which a child is born with disabilities. Thus Professor Selb argues that the law should not impose "eugenic control" on potential parents, but that they should be liable for infecting a child as a result of exceptional negligence in situations within their control⁵. Liability for failing to prevent procreation has also been considered judicially⁶. Through negligent reading of a prescription a pharmacist supplied laxative instead of contraceptive pills to a woman, who subsequently gave birth to a child. In an action of damages brought for the cost of maintaining the child, the court awarded fifty per cent of the support claimed, holding the mother to have been herself guilty of contributory negligence in failing to read the specification on the container.

(d) *Italy*

23. The Italian Civil Code, like the French, applies in express terms the principle embodied in the *nasciturus* doctrine only in certain particular provisions dealing with succession, donation and nomination of curators. Opinion has been divided as to whether and to what extent the maxim is to be generalised.

¹ B.G.H.Z. 8, 243; N.J.W. 1953, 417; J.Z. 1953 307—overruling, after consultation, the decision of another Senate (Division) of the Court which had held in another case that a claim could not be brought when infection was contracted in the prenatal state.

² Which raised problems comparable to the thalidomide cases in Britain.

³ Wolf-Naujoks *Anfang und Ende der Rechtsfähigkeit des Menschen* (1955) p. 230; Fabricius *Relativität der Rechtsfähigkeit* (1963) p. 8.

⁴ P.S.G.E. 18, 551. The same court in an earlier and severely criticised decision had decided that a pregnant woman entitled to social insurance payments could not recover for injury to her child caused by an industrial accident (B.S.G.E. 10 97). See W. Selb *Schädigung des Menschen vor der Geburt—ein Problem der Rechtsfähigkeit* in A.C.P. vol. 166 (1966) pp. 76–128.

⁵ *Op. cit.*

⁶ *Landgericht Itzehoe, Familienrechtzeitung* 1969, 90.

The leading Italian case on antenatal harm did not found (and could not have founded) on the *nasciturus* fiction¹. In this decision, (by the Tribunal of Piacenza), which has given rise to great controversy, it was held that the parents of an illegitimate child were liable as co-delinquents to make reparation to their child to whom it was assumed they had communicated syphilis at the time of conception. A general principle was stated that parents are answerable for a wrong² in relation to their children if they culpably cause to be transmitted to them a diseased condition which adversely impairs their physical state. The court considered that life is an immeasurable gift, but that to convert it into a miserable state by culpably transmitting disease by procreation is a wrong. It is immaterial that the person affected did not possess legal rights at the time of procreation. Accordingly the judges were of opinion that, if it is unlawful to transmit syphilis to an existing person, there is no reason why it should not equally be unlawful to transmit this disease to a future person—provided that there was a causal connection. Much of the criticism has concentrated on “liability for wrongful life” and the dangers of genetic monitoring of procreation³. The facts of the case were, however, concerned with the transmission of a specific disease which both parents knew they suffered from at the material time and which they had not taken steps to cure. The main critics assert that it is impossible for a pursuer in the situation of the child pursuer in the *Piacenza* case to establish damage because it would be impossible for it to prove loss, i.e. that it would have been better off if it had never existed. Those who support the decision do so mainly on the grounds that it is not necessary for the person injured to have existed at the time when the harmful act was committed, since it is accepted that a period of time may elapse between the unlawful act and its harmful consequences.

(e) *Netherlands*

24. Book 1 Article 2 of the Nieuw Burgerlijk Wetboek (New Netherlands Civil Code)⁴ provides that a child after conception is considered as if it is already born when this is in its interest; at the same time a child who is born dead is regarded as having never existed. It is generally accepted in the Netherlands that this Article applies to all cases of patrimonial loss and most authorities consider that it applies generally. The Article has been invoked successfully in claims by posthumous children for reparation in respect of culpable killing of their fathers, and, though there are no reported decisions relating to claims in respect of physical injury to a *nasciturus*, it is accepted that such claims are admissible. For example, we understand that the importer of thalidomide met claims on behalf of victims voluntarily and without court decree⁵. The dearth of legal literature on problems of prenatal injury may well indicate that the doctrine of Article 2 is too clear for controversy.

¹ See Trib. Piacenza 31.7.1950 *Foro Italiano* 1951 I.987 at p. 989. Medical opinion seems, however, to reject the possibility of simultaneous infection and conception.

² Art. 2043 of the Civil Code lays down the general principle of liability to make reparation for unjustifiable harm caused by a fraudulent, malicious or negligent act.

³ See references in *Foro Italiano sup. cit.*; G. Tedeschi *On Tort Liability for 'Wrongful Life'* (1966) 1 *Israel L.R.* 513; M. Comporti *La Responsabilité Civile en Italie* (1967) *Rev. Int. Droit Comparé* 858.

⁴ Replacing Article 3 of the Code in force until 1969 which was in similar terms.

⁵ Drugs fall within general provisions regarding the liability of producers.

PART V: SCANDINAVIAN SYSTEMS

25. In the Scandinavian countries liability for causing prenatal harm has never been doubted in modern times. Thus, for example, in Sweden a posthumous child has the same right of action in respect of the death of a parent caused by the defender's fault as do children already born at the time of that happening¹. It is accepted generally that the liability of producers, including liability for harm caused by pharmaceutical products, extends to antenatal injury, and that children harmed antenatally have rights of action.

¹ *Nytt Juridiskt Arkiv* 1929 p. 138.