LYNCH v. LYNCH & ANOR[1]

INTRODUCTION

Lynch v. Lynch & Anor is an example of a negligent driving action yielding a landmark decision in Australian tort law. The significance of this decision lies in the fact that the defendant was pregnant at the time of the accident and the plaintiff was her daughter, born with cerebral palsy, seeking damages for the prenatal injury allegedly suffered as a result of her mother's negligent driving. The plaintiff succeeded in her claim at both the Trial and Appeal Courts, and substantial damages were awarded. Both Courts, however, were faced with the difficulty of deciding a case without Australian precedent to guide it. That the defendant drove negligently was quickly established as was the causal link between this and the injury suffered.[2] The central question discussed was whether a pregnant woman owes her foetus a duty of care. The criteria of foreseeability and proximity[3] were clearly fulfilled but it was on policy considerations, including the question of the legal rights of an unborn child, that the case was principally argued. In *Lynch v. Lynch*, the Court of Appeal was faced with a series of complex moral and social issues.

THE SCOPE OF THE DECISION

The plaintiff succeeded in her claim at the trial level against her mother but failed against the second defendant, the owner of the motor vehicle, who was not found to have negligently maintained the vehicle.[4] The first defendant appealed against the damages which were awarded to the plaintiff claiming that where gratuitous nursing assistance was provided by the tortfeasor herself, such damages should not be awarded for the plaintiff is doubly compensated and the defendant is made to pay twice.[5] This appeal was dismissed by the Court of Appeal where it was decided that regardless of how services are provided, a fair value must be placed upon them in damages assessment, particularly in the case of an insured defendant.[6] On the question of damages, the Court of Appeal allowed a cross-appeal by the plaintiff against a fifteen percent reduction in damages by the trial judge which was to reflect the vicissitudes of life.[7]

The defendant's most significant ground of appeal, however, was that no

1 (1991) 25 N.S.W.L.R. 411 (Gleeson, C.J., Clarke, J.A., Hope, A.-J.A.).
2 See decision at first instance: *Lynch v. Lynch & Anor* [1991] Australian Torts Reports, 69,090, 69,094.
3 *Jaensch v. Coffey* (1984) 155 C.L.R. 549, 586 *per* Deane J.
4 [1991] Australian Torts Reports, 69,090, 69,091.
5 (1991) 25 N.S.W.L.R. 411, 418.
6 *Ibid.* 420.
7 *Ibid.* 418.

duty of care was owed by her in respect of prenatal injury suffered by her child.[8] This was submitted to be due both to policy considerations and the lack of an independent identity of the foetus prior to birth.[9] This appeal was also dismissed by the Court who upheld the decision of the trial judge with regard to this difficult question.[10]

Both Courts relied upon the decision of *Watt v. Rama*[11] and *X & Y v. Pal*[12] in determining whether a person has a general right to sue for injuries suffered prior to birth.[13] The principle emerging from these cases was that where a plaintiff is not legally defined at the time of the tort, the duty and legal rights may nonetheless crystallize at birth. The Courts accepted these authorities.

The question about which most debate arose was whether to extend this right of action for prenatal injuries to allow the plaintiff to sue her mother. Counsel for the defendants argued that because there was a unity of personality at the time of tort commission, there was no separate tortfeasor and victim, and an action cannot be brought against oneself.[14] The trial judge rejected this, holding that it would be artificial to claim that the foetus was devoid of personality and simply part of the mother.[15] The American case *Grodin v. Grodin*[16] was considered and supported this conclusion.[17]

Although the decision of the trial judge in *Lynch* appeared to extend a duty of care over foetuses to include all pregnant women, the Appeal Court was careful to limit its decision to situations involving motor vehicle accident claims. In doing so, the Court seemed to be drawing upon principles set down by the English Law Commission in its *Report on Injuries to Unborn Children*.[18] It was decided that children should not generally be allowed to sue mothers for antenatal injuries except in cases where there is compulsory motor vehicle insurance. The Court in *Lynch* justified its decision on the basis that, under the Motor Vehicles (Third Party Insurance) Act 1942 (N.S.W.), compensation is available to everyone for injury as a result of negligent driving and there is therefore no reason to exclude the plaintiff.[19] Clarke J.A. commented, 'the question with which this court is concerned is a narrow one and does not, in my opinion, involve far reaching questions of policy'.[20]

The Court in *Lynch* was intent upon the compensation of a deserving plaintiff, and the judgment is tailored to this end. However there are serious

8 *Ibid.* 414.
9 *Ibid.* 414-5.
10 *Ibid.* 418.
11 [1972] V.R. 353.
12 (1991) 23 N.S.W.L.R. 26.
13 *Watt v. Rama* [1972] V.R. 353, 360.
14 [1991] Australian Torts Reports, 69,090, 69,095.
15 *Ibid.* 69,096.
16 301 N.W. 2d 869 (1980) (Michigan).
17 [1991]) Australian Torts Reports, 69,090, 69,095.
18 English Law Commission, *Injuries to Unborn Children* Report no. 60 (August 1974), which led to the Congenital Disabilities (Civil Liability) Act 1976 (Eng.).
19 (1991) 25 N.S.W.L.R. 411, 415-6.
20 *Ibid.* 415.

doubts as to whether the limitation of the decision according to the availability of insurance will survive in future cases. It is contrary to both authority and principle for a duty of care to be determined by insurance. The majority of the High Court in *Cook v. Cook*[21] was strongly critical of Lord Denning for coming to a similar conclusion in *Nettleship v. Weston*[22] when he stated, 'morally [the defendant] is not at fault; but legally she is liable because she is insured and the risk should fall on her'.[23] It was commented in *Cook* that:

> the approach which these comments depict is not one which should be adopted by courts in this country where it has long been accepted that it is for the legislature, and not the courts, to decide whether considerations of social policy make it desirable that the traditional standards of the law of negligence should be abandoned in favour of a system of liability without fault.[24]

The law of negligence is not merely a mechanism for compensating deserving individuals, but also a means of establishing principles of behaviour across society. If a duty of care is to be imposed upon pregnant women, then the same standards should apply irrespective of insurance. It is therefore submitted that the significance of *Lynch* extends beyond motor vehicle accident cases. If the limitation imposed by *Lynch* is rejected in future cases, the entire realm of a mother's activities during pregnancy may become open to liability.

PREGNANCY AND THE DUTY OF CARE

The prospect of a general duty of care owed by mothers to their foetuses raises a number of concerns from a feminist perspective. One major area of concern lies in the fact that the law would be separating the interests of the foetus from those of the mother. The relationship between the two contains a number of unique elements: the foetus depends exclusively on the mother who puts herself at risk and must undergo biological changes to give life to the foetus, and throughout the entire pregnancy, all of the mother's actions influence the foetus's physical well-being.[25] For the civil law to treat the interests of the two parties as hostile and disconnected is an artificial and inappropriate approach. By allowing foetus-mother negligence actions, the law would not only be denying the uniqueness of such a relationship but would be making the mother and child 'legal adversaries from the moment of conception until birth'.[26] In the United States, there has been both judicial and academic discussion of the dangers of severing the two interests.[27]

Those who oppose legal action against mothers for prenatal injury argue

21 (1986) 162 C.L.R. 376.
22 [1971] 2 Q.B. 691.
23 *Ibid.* 700.
24 (1986) C.L.R. 376, 385.
25 *Stallman v. Youngquist* 531 N.E. 2d 355 (1988) (Illinois).
26 *Ibid.* 360.
27 *Ibid.*; *Grodin v. Grodin* 301 N.W. 2d 869 (1980) (Michigan); Note, 'Maternal Rights and Fetal Wrongs: The Case Against the Criminalisation of Fetal Abuse' (1988) 101 *Harvard Law Review* 994; Johnsen, D., 'The Creation of Fetal Rights: Conflicts with Women's Constitutional Rights to Liberty, Privacy, and Equal Protection' (1986) 95 *Yale Law Journal* 599; Robertson, J., 'Procreative Liberty and the Control of Conception, Pregnancy and Childbirth' (1983) 69 *Virginia Law Review* 405; Beal, R., '"Can I Sue Mommy?" An Analysis of a Woman's Tort Liability for Prenatal Injuries to her Child Born Alive' (1984) 21 *San Diego Law Review* 325.

that liability would 'infringe on [a woman's] rights to privacy and bodily autonomy'.[28] Almost any decision a woman makes with regard to her own body during pregnancy has the potential to affect the developing foetus.[29] By allowing legal action between the two parties, the law would be subjecting to scrutiny every decision a woman makes during the nine month period.[30] Not only does this infringe on her right to control her own life but also questions her decision-making abilities, implying that a predominantly male legal system has and should have the right to seize and control the decision-making powers of the pregnant woman with regard to her own person.[31]

Concern has also been voiced with regard to the detrimental effect such actions would have on sexual equality within the community. The burden resulting from foetus actions would fall solely upon women as a product of their biology.[32] Allowing mothers to be found liable for unintended prenatal injury to their foetuses not only focuses on a woman's child-bearing capacity but in fact defines her solely in terms of her reproductive function.[33] The law would be reinforcing traditional sex roles by treating her during her nine month pregnancy as little more than a 'baby- machine'. As a consequence, the pregnant woman's life could be regulated in areas from nutrition to employment in such a way that she is yet again denied the ability to participate as a full member of the community.[34]

On a more practical level, problems emerge with respect to implementing legal actions between mother and child for prenatal injury. Of major concern is the difficulty of imposing the universal standard of 'the reasonable pregnant woman'. *Stallman v. Youngquist* noted that pregnancy is experienced not only by women who have the ability to create the best possible environment for the foetus.[35] Amongst pregnant women there is a great variation in socio-economic position, cultural attitudes, education, employment and access to good health care. Furthermore, pregnancies are often unplanned and unknown. To define a universal standard of behaviour would not only impose insuperable difficulties but is also insensitive to this diversity.

The impact of legal action on the family unit is another area of concern. The relationships within a family in which there is a disabled child are frequently stressful. To increase this factor by adding the potential of legal liability is far from desirable.[36] There is the possibility of such an action being used as a weapon in matrimonial conflict,[37] for example, or as a form

28 *Stallman*, *supra* n. 25, 360.
29 Note, 'Maternal Rights and Fetal Wrongs: The Case Against the Criminilisation of Fetal Abuse' (1988) 101 *Harvard Law Review* 994.
30 *Stallman*, *supra* n. 25, 360.
31 Note, *supra* n. 29, 624.
32 Johnsen, *op. cit.* n. 27, 620.
33 *Ibid.* 625.
34 *Ibid.*
35 531 N.E. 2d 355 (1988) (Illinois), 360.
36 English Law Commission, *Injuries to Unborn Children*, Report no. 60 (August 1974).
37 *Ibid.* 23.

of punishment imposed on the mother by a husband or relative, disenchanted with the birth of a disabled child.[38] The psychological effect of focusing on the child's injury and blaming the mother could also be potentially destructive to the family unit. A disabled child in need of maternal care and affection could be made an adversary in a prolonged legal battle, and unwanted conflict could be fostered within family relationships.

To criticize the expansion of a mother's liability for prenatal injury, however, by no means implies that the mother has no responsibility to care for the foetus nor that she can behave entirely as she wishes. It suggests rather that this duty remains on a moral level. It seems reasonable to assume that all women wish their foetuses to be born as healthy as possible. As was stated in *Stallman*, the best way to ensure the health and well-being of our children 'is not ... through after-the-fact civil liability in tort for individual mothers, but rather through before-the-fact education of all women and families about prenatal development'.[39] Pregnant women should be aided and encouraged to make informed decisions about their behaviour based upon medical knowledge; however, the decision should always be their own and a perceived error in judgment should not open the gates to legal liability.

Those who support the expansion of a mother's liability for prenatal negligence argue that it is precisely because of the uniqueness of their relationship that a duty of care should be recognized. The very fact that there is a unique dependence and that the two parties' lives are so closely intertwined is what creates the need for the duty of care. The law of torts is constantly balancing one person's needs against another's liberty. When a woman decides to carry through her pregnancy, she loses the liberty to act in ways which infringe on a baby's right to be born as free as possible of mental and physical defects.[40]

Another view amongst the proponents of liability is that an injured child deserves compensation whoever the tortfeasor is. If the behaviour was negligent and the causal link between the injury and action has been established, it could be unfair for the child to go through life bearing the loss caused by another's negligence.[41] Whether or not the defendant is the child's mother, the child's life prospects have been altered.[42] Australian law has never provided immunity from actions between parent and child, so why should one now be created simply because the tort occurred before and not after birth?

This dilemma is best resolved by examining the purpose of a duty of care and whether this purpose would be fulfilled by imposing a duty of care in mother-foetus actions. There are two main reasons why a duty of care is established in the law. The first is that it takes on the role of regulating

38 Johnsen, *op. cit.* n. 27, 607.
39 531 N.E. 2d 355 (1988) (Illinois) 361.
40 Robertson, *op. cit.* n. 27, 437.
41 Cane, P., 'Injuries to Unborn Children' (1977) 51 *Australian Law Journal* 704, 716.
42 *Ibid.*

behaviour, the threat of legal action working as a sanction to ensure care for another person. This purpose is not necessarily furthered in cases of a mother's liability for prenatal injury. Virtually all mothers would presumably have a strong desire to bear healthy children, and the prospect of giving birth to a disabled child is likely to be as much of a deterrent as the threat of legal action. Education would have a greater regulating influence on such behaviour than legal sanctions.

The second purpose for creating a duty of care is to provide a means of compensating victims. Again this would not be particularly well satisfied in maternal liability cases. If there is no insurance, the mother would be paying out of her own pocket, which would in most instances be inadequate. Further, the mother may be bearing much of the loss both financially and emotionally whether an action is taken or not.

As a result of the decision of the Court of Appeal in *Lynch*, a broader maternal liability for prenatal injury has become a very real prospect. It is submitted that this would be a most unwelcome development. Neither purpose of creating a duty of care would be fulfilled. There are significant social implications which would have a detrimental effect on pregnant women if liability were allowed. Whilst women should take the greatest possible care for their developing foetuses, taking them to court to extract money from them if they do not do so is a quite inappropriate response.

CONCLUSION

Looking back to the decision in *Lynch*, it would seem that the Court made the best of a difficult situation. Motivated by a desire to compensate a severely disabled plaintiff the Court awarded damages, probably the most compassionate decision in the circumstances. However, the restriction the Court gave, only allowing liability for motor vehicle accident claims because of the presence of insurance, is a questionable basis for their decision. Because of the likelihood that this limitation will not survive but that liability will arise in other contexts, unwelcome results for pregnant women may ensue despite the wishes of the Court.

Although the Court in *Lynch* was obviously required to operate within the framework of the existing torts system, what a case such as this exposes are the inadequacies of a fault based regime. Many of the objects of the present scheme, such as the question of deterrence and the need to lay blame, are clearly not appropriate in a case such as this. The only benefit arising from legal intervention lies in the possibility of compensation. If this could be achieved by other means, for example the expansion of the Child Disability Allowance,[43] the current need to establish legal blame in order to receive compensation would be removed. The essence of the feminist objection lies not in the children receiving compensation but in the concept

43 Under Pt 2.19 of the Social Security Act 1991 (Cth), handicapped children can receive the Child Disability allowance. In May 1991 this was just under $30 per week and was not subject to a means test.

of fault or blame being imposed with respect to decisions made regarding one's person. If this concept of fault could be removed, disabled children could be provided with adequate financial assistance without the courts having to make decisions over complex moral and social dilemmas which arise when pregnant women are exposed to liability.

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