INJURIES TO UNBORN CHILDREN

In January the Law Commission published its Working Paper No. 47 - "Injuries to Unborn Children" and, as is customary with its working papers, invited comments thereon. Messrs. K S Cannar and F N Eaglestone read the paper and via the Hon. Secretary sent the following comments to the Law Commission:-

1 Legal Aspect

The paper under the heading "Should there be a cause of action?" and "A cause of action based on fault" seems to assume that the victim (unborn child) is within the foreseeable area of risk and this is probably correct. However, in some cases the ability to establish reasonable foreseeability of damage to the plaintiff (the unborn child) by the defendant is not so obvious. Take for example the case of the person whose act has injured a woman who is, but is not known by that person to be, pregnant. If, as stated later in the paper the unborn child is not to be identified with the parent in considering matters such as contributory negligence then this is not a case of the defendant foreseeing the presence of the woman and "taking the victim as he finds her" because the victim is not the mother but the unborn child. Probably the fact that a woman might be pregnant should be foreseeable, and as in Haley v. London Electricity Board (1965) it was considered that the number of blind persons on the streets alone was sufficient to require the defendants to have them in contemplation then presumably as there are more pregnant women on the streets than blind people the same would apply to pregnant women i.e., the presence of unborn children should be foreseen. However, should this legal point be made rather than assumed?

Secondly in the nervous shock cases where a child is injured or in danger of being injured it is probably reasonable for the defendant to foresee that the mother will be near by and suffer nervous shock but is it also reasonable to foresee that the mother might be pregnant and her unborn child will be injured? Presumably so, but should the point be covered in the report?

We consider that a child born alive but suffering temporarily or permanently from the effects of some accident (in the widest sense, as described in paragraphs 8 - 14 on pages 5 - 7) which occurred during the period of gestation should have exactly the same rights as a child who had a separate existence at the time of the accident. It seems to us that an objection to this fundamental proposition could not be effectively carried in the social context of our times, particularly in the wake of the thalidomide troubles. The problem of whether or not the child had actually been conceived at the time of the accident would be

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a matter of medical evidence and it would of course rest upon the plaintiff to prove the date of the accident. The problem of whether or not the child had actually been conceived at the time of the accident could be determined by the law incorporating a time element allowing for the average period of gestation, e.g., "A child born not more than X days after..."

The reasons in support of the opening statement in this last paragraph cannot be better indicated than the two sentences quoted from the judgment of Lamont J. in the Montreal Tramways case given on page (iv) of the Appendix to the paper.

On the other hand a child stillborn should not have any right of action. The only possible heading of a claim is loss of expectation of life and it is possible that this item of damages may be removed by statute at some time in the future. In any event to extend it to a child who has never had a separate existence is ludicrous. Presumably any damages awarded would go to the parents and obviously could be of no use at all to the child. As stated in the paper a miscarriage would form part of the mother's claim any way.

Finally, both the foregoing thoughts concerning a child born alive and a stillborn child refer to post conception acts but pre-conception acts or omissions affecting a parent and resulting in a damaged foetus are more difficult to consider. However, we feel that -

(a) a stillborn child should still have no remedy

(b) while a child born alive should, prima facie, have a right of action, there are considerable difficulties where the negligent act by the defendant (not the parent) occurs before conception as follows :-

(i) If the defendant is allowed to argue that the parents knew or ought reasonably to have known before conception that any foetus <u>which might be conceived</u> ran a greater than normal risk of abnormality and thus reduce or eliminate any damages for which he might be responsible, then logically one gives a right of action to the abnormal child against the parents and as will be seen later this is not considered desirable.

(ii) There could be cases of many years elapsing before the consequences of an incident became apparent. For example, the case of a young girl suffering in her childhood a pelvic injury which doctors were prepared to suggest,

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perhaps twenty years later, had caused difficulty when the same girl, now mature and married, gave birth to a baby which unhappily was deformed.

(iii) Claims by second and subsequent children after the first has been abnormal should be eliminated in any event. The paper is silent on this subject.

Because of these points it is felt that the right of action by a child should be limited to cases involving injury occurring only after conception.

2 General Point

While the Law Commission obviously appreciates the main difficulty in these cases, namely to establish that the child's condition was the result of the incident alleged to have caused it, from a practical point of view we can visualise the costs of expert evidence will be great and the period of hearin lengthy. In other words, the proportion that costs bear to the damages will probably be much higher in this type of case than in the normal injury action This means that it will only be open to those who have some financial backing

Maybe this point is irrelevant as it is for the Law Commission to consider what the law should be not whether it will be a practical procedure available to the public in general. Any way this situation exists in all actions to a degree.

3 Specific Points

(1) Action between members of the family

For reasons set out under the heading "Social Factors" below we do not consider actions should be allowed by a child against the mother and/or father because of an act or omission affecting the mother and/or father before conception. This view also applies to an action by a child against the mother because of an act of the mother while the child was in the womb. We have not included the father in the latter situation as we have in mind the desirability of allowing a child in the womb the same right against a father who is driving a car negligently as the child in its mother's arms would have.

(a) Insurance

The liability policies which are most likely to be involved in providing a fund against which the child could claim against its

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mother or father would be a Personal (or Family) Liability and a Motor Policy. While the former policies are being sold more frequently because they are now an adjunct to the Householders Personal policy it is a cover which is still not sold widely. In other words, far more parents are not covered for their liability to the public and towards other members of the family than those who are so covered. Sometimes such cover excludes claims by members of the Insured's family permanently residing in the Insured's house which would normally include his child.

(b) Social Factors

At one time claims by one member of the family against another were considered by the insurance industry under a liability policy (and even by the law in respect of one spouse claiming against the other) as inadvisable because of collusion but this view has now become outdated. The right of action of the victim is considered far more important than the possibility of collusion between members of the family, especially where there is insurance cover available. However, it is probably appropriate to consider, in the case of a child bringing an action, who will be "the next friend" in any such action. Presumably it will be the parent who is not the wrong-doer. Whether this is a good thing for the family is an open question, but the assumption that both parents will more or less act in collusion to help the child is a factor which might have to be accepted. Nevertheless, it is questionable whether in these circumstances it is a good thing to have a defendant who wants to pay the claim although this is by no means unknown in the insurance world. Furthermore if the insurer has doubts about liability it may have to bring the parents before the court to give details of their sex life or at least of matters personal to them and this may or may not be a problem depending on the feelings of those concerned.

There is also the question as to whether it is right to spend the court's time going through a charade of defending a claim (particularly where there is no insurance) where the defendant wishes to pay but only the sum concerned is in dispute. Unless there is disagreement on liability between the spouses an action on amount only is pointless in most cases, as the parents have got to look after the child in any event. The matter could be dealt with as under the Law Reform (Husband and Wife) Act 1962 i.e., to stay the action.

Greater difficulties on procedure might be experienced where the act or omission is carried out by both parents before conception resulting in a damaged foetus.

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The Commission's Report refers to the case of the contraceptive pill possibly causing an injury to the child although it could be any form of contraception. Presumably if both parents agree to the alleged wrongdoing neither could act as "next friend" as they would both be defendants. Is this socially an advisable situation? In any event is it possible for anybody to bring an action on behalf of the child against the parents without the parents' consent in practice?

In these circumstances we consider legislation should not furnish the child with a right of action against the mother in respect of ante-natal injury. The idea of a baby emerging from the womb with a writ clutched between its fingers ready to serve on the mother that has just been delivered of it is bizarre and repugnant.

This means identifying the child with the mother's actions or omissions before birth which we prefer to the alternative just mentioned, although others may disagree.

(2) Transitional Provisions

Legislation should not be retrospective in effect, unlike some legislative changes that have come into operation in recent years. We go along with paragraph 35 in this regard.

(3) Carriage by Air Act 1961

We note that the Working Paper deals with motor accidents in paragraph 40, but it does not mention the situation in regard to aeroplane passengers under the Warsaw Convention as enacted in the U.K. in the Carriage by Air Act. Legal liability to passengers is limited in amount: if the foetus is to be considered as a passenger, presumably this limitation would apply, but if not, then unlimited liability would in theory operate.

4 Conclusion

We consider that -

(i) a child born alive should have a right of action provided it is limited to cases involving injury occurring only after conception. Subject also to (iii) and (iv) below.

(ii) a child born dead should not have a right of action.

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(iii) a child who is born alive but dies before the action is heard should lose the right to continue that action.

(iv) a child born alive should not have a right of action against the mother in respect of ante natal injury.

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Mr John Churchill acknowledged these comments on behalf of the Law Commission in the following terms:-

Dear Mr Saxton,

Thank you very much for your letter of the 12 April enclosing the comments of the two designated members of your Association. We appreciate that their comments do not necessarily represent the views of all your Committee.

We are most grateful to the two gentlemen concerned for all the trouble and time they have taken to prepare their comments. These comments are indeed of value to us. They raise a number of points which had not occurred to us when we originally prepared our paper - necessarily against time - and they highlight the difficulties (which have already been drawn to our attention from other sources) in so reforming this aspect of the law as not to produce undesirable consequences and side effects.

Yours sincerely,

John Churchill

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The Law Commission's work in this respect has to some extent been overtaken by the appointment of the Royal Commission on Civil Liability and Compensation for Personal Injury. Nevertheless the Law Commissioners continue their work, and we must expect their report on "Injuries to Unborn Children" perhaps later this year and quite independently of any thoughts that the Royal Commission has.

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