

Liability of a mother for prenatal negligence to her child : A case for equal parenthood

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Pregnancy symbolizes hope of future generations. Nature has chosen women to continue human life on earth. Role of women in procreation should not be a basis for discrimination. Maternity should be understood as a social function and it is the duty of the society to minimize the trouble of the women and ensure social security. Maternal duty of care to the foetus *inutero* can raise serious issues on parenthood.

Anglo-Saxon Common Law¹ recognizes right to sue for torts. During British rule in India, British courts were established and these courts drew upon the common law and statute law of England as found suitable to be applied here. The law of torts based on English Common Law is continued by Article 372 of Indian Constitution, 1950. This is the branch of law governing actions for damages (compensation) for injuries to certain kinds of rights, like the rights to personal security, property and reputation.² Big nations like USA, Canada and Australia have also adopted law of torts in a substantial manner. The tort law developments in these countries very much influence decisions in India. Indian Courts look into not only judgments of foreign courts but also the statutory developments.³

A child's right to recover compensation for prenatal injuries caused by a third person and suffered by it *inutero*, is today a well established one under law of torts. The Congenital Disabilities (Civil Liability) Act, 1976(UK) provides that a person responsible for an occurrence affecting the parent of a child, causing the child to be born disabled, will be liable to the child if he would have been liable in tort to the parent affected. In UCC v UOI,⁴ the Supreme Court of India held that children who were in the womb and yet to be born at the time of the Bhopal gas leak disaster and who are able to show that their congenital defects are traceable to the toxicity from the gas leak will be entitled to compensation.⁵

This paper examines the question of liability of a woman who by negligence causes prenatal injuries to her child in her womb. This will help in the progressive evolution of tort law principles in the perspectives of gender justice. The question may pertain to rare occasions but the question raises significant issues as to parenthood and gender justice. Moreover, given the kind of activities women indulge in these days and the life style of modern times we cannot say that the question pertains to rare occasions.

Foreign law

Canadian Supreme Court considered this question in Dobson V Dobson (Litigation Guardian of)⁶ and delivered its judgment on Dec.08,1999.

Facts Cynthia Dobson was in the 27th week of her pregnancy. On that day, she was driving in a snowstorm. She lost control of her vehicle and struck an on coming vehicle. It is alleged that the accident was caused by her negligent driving. Her child Ryan Dobson was allegedly injured while *inutero* and was delivered prematurely by caesarean section later that same day. Ryan suffered from permanent mental and physical impairment, including cerebral palsy. Ryan by his grand father and litigation guardian⁷, launched a tort claim against Cynthia and others for the damages sustained by him.

The trial court and the court of appeal found the decision in favour of Ryan. On further appeal by Cynthia the matter came before the Canadian Supreme Court. The Canadian Abortion Rights Action League, the Evangelical Fellowship of Canada and the Catholic group for Health, Justice and Life joined the appeal as interveners.

A nine judge bench decided the case 7:2. The issue was - Should a mother be liable in tort for damages to her child arising from a prenatal negligent act which allegedly injured the foetus in her womb?

Decision & Reasons : The appeal by Cynthia was allowed; judgments of lower courts were set aside. The following reasons have been spelt out-

1. Even assuming that (a) a pregnant woman and her foetus can be treated as distinct legal entities and that (b) it is foreseeable that any careless act or omission by a pregnant woman could be expected to have a detrimental impact on foetal development, policy considerations militate against the imposition of maternal tort liability for prenatal negligence. The public policy impinges on the court not to impose such liability on mother because the relationship between a mother-to-be and her foetus is a special and a unique one. Every act of omission can have impact on foetus. If such women were to be sued for not resting, not regulating their diet, drinking, smoking etc. there would be no rational and principled limit to the types of claims which may be brought against them.

2. The duty of care of the mother to her child in the womb if recognized has a very real potential to intrude upon the women's liberty and autonomous decision making.

3. Judicial definition of a reasonable standard of care a mother owes to her foetus would be very difficult to articulate as great disparities exist in the financial situations, education, access to health services and ethnic backgrounds of the women.
4. Driving cannot be distinguished from other life style choices especially when driving is an essential requirement in urban life. Also driving is an integral part of parenting in many families.
5. If duty of care of mother to foetus in motor accident cases is recognized there arises a risk that the duty would be applied in other contexts where it would impose unreasonable obligations upon pregnant women.
6. The primary purposes of tort law are compensation and deterrence. Imposition of tort liability on a mother for prenatal negligence would provide neither compensation nor deterrence.
7. The existence of insurance is irrelevant to the determination of the issue of liability of the mother. That the judgment will be paid by an insurer cannot be the basis for a judgment.
8. Women are involved in different types of accidents and in all such cases where mother-to-be is involved, she would be liable if such a cause of action is recognized. Women alone bear the burden of pregnancy and the society stands to benefit. Court's imposition of a tort liability would restrict the activities of a pregnant woman.
9. Recognition of liability on mothers-to-be would be detrimental to harmony of the family and thereby affect the caring and nurturing environment required by the child. Such a liability would add emotional and psychological trauma to an already tragic situation.
10. A rule of law recognizing tort liability of mothers to their children in womb involves an extremely sensitive and complex issue of public policy and insurance law. It would have profound implications and consequences for all Canadian women who are or may become pregnant. Legislature is the more appropriate forum for the consideration of such implications and implementation of legislative solutions to them.

Negligent driving of mother – to- be resulting in injuries to her child in the womb came up before American Courts. Supreme Court of Illinois in Stallmen v Youngquist⁸ (1988) declined to impose a tort liability on the mother. In 1992 Supreme Court of law Hampshire in Bonte V Bonte⁹ by 3:2 allowed the infant's cause of action and imposed liability on the mother. Australian High Court in Lynch v Lynch¹⁰ (1991) decided in favour of the infant but strictly limited maternal tort liability for prenatal injuries to cases of motor vehicle negligence. The decision is based on the existence of compulsory insurance in that context.

In England, Congenital Disabilities (Civil Liability) Act 1976 exempts mothers from liability for congenital disabilities. 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; yet claims beyond the limits of their insurance policies are prohibited. England secures a compulsory liability insurance regime for motor vehicle negligence.

Indian Law

India has no statute on prenatal injuries; common law accepts liability for prenatal injuries. Till now the question as to liability of mother- to- be to her child in the womb has not come up before our courts. Motor Vehicles Act, 1988 of India makes it compulsory for a motor vehicle owner to undertake third party liability insurance¹¹. Judicial opinion has limited "third party liability insurance" to persons outside the vehicle.¹² Thus unless there is a 'comprehensive policy' or 'package policy' neither the person driving nor persons inside the vehicle can claim insurance coverage. But such package policy is not compulsory under Indian law. Even in cases where there is a comprehensive insurance policy, the negligence of the driver will have to be established for claiming compensation under the 1988 Act as the insurance is for covering liability arising from fault. No fault liability insurance under the Act cannot be of great assistance in compensating children who are born with prenatal injuries suffered by motor accidents¹³.

Indian Courts when faced with the question of liability of the mother to her child in the womb for injuries caused by negligence have the following options-

- (1) hold the mother liable for negligence generally in all cases
- (2) decline to impose liability for negligence in any case
- (3) hold the mother liable for negligence only in motor accident cases

Due to Motor Vehicles Act, 1988 and the insurance regime one can certainly say that motor accident cases are totally cordoned off from the general tort law. Modern urban life would come to a stand still without motor vehicles. All individuals cannot compensate for the magnitude of loss which can occasion due to motor accidents. Pragmatically, insurance is the viable path. Thus in claims under Motor Vehicles Act, 1988 the mother should be held liable (because under the law, liability of driver /mother is the basis of liability of the insurer.) The laudable object of supporting such a child would be achieved. Where there is no insurance coverage it is unlikely that the mother would be sued; whatever the mother has, including her life, the mother would readily give the child.

The recognition of liability of mothers in motor accident cases in my opinion will not involve the danger of extending the principle of negligence in other conduct like drinking, indulging in strenuous work, not exercising, not caring for nutrition and diet etc. Duty of care as a driver is well established even before 1846.¹⁴ No additional behavioral restrictions are imposed on her. She has to only drive with reasonable care

as in all other cases. Contrarily maternal duty of care to the child in the womb in the light of law of negligence is novel and it is very difficult to judicially evolve a general standard of care which the mother-to-be shall observe to the foetus. More over such a duty of care of a mother would unjustifiably trammel the liberty of the woman as the whole of the pregnant woman's conduct would come under the scrutiny of law. Such a duty therefore would not stand the test of Article 21 of Indian Constitution which guarantees right to personal liberty .

Children born with prenatally inflicted injuries need to be cared for. Instead of seeking to fix the blame on mothers, compulsory insurance regime shall be fortified. No fault liability in such cases shall be seriously considered. The society shall collectively bear the responsibility. Through legislation a fund could be created to compensate children with prenatally inflicted injuries.¹⁵

The gender issues

In *Dobson v. Dobson* it was submitted by an intervener that to impose a legal duty of care upon a pregnant woman towards her foetus or subsequently born child would give rise to a gender-based tort, in contravention of S.15(1) of the Canadian Charter of Rights and Freedoms. But as parties did not address the Charter and no arguments were put forward the court considered it inappropriate to resolve the central issue on Charter grounds.

Is there a bias against women in imposing a legal duty of care upon a pregnant woman towards her foetus or subsequently born child? Can it be said that such a tort is gender biased and so violative of the equality clause? To impose a general legal duty of care upon a pregnant woman towards her foetus or subsequently born child, there by bringing her every conduct under legal scrutiny is undoubtedly discrimination against women.¹⁶ Liberty is fundamental for the enjoyment of all other civil, political, social economic and cultural rights.

“...to apply common law liability for negligence generally to pregnant women in relation to the unborn is to trench unacceptably on the liberty and equality interests of pregnant women. The common law must reflect the values enshrined in the Canadian Charter of Rights and Freedoms. Liability for foetal injury by pregnant women would run contrary to two of the most fundamental of these values –liberty and equality.”¹⁷

Equal Parenthood State shall ensure the same rights and responsibilities as parents in matters relating to their children¹⁸ Mother carries the child in the womb. Due to biological reasons she cannot isolate herself from the child. To say that women choose pregnancy is no answer. Pregnancy is essentially related to womanhood. Women should not be penalized because it is their sex that bears children. If the child is entitled to sue the mother, the position of women becomes more onerous than men. The acts for which a pregnant woman may be sued would be indeterminate without any qualification or selection. Such a rule of liability is highly oppressive and discriminatory. Thus imposing a general rule of tortious liability for negligence is neither just nor desirable. Enacting a statute to prohibit pregnant women from indulging in certain reckless acts like drinking, smoking etc. through national debate and consensus may be appropriate.

Such a legislation will be justified as reasonable differentiation based on the object of best interests of children.

The principle of equality is well enshrined in our Constitution.¹⁹ Supreme Court of India has recognized equal guardianship rights to both the parents.²⁰ Both parents are equally responsible to maintain their children.²¹ Every citizen who is a parent shall provide opportunities for education to his child.²²

Whether one considers pregnancy as a life sustaining miracle or merely a harsh biological reality, no one can dispute the fact that it entails considerable hardship and sacrifice. Women carry out a function of special significance to the society. They are indeed entitled to adequate support and protection. State shall take all appropriate measures to ensure that family education includes an understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children.²³ States shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.²⁴ State shall recognize that special protection should be accorded to mothers during a reasonable period before and after childbirth.²⁵ Indian Constitution enables the State to make special provisions for women²⁶ and mandates the state to provide maternity relief.²⁷ It upholds the dignity of women by imposing a duty on all citizens to renounce derogatory practices.²⁸

Our social and cultural pattern respects motherhood. A pregnant woman becomes a VIP in the family. The family rejoices and awaits the new member. Family support, protection and empathy nurtures her and the child in the womb. The family puts her in the center while planning anything in the house. This kind of support system is unique in our families which shall be understood, valued and preserved. Moving out of this culture and seeking to emulate the west is an invitation to disaster.

References and Notes

1. It is a body of law that develops and derives through judicial decisions as distinguished from legislative enactments.
2. Ramaswamy Iyer's , The Law of Torts, p.1, 9th Edition, Lexis Nexis, Butterworths.
3. UK, Law Reform (Contributory Negligence) Act, 1945, Congenital Disabilities Act, 1976, Employers liability Act, 1860 etc have been followed.
4. AIR 1992 SC 248
5. See, S.Saiduddin v Court of Welfare Commr., (1997) 11 SCC 460, where compensation was actually awarded.

6. [1999] 2 S.C.R. 753
7. In India minors sue through next friend . See Civil Procedure Code, 1908, Order XXXII Rule 1.
8. 531 N.E. 2nd 355 (1988) 9. 616 A.2d 464 (1992)
10. (1991) 25 N.S. W.L. R. 411
11. See, Chapter XI Insurance of Motor Vehicles against Third Party Risks.
12. Yallwwa & Ors. V. National Insurance Co. Ltd., AIR 2007 SC 617.
13. S.140(2) provides for Rs. 25000/- as compensation in case of permanent disablement;
however the right to sue under tort law principles is preserved (S. 141)
14. The Fatal Accidents Act 1846 (U.K.) was enacted to recognize the rights of dependents to
sue in case of death. Indian Fatal Accidents Act came in 1855.
15. Justice Cory has made this suggestion in para 48 of the judgment in Dobson v Dobson
16. "...'discrimination against women' shall mean any distinction, exclusion or restriction made
on the basis of sex which has the effect or purpose of impairing or modifying the recognition, enjoyment or exercise by women, irrespective of their marital status,
on a basis of equality of men and women, of human rights and fundamental freedoms in the
political, economic, social, cultural, civil or any other field". Article 1, Convention on the
Elimination of all forms of Discrimination Against Women.
17. McLachlin J. in Dobson v Dobson para 84
18. Article 16 1(d), CEDAW
19. See, Preamble and Articles 14-18
20. Gita Hariharan v. R.B.I., A.I.R.1999 SC 1149
21. Hindu Adoptions and Maintenance Act,1956 and S.125, Cr.P.C
22. Art.51A(k), Indian Constitution
23. Art.16(1)(d),CEDAW
24. Art.12(2) CEDAW

25. Art. 10(2) ICESCR

26. Art. 15(3)

27. Art. 42

28. Art. 51A(e)