TORT LIABILITY FOR PRE-NATAL INJURIES

WATT v. RAMA [1972] V.R. 353

In our time, there has been a tendency for the Courts to extend remedies in tort to interests not formerly protected. No longer is it thought that negligence involves a number of separate torts each with its own rules. "The categories of negligence are never closed," said Lord Macmillan, as far back as 1932.[1]

It is in more recent times, however, that we find the ambit of negligence being extended by considerations of policy elements. This trend was greatly aided by the decision in *Hedley Byrne & Co. Ltd.* v. *Heller and Partners Ltd.*, where Lord Pearce was moved to say:[2]

> How wide the sphere of the duty of care in negligence is to be laid depends ultimately on the courts' assessment of the demands of society for protection from the carelessness of others.

This process of expanding the existing area of law is well illustrated by a recent Australian decision. In *Watt* v. *Rama* the Supreme Court of the State of Victoria recognised a cause of action by a child for injuries sustained before its birth. This authority, which settles a history of uncertainty and controversy,[3] opens the door to litigation in a new area of law; and is not without analytical and jurisprudential interest. The purpose of this paper is to consider *Watt* v. *Rama;* its antecedents; its effect; and its future.

The Facts:

For the purpose of determining the points of law in dispute, the Court proceeded on the assumption that the allegations in the statement of claim were true. These revealed that the defendant, Halil Rama, had negligently driven his motor car, and had collided with a motor car driven by one Sylvia Alice Watt. She, at the time, was pregnant, with the plaintiff-child. As a result of the accident, Mrs. Watt was rendered a quadriplegic. About eight months later, she gave birth to the plaintiff who was found to be suffering brain damage and epilepsy. These infirmities were caused to the plaintiff, yet unborn, in the collision; or arose from the inability of her mother, with her quadriplegic condition, to carry and deliver the child in normal manner. In either case, the injuries were attributed to the defendant's negligence.

On these facts, the Court was obliged to decide the following two questions of law:

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1. *Donoghue* v. *Stevenson*, [1932] A.C. 562 at p. 619; [1932] All E.R. 1 at p. 30.
2. [1964] A.C. 465 at p. 546; [1963] 2 All E.R. 575 at p. 615.
3. For a list of textbooks and articles on the subject, see *Watt* v. *Rama* at p. 358.

(i) Whether the defendant owed a duty of care not to injure the plaintiff, who at the time of the accident was unborn.

(ii) Whether the damages sought by the plaintiff were too remote.[4]

The Central Problem:

The defendant countered the plaintiff-child's allegations of negligence with the contention that he could owe no duty of care to one who, at the time of the collision, was *en ventre sa mère.* In other words, the plaintiff at that time was not a person in law; and, therefore, the defendant owed her no duty of care.

Enlarged, the argument proceeded thus:

> In negligence, the cardinal principle of liability is that the party complained of should owe to the party complaining a duty to take care. Therefore, as between the parties, there is on one side a duty to take care; and on the other side a right to have care taken.[5] Since legal personality and existence is accorded only by live birth, the child, being unborn at the time of the collision, could have no legal right to have care taken; and hence no legal duty could be owed to her.[6]

To reject the defence, the Court could adopt any one of three approaches:

(i) that, from the time of conception, a child is a person capable of having separate legal existence apart from its mother. Legal personality can be extended to the embryo in accordance with the opinion that life begins at conception. Therefore, the child in its mother's womb is a person to whom a duty can be owed at the time the fault is committed.

(ii) that, by a fiction in civil law, a child may be deemed born so far as is necessary for its benefit. A child, actually born alive, may be treated as born or living at an earlier point of time when it was *en ventre sa mère.* Although the fiction is applied primarily in respect of devolution of property,[7] it can be applied also in respect of tort; and the plaintiff-child therefore is deemed to be a person to whom a duty can be owed at the time of the collision.

(iii) that a duty to take care not to injure can be owed to a child although, at the time of the fault, it has no legal existence.

The Court based its decision on the third approach. Winneke C.J. and Pape J. delivered one judgment. Gillard J.,, in a separate judgment,

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4. A third question whether the defendant owed a duty to care to the infant plaintiff not to injure her mother did not require answering.
5. See Lord Macmillan in *Donoghue* v. *Stevenson,* supra, n. 1.
6. It must, however, be borne in mind that the plaintiff is at the time of her action a legal person.
7. E.g. a gift by will "to my children" includes children *en ventre sa mere:* see *Villar* v. *Gilbey* [1907] A.C. 139.

reached the same conclusion, but by slightly different reasoning. Also, it seems, he was prepared to uphold the plaintiff on the second approach.

Authority prior to Watt v. Rama:

"(N)ew categories in the law do not spring into existence overnight"[8] and decisions such as that in *Rama's* case must necessarily be influenced by, and based on, prior development of the law. There was no English precedent directly in point; but, as recently as 1962, *Halsbury's Laws of England* stated that "an infant cannot sue for a tort suffered while *en ventre sa mère*,[9] as authority for which is quoted the Irish case of *Walker* v. *Great Northern Railway Company of Ireland*.[10] There, the defendant company had caused a railway accident through the negligent operation of its line. A pregnant woman was injured, and her child was later born crippled and deformed. The plaintiff-child argued that there was to be applied the civil law fiction that a child *en ventre sa mère*, if subsequently born alive, is deemed to have all the rights of a child whenever that is to its advantage. The company was held not liable to the child: first, there was no contract for safe carriage with the child, no consideration having been given in respect of it; and secondly, no duty of care could be owed to the child whose existence was not known to the company. Even if the child had an existence by fiction of law it still had no actual existence of which the company could be aware, and consequently no duty could be owed to it. O'Brien J. did sympathetically comment:

> The pity of it is as novel as the case — that an innocent infant comes into the world with the cruel seal upon it of another's fault and has to bear a burden of infirmity and ignominy throughout the whole passage of life . . .[11]

but proceeded to give further reasons for disallowing the action: the difficulty or impossibility of proof and the law forbidding an advance on existing defined rights.

The civil law fiction was again considered in *Montreal Tramways* v. *Leveille*.[12] Here, the guardian of a child sued under the Quebec Civil Code which read: "Every person . . . is responsible for the damage caused by his fault to another." Due to the driver's negligence, a woman, seven months pregnant, fell from a tram. Two months later, she gave birth to the child who was found to be suffering from club feet. The deformity was attributed to the mother's fall, and damages were awarded against the tramways company. The Court held that the unborn child was at the time of the accident within the meaning of the word "another". To Lamont J., with whose judgment Rinfret and Crocket JJ. agreed, it was but natural justice that a child should

8. Per Lord Devlin *Hedley Byrne* v. *Heller*, n. 2, at p. 525; 608.
9. Vol. 37, (3rd ed.), p. 121, n. (u).
10. (1891) 28 L.R. Ir. 69.
11. Ibid., at p. 81.
12. (1933) 4 D.L.R. 337.

be able to maintain an action for injuries wrongfully inflicted while in its mother's womb. The judge considered the civil law fiction to be of general application, and therefore, when the child was born, "it was clothed with all the rights of action which it would have had if actually in existence at the date of the accident."[13] Smith J. dissented; and though he admitted the point to be doubtful, he considered the civil law fiction as to unborn children to refer only to their property rights. The learned judge advanced no authority or reasons for his view. Cannon J.'s judgment is more germane to *Watt* v. *Rama*. This learned judge thought it unnecessary to apply the civil law fiction at all. Under the statute, the sole issue was whether the mother's fall, occasioned by the defendant's negligence, had caused the damage to the child. That enquiry rendered it unnecessary to attribute a personality to the child at the time of the accident. Rather, its legal rights arose at the time of its birth; and it was at that stage that the damage that gave the child a cause of action was suffered.

In South Africa, the case of *Pinchin* v. *Santam Insurance Co. Ltd.*[14] upheld a cause of action based on the same fiction. However, the action failed as the medical evidence left it uncertain whether the negligence of the insured had been the cause of the child's condition.

Early American decisions denied a child a claim. No doubt this attitude largely resulted from a judgment of Holmes J. in *Dietrinch* v. *Northampton*.[15] That eminent judge rejected the notion that "a man might owe a civic duty, and incur a conditional prospective liability in tort to one not yet in being . . ."[16] Since the 1946 case of *Bonbrest* v. *Kotz*,[17] however, the general trend has been to favour an action for pre-natal injury. Yet, different States, allowing a claim, have adopted various of the approaches enunciated above. Many States have required, before granting a remedy, the viability of the foetus.[18] In later cases, some courts have been prepared to accord legal personality to the zygote. The American authorities do not display consistency in the principles to be applied.

In the cases outlined above the courts have, in the main, been concerned to establish the existence of a person to whom a duty could be owed at the time when the fault was committed. It is considered that the reasoning in *Walker's* case, above, cannot subsist after *Donoghue* v. *Stevenson*. Liability to the victim does not depend on any contract with it; and knowledge of the victim's presence is not a pre-requisite to a duty attaching to the wrongdoer. The persuasive value is further diminished by the later development of negligence as an independent tort. As Lord Reid has commented:

13. Ibid., at p. 344.
14. [1963] 2 S.A. 254.
15. 138 Mass. 14 (1884).
16. Ibid., at p. 16.
17. 65 Fed. Supp. 138.
18. At this stage the foetus is considered separate and distinct from its mother.

> In later years 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.[19]

It was to the basic principles of negligence that the Court in *Watt* v. *Rama* turned.

Judgment of Winneke C.J. and Pape J.:

These judges first emphasized that they were not dealing with a claim by a child still *en ventre sa mère;* nor with a claim by the estate of a stillborn child. They were dealing with a claim by a legal person for injury suffered while in its mother's womb;

> The real question posed for our decision is not whether an action lies in respect of pre-natal injuries but whether a plaintiff born with injuries caused by pre-natal neglect of the defendant has a cause of action in negligence against him in respect of such injuries.[20]

It is basic knowledge that negligence in the legal sense involves the complex concept of duty, breach, and damage suffered by the person to whom the duty was owing.[21] Whether or not a duty is owing is a question of law. A legal duty is one which requires conformity to a certain standard of conduct for the protection of others against unreasonable risks. The two judges noted "that the duty is not simply one to take reasonable care in the abstract, but to take reasonable care not to injure a person whom it should reasonably have been foreseen may be injured by the act or neglect if such care is not taken."[22] This test plays the double role of determining the existence of a duty and also of determining the question of remoteness of damage. It is unnecessary to prove knowledge on the part of the defendant of the presence of the victim in the area of risk, and it is unnecessary for the neglect or omission and the damage to occur contemporaneously.[23] Applying the basics to the present claim, it was clear that, as regards the mother, the defendant owed her the requisite duty to take care; and her special condition of pregnancy brought the case within the "egg-shell skull" rule.[24] The judges, moreover, considered it was reasonably foreseeable that a *pregnant woman* could be injured

19. *Dorset Yacht Co. Ltd.* v. *Home Office,* [1970] A.C. 1004 at pp. 1026, 1027: [1970] 2 All E.R. 294 at p. 297.
20. At p. 358.
21. See Lord Wright, in *Lochgelly Iron & Coal Co.* v. *M'Mullan* [1934] A.C. 1 at p. 25.
22. At p. 359.
23. Clearly the foetus is damaged, but, damage in the legal sense can only arise when a living person sustains it. The plaintiff's claim is, and can only be, for damage she suffered at or after birth due to the prior negligent act. Thus, injury to the foetus is only an evidentiary fact relevant to the issue of causation; see pp. 360-361.
24. *Dulieu* v. *White* [1901] 2 K.B. 669.

by the defendant's neglect. An analogy is the case of *Haley* v. *London Electricity Board*,[25] where the House of Lords held that persons carrying out excavations in a London Street ought to foresee the presence of blind persons. The number of blind persons who go about the street (some 7000 in London alone) was sufficient to require the defendants to have them in contemplation. The two judges here had no difficulty in reasoning that if a pregnant woman might foreseeably be injured, it is equally foreseeable that the child she is carrying could at birth be injured.[26]

However, this required the judges squarely to face the conceptual problem raised by the defence — how can there be a duty owed to one who had no existence as a person at the time of the neglect? How could the necessary relationship arise between the parties so as to impose on the one side a duty to take care and on the other side a right to have care taken? The relationship was held to arise *at the time of the injury.*

> (The) circumstances . . . constituted a potential relationship capable of imposing a duty on the defendant in relation to the child if and when born. On the birth, the relationship crystallized and out of it arose a duty on the defendant in relation to the child . . . (A)s the child could not in the very nature of things acquire rights correlative to a duty until it became by birth a living person, and as it was not until then that it could sustain injuries as a living person, it was, we think, at that stage that the duty arising out of the relationship was attached to the defendant, and it was at that stage that the defendant was . . . in breach of the duty to take reasonable care to avoid injury to the child.[27]

Although the judges saw a potential relationship arising at the time of the collision, the duty and its breach were projected forward to birth. The situation was seen to be analogous to the products liability cases, where there is a duty of care to the ultimate consumer. In these cases, the relationship imposing the duty is only potential — until the goods are used there can be no particular duty owing to a specific person. For, as Lord Wright pointed out, the goods may never be used: they may be destroyed by accident; they may be scrapped; or, in many ways they may fail to come into use in the normal manner.[28] The duty, therefore, is at the time of manufacture only to an inchoate class of persons. It may, however, be considered a breach of duty

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25. [1965] A.C. 778; [1964] 3 All E.R. 185.
26. The judges had in mind, no doubt, that the present birth rate must indicate an abundance of pregnant women. Statistics aside, it must be recognized that the judges, in applying the foreseeability doctrine are, in essence, making a value judgment that the plaintiff's interests are worthy of protection.
27. At p. 360.
28. *Grant* v. *Australian Knitting Mills Ltd* [1936] A.C. 85 at p. 104; [1935] All E.R. Rep. 209 at p. 217.

when the person is ultimately injured.[29] There is nevertheless a duty at the time of manufacture to those who might foreseeably be injured and a correlative right by such persons to have care taken.

The majority in *Rama's* case could not conceive of a duty attaching to the defendant in relation to the child until she was born. There is nothing, however, in law to prevent an unborn or non-existent "person" having rights contingent on birth. Although the rights are contingent, and the child may never be born to enjoy them, they are nevertheless real and present.[30] In *Rama,* a duty could be considered owing at the time of the collision by the defendant not to the foetus but to the child at birth. This approach avoids the obvious conceptual problems of projecting the duty into the future.

Judgment of Gillard J:

This judge deals with the issue in greater detail, and, in some ways, more satisfactorily. His Honour realised the artificiality of considering the existence of a duty of care in isolation from the elements of breach and damage. He adopted the approach of Lord Pearson in the *Dorset Yacht* case;[31] and reversed the familiar order of inquiry and began with damage. As Lord Reid had pointed out in *Dorset Yacht:*

> . . . the question is really one of remoteness of damage.[32]

Thus, if the damage suffered here is in the range of potential damage which was foreseeable, and if causation can be established, then a duty can normally be inferred. Foreseeability as to the likelihood of the infant plaintiff being injured is the vital matter to be determined, and to resolve this, the test as enunciated by Lord Atkin in *Donoghue* v. *Stevenson* was, in essence, employed by the judge. Was it foreseeable by the defendant, as a reasonable man, that the child "was a person likely to suffer a disability, when born, by his careless driving?"[33] Under the "Atkinian" test it would be immaterial whether at the time of the fault the victim was in existence or not — the ginger beer in *Donoghue's* case could be conusmed by a person born on unborn at the time of its manufacture. His Honour thought that the damage to the infant plaintiff ought to have been in the defendant's contemplation at the earlier time of his driving:

> The unborn should be included in the class of persons likely to be affected by his carelessness since the regeneration of the human species implies the presence on the highway of many pregnant women.[34]

29. The breach of duty may be considered the neglect in manufacture, or the supply of the defective goods, or when injury occurs — see *Watson* v. *Fram Reinforced Concrete Co. Ltd.* [1960] S.C. (H.L.) 92, esp. Lord Denning at p. 115.
30. See Salmond, *Jurisprudence* (12th ed.) Book 3, at p. 41.
31. Supra, n. 19.
32. Ibid., at p. 1027; 298.
33. At p. 370.
34. At p. 374.

Therefore, the learned judge would impose a duty on the defendant to take reasonable care in his driving not to injure the plaintiff at birth. Breach of the duty was the actual injury suffered at birth.

Moreover, his Honour was inclined to uphold the plaintiff on the second approach. That is, he would attribute existence to her at the time of the accident if that were necessary to found her claim.[35] As mentioned previously, for some purposes a person is regarded in law as having been born at the time it was in its mother's womb. The judge made reference to these cases, found mainly in the Court of Chancery. In one such case, Buller J. had stated:

> It seems now settled that an infant *en ventre sa mère* shall be considered generally speaking as born for all purposes for his own benefit.[36]

However, the cases listed are concerned, in the main, with devolution of property and it can be questioned whether the statements in them were intended to be of general application.[37]

Further, his Honour considered the criminal law, wherein an unborn child does obtain some protection, providing it survives its birth. In *R.* v. *Senior*[38] a child died after birth, caused by accused breaking the skull of the infant while still *en ventre sa mère*. He was found guilty of manslaughter.

Finally, there is an examination of cases where a child *en ventre sa mère* comes within the Workers Compensation Act, and Lord Campbell's Act.[39] In these areas it is recognised that the fiction applies, and deems the unborn child at the relevant time a "person" or "dependant" within the meaning of these Acts.

The learned judge could find neither principle nor logic preventing his applying the fiction in actions for negligence. This would establish the plaintiff, at the time of the accident, "a person" to whom a duty could be owed. Support for this is to be found in the judgments of *Léveillé* and *Pinchin* discussed above. The judge acknowledged that this second approach was unnecessary.

In the result, *Watt* v. *Rama* affords a good illustration of the difficulty with, and the redundancy of, the concept of duty in the law of negligence. The judges refused to allow the concept of duty to prevent their holding the defendant liable for foreseeable damage.

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35. By this fiction, breach and damage occur to the plaintiff at the time of the accident.
36. *Doe d. Clarke* v. *Clarke* 2 H. Bl. 399, 401; 126 E.R. 617, 401.
37. Cf. Lamont J. in *Leveille*, n. 12 at p. 344.
38. (1832) 1 Mood. & R. 346; 168 E.R. 1298. In *Walker*, supra, n. 10, Johnson J. pointed out that this analogy between crime and tort is false; one being a public, the other being a private wrong.
39. E.g. *Williams* v. *Ocean Coal Co. Ltd* [1907] 2 K.B. 422; *Schofield* v. *Orrell Colliery Co. Ltd* [1909] 1 K.B. 178.

Causation:

Watt v. *Rama* will be of academic importance only if the infant, Alice Watt, has succeeded in all points of law only to find the impossibility of proving in fact that her injury was caused by the defendant's negligence. Although the Victorian Court was not confronted with this problem, many cases must collapse through inability to prove causation. It is for this reason that an understanding of the problem is desirable.

Medicine had proceeded for years on the supposition that the cause of congenital malformations lay in hereditary factors. Only since the Second World War have doctors realised that the environment plays an integral role, but there still remains considerable disagreement as to the specific outside influences that cause specific malformations. Disease, drugs, radiation, trauma, shock, emotional distress, and even smoking, are some of the agents which may influence the growth of the foetus. Allegations that the pesticide, 2,4,5-T, caused foetal abnormalities were recently raised in our Supreme Court.[40] The evidence was based mainly on experiments of the effects of the poison on the progeny of small rodents. The evidence was held to be inconclusive. In *Léveillé*, one may well have been sceptical of the evidence as to the cause of the child's club feet. The case for the plaintiff was that her mother had lost amniotic fluid due to her fall; that the uterus contracted and forced the feet of the baby into such a position that club feet developed. Prominent doctors called by the defence contradicted this theory of causation. The majority of the Court was not prepared to interfere with the jury's verdict; only Smith J., dissenting, was minded to characterise the plaintiff's theory as a "mere guess".[41] Hiemstra J. in *Pinchin* thought the jury in *Léveillé* rather gullible; and the kindest that could be said for its finding was that "in medicine anything is possible".[42] However, the Courts of law are not concerned with possibilities. It is the weight of evidence on balance of probabilities which must guide them.

In this respect, we have the careful and competent balancing of the evidence in *Pinchin's* case. The pregnant woman, through a motor vehicle accident, suffered a gross loss of amniotic fluid through a ruptured membrane of the uterus. The child was born three months later suffering from cerebral palsy. In the circumstances the foetus would almost definitely have suffered from oxygen deprivation for some time, which is an accepted and well-known cause of cerebral palsy. However, the learned judge concluded:

> . . . the likelihood that the loss of fluid led to the cerebral

40. *Environmental Defence Society Incorp.* v. *The Agricultural Chemicals Board*, judgment 21 May 1973. Note: the Board had balanced "the benefits of 2,4,5-T against the possible risks"; p. 6. As to foreseeable damage and the justification in disregarding it, see *Bolton* v. *Stone* [1951] A.C. 850.
41. Supra, n. 12 at p. 366.
42. Supra, n. 12 at p. 256.

palsy is not stronger than the opposite contention. That means the plaintiff's case has not been proved on a balance of probabilities.[43]

With the present state of medical knowledge, speculation and conjecture must inevitably arise in many instances as to the probable cause of malformation. The problem does accentuate insistence on convincing medical evidence to establish the required link between pre-natal injury and its post-natal manifestations.

Legal Status of Unborn Child:

The approach which found favour with the Court in *Rama's* case avoids determining the legal status of the unborn child, but requires only a causative link between the plaintiff's condition and the defendant's wrongful act. However, what are the rights of the child to have an action in tort brought on its behalf while still *en ventre sa mère?* Does the foetus have any legal personality? The Court in *Rama* did advert to the cases where this point was in issue.

In *The George and Richard,*[44] a suit in Admiralty for limitation of liability, the widow was pregnant at the time of the collision at sea. An appearance was entered on behalf of the child *en ventre sa mère.* Phillimore J. held that a posthumous child possessed a right to claim under Lord Campbell's Act for the wrongful death of its father, although no adjudication on the matter could be made until its birth. That case was relied on in *Manns* v. *Carlon*[45] where a pregnant woman sued under the Wrongs Act[46] claiming damages for herself and her unborn child. The defendants sought to have all reference to the unborn child struck out. Martin J. granted, on the balance of convenience, a stay of trial until its birth.

Although there is a dearth of authority on the subject, an observation by Loreburn L.C. that an unborn child may be a party to an action cannot be supported.[47] Perhaps an action can be commenced on its behalf, for the law recognises its potential existence, but it appears from the above authorities there can be no adjudication until its live birth.

Life in law begins at live birth, whereas to Medicine and Religion life begins at conception. Why not consider the child *en ventre sa mère* distinct from its mother and accord it legal personality? "It is obvious that 'the person' who is conceived and develops in the mother's body is biologically the same 'person' who survives birth, lives, and finally dies".[48] It is this biological approach that many American

43. Ibid., at p. 263.
44. (1871) L.R. 3 A. & E. 466.
45. (1940) C.L.R. 280; (1940) A.L.R. 184.
46. Cf., the Deaths by Accident Compensation Act, 1952 (N.Z.).
47. *Villar* v. *Gilbey* [1907] A.C. 139 at p. 144.
48. Per Gillard J. at p. 377.

decisions have adopted in respect of pre-natal injuries and have accorded legal personality to the zygote. However, this approach is accompanied by many uncertainties and inconsistencies. Once there is life there can be death; and, taking the cases to their logical conclusion, an action could be brought before birth, and if stillborn, even by the unborn child's estate. Many States have balked at the extension, and have held legal personality to be conditional on live birth. But in *Rainey* v. *Horn*,[49] the Supreme Court of Mississippi decided that once the foetus had reached viability, it was a person, separate and distinct from its mother, and therefore, if stillborn, an action could be maintained under the wrongful death statute. Clearly, this is not the situation in English law. An action under Lord Campbell's Act is maintainable on behalf of a child — but only when the child is born — by applying the civil law fiction. Incongruous as it may seem, an action for the benefit of the stillborn child's family for its wrongful death while *en ventre sa mère* is not maintainable; the civil law fiction applies only if it be for the child's benefit.

Scope of Watt v. Rama:

The Court in *Watt* v. *Rama* has recognised that a child has a right to compensation for wrongs committed to it while *en ventre sa mère*. It now remains to be seen the extent to which litigation is open to the malformed child. What, for instance, is the position where the wrongful act is committed before the child is even conceived? Thus, in West Germany, a hospital negligently gave a woman a transfusion of blood from a syphilitic donor. The Civil Senate of the Supreme Court of West Germany held that a cause of action accrued to a child who was later conceived and born to the woman, and who was suffering congenital syphilis.[50] In English law, Street makes the enquiry: ". . . can one doubt that a manufacturer who carelessly prepared baby food is answerable to a child injured thereby even though he made it before birth (or even conception)."[51]

By adopting the approach in *Watt* v. *Rama*, liability is attached to the hospital[52] or manufacturer (immediately above) as owing a contingent duty to one not yet in being. There would be no need to postulate a continuing duty; or a breach at the time of the injury; or project the duty into the future. Clearly, this paves the way for liability of the manufacturers of the drug thalidomide to the affected children.[53] This drug was distributed widely throughout the world.

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49. 72 S. 2d 434 (1954). See also, *Verkennes* v. *Corniea* 38 N.W. 2d 838 (1949); *Hatala* v. *Markiewicz* 224 A. 2d 406 (1966).
50. See Gordon, "The Unborn Plaintiff" (1965), 63 Mich. L. Rev. 579 at p. 614.
51. *The Law of Torts*, (5th ed.) p. 109, n. (i).
52. Causation may prove some difficulty here: was the injury caused by the hospital or by the subsequent act by which the plaintiff was conceived, a *novus actus interveniens?*
53. See Bennett, *"The Liability of the Manufacturers of Thalidomide to the Affected Children"* (1965) 39 A.L.J. 256.

In the areas where the drug was available, its use by pregnant women resulted in a high proportion of malformed births. It was discovered that the foetus was highly susceptible to the effects of the drug in the first three months of pregnancy. The availability of legal redress to the affected children has not as yet been determined by the Courts.[54] Not only has there been the difficulty in proving negligence, or, to a lesser extent, even causation, but also in determining whether in this situation a cause of action exists.

Instances of pre-natal damage carelessly inflicted are legion. With the lead now given by *Watt* v. *Rama,* a child born injured will not be without remedy when it is able to rely on the foreseeability doctrine.

Application to other Torts:

The issue in *Watt* v. *Rama* brings into focus the unborn child in relation to other torts.

(i) *Assault:* This is the intentional infliction of harm on the *person* of another. An illustration is of a child born with injuries resulting from an abortion attempted by its mother or by some other person. If one, knowing that a woman is carrying a child, intentionally damages the foetus, the child, when it suffers legal damage at birth, could be considered at that stage to have been assaulted. It would be incongruous indeed if a child had redress for negligent but not intentional acts before birth. O'Brien C.J. in *Walker's* case, above, expressly guarded against denying possible recovery in this situation, and Hiemstra J. in *Pinchin* thought the child should have an action. In any event, the civil law fiction may apply if an assault does require contemporaneous harm to the person and an intentional act.

(ii) *Injury to Reputation:* A defamatory statement is one which is calculated to injure the reputation of another by exposing him to hatred, contempt, and ridicule. Street[55] states that any person who is in being may be defamed. There appears no reason why the defamatory statement could not be made before a person exists, e.g. imputation of illegitimacy of child *en ventre sa mère,* so long as the person suffers the required damage to his reputation at or after birth to provide him his cause of action. If a person need be in existence at the time of the defamatory remark, arguably the civil law fiction could apply.

(iii) *Injury to Property:* It is possible for an unborn child to have present title to property. There would seem no reason why, when it attains the necessary legal personality, it could not sue in tort for any damage done to its property before birth.

54. In *S.* v. *Distillers Company (Biochemicals) Ltd.,* (1970) 1 W.L.R. 114 claims were compromised at 40% and the question before the court was as to quantum of damages only.
55. Supra, n. 51 at p. 289.

(iv) *Deprivation of Rights:* In the interesting American case of *Williams* v. *State of New York*[56] a child sued the State for a negligent act committed before her birth, namely, failing to provide proper care for her mother in a mental hospital, in consequence of which the mother had been raped and the child conceived. The child claimed damages in that she had been deprived of property rights of a normal childlhood, and caused to bear the stigma of illegitimacy. The Court of Appeals refused to recognise any actionable wrong. In fact, there was regarded to be no wrong to the child — without the very negligence of which she complained, she would not have been born at all. It is difficult to imagine that life can ever be considered a "loss". Desmond, Chief Judge, said:

> Being born under one set of circumstances rather than another or to one pair of parents rather than another is not a suable wrong that is cognizable in Court.[57]

However, in an earlier case[58] the Appellate Court of Illinois recognised that an illegitimate child may have a wrong inflicted on it and suffer damage and disability thereby. The Court relied on the American cases in connection with damage to an embryo by acts committed during gestation or before conception, The Court, nevertheless, finally rejected the cause of action, solely on policy grounds of the far-reaching consequences of such a decision.

In many instances, it may be known or be reasonably foreseeable that a child will be born injured if an act of intercourse takes place. For example, a child conceived from a parent suffering from syphilis. It is suggested, however, that the Courts are unlikely to recognise any duty of care not to injure the child in these circumstances. Imposing a duty is a value judgment that the plaintiff's interest is worthy of legal protection. The interest affected by the act is not the right to be legitimate, or born without deformity, but, the complaint is of life itself.[59]

(v) *Accident Compensation Act 1972:* With the future availability of compensation under this Act for personal injury by accident, it is desirable to give consideration to the position of a child whose injuries are received while *en ventre sa mère.*

It is regrettable, and indeed remarkable that the comprehensive scheme of compensation provided by the Act should fail to consider injury by accident to the unborn child. The Act speaks of personal injury. For example s. 102B, inserted by the 1973 Amendment (No.

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56. 276 N.Y. Supp. 2d 885 (1966).
57. Ibid., p. 887.
58. *Zepeda* v. *Zepeda,* 190 N.E. 2d 849 (1963).
59. Beating J. in *Williams,* n. 56 at p. 888 talks of the 'logico-legal' difficulty of permitting recovery when the very act which caused the plaintiff's birth is the same one responsible for whatever damage the child has suffered or will suffer. On this topic, see Tedeshi *On Tort Liability for "Wrongful Life"* (1966) 1 Israel L. Rev. (No. 4) at p. 1.

2), states that all persons shall have cover under the supplementary scheme in respect of personal injury by accident if they do not have cover in respect thereof under either the earner's scheme or the motor vehicle accident scheme. Does the language of this section and other similarly phrased sections require the legal existence of the person at the time of the accident?

Relying on the approach of Cannon J. in *Leveille*[60] and of *Watt* v. *Rama*, it can be maintained that if the child survives birth and is suffering personal injury, and causation is established, its right to compensation then arises. It is at birth that the child suffers the personal injury by accident. This interpretation is consistent both with the language and with the spirit of the legislation.

In any event, if the argument is advanced that the language is framed as suitable only to persons existing at the time of the accident, then, indeed, there is strong argument for application of the civil law fiction. As previously mentioned, under the Workers' Compensation Act and Lord Campbell's Act, a child is treated as a "dependant" and as a "person", even when *en ventre sa mère*. These decisions do not turn upon the interpretation of the Act in question; but they turn on a "peculiar fiction of law by which a non-existent person is to be taken as existing".[61] The cases of *Léveillé* and *Pinchin* confirm the existence and application of the fiction. Thus, in the latter case, an insurance company was obliged to compensate "any person whatsoever for any bodily injury or death caused or arising out of the driving of an insured motor vehicle". Hiemstra J. treated an unborn child as alive at the time of the accident so as to come within the section.

It is submitted that either view advanced here would find acceptance in the New Zealand courts; but certainly the first-mentioned approach is to be preferred. The child's non-existence at the time of the accident is immaterial; and only a causative link need be established between the accident and the injury. This avoids the unreality of the civil law fiction.

Conclusion:

Watt v. *Rama* is the first Commonwealth decision to recognise a cause of action at common law for pre-natal injuries, negligently inflicted. The decision was reached, superficially, on the application of strict legal principle. In essence, however, it is a resort to public policy, to social expediency, which has rendered "the law . . . what it ought to be."[62]

Whatever one's views of the respective functions of the legislature

60. (1933) 4. D.L.R. 337.
61. Per Fletcher Moulton L.J. in *Schofield* [1909] 1 K.B. 178, at p. 182.
62. Per Stephenson L.J. in *Binions* v. *Evans* [1972] Ch. 359 at p. 373.

and judicature, the Courts are not permitting the law to remain inflexible, uncompromising to new situations, or indifferent to the social environment of the times. Already Canada has followed the *Watt* v. *Rama* approach, in *Duval* v. *Seguin*.[63] One can expect that a New Zealand court will be moved to a similar result. The way is already signposted with the remarks of Turner J. in *Bognuda* v. *Upton & Shearer Ltd.*:

> The law must not be allowed to atrophy through failure to evolve with the times . . . 'The important point . . . is that a decision to expand or not to expand the existing area stems from policy not law'.[64]

The common law is now equal to the challenge of equiparating law to the social conscience of the times.[65]

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63. (1972) 26 D.L.R. (3d) 418.
64. [1972] N.Z.L.R. 741, at p. 764.
65. The Law Commission in England has provisionally recommended in a working paper (No. 47) published 19 January 1973 that a child should be able to sue for pre-natal injury; also against the mother if negligent during pregnancy. Moreover, any defence against the mother, as *volenti non fit injuria* would be inapplicable to the child. This, it is suggested, is adequately covered by the common law in the light of *Watt* v. *Rama*. It is difficult to see legislative intervention in this area as either helpful or desirable.

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