

MOTHER'S LIABILITY FOR PRE-NATAL INJURIES: A CRITICAL ANALYSIS

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Abstract

Nata Pratha, a centuries-old custom not very prominent in the contemporary metropolitan cities of India, is still shockingly prevalent in various parts of Rajasthan and Gujarat. Gujjar, Jat, Rajpoot and Bhil being some of the main castes which practice the Nata system. The custom provides for a married man or a married woman to choose a partner of their choice and live with that partner without the formality of divorce and remarriage. Traditionally, under this custom both the partners entering into Nata, need to be previously married to another person. They leave their respective spouses and start living together without going through the rituals of getting married. The paper while aiming to analytically study this peculiar custom, its advantages and disadvantages, elaborates on the various demographic perspectives regarding Nata Pratha. It throws light on the status of women with regard to this custom and the consequences thereof, primarily affecting the abandoned children. The paper highlights various provisions of law which this custom violates and the judicial discourse on the validity of Nata Pratha by citing few recent cases which clearly reflects the judicial approach towards this custom. This paper will conclude with few recommendations and suggestions to resolve the issues arising from this unusual custom and also how few provisions need to be included in the existing law to protect all the people who are directly or indirectly involved in this custom.

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Introduction

Early common law suggests that the mother and the unborn child were considered to be one and any injury suffered by the unborn child could not be attributed to the mother as one cannot injure oneself. A shift in trend has been witnessed over years wherein unborn children are receiving much more legal protection for prenatal injuries as compared to the limited protection they received historically.¹

Prenatal injuries are those injuries that an unborn child suffers after being born due to parental negligence and errors. It can be in various forms such as abnormalities or congenital defects and can further be attributed or categorized to unavoidable, natural injuries and injuries due to parental negligence on the part of a parent. For the child to prove that there lies a liability on the parent, they have to prove that there lies a lack of reasonable care that should have taken place while pregnant.²

It is very easy to contribute a third party negligence for injury towards an unborn child i.e. doctors or parties involved in accidents. But the biggest question that arises is whether we can hold a parent responsible and whether a parent has a legal duty to ensure that there is no negligence that may result in injury of their child. This project talks about the different types of injuries that a child may suffer from and the extent of

liability that a parent and specifically a mother holds for the said injuries.³

Prenatal injury or antenatal injury may arise due to several reasons. The most commonly litigated case has been of traumatic injury suffered by the mother passed on to the child causing numerous disabilities and sufferings to the child. This traumatic injury may be either mental trauma in forms of depression or physical trauma in forms of accidents, etc. These accidents may take place while driving or a work related injury. 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. As mentioned earlier, these types of injuries can be attributed to a third party or can be considered as an antenatal injury contributing to the mother. This can be further classified as negligent behaviour or non negligent behaviour which further helps necessitate liability.⁴

Temporary mental distress to the mother which might have affected her for a short period of time during pregnancy might cause long term serious injuries to the child. Therefore, it is the duty of the mother to be cautious and not negligent throughout the period of pregnancy. The question that arises is what is the level of responsibility that a mother should hold and what acts contribute to negligence due to which the child might suffer.

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

¹ Lenow, The Fetus as Patient: Emerging Rights as a Person?, 9 AM. J. L. & MED. 1, 3 (1983).

² <https://www.birthinjuryhelpcenter.org/prenatal-injuries.html>

³ <https://pubmed.ncbi.nlm.nih.gov/3687865/>

⁴ Ramaswamy Iyer's, The Law of Torts, p.1, 9th Edition, Lexis Nexis, Butterworths.

addiction on the part of the mother, all of which are mostly considered to be negligent acts of the mother.⁵

The child's injuries may also be attributable to its exposure in the womb to diseases affecting the mother. One needs to consider the fact that factors such as diseases and third party accidents cannot be accounted for by a mother's negligent act. It is caused due to the natural course of existence and therefore proving mother's liability in such cases is highly difficult.⁶

The parental immunity doctrine may be used as a defense by a parent to an infant's claim against them for prenatal injuries caused during the course of pregnancy. This doctrine lays down the notion that a minor may not bring out a liability against their parents in the form of a tort. This doctrine has been followed for ages immemorial due to the reason that parents are considered to be the well wishers of their children and act as their guardian giving them the right to take decisions for their children. Due to the existence of this doctrine, it acted as a restriction for a child to bring about a suit against his or her parents. But as the judicial system has seen the new sun rise, the need for removal of such a doctrine has been demanded for by various jurists who successfully managed to give these children the right that they deserve.⁷

⁵ Kerr, Ian R. (1998) „Pre-natal Fictions and Post-partum Actions“, *Dalhousie LawJournal* 20: 237–74.

⁶ Liability for Antenatal injury, Scottish Law Commission, (Scot. Law Commission No. 30).

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<https://www.scotlawcom.gov.uk/files/5112/7989/6877/rep30.pdf>

The needs of society and the structure of the family are changing and evolving. Much of this judicial distaste has arisen because the doctrine can be employed as an umbrella rule that prevents recovery to an entire class on the sole ground that they are minors, and any suit by them against their parents would dissolve family harmony. Modern courts have questioned the early rationale that preservation of family harmony and domestic relations requires that a child be denied recovery for injuries caused by a parent.

Causes Of Prenatal Injuries

It becomes imperative to provide in this study the types of ante-natal or prenatal injuries which has led to various legal actions. This would provide as a reliable distinguishable measure, talked earlier, which could help in identifying a mother's liability if the said legislation was to be enacted. As we have already talked about case-by-case solutions, these types of injuries tell us how certain omissions or prevalence of the said problem such as trauma, which inevitably injures the fetus where the pregnant woman has no control over such acts is different from the reckless acts such as the consumption of drugs. The type of injury in itself would help in determining the liability on the tortfeasor.⁸

1. Trauma and Accidents:

One of the major factors in litigation is the infliction of trauma on a pregnant woman. This has allegedly resulted in the child being affected majorly and has resulted in the child being mentally or physically disabled. The instances of such trauma related wrongful birth litigation result

⁸ „Injuries to Unborn Child“, The Law Commission, Working Paper no. 47, Jan 19, 1973.

from accidents which the woman was involved in, actively or passively. These accidents give out possible reasons for the disability of the child.

a) The direct impact of the accident on the fetus such as an injury on the womb which has resulted in the injury to the child.

b) the injury has affected the mother and during the conception, the existence of such injuries has affected the child birth.

Considering all these possibilities, the courts have to take in consideration as to what was the degree of care taken by the mother. In most cases, these accidents and traumas are a result of third party negligence and therefore the mother cannot be held liable. But certain instances such as rash driving by the mother resulting in injury to the womb can be attributed to mother's liability.⁹

2. Drugs and Smoking:

The consumption of psychotropic or chemical substances could lead to the cause of prenatal injuries. There are two ways the litigation could work.

a) The imposition of liability comes on the mother, seeing the nature of drugs and the legality and reasonability of its consumption if the drugs are not prescribed.

b) The manufacturing company which has produced the drug for a specific discomfort or illness which in result has caused an undesirable reaction causing injury. Prescribed drugs which aim at healing a part of the mother results in injuring the womb.

While considering the intake of drugs, the courts need to understand that there are two types of drug intake. The first one is prescribed drugs which are prescribed by a doctor which causes harm to the womb. In this case, the mother cannot be held liable and the liability may shift to the medical professional. The other case is the use of recreational drugs or non prescribed drugs. Here, the mother has a control over such an abuse and her negligent behaviour towards the unborn child can hold her liable. The same goes for other substance abuses such as heavy consumption of alcohol or frequent smoking.¹⁰

3. Irradiation and medical treatment:

X-RAY treatments and other tools which require radiation as a method to treat have caused various detrimental effects on the fetus. This could be imposed under negligent diagnosis of a pregnant woman. This could result in the child being feeble minded or crippled. Thus irradiation directly caused the injury to the mother, hence causing injury to the fetus inside of her.

After the occurrence of such an event, the courts need to affirm whether the mother was responsible and can be held liable or not. In most cases, the mother is under a doctor-patient relationship wherein the doctor instructs the patient to go for such treatments. But in these cases too, the mother can be held responsible as she knows the gravity of her pregnancy. In other cases, wherein the mother goes ahead with such forms of irradiation without any professional

⁹ Id.

¹⁰ Paltrow, Lynn M. (1999) „Pregnant Drug Users, Fetal Persons, Albany Law Review 62: 999–1055.

advice, she can be held liable for negligent conduct.¹¹

4. Diseases and virus:

Certain diseases caused by the infectious womb of a mother as the immunity to such diseases is weakened by the pregnancy has led to various allegations of the child being born unhealthy. Viruses such as COVID-19, have resulted in the virus being transmitted to the children through their infected mothers as well.

The courts need to take care of the fact that these diseases and viruses are not in control of the mother and are in existence due to natural causes. The disease or the virus harming the child is an unfortunate event but the responsibility for which cannot be passed on to the mother in most cases.¹²

5. Injury caused in attempted termination of pregnancy or sterilization:

It is a very common practice to abort a child or attempt to terminate pregnancy at a n early as well as late stage. In some cases, the abortion fails and child is born regardless but with several injuries leading to mental and physical disability. One needs to understand that abortion is not illegal and is the right of the mother before a certain stage of development of the fetus. Once abortion is attempted after such a stage has passed, the mother can be held liable even if medical negligence is involved. On the other hand, if due to medical negligence before such a stage, the fetus is injured, the mother does not hold liability.

Cases such as *State Of Kerala vs P.G.Kumari Amma* are a constant occurrence in India, where due to medical negligence, the child has received damages and hence had a detrimental effect during their personal growth in initial years which has hampered them drastically as they grow. Only medical professionals are held liable in such cases.¹³

6. Improper nutritional diet:

During pregnancy, it is the mother's responsibility to ensure that she consumes a healthy and nutritional diet so that the fetus becomes healthy. This responsibility might seem a menial one but in cases of pregnancy, this can contribute to negligence as any other reason. The mother can be held liable for injuries or harm caused to the child for practicing slack eating habits during pregnancy.

For example, eating solely junk food and no nutritional food can be attributed to negligent behaviour of the mother and she can be held liable for negligence and lack of care towards the child. The courts though also have to consider the possibility that certain mothers are not financially stable to ensure a nutritional diet for herself and therefore cannot be held liable in such a case.¹⁴

Creating a Tortious Liability

In the law of torts, negligence has been a concept that has been of utmost importance in every case and therefore due to its great adaptability, it has been changing and evolving for bringing about justice in a fair manner. A remedy is offered in the

¹¹ Supra note, 8.

¹² Id.

¹³ State of Kerala v. P.G. Kumari Amma; ILR 2011 (1) Kerala 508.

¹⁴ Keeton, Creative Continuity in the Law of Torts, 75 HARV. L. REV. 463 (1962).

law of torts to recognize the sufferings of the plaintiff due to the negligent act of another party. This may be the same in the case of a parent and a child wherein the parents negligence has led to injury caused by a child. This may also be a case in forms of surrogacy. When a surrogate mother has pursued a course of prenatal care proven to be deleterious to the health and well-being of the fetus and injury results, justice demands a remedy.¹⁵

While solving the issue of remedy based on negligence and lack of duty of care, it is obligatory to study the relevance of the factors necessitating liability: duty, breach, causation, and damages.

1. Duty

Only when there lies a duty of the mother to their children, can courts give recognition to a child's suit against his or her mother for prenatal negligence. In layman's terms, mothers are required to observe a standard form of conduct while pregnant.¹⁶ A court cannot arbitrarily oppose a child's action against his or her mother for preconception negligence. Rather, the court is obliged to determine the liability in the case by considering the factors of public policy and legal understanding of duty. Numerous factors are involved while determining the existence of a duty of care.¹⁷

The most important of these factors are foreseeability and the extent of the burden to be incurred:

1. **Foreseeability-** This factor is a necessary condition to acknowledge a legal duty by a court. This essentially means the conduct or general practice that a reasonable person would take in the best of its ability and sense. In case of prenatal injury, the foreseeability of a prudent mother would be to distinguish between healthy and unhealthy practices that might affect her future child. One can easily foresee that involving oneself in frequent drinking or smoking might affect the child while pregnant. Also, some practices might be reasonable and considered to be healthy while not in pregnancy but during pregnancy might be unhealthy such as manual labour, etc. Therefore one needs to gauge the consequences of their actions and conduct and foresee whether those actions might cause injury to their child.
2. **Extent of the Burden-** The second factor is determining the extent in which the mother should restrict herself with her usual occupational and personal lifestyle that she had before pregnancy. This burden may require her to bring about a change in her said lifestyle and hold certain forms of reasonable restrictions with regard to her body and physical conduct. Such a couple should not treat their bodies with impunity. Proper medical advice should be taken at every step of pregnancy not only with regard to pregnancy and the child but also the medical history with which the mother suffers. Taking adequate care of one's health not only benefits

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<https://scholarlycommons.law.cwsl.edu/cgi/viewcontent.cgi?article=1539&context=cwlr>

¹⁶ Fleming, *The Scope of Duty in Negligence Cases*, 54 Nw. U.L. REv. 778, 800 (1953).

¹⁷ Rogers, W. V. H. (1998) *Winfield and Jolowicz on Tort*. London: Sweet & Maxwell.

the mother but also the child and therefore health care is a must.¹⁸

One can analyze the reasonability behind a mother's actions while determining the extent of care and duty that the mother exercised and whether she has satisfied the foreseeability test. The actions of a mother are considered to be unreasonable in cases where the harm is foreseeable and the mother acts irrespectively knowing that it may cause injury due to the existence of the danger. It must be determined whether the defendant's acts or omissions were unreasonable. The negligent action must be judged with regard to the possibilities evident at that time and whether it could have been avoided or not. With a rise in the gravity of harm of the conduct, the duty of precaution also increases and calls for increased observant and cautious behaviour. When a mother undertakes affirmative action, she also undertakes a duty to take reasonable measures to protect their potential child from any form of injury. A negative duty thus arises to refrain from unreasonably dangerous conduct.¹⁹

2. Breach

Negligence is defined as the failure to exercise the care that the circumstances justly demands. It consists of deliberate and voluntary ignorance of duty and care. Negligence as mentioned earlier, is not a definite term and adapts itself to the circumstances. In this case, something very trivial and menial like manual labour might also account

to negligence which might not be the case in other suits. It takes its content always from specific circumstances, and its meaning varies as the context of surrounding circumstances change.²⁰

Once there has been an omission of the said duty of care in forms of voluntary or involuntary negligence, does a breach occur. This breach may occur in forms such as alcohol consumption, tobacco consumptions, usage of drugs or not maintaining a proper nutritional diet. This breach may not only occur in cases of normal pregnancy but might also occur in surrogacy. In the surrogate motherhood arrangement, once duty has been established, a breach of that duty is readily observable. The surrogate mother before entering into this arrangement is fully apprised of her responsibilities while pregnant. Failure to adhere to these responsibilities which are similar to that of a normal pregnancy accounts for breach of duty towards the unborn child. Breach of that duty results from the mother's unreasonable conduct in exercising an improper course of prenatal care. The deviation from the general standard of care in form of negligence is what causes the breach. Whether defined in terms of ordinary negligence or recklessness, pursuing a course of conduct known by the mother to be associated with risk cannot be excused.²¹

3. Causation

In cases of prenatal injuries, the child's biggest asset in pursuit of seeking remedy is medical assistance. Proving an injury due to a negligent or

¹⁸ J. PRITCHARD & P. MACDONALD, WILLIAMS OBSTETRICS 304 (16th ed. 1980).

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<https://repository.jmls.edu/cgi/viewcontent.cgi?article=2108&context=lawreview>

²⁰ Fleming, John G. (1992) *The Law of Torts*. Sydney: Law Book.

²¹ Martin, Sheilah and Murray Coleman (1995) „Judicial Intervention in Pregnancy“, *McGill Law Journal* 40: 947–91

wrongful act may become very difficult for the plaintiff and therefore courts determine liability using the causation test to trace and link the injury and wrongful act. It is not necessary for the wrongful act of the mother to be the sole cause of the injury but it should be a substantial or material cause of the injury. It is the plaintiff's burden to prove that the act of the mother is the primary cause of the injury. While it can become very difficult in a few cases due to the general lapse of time or evidence to be proved, on the other hand one can easily attribute certain actions to the injury such as drug ingestion, tobacco smoking, alcohol consumption, or improper diet that can help necessitate liability.²²

There will be several instances wherein a link between the conduct and the injury is not successful. For example, causation may be difficult to establish when the mother smokes only a few cigarettes or consumes a minimal to moderate amount of alcohol. The consumption of such substances in such minimal quantities might have been the causal element adding up to the injury but it might not be considered as a breach of duty as it might lead to speculation. As long as competent medical evidence establishes the causal relation and damage to the child, recovery will be allowed.²³

4. Damages

The most essential element in this suit for the plaintiff once liability has been proven is the proof of damage. To determine the amount of damages, one must determine the gravity of the

injury caused due to the negligence of the mother. Other than damages for compensation, the plaintiff is also entitled to recover both nominal damages, to vindicate his rights, and punitive damages, as a form of punishment, exemplifying the legal consequences of neglecting the affirmative duty intrinsic in surrogate mothering.²⁴

Indian Overview

Currently, while we look at the Indian view on prenatal injuries, the Indian judicial system has not witnessed any landmark judgment on mother's liability for injury caused during pregnancy. This may be because of several reasons but the biggest reason evident is close familial bonds and mother-child relation that exists in the Indian social system wherein filing a suit against the mother might result in negative effects on family relationships. Nevertheless, the Indian judicial system has relied heavily on foreign cases in the law of tort and if and so a case arises wherein the mother's liability is in question, several landmark judgments have been laid by courts of common law across the world which might help shape the course of the judgment. Following the principles of law wherein it is imperative to reward the injured and deter the faulty, the Indian courts are competent enough to rule upon such a situation wherein the liability of the mother is questioned.

There is no straight jacketed precedent that calls upon courts to follow a set course of action. Common courts across the world follow different approaches and the Indian judicial system is at liberty to choose any course of action. There are

²²<https://onlinelibrary.wiley.com/doi/pdf/10.1111/j.1468-2230.1977.tb02415.x>

²³ Supra note, 21.

²⁴<https://engagedscholarship.csuohio.edu/cgi/viewcontent.cgi?article=1969&context=clevstlrev>

mainly two approaches that have been used which will be studied in depth further. The first approach holds that the mother and the child are one entity and either cannot sue the other. This approach does not stand valid for a third party and a third party can be sued for injury to the child. This approach was widely used in conservative times and is still in use in some common courts. The second approach and with a more modern view is that the unborn child holds a separate identity and has certain rights as part of the individuality. In this approach, the child can sue his mother and hold her liable for prenatal injuries caused due to her negligence or harmful conduct. Even though this approach exists, the courts should keep in mind that the duty of care should be studied with extreme care as the duty in these types of cases is very fragile.

Though the Indian judicial system might not have witnessed cases on this form of injury, the courts should be well equipped to handle these cases with extreme care and should feel free to rule using a different approach as well. As the social systems of every region differs, the judicial approach also differs and therefore no set approach can be mandated over any judicial system.

Development of Maternal Liability

As mentioned earlier, the existence of the Parental immunity doctrine assisted parents in getting free of any form of liability against the injuries towards their children. This was topped by courts refusing any form of recovery to children for prenatal injuries or injuries suffered while in the womb. In the year 1914 it was laid in *Dietrich v.*

Northampton that the fetus or the unborn child does not hold any individuality and is to be considered as a part of the mother.²⁵ This decision was obeyed by courts until 1946 when a third party caused harm to the unborn child causing injuries while birth. This case of *Bonbrest v. Kotz* granted the recovery of damages.²⁶ The court ruled that the fetus was an altogether different entity because the injury would harm the child and only the child would suffer due to the injury, hence awarding the child damages. Bonbrest conditioned recovery for prenatal injury on two factors:

1. The child must be born alive
2. The injuries must be suffered during the course of pregnancy.

Till then it had been established that the unborn child has an identity of its own and holds certain rights. As the courts developed, the scope of liability also extended to the mothers. In the case of *Watt v. Rama*, the negligence on the part of the mother resulted in brain damage to the child and the courts ruled on behalf of the child necessitating liability on the mother and requiring her to pay damages.²⁷ The „born alive“ condition set in the case of *Bonbrest v. Kotz* was disregarded in the case of *O'Grady v. Brown* as the judicial system developed and recognized that those involved in killing of a fetus would go scot free

²⁵ *Dietrich v. Inhabitants of Northampton*, 138 Mass. 14, 17 (1884).

²⁶ 65 F. Supp. 138 (D.D.C. 1946).

²⁷ *Watt v. Rama* [1972] V.R. 353.

escaping liability whereas the one inflicting a lesser harm would be held liable.²⁸

Codifying all the laws and conditions set forth until 1976, the *Congenital Disabilities (Civil Liability) Act, 1976* came into being exempting mothers from liability for congenital disabilities and holds them accountable for any negligent act harming the child.²⁹ Thus there is a general rule of immunity with a limited exception. However, mothers are liable under the Act for injuries caused by negligent driving, substance abuse and any such conduct that may result in harming the child.

Different Approaches through Case Laws

1. **Dobson v Dobson**

Canadian Supreme Court had considered the dynamics of this issue in *Dobson v Dobson* in 1999. This case is one of the most landmark cases in the subject of prenatal injuries and most courts refer to this case while ruling upon cases of prenatal injuries.³⁰

Facts: Cynthia Dobson was 27 weeks pregnant. One day, she was driving in a snowstorm when she lost control of her vehicle and was part of a major collision. It was alleged that the accident was due to her negligent driving. Her son, Ryan Dobson was allegedly injured in the womb and suffered a premature delivery with the help of C-Section. The effect of the accident could be witnessed on him as he suffered from mental and physical impairment, including cerebral palsy.

²⁸ O'Grady v. Brown, 654 S.W.2d 904, 909 (Mo. 1983).

²⁹ Congenital Disabilities (Civil Liability) Act, 1976 (United Kingdom).

³⁰ Dobson v Dobson [1999] 2 S. C. R. 753.

Ryan's grandfather (also his litigation guardian) filed a tort claim against Cynthia and others for the damages sustained by Ryan.

Issue: Whether a mother should be held liable in tort due to negligent acts which leads to pre-natal injuries to the child?

Decision: The trial and appellate court found the verdict in favor of Ryan. But the Canadian Supreme Court allowed the appeal in favor of Cynthia. The verdicts of the lower courts were quashed due to various reasons. The court said that if we were to consider that the mother and the fetus are two distinct separate identities and if we assume that foreseeable negligent acts would hamper the healthy development of a child, this would be problematic to the concept of stare decisis. The precedence to this would be problematic as this would provide room for further liabilities on a mother while stripping her away from her autonomy as a mother and a decision maker. This would mean that the negligent acts could mean and vary from anything like not resting, smoking or exerting herself too much to her diet or drinking. Thus making every act or omission having an impact on the fetus. This would set a dangerous precedence as any act omitted by the mother could give rise to various tortious claims and there would be no rational or principled limit which could stop the claims.

Indian Relevance: This could also further be problematic for the decision making bodies to actually set a definition of reasonable standard of care a mother could owe to her fetus. This could be more challenging in countries like India, where there are great disparities which exist in every

social class. Be it the difference of financial situation, access to health services, hygienic living standards, access to proper healthcare and ethnic backgrounds and its impositions. Certain disparities would lead to various tortious liabilities on the mother without it being her fault in the first place. Even issues such as negligent driving are very much incorporated and required in the daily life of an urban dweller. And there are various other required household chores or activities which a mother is expected to do. If the liability is to be put on the mother for negligent driving, there would be various different contexts and activities which could impose unreasonable obligations on a pregnant woman. Such obligations would impose various restrictions on the life of a mother to be, proving detrimental to the harmony of the family, thereby affecting the nurturing environment of a child. In a country like India, where the women are already subjected to various inhuman treatment by the stereotypical households on issues such as dowry, the existence of this tortious claim would further put pressure on the state of a mother's well-being and fuel the already tragic situation.³¹

2. Grodin v. Grodin

Another important landmark judgment with another approach is *Grodin vs. Grodin* which talks about the individuality of the child and how the child holds certain rights. It further goes on to

state that the mother holds a responsibility towards the fetus.³²

Facts: Roberta, the mother of Randy, was consuming a medicine called tetracycline during pregnancy and consumed it till 7-8 months after being mature of pregnancy. She stopped its consumption only after a doctor advised her to do so. The plaintiff accused the defendant of negligence as she did not request for a pregnancy test from her former doctor and continued consuming the prescribed medicine.

Issue: Whether the unborn child holds any individual rights and whether the mother holds a responsibility towards the fetus?

Decision: The Michigan Court of Appeals, in this case, was the primary court to acknowledge a responsibility on the part of a mother to her unborn child. In this case, the infant brought a legal imposition against his mother claiming that she was negligent in taking a medicine during pregnancy which resulted in physical injury to him. Relying upon *Womack v. Buckhorn*,³³ which recognized a child's right when born to recover for prenatal injuries, the Grodin court concluded that a mother would be required to refrain from unreasonable conduct that would result in injury to the fetus. Thus, she would be subject to the same liability to her fetus for negligent conduct as would a third person. The court also relied on *Plumley v. Klein*. The examination of facts on a case by case basis would provide reasonable immunity to the mother and would lead to establishing the norms towards

³¹ I A and others, 'Violence Against Women In The Marriage : Cross-Sectional Study In The Family Planning Clinic Monastir' (2020).

³² Grodin v Grodin 301 N.W. 2d 869 (Mich Ct App. 1980).

³³ 384 Mich. 718, 187 N.W.2d 218 (1971).

a dignified womanhood. Such an idealistic approach to maintain the rights of the unborn child and the rights of a pregnant woman could be easily understood with the case of *Plumley v. Klein*, which limited parental immunity to acts of reasonable parental discretion in the provision of food, clothes and medicine. Finally, it was concluded that the child holds certain individual rights even as a fetus and the mother can be held liable for negligence and wrongful conduct.

Indian Relevance: This approach though a more modern one, might not sustain in the Indian social system as India follows a more traditional view of social systems. Indian familial relationships are closely knitted and following such an approach might bring a disruption to the existing social system. On the other hand, as India is growing towards a more progressive judicial system, this approach might benefit India as child rights are something that India is lacking. This precedence might help that situation and bring about justice for minors as well.

Criminal Liability

While it has been established that harm caused by prenatal injuries accounts for civil liability, at the same time the notion of criminal liability also exists. Most courts disregard this notion as they believe that no crime has been committed with regard to parental negligence. Holding a mother liable criminally for smoking or abusing drugs is not something that the courts favour. But at the same time, there can be instances wherein the abuse is so high that the conduct results in feticide rather than an injury. The Indian judicial system has adopted the *Pre-Conception and Pre-Natal Diagnostic Techniques Act* in 1994 that holds parents criminally liable for severe voluntary or

involuntary negligence contributing to feticide. The courts often consider this act of feticide to be a form of homicide. The fetus is considered to be a person after a certain age and is awarded some rights and therefore destroying a fetus may account for criminal liability.³⁴

For the protection of the fetus, there has been laid two crucial public policies. The first policy which is recognized in its complete sense is that the child has a right to be born without any form of injury. Secondly, the State holds a responsibility towards the unborn child and has to treat the fetus as an actual human being, protecting potential life after a certain age of development. In contrast to the law and judicial view earlier, courts do not merely focus on compensating the mother for the loss of the child but recognizes the rights of the unborn child as well. Protection of a fetus from the acts of the mother serves to promote the same interests as does protection of the fetus from acts of a third party. In the fetal-maternal relationship, however, certain rights of the mother may be limited in order to achieve fetal protection. With a rise in the development of health care, the mother's conduct can be monitored with extreme precision and how her actions may have consequences on the unborn child. Keeping this in mind, the concern that arises is the degree of a pregnant woman refraining herself from engaging in injurious conduct.³⁵

For creating a liability, the first condition for courts is to include fetuses while defining a child. There have been certain instances, wherein the

³⁴<https://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=1186&context=ilj>

³⁵ Sherman, Keeping Baby Safe From Mom, Nat'l L.J., Oct. 3, 1988.

courts have showcased a willingness to extend the definition of children to fetuses as well. In the case of *Hoener v. Bertinato*, refusal of the mother's consent for blood transfusion to save the unborn child's life, gave the custody of the child to the State under the Statutes of child abuse and neglect.³⁶ Although the state has a legitimate interest in ensuring that a fetus is not neglected, the use of criminal liability would undermine the doctor-patient relationship, making it less likely that mothers would confide in their doctors. This is because doctors would probably be the ones responsible for reporting fetal abuse or neglect further resulting in less treatment for the mothers. As in the state intervention situation, the attempt to help the fetus would result in more harm than good.³⁷

Critical view of this law

This law might sound as a perfectly constructed law which is a requirement in today's day and age but like every well framed law, this law has certain flaws to it as well.

1. Gender based tort or Equal Parenthood

This view essentially questions the liability only falling on the mother and not on the father. The problem arises as due to biological reasons, it's the mother who carries the fetus and is therefore responsible to alter her lifestyle. The child cannot be isolated from the mother and they are therefore bound to be grouped. Due to the reason that the mother holds the child, the amount of negligence is drawn solely towards the mother with regard to

her nutrition, consumption of substances and other forms of conduct.

This results in an unequal classification of liability wherein the concept of equal parenthood is disregarded. The infant bringing about a lawsuit on the mother makes the position of women more onerous to men. Such a rule of liability is highly oppressive and discriminatory. Therefore one can say that this law may not be a just law with regard to gender neutrality. Both parents are equally responsible to maintain their children.³⁸

Article 16 1(d) of the *Convention on the Elimination of All Forms of Discrimination against Women* lays down that both the parents are equally responsible and shall hold equal duties with regard to their child.³⁹ When such a statute has set a precedent for equal parenthood, it indicates how the imposition of added liabilities to the mother would disregard the status of women in the society, hence deeming such liabilities to be discriminatory against women as a woman doesn't choose to get pregnant.

The Supreme Court of India has recognized equal guardianship rights to both the parents in the case of *Ms. Githa Hariharan & Anr v. Reserve Bank Of India & Anr.*⁴⁰ The principle of equality is very much given through our Constitution. And with equality comes the concept of equal parenthood. The Supreme Court of India, through this case stated that "it is an axiomatic truth that

³⁶ *Hoener v. Bertinato*, 67 N.J. Super. 517, 171 A.2d 140 (Bergen County).

³⁷ W. PROSSER & W. KEETON, HANDBOOK OF Tm LAW OF TORTS 335 (4th ed. 1971).

³⁸ Hindu Adoptions and Maintenance Act, 1956 and S.125, Cr.P.C.

³⁹ 'OHCHR | Convention On The Elimination Of All Forms Of Discrimination Against Women' (*Ohchr.org*, 2020).

⁴⁰ *Gita Hariharan v. R.B.I.*, A.I.R. 1999 SC 1149.

both the mother and the father of a minor child are duty bound to take due care of the person and the property of their child and thus having due regard to the meaning attributed to the word "guardian" both the parents ought to be treated as guardians of the minor".

2. Effect on autonomy of mothers and familial relationships

The most widely used notion against creating a duty of care on the mother who is pregnant is the effect of such duty on the mother's autonomy. Distinguishing what would be considered as rational and irrational as part of the mother's conduct becomes a very subjective issue as there are no limits to the duty of care. The majority in the *Dobson case* claimed that there was no rational and principled limit to a mother's liability if a duty of care was imposed.⁴¹ They gave several examples of what was implied to be such irrational" or "unprincipled" claims, including actions for failing to regulate diet, for drinking and smoking, and for tripping on stray objects in the home.⁴²

The mother's autonomy is affected as one cannot precisely distinguish the acts of the mother and classify them as appropriate or not. On the other hand bringing about such a lawsuit also affects the familial relationship that exists. But at the same time, it cannot be a factor that prevents the occurrence of the lawsuit. In *Stallman v. Youngquist*, the Appellate Court of Illinois held that the public policy consideration of possible

disruption of family harmony does not outweigh a child's right to be compensated for prenatal injuries received due to her mother's negligence.⁴³ The right of the child to sue his or her mother will always precede any other public policy consideration such as harm to the familial relationships.

3. Failure to regulate diet and to prove causation

We as the privileged class might find it easy to blame mothers for a lack of nutritional diet but one has to consider the fact that not all mothers are financially sound to afford a regulated and nutritional diet. There are several mothers who cannot provide herself with the best diet which further goes on to affect the child. In such a scenario, the mother cannot be held liable due to obvious reasons that she was not negligent, rather it was a compulsion on her part.

On the other hand, proving that a non-nutritional diet of the mother was the cause of the injury suffered by the child is again a very difficult job. Intuitively it does seem irrational for a child to bring an action against its mother for eating too many hamburgers during pregnancy. However, not only does the child have to show that its mother's eating habits have fallen below the standard of a reasonable pregnant woman, but also that they caused the child's injury. Where injury to the fetus is not an obvious or probable result of an activity and a direct link between action and injury cannot be drawn, causation will be a significant barrier to proving the child's right to damages.

⁴¹ Supra note, 30.

⁴² Fineman, Martha A. (2004) *The Autonomy Myth: A Theory of Dependency*. New York: New Press.

⁴³ 129 Ill. App. 3d 859, 473 N.E.2d 400 (1984).

Conclusion

At the very outset, one needs to consider the fact that social systems and familial relationships across regions differ and therefore no set precedent can be used in cases of prenatal injuries. India hasn't witnessed a significant number of cases of prenatal injury yet has been gifted with different approaches and precedents set by common courts across the globe. The first approach considers the fetus to be a part of the mother and further states that no action can be brought about by the child against the mother as at that time, both of them were the same. The second approach gives the fetus a different identity and that concept of individuality awards the fetus with some rights including suing the mother for prenatal injury.

Other than these approaches, to build a liability against the mother, a four step process needs to be followed. The first step entails the plaintiff to prove that a duty of care existed wherein the mother had to take care of the fetus through her conduct and not act negligently that might harm the fetus in the present or the future. Once, the duty has been established, a breach of that said duty has to be proved. It has to be proven to the court that the mother did not act in the manner she was supposed to and which resulted in the breach of the duty. The third requirement is to prove that the breach of duty resulted in the injury so caused. There needs to be proof that there lies a direct link between the conduct and the injury and that the conduct is the primary cause of the injury. One all three of the above requirements are complete, the question of damages and recovery comes as part of the fourth step.

Several case laws have emerged over the years and have given different insights over this issue. Another view also holds mothers liable criminally and not just through civil liability. It happens when mothers are involved in the killing of the fetus in certain situations and conditions which are defined above. This law also holds certain critical aspects to it wherein this law is considered to hold several flaws. The biggest flaw is that it is a gender based tort and solely holds the mother responsible and not the father. The second aspect is that it affects the mother's autonomy of decision making and further affecting familial relationships. The next aspect is that it fails to distinguish between the privileged with the not while deciding on such cases. The final aspect is that proving causation becomes very difficult in certain cases.

In a nutshell, this law might have certain flaws but is an important law in our pursuit to child empowerment and moving towards a progressive legal approach.