The Law Commission

(LAW COM. No. 60)

REPORT ON INJURIES TO UNBORN CHILDREN

ADVICE TO THE LORD CHANCELLOR UNDER SECTION 3(1)(E)
OF THE LAW COMMISSIONS ACT 1965

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The Law Commission was set up by section 1 of the Law Commissions Act 1965 for the purpose of promoting the reform of the law.

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THE LAW COMMISSION

INJURIES TO UNBORN CHILDREN

Advice to the Lord Chancellor under section 3(1)(*e*) *of the Law Commissions Act* 1965

To the Right Honourable the Lord Elwyn-Jones,
Lord High Chancellor of Great Britain

PART I. INTRODUCTION

Terms of reference

1. On 29 November 1972 Lord Hailsham of Saint Marylebone requested us, pursuant to section 3(1)(*e*) of the Law Commissions Act 1965[1], to advise what the nature and extent of civil liability for ante-natal injury should be. We were, of course, aware that many of the questions raised by this request were provoking much controversy in Parliament and elsewhere as a result of the thalidomide tragedy and that litigation arising from that tragedy was still pending. It was also obvious that our terms of reference raised matters of great social importance and difficulty. It was important that we should report as soon as possible but we were pleased to be told that it was thought desirable that, before tendering our advice, we should follow our usual practice of general consultation by means of a working paper.[2] Having completed our consultation we now submit this report. A summary of our recommendations will be found at paragraph 111 in Part VI below and a draft Bill to implement our recommendations, the Congenital Disabilities (Civil Liability) Bill, is annexed at *Appendix* 1.

The Royal Commission on Civil Liability

2. On 19 December 1972 the then Prime Minister announced in the House of Commons[3] that a Royal Commission was to be established under the chairmanship of Lord Pearson to conduct a wide-ranging enquiry into the question of civil liability for personal injury. The terms of reference of the Royal Commission are:—

"To consider to what extent, in what circumstances and by what means compensation should be payable in respect of death or personal injury (including ante-natal injury) suffered by any person—
(*a*) in the course of employment;
(b) through the use of a motor-vehicle or other means of transport;
(c) through the manufacture, supply or use of goods or services;
(d) on premises belonging to or occupied by another; or
(*e*) otherwise through the act or omission of another where compensation under the present law is recoverable only on proof of fault or under the rules of strict liability,

having regard to the cost and other implications of the arrangements for the recovery of compensation, whether by way of compulsory insurance or otherwise."

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[1] 1965 c. 22.
[2] Working Paper No. 47—Injuries to Unborn Children was published on 19 January 1973: see further para. 13 below.
[3] *Hansard*, 19 December 1972, Vol. 848, Cols. 1119–1124.

3. In the course of his statement[4] the Prime Minister referred to the fact that one of the difficulties which had arisen in the thalidomide case was whether there is a right to recover compensation in respect of ante-natal injuries and that we had been asked to consider the matter. He concluded his statement by saying that the Royal Commission would be able to take into account our report on this aspect of the matter and any action which Parliament may have taken upon it in the meanwhile.

4. We are asked to consider one class of injury only, namely, pre-natal[5] injury, and we are asked to consider what the nature and extent of civil liability for such injury should be. It seems to us to be inevitable that such an inquiry should be conducted within the context of the present law governing general civil liability, that is, within the context of the present law of tort. The law provides that compensation shall only be payable on proof of fault or under the rules of strict liability, and our proposals in relation to pre-natal injuries do not provide for any compensation to be payable otherwise than upon proof of fault or breach of strict duty.

5. The Royal Commission's terms of reference are far wider than ours and touch on various fundamental issues with which we are not concerned. They are concerned not only with pre-natal injury, but with the whole range of accidents causing death or personal injuries. They are not confined to considering the matters referred to them within the context of general civil liability as it is now understood, that is, within the context of the law of tort. They are free to consider the question of compensation whether or not there is fault or breach of duty. And in considering what the measure of compensation should be they are not limited by the existing rules which determine the measure of damages once civil liability has been established.

6. When viewed in the light of the Royal Commission's terms of reference, our own conclusions cover a much narrower field. It is our view that any legislation based on our proposals neither can nor should prejudge the much wider issues which the Royal Commission is considering. We do not know what period will elapse before any report from the Royal Commission is considered by Parliament. If in that period individual cases of pre-natal injury arise, there will, for reasons later developed in this report, be some doubt as to whether a claim for compensation lies under the existing law; and, if it lies, it will not be governed by the special rules which we think are desirable in cases of this kind. These disadvantages would be intensified if another disaster such as that caused by thalidomide were to occur.

PART II THE PRESENT LAW

The absence of English authority

7. Claims for damages for pre-natal injuries have been made in many other jurisdictions but there is no English[6] or Scottish authority[7] as to whether a

[4] *Hansard*, 19 December 1972, Vol. 848, Col. 1120.

[5] In our working paper we used the phrase "ante-natal"; in this report we use "pre-natal" instead.

[6] In 1939, a case occurred at Liverpool Assizes: see (1939) 83 Sol. J. 185. A ladder fell upon a pregnant woman. The fall was caused by the defendant's negligence, and as a result of the accident, the child was born the next day and lived only one day. The defendant paid £100 into court when the parents brought a claim for damages for loss of expectation of life as administrators of the child's estate and this they accepted in settlement of their claim. See Winfield, "*The Unborn Child*", (1942) 4 University of Toronto Law Journal, 278; reprinted in (1942) 8 Cambridge Law Journal 76 (at p. 83).

[7] See *Report of Scottish Law Commission, Liability for Ante-natal Injury*: Scot. Law Com. No. 30; (1973) Cmnd. 5371. para. 8.

claim would lie and, if it did, what rules and limitations should govern it. In our working paper we did not attempt to forecast how such a claim would be decided if it came before a court in this country, although we did add, as an appendix to the paper, a brief account of some of the decisions of courts in other jurisdictions. Nor, in this report, does it seem to us to be necessary to state any detailed opinion as to the way in which the courts would decide the questions raised by our terms of reference; to do so would require a close analysis of general tort law principles which would be out of place in a report proposing legislation which, in some important respects, would provide for different treatment of some matters from that which they are accorded in other branches of tort law. We are also mindful of the fact that, to our knowledge, at least one claim for pre-natal injury is at present proceeding, in addition to the thalidomide claims which have not yet been finally settled.

A claim would probably lie

8. It is, however, important from our point of view to express our opinion (reinforced by our general consultation and supported by the report of the Scottish Law Commission) that it is highly probable that the common law would, in appropriate circumstances, provide a remedy for a plaintiff suffering from a pre-natal injury caused by another's fault. It is important to make our opinion on this point clear because, on consultation, it has become apparent that many people think that we were, in our working paper, proposing the creation of new liabilities, whereas it is probable that liability under the common law already exists. For this reason any legislation must make it clear that its provisions shall neither have retrospective effect nor prejudice any claims made in respect of causes of action arising before the coming into force of any legislation which may implement our proposals.

The Scottish Law Commission Report

9. In considering, no matter how briefly, what the present law probably is, the report of the Scottish Law Commission[8] is of great importance. On 13 December 1972 they were asked by the Lord Advocate to examine the following questions:—

(*a*) What is the present law of Scotland regarding liability to make reparation (including payment of *solatium* if the child fails to survive) in respect of injury caused to a child before birth?

(*b*) If the present law gives rights of reparation in respect of such injury, is redress competent when the defender's acts causing the injury occurred prior to the time of the child's conception?

(*c*) Should there be liability if there is none under the present law?

10. The report of the Scottish Law Commission contains a full consideration of the present law of Scotland and concludes that the Scottish courts, by applying existing principles of law, would admit the right of a child who has been born alive to recover damages for ante-natal injuries which it has sustained by reason of the wrongful act of another whether the defender's act occurred before or after conception[9]. It is of interest that the opinion is expressed that this result might be achieved either under the existing principles of the law of reparation or, in the case of injury caused after conception, by an application

[8] *ibid.*
[9] *ibid.*, p. 16.

of the equitable principle that, provided it is born alive a foetus[10] (or *nasciturus*) is treated as though it has already been born whenever that is to its advantage[11]. For our purposes, we do not favour this second approach.

11. Another difference between the report of the Scottish Law Commission and this report arises out of our different terms of reference. In dealing with specific problems they state[12] what the law would be held to be in respect of various matters. Our consultation has led us to the conclusion that, in the special context of pre-natal injuries, legislation ought to provide for special rules different from those to which application of the general principles of tort law might well lead. In particular, the following matters with which we deal in detail later are the subjects of recommendations which differ from the way in which the common law would probably develop:—

(*a*) the child's right to sue his own mother[13];

(*b*) the mother's own negligence[14];

(*c*) voluntary assumption of a risk by the mother[15]; and

(*d*) contractual exemption from or limitation of liability binding upon the mother.[16]

PART III THE PROCESS OF CONSULTATION

Preliminary advice from the medical profession

12. At the outset we sought advice from the British Medical Association and the Royal Society of Medicine on the distribution of our working paper. It is thanks to the ready help which we received from Dr. A. J. G. Dickens, M.B., B.Ch., D.P.H. and Mr. R. H. Thomson at this stage that we were able to develop the prolonged process of detailed consultation that ensued and has proved so fruitful.

Working Paper No. 47—Injuries to Unborn Children

13. We were able to publish this working paper on 19 January 1973 within two months of the reference to us and, in the hope that we should be able to report during the Summer of 1973, we asked for comments upon this paper before 20 April 1973. We knew that our provisional proposals contained in that paper would provoke great interest and controversy, particularly within the medical profession and, in the event, our time limit for consultation proved over optimistic. A total of nearly 1500 copies of the paper were distributed initially, about 750 being sent to bodies representing the medical profession and pharmaceutical industry. References to the paper in the general press and professional journals and the evident general interest it provoked brought requests for about 530 further copies of which 150 came from medical sources. We have been much concerned to ensure that our consultation was as comprehensive as possible.

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[10] In this report for convenience sake we use the expression "foetus" to denote the unborn child throughout the whole period of gestation. In strict medical usage, however, the unborn child should not be described as a foetus until after the twelfth week: for the first twelve weeks it is called an embryo.

[11] *Liability for Ante-natal Injury*. Scot. Law Com. No. 30; (1973) Cmnd. 5371, paras. 10–15.

[12] *ibid.*, paras. 22–28.

[13] See paras. 53–64 below.

[14] See paras. 65–66 below.

[15] See paras. 67–71 below.

[16] *ibid.*

We have been greatly assisted in our task by the written comments we have received and the breadth of our consultation will be apparent from the list of organisations and persons who submitted memoranda, which is *Appendix* 2 to this report. In particular we could not have received a greater measure of help than we did from the medical profession; we have had immensely valuable co-operation from every relevant medical organisation and from many individual doctors.

Consultative meetings

14. While we were awaiting the submission of written comments on the working paper, this aspect of our consultation was notably supplemented on four occasions when we received further help for which we are much indebted. On 1 February the staff team responsible for our paper had a most valuable preliminary discussion with Mr. L. J. Bromley, Q.C., Mr. C. M. Clothier, Q.C. and Mr. J. D. Stocker, M.C., T.D., Q.C. (now the Honourable Mr. Justice Stocker), representing the General Council of the Bar. On 9 March the British Medical Association invited our Chairman and Mr. Derek Hodgson, Q.C., to meet Sir John Peel, K.C.V.O., F.R.C.P., F.R.C.S., F.R.C.O.G., and Professor T. E. Oppé, F.R.C.P., for an informal discussion. On 19 March a Colloquium was arranged on our behalf by the President of the Royal Society of Medicine, Sir Hedley Atkins, K.B.E., M.Ch., P.P.R.C.S., when our working paper was discussed with a group of distinguished doctors. A list of those who attended this Colloquium is given at *Appendix* 3. On 13 June the Law Commissioners took part in a further discussion by an Interdisciplinary Study Group at the Institute of Advanced Legal Studies under the chairmanship of Professor J. N. D. Anderson, O.B.E., Q.C., LL.D., F.B.A., the Institute's Director and *Appendix* 4 lists those present on this occasion.

15. To complete the account of our consultation, we must especially mention the help we have received during its last phase from Professor S. G. Clayton, M.D., M.S., F.R.C.S., F.R.C.O.G., President of the Royal College of Obstetricians and Gynaecologists. A few of the medical bodies who commented on our working paper had told us they hoped we would be able to afford some further opportunity for consultation which would enable the medical profession as a whole to express a common view on certain aspects of our proposals rather than that reports from individual bodies should reach us piecemeal. In principle, this suggestion was most welcome. For our part an essential aim of our consultation has been to try and obtain as great a consensus of medical opinion as possible. At the same time we felt diffident about our ability, as lawyers, to act as co-ordinators of possibly conflicting medical views. Our special indebtedness to the President of the Royal College of Obstetricians and Gynaecologists lies in the fact that he has undertaken this co-ordination for us.

16. At the instigation of Professor Clayton a meeting was held on 25 July at the Royal College of Obstetricians and Gynaecologists, which was attended, as shown in *Appendix* 5, by representatives of all the leading medical bodies who had submitted individual memoranda on our working paper. The report of the proceedings at this meeting was supplied to us and Professor Clayton, as the author of the report, subsequently visited the Commission and we were able to have a most valuable further discussion with him. While it was made clear to us that Professor Clayton's report in no way superseded the evidence previously submitted to us directly by the various bodies concerned, it has been of particular

significance for our deliberations. This clear and cogent report has helped us not merely because of the way in which it clarified and unified medical opinion: it also set out three main views on which all present at the above-mentioned meeting had been agreed. To these we revert in paragraph 31 below.

17. Finally when this report was already in draft we received most valued help from Professor J. A. Dudgeon, M.C., M.A., M.D. M.R.C.P., F.R.C. Path., Professor of Microbiology, at the Institute of Child Health and Dr. W. C. Marshall, Ph.D., D.C.H., Research Fellow, Department of Microbiology, the Hospital for Sick Children, Great Ormond Street. Having read the draft of the report and the appended Bill, they most helpfully commented upon it in an informal discussion with our staff team.

PART IV THE MEDICAL BACKGROUND

Introduction

18. Because we wished to begin our usual process of consultation as soon as possible we did not enlist any medical assistance in the production of Working Paper No. 47. Accordingly, in considering types of pre-natal injury, we took our examples[17] from reports of litigation in other jurisdictions, saying, at the same time, that we should, on consultation, particularly welcome medical and pharmaceutical advice. Our expectations of assistance have not been disappointed and, as a result of the very extensive consultation referred to above[18], we are now in a position to give an authorative, though brief, account of the medical and scientific background to the legal problems dealt with in this report.

The prevalence of abnormal births

19. In 1971 there were 905,600 births in the United Kingdom. This number has been estimated to be the result of 74% of all pregnancies, 15% ending in miscarriage and 11% being medically terminated[19]. The number of live births exhibiting significant abnormalties is very high. The estimates we have received from different medical commentators have varied, probably because different views are held as to what should be termed significant and also the time at which the child was examined. Examinations at birth produce lower figures of incidence. The lowest estimate we have received, startling to a layman, was between 1% and 2%; other estimates went higher than 5%. We were told by the Medical Defence Union that there were 1000 handicapped children born in the United Kingdom every week and that a child suffering from cerebral palsy is born every eight hours.

Medical knowledge of the causes of congenital defects an expanding science

20. Consultation has left us in little doubt that we are in an era of rapidly expanding knowledge as to the aetiology of congenital defects. It is equally true that the ability to diagnose foetal deformity before birth by, for example, diagnostic radiology or amniocentesis[20] is also increasing. In general the types of pre-natal injury which we mentioned in Working Paper No. 47, trauma,

[17] Working Paper No. 47, paras. 6–16.

[18] See paras. 12–17 above.

[19] The estimates on pregnancies are those of Professor François Lafitte: *New Society*, 14th December, 1972, p. 623.

[20] Amniocentesis, *i.e.* the procedure whereby a sample is taken of the fluid in the uterus in which the foetus is floating, with the object of analysing the fluid and obtaining data on whether the foetus may be born with congenital defects.

injury during birth, drugs, abortifacients, irradiation and diseases, were accepted as valid. There was, however, a good deal of doubt expressed as to whether direct trauma to the mother could ever cause foetal injury without a spontaneous abortion and the particular examples which we mentioned[21] were considered very doubtful cases. However, it was not disputed that, where the mother died before the birth as a result of trauma, the lack of oxygen between her death and the child's subsequent birth (by caesarian section) could cause damage to the child.

The effect of drugs

21. There are known to be about 1500 drugs having teratogenic[22] effects with varying (usually slight) degrees of risk. However, particularly in relation to drugs, the aetiology of deformities is the subject of dispute. This was a common theme running through nearly all the medical comments we received. It seemed to be generally agreed that no drug could ever be guaranteed safe for the foetus and the point was made with some emphasis that a pregnant woman would become virtually untreatable if no small risk to the foetus could ever be ignored. Nevertheless, it seems clear that, in addition to thalidomide, the terrible teratogenic effect of which is no longer in doubt, there are other drugs which present a substantial risk of damage to the foetus if taken by a pregnant woman. Examples, which have been mentioned to us, include stilboestrol, which, when prescribed for pregnant women liable to miscarriages in the hope of preserving a pregnancy, has been followed by the developement of vaginal cancer in their adolescent daughters; anti-convulsant drugs, causing cleft palates; antibiotics causing mottled teeth; progestogens causing severe virilisation[23] in the female foetus with permanent effect on the genitalia; and some drugs used in the treatment of diabetes. The chance[24] of a defective contraceptive pill damaging a foetus was accepted as a possibility meriting most serious consideration by one eminent physician. In the opinion of some doctors pregnant women should not, without prescription, take aspirins, laxitives or even vitamins, but, despite this opinion, 82% of pregnant women in the United Kingdom take prescribed drugs during pregnancy and 65% take self-medicants.

Poisonous waste

22. An example of poisonous waste causing pre-natal injury was reported in The Times of 21 March 1973. Twenty years ago the coastal waters of Minamat, a town in south-western Japan, were polluted by industrial waste containing methyl mercury which was absorbed by fish and shellfish. The children of pregnant women who consumed the polluted fish were born with deformed limbs and an impaired nervous system. Adults who accumulated mercury in their systems from eating the fish suffered permanent paralysis, loss of coherent speech and malformation of the eyes. After litigation extending over 17 years

[21] *i.e.* that a child was born crippled as a result of injury sustained by his mother in a railway accident: that a child being born with club feet was caused by his mother's involvement in a tramcar accident: that a child's brain damage and epilepsy was caused seven months before birth when his mother was involved in a road accident wherein she was rendered a paraplegic. See Working Paper No. 47, para. 8.

[22] Teratogenic, *i.e.* capable of causing damage to the foetus.

[23] Progestogens are substances with an action like that of the ovarian hormone progesterone. Cases arise where excessive intake of such hormones by a female can result in the development of male characteristics, i.e. virilisation.

[24] We referred to this hypothetical case in para. 38 of Working Paper No. 47.

the chemical company responsible for the pollution was ordered to pay compensation totalling £1,500,000 to the victims of the disaster.

The effects of illness, infection and disease

23. It is clear that there are infections and diseases which may have an adverse effect on the foetus. Infections such as syphilis and rubella[25] can cause considerable damage. Other infections which may have teratogenic effects were suggested to us by the Medical Defence Union; they included smallpox and vaccinia virus, chicken pox and influenza. Even without infection, there are dangers. Although prematurity will more often than not be caused by, rather than cause, an abnormality; prematurity (and, indeed, postmaturity) can result in poor prospects for the child in terms of health and development. Prematurity can also be caused by an incompetent cervix, which ought to be diagnosable. An eclamptic mother[26] should have the birth induced, although this itself carries a risk to the foetus. Other conditions in the mother, such as toxaemia[27], hydramnios[28], diabetes mellitus[29] and thyroid disorders all carry risks for the foetus. Immunisation against Rhesus disease[30] of a mother can cause haemolysis[31] in the foetus; this can be treated by intra-uterine blood transfusion, a process carrying, however, its own risks.

Injury caused in attempted termination of pregnancy

24. It is apparent that there is an area of potential risk to a foetus surviving an unsuccessful attempt to terminate a pregnancy. The case is known, for example, where there was a failure to diagnose twins and at operation for termination of the pregnancy only one foetus of the undiagnosed pair had been evacuated from the uterus[32]. In New York, where over 400,000 abortion operations have been performed after the 24th week, 73 live births have taken place despite the abortion operations. In two of these cases the infant has survived, one in a seriously handicapped state[33].

Risks in pre-natal treatment and childbirth

25. There is a slight risk to the foetus even in some properly and carefully performed diagnostic investigations such as amniocentesis[34] and some forms of treatment such as intra-uterine transfusion. General anaesthetics and treatments for toxaemia also carry a slight risk to the foetus. It was the general opinion of the doctors whom we consulted that treatment of the mother during childbirth could also cause injury to the infant.

Risks resulting from the mother's condition

26. Certain conditions of the mother make it statistically more probable that a child will suffer an infirmity or be abnormal. Women over 40 have an increased

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[25] Rubella, *i.e.* German measles.

[26] Eclamptic mother, *i.e.* a mother suffering from pre-eclampsia, which if untreated can lead to eclampsia, a condition manifested by fits and coma and even death.

[27] Toxaemia, *i.e.* a condition denoting a hostile substance in the blood.

[28] Hydramnois, *i.e.* an excess of fluid in the uterus which can be associated with a cogenitally abnormal foetus.

[29] Diabetus mellitus is the common form of diabetes attributable to a failure of the pancreas as contrasted with diabetes insipidus attributable to a defect in the pituitary gland.

[30] For details of Rhesus disease see footnote 37 below.

[31] Haemolysis, *i.e.* a condition denoted by the destruction of the red blood corpuscles, which can be fatal unless treated.

[32] We have been so informed by the Royal College of Physicians.

[33] We have been so informed by the Medical Defence Union.

[34] See footnote 20 above.

chance of bearing a mongol child or a child born with a defect of the central nervous system. A diabetic mother is said to have twice the normal chance of having a disabled child. Where a woman has borne one child suffering from cystic fibrosis[35] the risk for the next child being similarly affected is one in four. An extreme case mentioned to us was that of a mother who was a dwarf due to osteogenesis imperfecta[36], a condition in which there is a 50% chance of it being passed on to the child.

The effect of events occurring to a parent before conception

27. It was accepted that events happening to a parent could be the cause of abnormalities to a child subsequently conceived. Radiation may affect the reproductive germ cells of either parent. As another example, it is possible that failure to give a Rhesus negative woman anti-D gamma globulin in the first 72 hours after the birth of her first child, if it was Rhesus-positive, would lead, in subsequent pregnancies, to her later child suffering avoidable Rhesus disease[37].

Difficulties of proof

28. Again and again in our consultation with the medical profession it was emphasised that the whole field of teratology is in a state of development and that, in many cases, the evidence as to the cause or causes of a child's congenital disability will be inconclusive. There is no doubt that proof of the causation of pre-natal injury presents great difficulty at present and will continue to do so in many cases in the foreseeable future. We are, however, left with the clear impression that rapid progress is being made and that we must be prepared for far greater certainty both in the identification of teratogenic agents and the proof of causation of specific disabilities in the future.

Medical advice during pregnancy

29. The development of medical and social services has led to more and more women seeking medical advice during pregnancy. This, together with the increase in medical and scientific knowledge referred to in previous paragraphs, is bound to lead to greater risks of medical advisers failing to tender the correct advice or to prescribe and give the correct treatment. Section 1(1)(*b*) of the Abortion Act 1967[38] provides that a medical practitioner is not guilty of an offence under the law relating to abortion when he terminates a pregnancy if two medical practitioners are of the opinion, formed in good faith, that "there is a substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped". Whilst the Act has no direct bearing on questions of civil liability we think it probable that a doctor would be held to be failing in his duty of care to a pregnant woman if he failed

[35] Cystic fibrosis, *i.e.* a familial disease denoting a disorder of the mucus secreting glands in the body and characterized by excessive respiratory infections and failure to thrive and early death.

[36] Osteogenesis imperfecta, *i.e.* a rare condition in which the bones are brittle and fracture on relatively trivial strains.

[37] The Rhesus factor (so-called because it appears in the blood of the Rhesus monkey) is a constituent factor in the blood of 84% of human beings, who are called Rhesus-positive. A person lacking this factor is called Rhesus-negative. A Rhesus-negative mother may develop antibodies against the Rhesus factor from a transfusion of Rhesus-positive blood or by bearing a child which is itself Rhesus-positive. The Rhesus-negative mother's antobodies may, in a subsequent pregnancy, pass into the foetal circulation and thus cause haemolysis of the foetal blood of the later foetus. The mother may be immunised by treatment with anti-D gamma globulin after her first confinement.

[38] 1967 c. 87.

to warn her that it could be reasonably foreseen that there was a risk of her bearing a disabled child and that this was such as to make an abortion legal. Whether a child, thereafter born disabled, ought to be able to recover damages from the doctor is a matter which we consider and answer in the negative later in this report[39].

30. In addition to the possible liability upon doctors and others advising pregnant women, referred to in the last paragraph, every new positive identification of a teratogenic agent or procedure creates a new sphere of duty, for example, to refrain from prescribing a drug or treatment. Moreover, lack of care in performing therapeutic or diagnostic treatment may lead to a child being born with disabilities caused thereby. We are very conscious of these added responsibilities which are being placed upon the medical profession and which have been emphatically brought to our notice by the profession. If our view of the way in which the courts would decide cases where pre-natal injury is caused by negligent conduct is correct[40] the proposals we make in this report will in no way add to the potential liability of those who advise and treat women during pregnancy, but we have, in framing these proposals, kept in mind their difficulties. Particularly in relation to the possibility of allowing an action in those cases where the allegation is that a child has suffered harm from the fact of being born[41], those difficulties have been a major factor influencing us in the conclusion at which we have arrived. We are also well aware that parents of disabled children sometimes suffer (naturally but illogically) from feelings of personal guilt which it is a natural instinct to transfer elsewhere. It would be a sorry result of the legislation we propose if it were to lead to the harassment of the medical profession with unfounded claims. We have taken care that the draft Bill which we append to this report will not, if it is eventually embodied in legislation, have any such effect.

Main views of the medical profession

31. We have referred in paragraph 16 above to the main views arrived at by the representatives of 14 of the main medical bodies at their meeting held on 25 July 1973. It is convenient to record them here. They were:—

(*a*) the meeting agreed that a child born alive should have a right of action, accruing at birth, in respect of injury either sustained by it after conception and before birth, or resulting from injury sustained by its mother during pregnancy due to the fault of a third party;

(*b*) the meeting could not agree whether to advise that new legislation should exclude the right of the child to bring an action against its own mother for pre-natal injury caused by her act of omission or commission;

(*c*) the meeting agreed it should be a defence to an action brought by the child for pre-natal injury that a medical practitioner acted in good faith and in accordance with accepted practice in the discharge of his primary duty towards the mother, having due regard to the unborn child, in carrying out any treatment or giving any advice.

[39] See para. 89 below.
[40] As to which see paras. 7–11 above.
[41] "Wrongful life" is treated at paras. 85–91 below.

V. THE PROBLEMS CONSIDERED: LEGISLATIVE PROPOSALS

(A) THE BASIS OF LIABILITY

The basis of liability

32. In paragraph 17 of Working Paper No. 47 we expressed the provisional view that "whenever a plaintiff has suffered ante-natal injury caused by the fault of another he ought to be entitled to recover damages". This simple sounding proposition, by emphasising the word "plaintiff", expressed our view that legislation should deal with the rights of a living person rather than the rights of a foetus. Our consultation has convinced us that this provisional view was correct. It accords with the general principles of tort liability for negligence which have been developed by the common law. For there to be any cause of action there must be a live birth. The cause of action can be said to crystallise at birth. A developing common law points towards this result. It is no bar to a claim at common law that the negligent act which caused the injury was not contemporaneous with the injury itself. Thus there is nothing repugnant to common law principle in fixing the date of injury at a point, live birth, necessarily later than both the negligent act causing the injury and the event or occurrence resulting from that act and damaging the foetus. To look back from the fact of live birth with injury to the fault causing the injury is consistent with the common law. In *Dorset Yacht Co. Ltd.* v. *Home Office* Lord Pearson said:—

> "The form of order assumes the familiar analysis of the tort of negligence into its three component elements, *viz.*, the duty of care, the breach of that duty and the resulting damage. The analysis is logically correct and often convenient for purposes of exposition, but it is only an analysis and should not eliminate consideration of the tort of negligence as a whole. It may be artificial and unhelpful to consider the question as to the existence of a duty of care in isolation from the elements of breach of duty and damage. The actual damage alleged to have been suffered by the plaintiffs may be an example of a kind or range of potential damage which was foreseeable, and if the act or omission by which the damage was caused is identifiable it may put one on the trail of a possible duty of care of which the act or omission would be a breach. In short, it may be illuminating to start with the damage and work back through the cause of it to the possible duty which may have been broken."[42]

The difference between claims for pre-natal and for other injuries

33. There are, however, major differences between claims for damages for pre-natal injury and other claims in respect of personal injury. The plaintiff has no legal existence at the time of his injury nor has he, prior to live birth, an existence separate from his mother. The fact of physical identification of mother and foetus is something which cannot be ignored and which gives rise to difficult questions. Nor can one ignore the fact that an event or occurrence (resulting from a negligent act or omission) can cause pre-natal injury even though it happens before the injured person's conception. Injury to either parent before conception can cause the child subsequently conceived to be born with disability. These factors have led us to propose rules in respect of pre-natal claims which differ from those which would be derived from common law

[42] [1970] A.C. 1004 at p. 1052.

principles. We deal in detail with these matters later in this report[43]. Subject to these differences, however, we think that, so far as possible, claims for pre-natal injury should be equated with ordinary claims for damages for personal injury and that the principles governing liability should be as for personal injuries inflicted after birth.

"Fault" in relation to pre-natal injury

34. In our working paper[44] we expressed the provisional view that there should be liability for causing pre-natal injury whether the injury was caused intentionally, negligently or by a breach of statutory duty. Our consultation has, in the main, confirmed this provisional view. The difficulties of deciding upon the detailed principles to be followed in proposing legislation and the difficulties encountered in framing legislation have, however, proved formidable. The difficulties in the main stem from the differences between claims for pre-natal injuries and for other injuries mentioned in the preceding paragraph.

Physical identity of mother and foetus

35. The fact that, at the point of time when the actual injury is caused, the foetus is physically identified with its mother has caused great difficulty in three ways:—

(*a*) in deciding upon the framework of rules to govern liability for pre-natal injury;

(*b*) in deciding whether any rules are required to take account of the special relationship between a child born with pre-natal disability and his mother; and

(*c*) in deciding how, in the case of pre-natal injury, effect should be given to the rule of English law that a tortfeasor "takes his victim as he finds him".

In subsequent paragraphs we deal with these three matters and indicate the decisions of policy at which we have, not without great difficulty, arrived. We shall then deal with the problems which arise in the consideration of whether there should be liability where a parent's injury before conception causes a child to be born with disability. After conception it is only by something happening to mother and foetus that pre-natal injury can be caused so that our consideration of the problems arising from physical identification are primarily limited to mother and child.

(B) The Main Principles which should govern liability for Pre-natal Injury

Liability at common law

36. We have always recognised that the most likely ground for liability for pre-natal injury will be the tort of negligence[45]. This tort is, however, still being developed by the common law. This makes it difficult to enact in statutory form rules governing one very small part of its application without, in effect, codifying the tort itself. Our first inclination was to follow the pattern of the Occupiers' Liability Act 1957[46] and frame, in terms of the common law, a general duty of

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[43] See paras. 53–71 below.
[44] Working Paper No. 47, paras. 18–21.
[45] Working Paper No. 47, para. 18.
[46] 1957 c. 31.

care owed to unborn children. The difficulties of doing this without making rules which might run counter to the way in which the tort of negligence will be developed by the courts have, however, persuaded us that this would not be the right course to take.

The difficulties encountered

37. In creating any new duty or liability by statute it is first necessary to define the relationship to which the new duty or liability is to apply as for example:—

(*a*) factory occupier – person employed[47]; or

(*b*) nuclear site licensee – any person[48]; or

(*c*) keeper of animal – any person[49]; or

(*d*) occupier of premises – lawful visitors[50].

It is in stating the relationship out of which a duty of care to the unborn should arise that the greatest difficulty has been encountered. As Professor J. G. Fleming points out, "Everyone agrees that a duty must arise out of some relation between the parties but what that relation is no one has ever succeeded in subsuming under any formula"[51].

38. For English lawyers the most familiar attempt at formulating criteria for deciding whether a relationship giving rise to a duty of care exists is Lord Atkin's dictum in *Donoghue* v. *Stevenson*:—

> "There must be, and is, some general conception of relations giving rise to a duty of care, of which the particular cases found in the books are but instances. . . . The rule that you are to love your neighbour becomes in law you must not injure your neighbour, and the lawyer's question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law, is my neighbour? The answer seems to be – persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question."[52]

39. This dictum is however too wide because there are a number of cases where someone who suffers injury or damage caused by the act or omission of another is denied a remedy although that injury or damage was a reasonably forseeable result of the act or omission. This denial of remedy can result from a number of different reasons:—

(*a*) the nature of the act or omission: mere omission to act in the absence of a special relationship is not actionable and there are special limits upon the extent to which injury or damage suffered as a result of a negligent misstatement can ground an action;

(*b*) the damage suffered: mere economic loss as opposed to physical injury or damage will not always be recoverable;

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[47] Factories Act 1961 (c. 34), s. 76.
[48] Nuclear Installations Act 1965 (c. 57), s. 7.
[49] Animals Act 1971 (c. 22), s. 2.
[50] Occupiers' Liability Act 1957 (c. 31).
[51] *The Law of Torts*, 4th Edition (1971) p. 134.
[52] [1932] A.C. 562 at p. 580.

(c) the special relationship between plaintiff and defendant: trespassers and, perhaps, donees are owed a lesser duty than other "neighbours".

40. The tort of negligence is analysed as consisting of a duty owed by one to another, an act or omission constituting a breach of that duty and damage from that breach. This, as Lord Pearson pointed out[53], is logically correct but it is often convenient to look backwards from the damage to see whether the act or omission identified as its cause amounted to a breach of any duty. The difficulty with pre-natal damage, however, is that, by definition, it was suffered at a time when the plaintiff was not in existence. It is not, therefore, meaningful in many cases, to ask whether the plaintiff's claim is excluded for one of the reasons mentioned in the previous paragraph. He cannot have been either within one of the special categories, such as "lawful visitor", which give protection against mere omissions, nor one of the special categories to whom a lesser duty of care is owed, such as "trespasser"; nor can he have been the recipent of a negligent misstatement.

41. It is, we think, clear from the preceding paragraphs that an unrestricted relationship in terms of "any person – all unborn children" would not be satisfactory.

Difficulties arising from the existence of duties at common law higher than the duty of care in the tort of negligence

42. In our report on civil liability for dangerous things and activities[54] we identified the following duties imposed by the common law which were higher than the duty of care in negligence:—

(a) the doctrine of *Rylands* v. *Fletcher*[55];

(b) liability for fire;

(c) nuisance.

43. The report then dealt[56] with liability for independent contractors. So far as the strict liabilities set out in the previous paragraph are concerned it is clearly no defence to show that the breach was caused by someone else. But, as the report points out, there are other situations in which the duty as ordinarily formulated is merely to use reasonable care, but breach of that duty by a carefully chosen independent contractor will result in liability. The best analysis of those cases is that they convert a duty to take reasonable care into a duty to assure that care is taken. They therefore form a class of case where the duty is higher than the normal duty of care in negligence. If, by legislation, the duty of care owed to an unborn child were framed as being the ordinary duty of care in negligence an unsatisfactory result could occur. If an independent contractor, by his negligence injured both mother and unborn child, his employer might be liable to the mother, his duty to her being to assure that care was taken; against her child's claim, however, he would be able to plead successfully that he had fulfilled his duty by the careful selection of the independent contractor.

The problems stated

44. Whilst it is, of course, impossible to foresee all the fact situations which may arise in the future we have identified a number of questions which require

[53] *Dorset Yacht Co. Ltd* v. *Home Office* [1970] A.C. 1004 at p. 1052.

[54] Law Com. No. 32; (1970) H.C. 132.

[55] (1868) L.R. 3 H.L. 330.

[56] Law Com. No. 32; (1970), Appendix 1.

consideration and have reached conclusions as to what the law should provide by way of answer. They are:—

(*a*) To what extent should a child's rights be limited by a limitation of his mother's rights? Ought, for instance, the unborn child of a pregnant woman trespasser to be owed the duty of care owed by an occupier to a lawful visitor or the duty of care as defined for the tort of negligence by the House of Lords as the duty owed to a trespasser[57]? (We refer hereafter to this duty as "the duty of humanity".) We have concluded that the physical identification of mother and child would make it not only impracticable to attempt to distinguish between the duty owed to a mother and to the child, who, at the time of the injury, is a physical part of her, but that to do so would also be unjust to defendants.

(*b*) In what circumstances should mere omission to act ground a cause of action for pre-natal injury? Mere omission to act only amounts to the tort of negligence where a special relationship between tortfeasor and victim exists prior to the omission. One is under no duty at common law to save a drowning man or to shout a warning to a stranger who is about to be run over. If, however, some special relationship exists or has been assumed, the duty to act arises and failure to act can give rise to liability. But, as we have seen, no such relationship can be present when one party to it is not in existence. In line with our conclusion in (*a*) above we have concluded that the question whether a failure to act which causes pre-natal injury ought to ground liability to the child should depend upon whether a special relationship exists between tortfeasor and mother when the pre-natal injury occurs.

(*c*) Should the breach of a "strict" common law duty, such as those to which we referred in paragraphs 42 and 43 above, ground a cause of action by the child? We have seen that such a breach can only arise in relation to the mother. It might, however, cause pre-natal injury to the child. If it does we have concluded that, as a general rule, the child ought to be able to recover damages.

(*d*) There are other situations where a breach of duty towards the mother might conceivably cause pre-natal injury. For instance, special rules govern liability for negligent misstatement. And new extensions or limitations of common law liability may be created or imposed in the future. We think that, in principle, the same general rule should apply as we have recommended in (*a*) to (*c*); liability to the child should depend on liability to the mother.

Conclusion as to a general rule for liability

45. We have concluded that, as a general rule, whenever there is liability at common law to a mother for an act or omission which causes pre-natal injury, the child should be entitled to recover damages. (There are, however, certain limitations to this broad "derivative" basis of liability with which we deal later[58]). This general rule will also cover the case of an intentional injury to the mother causing pre-natal injury. Whether this takes the form of physical trespass to the

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[57] See *Herrington* v. *British Railways Board* [1972] A.C. 877.
[58] See paras 47–52 below.

person of the mother or other intentional harm[59], if pre-natal injury is caused the child should recover damages.

"Technical" difficulties in stating a general rule for liability

46. There are "technical" difficulties in stating the general rule that "liability" to the mother should ground liability to the child. In English law, no cause of action for negligence arises until damage is done. It is possible that an act or omission may cause pre-natal injury to the child but leave the mother physically unaffected, or even benefited; for instance the drug thalidomide actually benefited the mothers. Or the mother might die before the birth of the child from some cause unconnected with the act or omission causing pre-natal injury: one of the mothers of a thalidomide child might have been killed in a car crash and her disabled child have been delivered posthumously by caesarian section[60]. It is also difficult to speak of an injury to the foetus during childbirth and just before birth as being an injury to the mother. Whilst most people would consider that to cause a woman to bear a disabled child was to cause her personal injury, we have thought it desirable in relation to the child's action to clarify this possible area of doubt in the legislation we propose.

Breach of statutory duty: how the present law might apply to pre-natal injuries

47. Breach of an existing statutory duty might cause pre-natal injury. It is, however, unlikely that when the enactment giving rise to the duty was drafted any consideration was given to this possibility. In the absence of legislation could such an enactment be construed as entitling a plaintiff to claim damages for pre-natal injury? This would, we think, depend on the form of words adopted in the enactment in question. There are several possibilities:—

(*a*) The enactment might not contain any words defining or limiting the class of potential plaintiffs. This might well occur where the statute imposes a duty without adverting to the possibility of a civil action. For example, section 133(2) of the London Building Acts (Amendment) Act 1939[61] provides that "All means of escape in case of fire . . . provided in pursuance of the provisions of Part V . . . of this Act or otherwise shall be kept and maintained in good condition and repair and in efficient working order by the owner of the building. . . .". There is no mention of the persons to whom this duty is owed, but it has been held that a worker in a building subject to the provisions was a person within the class for whose benefit the duty was imposed and could therefore bring a civil action for breach of statutory duty[62]. The class included workers because the relevant provision entitled the local authority to serve a fire escape notice on the ground that the building was one in which more than ten persons were normally employed above a certain height. Other grounds include that a building of a certain type is let in flats, or used as an inn, hotel or boarding house; if such provisions had been relevant, and had a breach of duty

[59] As in *Wilkinson* v. *Downton* [1897] 2 Q.B. 57. Where A, by way of a practical joke, falsely told the plaintiff that her husband had broken both his legs; the consequent nervous shock caused her to be seriously ill.

[60] In the case to which we refer in paragraph 7 the plaintiff is alleged to have suffered pre-natal injury because of lack of oxygen between the moment of his mother's death due to injuries sustained in a road accident and his birth by caesarian section.

[61] 1939 c. 97.

[62] *Solomons* v. *R. Gertzenstein Ltd.* [1954] 1 Q.B. 565.

led to pre-natal injury, we think that the statutory provision would lend itself to the interpretation that a child so injured might recover damages.

(*b*) The enactment might contemplate or be held to contemplate a duty owed to, or a civil liability at the suit of, anyone affected by the duty or its breach. Examples include:—

the Consumer Protection Act 1961[63], section 3: "Any obligation imposed by or by virtue of the foregoing section is a duty which is owed . . . to any other person who may be affected by the contravention of or non-compliance with the requirement in question. . . ."

the Animals Act 1971[64], section 2(1): "Where any damage is caused by an animal which belongs to a dangerous species, any person who is a keeper of the animal is liable for the damage . . ." Damage is defined (section 11) as including "the death of, or injury to, any person (including any disease and any impairment of physical or mental condition)".

the Deposit of Poisonous Waste Act 1972[65], section 2(1): "Where any damage is caused by poisonous, noxious or polluting waste which has been deposited on land, any person who deposited it . . . is liable for the damage. . . ." Damage is defined (section 2 (3)) as including "the death of, or injury to, any person (including any disease and any impairment of physical or mental condition)".

Another example is afforded by the duty imposed by section 143(1) of the Road Traffic Act 1972 to insure the users of motor vehicles against third-party risks[66]. The policy must insure the persons specified in it "in respect of any liability which may be incurred by him or them in respect of the death of or bodily injury to any person. . . ."[67]

In our view a court would hold that "any person" in all statutes such as these includes a child suing in respect of pre-natal injury.

(*c*) The enactment might contemplate a duty owed to, or a civil liability at the suit of, a wide but nevertheless limited class of persons which might or might not be capable of including a child born with pre-natal injury. For example, the rules enacted by sections 2 and 3 of the Occupiers' Liability Act 1957 regulate "the duty which an occupier of premises owes to his visitors. . . ."[68].

For the purposes of these rules "the persons who are to be treated as . . . visitors are the same . . . as the persons who would at common law be treated as . . . invitees or licensees."[69]. If an accident to a visitor led to the birth of a child with pre-natal injuries it is arguable whether the child would at common law be accorded the same status as its

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[63] 1961 c. 40.

[64] 1971 c. 22.

[65] 1972 c. 21.

[66] An action lies under this section for breach of statutory duty: *Monk* v. *Warbey* [1935] 1 K.B. 75.

[67] Road Traffic Act 1972, (c. 20), s. 145 (3) (*a*).

[68] Occupiers' Liability Act 1957 (c. 31), s. 1 (1).

[69] *ibid.*, s. 1 (2).

parent *vis-a-vis* the occupier. We express no view at this point, but discuss the question below[70].

(*d*) The enactment might contemplate a duty owed to, or a civil liability at the suit of, a limited class of persons defined in terms which cannot include a child born with pre-natal injury. For example, the Waterworks Clauses Act 1847[71] provided in section 53 that, on laying the necessary pipes and paying or tendering the water rate, "Every owner and occupier of any dwellinghouse . . . shall . . . be entitled to demand and receive from the Undertakers a sufficient supply of water for his domestic purposes."[72]. It was held that this duty was enforceable by an action for breach of statutory duty by the owner or occupier, but not by his infant daughter injured by the breach of duty[73]. A fortiori no action would lie at the suit of a child in respect of pre-natal injury. Again, many of the statutory duties imposed by or under the Factories Act 1961[74] are stated to be for the benefit of "persons employed"; although this class is not limited to persons in a contractual relationship with the owner or occupier of the factory[75], a civil action lies only at the suit of a person employed to do work in and for the purposes of the factory[76]. We therefore do not think that any action would lie at the suit of a child in respect of pre-natal injury caused by a breach of a duty imposed by or under the Factories Act for the benefit of persons employed, without some statutory amendment. This conclusion must, we think, be valid even where regulations made under the Act clearly contemplate the possibility of pre-natal injury. For example, the Ionising Radiations (Unsealed Radioactive Substances) Regulations 1968[77] lay down that "no person shall receive any radiation dose in excess of those permitted under Schedule 1 to these Regulations"[78]. Schedule 1, after prescribing the maximum permissible doses for persons employed in a factory, prescribes a very much smaller dose for "any female person whom the occupier knows, or has reasonable cause to believe, to be pregnant"[79]. The reason for including this provision is clear, but the regulations in question are made under sections 62 and 76 of the Factories Act 1961 for the purpose of securing the welfare of and reducing the risk of bodily injury to "the persons employed" and we do not therefore think that any action by the child himself would lie in respect of pre-natal injury unless some new statutory provision is made. We discuss this question below[80].

(*e*) Some statutory duties take effect as implied terms in a contract. No action lies in tort for breach of statutory duty in these cases, the liability

[70] See para. 49 below.

[71] 1847 c. 17.

[72] See now the Water Act 1945 (c. 42), Schedule 3, s. 30.

[73] *Read* v. *Croydon Corporation* [1938] 4 All E.R. 631.

[74] 1961 c. 34.

[75] *Massey-Harris-Ferguson Ltd.* v. *Piper* [1956] 2 Q.B. 396; *Ward* v. *Coltness Iron Co.* 1944 S.C. 318.

[76] *Hartley* v. *Mayoh & Co.* [1954] 1 Q.B. 383.

[77] S.I. 1968/780 (1968 II, p. 2153).

[78] Regulation 12(2).

[79] *ibid.*, Schedule 1, para. 3.

[80] See paras. 50–51, below.

being regarded as contractual[81]. Since a child cannot be a party to a contract before he is born, no action under such a statute would, we think, lie at the suit of a child in respect of pre-natal injury.

Discussion of breach of statutory duty

(*a*) *Duties owed to an unlimited class*

48. In our description in the previous paragraph of the different ways in which a statutory duty may be imposed, we have indicated our view that where the statute does not define or limit the class of potential plaintiffs or contemplates (or is held to contemplate) a civil action brought by "any person" or uses a similar all-embracing phrase, then an action probably would lie at the suit of a child in respect of pre-natal injury. We think that there should be liability in such cases and that the legislation we recommend should ensure that there is.

(*b*) *Occupiers' Liability Act 1957*

49. More difficult questions arise where the class of potential plaintiffs is limited to, for example, "visitors", "owners", "occupiers" or "persons employed". In this area special considerations apply to the Occupiers' Liability Act 1957 and we must treat it separately. The reason is that the duty under the Act is, unlike that imposed by many statutes, simply a duty to take reasonable care[82]; in this it is not unique, but what distinguishes it is that its rules have effect "in place of the rules of the common law"[83]. Thus in *Read* v. *Croydon Corporation*[84], where the statutory duty to supply pure and wholesome water was "not an absolute obligation, but is limited to the exercise of all reasonable care and skill"[85], it was held that the 14-year-old daughter could not enforce the statutory duty but could sue at common law for negligence. It is true, no doubt, that if a child suing in respect of pre-natal injury were held not to be a visitor, the Occupiers' Liability Act would not prove to be an obstacle to a common law action; but we take it as axiomatic that an action brought against an occupier of land or premises in respect of pre-natal injury ought if possible to proceed on the basis of alleged breach of the common duty of care (or, in the case of a trespasser, the duty of humanity) and ought not to lead to an inquiry into the nature of the duty which the occupier might have owed at common law in the circumstances of the case. The meaning of "visitor" in the Occupiers' Liability Act depends, however, on the persons "who would at common law be treated as . . . invitees or licensees"[86]. It seems to us to be possible that where a woman is an invitee or licensee then, whether or not she is known to be pregnant, the invitation or licence might reasonably be held to extend to any child she may be bearing, and we think that a child subsequently born might therefore be in a position to sue in respect of pre-natal injuries, if these were due to a breach of the common duty of care. Whatever the meaning of invitees or licensees at common law, we have no doubt that where a child is subsequently born to a visitor or trespasser, and has pre-natal injuries sustained as a result of a breach

[81] A good example is afforded by the implied terms in the Sale of Goods Act 1893, (c. 71), ss. 12–15.

[82] Occupiers' Liability Act 1957 (c. 31), s. 2(2): "The common duty of care is a duty to take such care as in all the circumstances of the case is reasonable . . . . ."

[83] *ibid.*, s. 1(1).

[84] [1938] 4 All E.R. 631; see para. 47(d), above.

[85] [1938] 4 All E.R. 631, *per* Stable J. at p. 651.

[86] Occupiers' Liability Act 1957 (c. 31), s. 1(2).

of the common duty of care or a breach of the duty of humanity, he should have a remedy.

(*c*) *Other duties owed to a limited class*

50. Where the statutory duty is owed to a class of persons defined in terms which are not apt to include a child born with a congenital disability, a difficult question of policy arises. In the absence of an amendment to the statute in question, or legislation in general terms, it seems clear that no action would lie in respect of pre-natal injury. Should amendments be made to specific statutes or should there be general legislation? There are two possible approaches to resolving this question.

51.(*a*) One possible answer is that no amendment should be made in general terms and that each statute imposing a duty enforceable by civil proceedings should be left unchanged unless and until it has been the subject of separate consideration.

This solution would recognise that statutory duties are extremely varied and that considerations relevant to, say, the Factories Act 1961 may have little relevance to, perhaps, the Waterworks Clauses Act 1847 or local Acts that have incorporated it. It would also enable thought to be given to the anomaly that might arise whenever in the existing law there is no right of action for breach of statutory duty by persons other than those to whom the duty is owed[87].

However, the difficulties inherent in the task of considering separately all existing statutes and the uncertainty that Departments preparing future legislation might understandably feel on whether to mention pre-natal injury have persuaded us that this would not be a satisfactory course to adopt. Moreover, we think it would be impossible to deal with many statutory duties at all on an individual basis, for there are many duties imposed by statutes which do not indicate whether a civil action lies: in the absence of a judicial decision on the particular statute it would not be known whether an individual amendment relating to pre-natal injury was needed or not.

(*b*) Another possible answer is the enactment of general legislation purporting to confer a right of action in respect of pre-natal injury for all breaches of statutory duty *vis-a-vis* the mother.

Such a provision would of course have to be more restricted than the phrase "general legislation" suggests and would require limiting in two respects:—

(i) In the first place it ought obviously to apply to those statutory duties where a civil action lies in respect of injury caused by a breach. Limited in this way, it would be a solution far easier to achieve than the enactment of individual statutes to amend individual Acts.

(ii) The second needful limitation is to establish a connection between a breach of duty and pre-natal injury. It would, we think, be impossible to support a provision giving a right of action to any child born with a congenital disability as a result of a breach of statutory duty when that duty was,

[87] For example, if the owner to whom the duty was owed in *Read* v. *Croydon Corporation* [1938] 4 All. E.R. 631 had been the mother, the 14-year-old daughter living with her would not have recovered in respect of personal injuries in an action for breach of statutory duty; an amendment to deal with pre-natal injury might have the consequence that the child already alive would not sue, but the child subsequently born could. This anomaly might suggest that no extension of such a statute to deal with pre-natal injury would be justified, but in our view the physical identification of mother and foetus at the date of the injury supports a solution enabling the child to sue in respect of pre-natal injury.

under the statute by which it was created, owed to a person or class of persons in no way linked to the child or its mother. Suppose on the facts of *Read* v. *Croydon Corporation*[88] that a guest visiting the owner of the house took a glass of impure water and contracted a disease which affected both her and a child to which she subsequently gave birth; we do not think that child should have a right of action when there has been no breach of statutory duty to its parent.

We believe that general legislation with the above two limitations would provide the right solution to the question posed in the foregoing paragraph and we recommend accordingly.

Conclusion as to breach of statutory duty

52. We recommend that the general rule should be that where a breach of statutory duty owed to a pregnant woman causes pre-natal injury to her child that child should be entitled to recover damages for his disability. In the same way as we have recommended for actions in tort at common law[89], liability to the child should depend upon liability in tort to the mother. If the rule is stated in terms of liability to the mother this will exclude those duties which do not give rise to a civil action for their breach; it will also mean that only breach of a duty owed to the mother will ground an action in the child.

(c) The Special Relationship between a Child Born with Disability and his own Mother

The problem analysed

53. If a young child is caused physical injury by the negligence of his mother or father he can recover damages from that parent. It is not uncommon for claims of this sort to be made by a child for damages for personal injuries resulting from a road traffic accident where the accident was caused by the negligent driving of one of the child's parents. (Apart from traffic accidents such claims seem rarely, if ever, to be made.) The difficulty of distinguishing, on grounds of legal principle, between such claims for damages for personal injury and claims for damages for pre-natal injury led us, in Working Paper No. 47, to make the provisional proposal that, where a plaintiff suffers pre-natal injury caused by his mother's negligence he should be entitled to recover damages from her[90]. Legal principles further led us to make provisional proposals as to the related topics of a mother's own contributory negligence, her voluntary assumption of risk and her agreement to a contractual exemption from or limitation of liability. Rejecting any application of the doctrine of legal identification we proposed that a mother's contributory negligence should not diminish her child's claim; we pointed out that, as she would under our provisonal proposals probably be liable to her own child, any joint tortfeasor with her would be able in contribution proceedings to recover from her in respect of her share of her child's injuries. We recognised that, in the absence of insurance cover, there would frequently be no fund from which contribution would be forthcoming but pointed out that, in the particular circumstances attending claims for pre-natal injury, the mother herself would probably also have been injured and that compensation for her injury might provide a fund out of which contribution

[88] [1938] 4 All. E.R. 631.
[89] See para. 45 above.
[90] Working Paper No. 47, para. 34.

could be paid to her joint tortfeasor[91]. We also reached the provisional conclusion that a plaintiff's claim for pre-natal injury should not be extinguished or limited by any contract entered into by his mother or by his mother's voluntary assumption of risk[92]. Consultation has caused us radically to re-appraise all these questions. The proposals we now make are in line with our recommendation as to the general rule as to liability to a child for pre-natal injury at common law and under statute.

The mother's liability for pre-natal injury: the results of consultation

54. In Working Paper No. 47 we expressed what had been our first reaction to the question whether a mother ought to be liable to her own child for negligently causing pre-natal injury thus:—

> "If a child is born with a disability due to his mother's negligent act or omission during pregnancy it seems at first sight socially unacceptable that he should have a cause of action for damages against her."[93]

On consultation, that view, which we provisionally rejected in our working paper[94], has commanded very wide and authoritative support. Numerically there was a fairly even division of opinion between those who thought that our provisional view was correct and those who thought that, on the grounds of social policy, the possibility of such an action should be excluded. However, among those who were strongly opposed to allowing a cause of action were the President and those judges of the Family Division who commented on our paper, the Bar Council and The Law Society.

55. The Bar Council, in their memorandum to us, dealt in some detail with the question whether a cause of action should lie against a mother at the suit of her own child for pre-natal injury. Their views merit quotation:—

> "*The mother's liability to her unborn child*
>
> We recognise that logic and principle dictate that if a mother's negligent act or omission during or before pregnancy causes injury to a foetus, she should be liable to her child when born for the wrong done. But we have no doubt at all that in any system of law there are areas in which logic and principle ought to yield to social acceptability and natural sentiment and that this particular liability lies in such an area.
>
> We offer the following reasons for thinking that it ought to be the law that no child shall have a right of action against its mother for ante-natal negligence:
>
> 1. The relationship between mother and disabled child is one of the most stressful that can exist. To add to it a legal liability to pay compensation would be bound to increase the tension already existing between them.
>
> 2. From a practical standpoint, the difficulty and unseemliness of some possible allegations of negligence in the ante-natal regime are discouraging. Do smoking and gin-drinking count as negligence in a pregnant mother? Many doctors say that neither tobacco nor alcohol should be taken in pregnancy. Must the mother follow always the most recently published ante-natal dietary or other regime in order to secure for her child the best possible mental and physical capacity? It may be

[91] Working Paper No. 47, paras. 26 and 31–34.
[92] *ibid.*, para. 25.
[93] *ibid.*, para. 27.
[94] *ibid.*, para. 34.

said that these are fanciful complaints for a child to make against its mother and that the type of injury which might reasonably give rise to an action would be the traumatic kind due to negligent driving or a dangerous sport. But as we understood the evidence at the Colloquium at the Royal Society of Medicine, injury to a foetus by trauma is extremely rare. It seems to us that the most probable cause of injury to a foetus at the hands of its mother would be the taking of drugs or foodstuffs either excessive in quantity or unsuitable in kind, usually in the face of warning. Difficulty of proof might be a great obstacle here.

3. There will not often be a fund from which the mother's liability could be paid without hardship to the rest of the family and frequently there will be no fund at all. It seems unlikely that insurance will be available to a mother against the proposed liability. We are of opinion that the creation of a right of action which could seldom be satisfied would merely exacerbate the bitterness which a disabled child so often feels when it grows conscious of its condition.

4. The existence of a cause of action for ante-natal negligence by a mother might easily become a weapon between parents in a matrimonial conflict, to the further detriment of a disabled child."

56. The President of the Family Division, The Right Honourable Sir George Baker, expressed very firmly the opinion that a child should not be granted a cause of action against its mother. He, indeed, was of opinion that the ban should be extended to an action against the father, with which question we deal later in this report. He expressed his main anxiety thus:—

"My reasons are really very simple. Logic and love are not always congenial bedfellows. I would go so far as to say that it would be cruel to allow such an action against a mother, and even against a father. But the real danger is that it would give a new weapon to the unscrupulous spouse – and there are many. One knows from one's own experience the difficulties in married life which arise when a child is born even with a blemish; and the figures which were given by the doctors of one in thirty with some blemish, and one in forty with a deformity, were really quite frightening. The vindictive father might be dissuaded in all but a few cases from seeking to take action on behalf of the child against the mother whom he is seeking to divorce and whom he now hates. But what of the father who is seeking custody of the child or children? An action against the wife for her supposed negligence while carrying the child would be a splendid additional weapon in his armoury, and I have no doubt it would be used."

The mother's liability: three fact situations examined

57. In Working Paper No: 47 we examined three fact situations in which the question of a mother's liability to her child for pre-natal injury might arise[95]. These were:—

(*a*) injury caused by the mother's negligence in the pre-natal regime;

(*b*) injury caused by the mother's negligent driving;

(*c*) the mother as third party, where the child brings a claim in respect of pre-natal injuries against a defendant who brings the mother into the proceedings as a third party, seeking contribution from her on the

[95] Working Paper No. 47, paras. 29–32.

ground that she would be liable to the child as a joint tortfeasor. We consider each of these fact situations in turn.

(*a*) *Mother's negligence in the pre-natal regime*

58. There is a wide range of rash conduct during pregnancy by which a mother may cause injury to her unborn child, either by failing to heed medical advice or by herself taking unjustified risks of physical injury. It is to this situation that the views of the Bar Council and the President are directly relevant. We have been convinced by their arguments that, in this context, our provisional view was wrong. We pointed out the similarity between this situation and that where a mother negligently injures her child when washing or dressing it, and said: "We know of no case where a claim has been brought on the child's behalf in these circumstances even after the break-up of a marriage and believe that actions in respect of ante-natal injuries caused by a mother are so unlikely that they can be ignored."[96] We now think that we under-estimated the number of different ways in which it might be alleged that a mother's negligence caused her child's disability[97] and the extent to which actions or threats of actions might be used in matrimonial disputes. We have therefore concluded that leglislation should not permit a right of action by a child against its own mother for pre-natal injury resulting from the mother's negligence in the pre-natal regime.

(*b*) *Mother's negligent driving*

59. In the working paper we said that the situation perhaps most likely to arise in practice was where a pregnant mother by the negligent driving of a motor car caused injury to the child she was bearing[98]. In the light of the medical evidence which we have received we no longer find it possible to say that this is the situation most likely to arise, though the possibility of injury to a child as a result of premature birth in consequence of an accident or as a result of its birth after the mother's death cannot be ruled out[99].

60. The arguments that have persuaded us that a child should not have a right of action against its mother in respect of the mother's negligence in the pre-natal regime are, we think, not really relevant to claims arising from the mother's negligent driving. When Parliament passed the Motor Vehicles (Passenger Insurance) Act 1971[100] it accepted the policy that all passengers injured in road accidents should "have open to them sources of compensation afforded by passenger liability insurance"[101]. The present position, as a result of the need for compulsory insurance and the agreement between the Secretary of State for the Environment and the Motor Insurers' Bureau[102], is that any person injured in a road accident as a result of the negligence of the driver of a motor vehicle will, subject to a reduction if there has been contributory negligence, receive compensation. It matters not that the injured person was a passenger in the driver's vehicle nor that he or she is related to the driver. This social policy reflects the nation's concern at the suffering caused by road accidents and the determination that all owners or users of motor vehicles should contribute by

[96] Working Paper No 47, para. 33.
[97] See generally paras. 19–30 above.
[98] Working Paper No. 47, para. 30.
[99] See para. 20, above.
[100] Now consolidated in ss. 145 and 148 of the Road Traffic Act 1972 (c. 20).
[101] Mr Eldon Griffiths, M.P., Under-Secretary of State for the Environment, in the House of Commons on 26 March 1971: *Hansard*, Vol. 814 Col. 1119.
[102] Agreement dated 21 April 1969 and operative from 1 March 1971.

insurance to the provision of adequate compensation. We believe that, if our main recommendation that there should be liability for pre-natal injury caused intentionally or by negligence or breach of duty[103] is accepted, the child suffering from pre-natal injury caused in a road accident should be in a similar position to the child, or any other person, injured in a road accident, and that the child whose pre-natal injury was caused by his own mother's negligence should not be singled out as the one class of blameless victims of negligent road accidents to be unentitled to compensation. The third party insurance required by section 143 of the Road Traffic Act 1972 would therefore cover claims in respect of pre-natal injury, and there would be no more risk of a child's claim against its mother in respect of such pre-natal injury causing bitterness or becoming a weapon in matrimonial conflict[104] than of a claim by a child injured when riding in a passenger seat. Indeed, knowledge that the child could not claim compensation might, having regard to the existence of compulsory insurance, tend to increase the mother's stress, not decrease it[105].

61. Similar considerations would not apply to pre-natal injury arising out of the mother's negligence when engaged in a dangerous sport, such as mountain climbing. We therefore think that the only exception to the mother's exemption from liability to her own child should be in relation to her driving of a motor vehicle[106].

(*c*) *The mother as third party*

62. This problem is closely related to the question whether the child's claim in respect of pre-natal injury should be affected by the mother's contributory negligence. Where the child has no claim against its mother in respect of pre-natal injury a defendant would not be entitled to contribution from the mother: in these circumstances the mother's contributory negligence should operate to reduce the child's claim[107]. Where exceptionally the child would have a claim against its mother in respect of pre-natal injury – that is, where the injury resulted from the mother's negligence in driving a motor vehicle[108] – we believe that the mother's contributory negligence should not be relevant to the child's claim against someone other than the mother (it is clearly irrelevant to a claim against the mother herself), but that the defendant should have a claim to contribution from the mother: this would normally follow from the fact that the mother "is, or would if sued have been, liable in respect of the same damage"[109].

Conclusions as to the mother's liability

63. We have finally concluded that our provisional view in Working Paper No. 47 was wrong. We now recommend that, as a general rule, legislation should specifically exclude any right of action by a child against its own mother for pre-natal injury. This will mean in practice, as we have explained in the previous

[103] See paras. 45 and 52 above.
[104] See the third and fourth points made by the Bar Council, quoted in para. 55 above.
[105] See the first point made by the Bar Council at para. 55 above.
[106] It is, of course, possible that she may not be insured against this liability; this possibility does not, we think, justify an exception from the exception.
[107] See paras. 65 and 66 below for a discussion of this question and our reasons.
[108] See paras. 59–61 above.
[109] Law Reform (Married Women and Tortfeasors) Act 1935, (c. 30), s. 6(1).

paragraphs, that the child will have no right of action against its mother for her negligence in the pre-natal regime.

64. We further recommend, as argued in paragraphs 59–60 above, that legislation should provide an exception to the general rule namely, that where a mother causes pre-natal injury to her child by her negligent driving of a motor vehicle she should be liable to her child. In this exceptional situation, we further recommend that any person jointly liable with the mother should have a right to claim contribution from her.

The mother's contributory negligence

65. Our provisional conclusion as to a mother's liability to her own child led us, almost inevitably, to the opinion that a mother's own contributory negligence ought not to effect any reduction in her child's damages[110]. On consultation many have expressed the opinion that such a rule would be grossly unfair to tortfeasors and their insurers in a fault based tort system, and that the physical fact of identification between mother and foetus during pregnancy ought to mean that the mother's own negligence should reduce the damages payable by a tortfeasor. The medical treatment and medication of a pregnant woman depends so much upon her co-operation and care for herself that the possibility of joint liability (perhaps with the mother herself most to blame) is one which cannot be ignored. In such circumstances we think it would be wrong if, perhaps for very slight carelessness in comparison with the mother's own negligence, a doctor, chemist or drug manufacturer had to compensate the child in full for his disability.

Conclusion as to the mother's contributory negligence

66. These arguments and our own change of mind as to the mother's liability to her own child lead us now to advise that a mother's negligence should be available as a partial defence to a torfeasor where her fault has also contributed to her child's pre-natal injury.

Contractual exemption or limitation of liability: volenti non fit injuria

67. Strict adherence to legal principle led us in our working paper to the provisional conclusion that neither an exemption clause in a mother's contract nor a mother's own voluntary assumption of risk should negative or reduce a defendant's liability. On consultation the majority of those who commented upon this provisional conclusion disagreed with it. The Bar Council's memorandum most clearly expressed the contrary view to that at which provisionally we had arrived:—

> "Paragraph 25 of the Working Paper raises the cognate questions of contractual exclusion or limitation of liability and *volenti non fit injuria*. . . . In either instance, we find it difficult to evade the effects of physical identification between mother and foetus. If two women engage in a wrestling match for the entertainment of television viewers, is the child of one who was pregnant at the time entitled to sue the other for damage for assault if he is born with an incapacity traceable to the fight? And are women to be perhaps denied transport by air or sea or employment in a particular industry on the ground that it is impossible to limit liability in contract with a foetus? Moreover we think that identification of mother with foetus in contractual relations

[110] Working Paper No. 47, paras. 26 and 34.

with other members of the community is socially both acceptable and desirable."

68. Added emphasis to one of these points was given by Dr. O. M. Stone, a member of the Family Law Sub-Committee of the Society of Public Teachers of Law, who wrote: "I think there is a real danger that what may be a remote possibility of liability to an unborn child may be seized upon as justifying refusal to enter into a wide variety of contracts or social relationships with women of any age or status".

69. We are convinced by these arguments that our provisional conclusion was wrong. Contractual exemptions from liability are often objectionable, but we believe that the proper way to control them is to deal with them as exemption clauses, and not as a consequence of the fact that a particular claim is being brought by a child in respect of pre-natal injuries. We are at present engaged in a full study of exemption clauses, including exemptions from or limitations of liability for negligence in respect of personal injury. In our working paper on that subject we expressed the provisional view that certain exemption clauses should be made void and that others might be subjected to a judicial test of reasonableness[111]. Our consultation on that complex subject has confirmed our provisional view that in some circumstances it may be reasonable to rely on an exemption clause. If in a particular case it would be reasonable for a defendant to rely on a contractual exemption in a claim brought by the mother with whom he contracted, we see no reason why he should not seek to rely on the same exemption in a claim brought by the child in respect of pre-natal injury. Again, if the contract with the mother purports specifically to exclude or limit liability to her unborn child we see no reason why the defendant should not be entitled to rely upon it in an action brought by the child. Clearly, if an exemption clause is void (such as a contractual exemption from liability in respect of the death of or bodily injury to a passenger in a public service vehicle[112]) or subject to judicial control in relation to the mother it should be similarly void or subject to control in relation to the child she is bearing.

70. There is one problem with respect to contractual exemptions: that the child, unborn when the contract with the mother is made, can never be a party to the contract so that the doctrine of privity of contract will prevent the clause from binding him. If our policy that the child should be identified with the mother in relation to such provisions is right, this must constitute a new exception to the doctrine of privity of contract.

Conclusion as to contractual exemption or limitation of liability and volenti non fit injuria

71. We are convinced by the arguments of the Bar Council that our provisional conclusion was wrong and that we ought now to advise that a defendant should be able to rely upon a contractual term binding upon the mother which exempts him from or limits his liability either towards her or towards her unborn child and upon a mother's voluntary assumption of risk. While contractual

[111] Working Paper No. 39 (issued jointly with the Scottish Law Commission) dated 27 September 1971—Provisional Proposals relating to the Exclusion of Liability for Negligence in the Sale of Goods and Exemption Clauses in Contracts for the Supply of Services and other Contracts; see the summary of provisional conclusions in para. 82 of that paper.

[112] Road Traffic Act 1960 (c. 16), s. 151.

exemptions from liability are often objectionable, we believe that the proper way to control them is to deal with them generally. Our present conclusion has been arrived at in the knowledge that we are at present engaged on a full study of exemption clauses and we envisage that any recommendations which we ultimately make on this subject should become applicable in cases where pre-natal injury has been caused.

(D) THE RULE THAT A TORTFEASOR "TAKES HIS VICTIM AS HE FINDS HIM"

The rule as to remoteness of damage in claims for personal injury.

72. The rule of English law as to remoteness of damage in claims for personal injury is different from that applying to other types of claim. In *Smith* v. *Leech Brain & Co. Ltd.*[113] an employee already suffering from unknown pre-malignant changes, sustained a burn caused by his employer's negligence which was the promoting agent in the development of cancer from which the employee died. In a fatal accident claim by his widow, it was argued for the defendant employers that the development of cancer was unforseeable and that, on the basis of a decision of the Privy Council[114], the claim should be dismissed.

Lord Parker, however, rejected this argument. He said:—

> "For my part I am quite satisfied that the Judicial Committee in the *Wagon Mound* case did not have what I may call, loosely, the thin skull cases in mind. It has always been the law of this country that a tortfeasor takes his victim as he finds him. . . . The test is not whether these employers could reasonably have foreseen that a burn would cause cancer and that he would die. The question is whether these employers could reasonably foresee the type of injury he suffered, namely, the burn. What, in the particular case, is the amount of damage which he suffers as a result of that burn, depends upon the characteristics and constitution of the victim."

The Court of Appeal have recently approved both the decision in *Smith's* case and this dictum[115].

The effect of the rule on claims for pre-natal injury

73. There are two ways in which the rule that a tortfeasor "takes his victim as he finds her" could affect a claim for damages for pre-natal injury. In the case where the birth of a child with some slight disability was a foreseeable result of a defendant's negligence, the child might be born with a serious disability because of an unknown and unforeseeable weakness in the foetus. Or the mother might herself be injured in circumstances in which it was foreseeable that she might suffer some injury; as a direct but unforseeable result of her injury she might bear a child with disability. In both these cases we recommend that the child should be entitled to recover full compensation for the disability. We think that, in the words of Lord Parker, "the characteristics and constitution" of a female tort victim should include the fact that she is pregnant and that, if injury is caused to the foetus she is bearing, that injury is properly equated with

[113] [1962] 2 Q.B. 405.
[114] *Overseas Tankship (U.K.) Ltd.*, v. *Morts Dock & Engineering Co. (The Wagon Mound No. 1)* [1961] A.C. 388.
[115] *Keith Robinson* v. *The Post Office and McEwan* (1973) Unreported. Royal Courts of Justice Bar Library No. 364.

unforseeable personal injury caused to the woman herself. The physical identification of mother and foetus at the time the injury is caused seems to us to justify this recommendation. Further, we think that as between the innocent child and the tortfeasor who was in breach of duty to his mother the loss should fall on the tortfeasor. Of course, the birth of the child with disability in the latter case must be the direct result of the injury suffered by the mother; in the hypothetical case of the mother being injured, her injury being foreseeable, and the child being born with disability, such a birth being neither forseeable nor connected with the injury to the mother, the child ought not to be able to recover damages.

Conclusion as to the rule that a tortfeasor "takes his victim as he finds him."

74. We recommend that the rule that a tortfeasor "takes his victim as he finds her" should apply where a pregnant woman is injured by the defendant's fault and that the fact that she is bearing a child should be treated as one of her "characteristics and constitution".

(E) PRE-NATAL INJURY CAUSED BY EVENTS OCCURRING BEFORE CONCEPTION

Events before conception which can give rise to pre-natal injury.

75. In paragraphs 32–74 we have been mainly concerned with the situation where pre-natal injury is caused during pregnancy. This is much the most likely time for injury to be caused and, during this time, it can, of course, only be caused by some occurrence affecting the mother. We have, therefore, in the preceding paragraphs, been much concerned with the consequences of the physical identification of mother and foetus during this period. In this section we consider the very difficult question whether an occurrence happening before conception and causing pre-natal injury should, in any circumstances, ground liability. Such an occurrence can happen either to the father or the mother as we pointed out in paragraph 33 above. As subsequent paragraphs show, we have concluded that there are circumstances in which "pre-conception" injury should be actionable, and many of the recommendations which we have made in the context of "post-conception" injury will be equally applicable. These recommendations are:—

(*a*) Legislation should deal with the rights of a living person and no rights should be given to the foetus (paragraph 32).

(*b*) The general principle should be that whenever pre-natal injury is caused intentionally, negligently or by breach of statutory duty there should be liability for that injury (paragraph 34).

(*c*) As a general rule whenever there is liability at common law to a parent for an act or omission which causes pre-natal injury, the child should be entitled to recover damages (paragraph 45).

(*d*) As a general rule, whenever a breach of statutory duty owed to a parent causes pre-natal injury to his or her child that child should be entitled to recover damages for his disability (paragraph 52).

(*e*) Where liability for breach of a statutory duty is regarded as contractual no action should lie at the suit of a child in respect of pre-natal injury (paragraph 47(*e*)).

76. As we have pointed out in paragraph 33 above, one of the differences between pre-natal injury and other personal injury is that the event or occurrence resulting from a negligent act or omission happens, in the case of pre-natal injury, at a time when the plaintiff is not in existence and to someone other than himself, namely his mother, or, exceptionally and, of course, only prior to conception, his father. So far as the negligent act or omission itself is concerned, it is of no consequence that it may happen before the plaintiff exists; the present common law rules easily comprehend this possiblity. If a manufacturer negligently manufactures and markets a pram it is no answer to the claim of the child under whom it collapses that he was not alive at the date of its manufacture. In the case of pre-natal injuries, however, the equivalent of the pram's "collapse" necessarily also occurs before the plaintiff is in existence and may occur even before the plaintiff is conceived. It is this latter possibility which has caused great concern amongst those whom we have consulted.

77. We have been given examples of cases where something happening to a child's parents before its conception can lead to its being born with disabilities. An obvious example is physical injury to a woman's pelvis causing injury to a child subsequently conceived and born. It is known that radiation of the reproductive organs of animals causes gene mutations and it can almost certainly do so also in man. The exposure of mother or father to radiation could cause gene mutations which might not become manifest for several generations. A claim has succeeded before the German Supreme Court[116] for damages for pre-natal injury in the form of congenital syphilis caused by a blood transfusion given negligently to the mother before conception, the blood donor having suffered from the illness. The negligent supply of male sperm for artificial insemination would seem to be another possible source of pre-natal injury. The possiblity that a contraceptive pill might prove both ineffective and damaging to the child born because of its ineffectiveness[117] was not ruled out by our consultation with the medical profession. There are, no doubt, a number of other possible fact situations where pre-natal injury could be caused by an event happening before conception.

Conclusion as to "pre-conception" injury

78. The possiblity of claims for damages for "pre-conception" injury being brought excited much comment and, indeed, apprehension amongst many of those whom we consulted. We share this apprehension. Nevertheless it is our opinion that, subject to the important limitation referred to below, a child who is born disabled because of some tortious injury inflicted upon its parent before conception should have a remedy. On the facts as found by the German Supreme Court in the case mentioned in the preceding paragraph we think that the child ought to have a claim. Radiation probably provides a more likely example of what may occur in the future. The General Council of the Bar, through their Law Reform Committee made a constructive suggestion to us for limiting this sphere of liability. The test should be, they say, whether the parents or either of them know or ought to know at the time of the conception that, because of something which has happened to one of them previously, there is a risk that a child born of the intercourse will be disabled. We agree in principle

[116] Bundesgericht, 20. XII. 1952, *Juristenzeitung*, 1953, 307 cited by I. Tedeschi in an illuminating article in the Israeli Law Review: "*On tort liability for 'wrongful life'*" (1966) I Is. L.R. 513.

[117] An example we mentioned in Working Paper No. 47, para. 38.

with this proposal which, we think, is consistent with the general principles of the common law as to causation. The knowledge of the parents is a circumstance which, intervening between the act or omission and the injury, can properly be held to break the chain of causation otherwise linking them together[118]. We hope that this solution will meet most, if not all, of the worries expressed to us in consultation[119].

(F) TIME BETWEEN NEGLIGENCE AND CAUSE OF ACTION

The problem which arises in pre-natal injury

79. It is mainly in relation to "pre-conception injury" that concern has been expressed at the length of time which may elapse between the act or omission and the cause of action arising by the birth of a child with disability. The possibility of a long interval between the negligence and the birth is not, however, restricted to claims based on "pre-conception injury" nor indeed to pre-natal claims; a long time may elapse between an act and personal injury; a negligent act, for example, the negligent deposit of poisonous waste, may not cause injury to a living plaintiff, a pregnant woman or a prospective parent until many years after the act and, in English law, no cause of action for negligence arises until damage is suffered. The possibility, adverted to in paragraph 77, that gene mutations might not become manifest for several generations does, however, add a further possibility of delay which we think we must provide against. It is probably mainly in the field of medical treatment that it is possible to envisage something happening to a person which is transmitted to a child in whom the condition is dormant but capable of transmission to the child's child. We do not think that a duty ought to be owed to any but the immediate children of a parent.

Conclusion: a claim for pre-natal injury should be limited to the first generation

80. We therefore recommend that there should be no claim for pre-natal injury otherwise than at the suit of the first generation. This limitation should apply equally to intentional harm, harm caused by negligence and harm caused by breach of statutory duty.

(G) THE NUCLEAR INSTALLATIONS ACT 1965

The scheme of liability to pay compensation under the Act

81. The Nuclear Installations Act 1965[120] lays upon licensees duties to secure that no occurrences (defined in the Act) or emissions of ionising radiations shall cause injury to any person. The Act also provides that a claim for compensation under the provisions of the Act for injury caused by a breach of these duties "may be made at any time before, but shall not be entertained if made at any time after the expiration of thirty years from . . . the date of the occurrence which gave rise to the claim"[121] The Act therefore provides its own time limit (which comprehends both the period between the occurrence and the injury and the injury and the making of the claim, the latter being in claims at common law the period limited by the Statutes of Limitations).

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[118] Of course it may well be that the parent has a cause of action.

[119] Because in certain circumstances a father might himself be liable, a special exception to this general rule has to be provided. See para. 93 below.

[120] 1965 c. 57.

[121] *ibid.*, s. 15 (1).

82. The Act also provides that the compensation payable under it may only be reduced by reason of the fault of the person claiming compensation "if, and to the extent that, the causing of that injury or damage is attributable to any act of that person committed with the intention of causing harm to any person or property or with reckless disregard for the consequences of his act"[122].

83. The Act provides that "injury means personal injury and includes loss of life". We have no doubt that if a child were born disabled as a result of an occurrence injuring him between conception and birth he would be able to recover compensation under the Act. This was, indeed, the advice given to the Government during the Bill's passage through Parliament, as appears from what was said by Sir Eric Fletcher, the Minister without Portfolio, in moving an amendment to leave out of the Bill the word "physical hurt" and to insert "injury". As to pre-conception injury, the Minister continued:—

> "The position of a child not conceived at the time of a nuclear incident but conceived subsequently raises very different problems, as honourable Members will understand. In the first place, I imagine that it would be very difficult in those circumstances to relate an injury to the incident. I express no opinion as to whether any such person could ever substantiate a claim. I would think it very doubtful. But in this whole field there must inevitably be matters of detail of this kind which are far more appropriately left to be dealt with by the judiciary in circumstances which may arise. In my view it is not the province of the Legislature to provide for a whole variety of hypothetical cases which could be imagined."[123]

Conclusion on the Act

84. We do not think that any legislation which we propose should interfere with the scheme of this Act. It lays down a self-contained code for providing compensation for injury and damage caused by nuclear occurrences with its own limitation period and a very strictly limited exemption from liability. However, our consultation has made us doubt whether it would be as difficult as Parliament in 1965 thought, to relate a "pre-conception" injury to an incident and we have made general recommendations for dealing specifically with this situation. We think, therefore, that, after consideration of our report, it would be desirable to reconsider the Act in its light. We think that the Act should certainly be amended to make it clear beyond doubt that "injury" in the Act includes injury suffered pre-natally by a child between conception and birth. Whether and to what extent this liability should be extended to include pre-conception injury, will depend on whether our recommendations on this matter are accepted. If they are, then we think that, at least to the same extent and with the same defences, the Nuclear Installations Act should be brought into line with the general rule.

(H) An Action for "Wrongful Life"

The nature of a possible claim for "wrongful life"

85. The question whether there should be a cause of action for damages for what has been called "wrongful life" is a difficult one which has caused us much concern. The question is whether a child should have a right of action when the allegation essentially is that it has suffered harm from being born and the real

[122] 1965 c, 57, s. 13(6).
[123] *Hansard*, 11 February 1965, Vol. 706. Cols. 669–670.

complaint is that it would have been better not to have been born at all. The subject is an important and controversial one which has given rise to litigation in some American states[124].

The situation with regard to advice to a woman during pregnancy

86. In paragraph 29 above we referred to the increased reliance on medical advice during pregnancy and pointed out that in certain circumstances a duty would be owed to a pregnant woman to warn her if the risk of her bearing a disabled child is so great as to make an abortion legal. With the increasing knowledge of the aetiology of congenital disabilities these duties are bound to become more onerous. If there is a negligent failure to warn a woman of this risk and if it is established that, had she been warned, she would have undergone a therapeutic abortion, it could be argued that the disability with which her child was born should found an action against her doctor or other adviser. Here the negligence did not cause the disability; it caused the birth, but no act or omission of the adviser could have brought about the birth of a normal child. Similarly, negligence in the performance of a therapeutic abortion may result in a birth which care would have avoided. As cited in paragraph 24 above, the case is known where there was a failure to diagnose twins and at operation for termination of the pregnancy only one foetus was aborted. In such a situation it might well be that the other foetus would be born with a disability the risk of which had led to and legally justified the abortion operation.

The situation with regard to drugs

87. Drugs may exist or be discovered which have the effect of preventing the spontaneous natural abortion of a deformed foetus. On the basis of observations made as to the effect of thalidomide on animals by English scientists it was suggested by a German professor of pathology that thalidomide did not cause malformation of the foetus but prevented the spontaneous abortion of already deformed foetuses[125]. Thalidomide, it was said, had a "life-promoting" effect on deformed embryos which under normal circumstances would not have survived. This hypothesis has not been accepted, but, had it been correct, this would have been another example of "wrongful life" which, on proof that there was negligence in the manufacture and marketing of the drug, should arguably, give rise to a cause of action.

Similar situations which can arise

88. Other examples of what have been called "wrongful life" actions have been brought to our attention. In an American case[126] proceedings were taken against the State of New York, to hold it liable for an institution for which it was responsible, a Manhattan hospital, which was alleged to have been negligent in failing to prevent the rape of a female patient from which the plaintiff's birth resulted. In the case itself the only damage allegedly suffered by the plaintiff was that he was born a bastard but, if the rapist had been syphilitic, a more sympathetic basis for a claim might have been advanced. A case might arise not out of negligence but out of an intentional wrong. If a man suffering from syphilis has intercourse with a woman without telling her that he is infected, ought the child resulting from the assault to have a cause of action against him? Where

[124] See generally I. Tedeschi "*On tort liability for 'wrongfull life'*" (1966) I. Is.L.R. 513.

[125] Henning Sjostrom and Robert Nilsson *Thalidomide and the Power of the Drug Companies* published as a Penguin Special by Penguin Books Ltd. (1972).

[126] *Williams* v. *State of New York* 46 Misc. 2d. 953 (1965).

the disabilities with which a child is born are actually caused by the sexual intercourse which results in his conception we do not think that any action he may have for such disabilities is properly called a "wrongful life" action. It is not for being born that he seeks a remedy but for compensation for the disability resulting from the sexual intercourse. If that sexual intercourse and consequent disability can be shown to have resulted from the fault of another, then we do not think that the child should be without a remedy.

Conclusions as to "wrongful life"

89. We do not think that, in the strict sense of the term, an action for "wrongful life" should lie. In the cases referred to of negligent treatment of a woman during pregnancy and the hypothetical drug preventing spontaneous abortion, had it not been for the negligence, the child would not have been born at all. To justify an action in logic, therefore, it is necessary to argue that the child would have been better off had he never existed. Nor would it be easy to assess his damages on any logical basis for it would be difficult to establish a norm with which the plaintiff in his disabled state could be compared. He never had a chance of being born other than disabled. We have given this problem the most careful consideration and have not, we think, been unduly influenced by these considerations of logic. Law is an artefact and, if social justice requires that there should be a remedy given for a wrong, then logic should not stand in the way. A measure of damages could be artificially constructed. We react in different ways to the various situations we have postulated, but the one which is much the most likely to give rise to claims is that which arises out of medical advice. In this situation we are clear in our opinion that no cause of action should lie. Such a cause of action, if it existed, would place an almost intolerable burden on medical advisers in their socially and morally exacting role. The danger that doctors would be under subconscious pressures to advise abortions in doubtful cases through fear of an action for damages is, we think, a real one. It must not be forgotten that in certain circumstances, the parents themselves might have a claim in negligence. Similar considerations lead us to the same conclusion in respect of the negligent performance of a therapeutic abortion.

(*a*) *The prevention of spontaneous abortion*

90. We have been much exercised by the problems which would be presented were a drug to be negligently manufactured, marketed or prescribed which had the effect postulated as a possibility in the case of thalidomide[127]. With some hesitation we have concluded that it should not form an exception to the general rule which we propose that a person should not be liable on the ground that, but for an act or omission of his, a mother's pregnancy would have been terminated. We are particularly concerned that doctors should not be inhibited from prescribing drugs or treatment to assist a woman to bear a child by phantom fears that a child might be born with disability.

(*b*) *The "hospital negligence" and assault situations*

91. In the perhaps unlikely event of a fact situation arising such as we have envisaged in our examples based on the American case cited[128], we have, however, come to the conclusion that the child should have a remedy. As we

[127] See para. 87 above.
[128] *Williams* v. *State of New York* 46 Misc. 2. d. 824, 26 O. N. Y. S. 2d 953 (1965): see para 88 above.

have said we do not think that these are really cases of wrongful life. There is, we think, a difference between a negligent failure to prevent the birth of an already conceived child and negligence which actually causes the intercourse which results in the conception. In the latter case we think that the child should be able to claim damages and that they should be assessed by comparison with the child as he would have been had he not suffered from the disability.

(I) THE RELATIONSHIP BETWEEN A CHILD BORN WITH DISABILITY AND HIS FATHER

The relationship of father and child

92. In paragraphs 53 to 64 above we dealt in some detail with the question whether a child should be allowed to sue his own mother. The same question arises in respect of the child's father. Different considerations, we think, apply to this question. There is here no question of physical identification nor is there, in the case of the father, the same enormous variety of ways in which his conduct could be alleged to have caused a congenital disability. We have, of course, paid very great attention to the President's view on this matter[129]. We do not, however, think that the dangers of the action or threat of action being used in matrimonial disputes is as great here as in the case of the mother; available allegations would be very much more limited than in the case of a mother. Nor, we think, must it be forgotten that "father" does not necessarily coincide with "husband" and legislation drafted in terms of "father" could conceivably lead to very bizarre litigation. We are also of opinion that, as we said in paragraph 91 above, a child born disabled as a result of an assault by a man on the mother should have a cause of action against that man, even though it was the assault itself which caused the child's conception.

Conclusion as to the father's liability

93. We are of opinion that, in respect of a father, the general principles of the common law should prevail and that no special exemption from liability should be provided. As it is possible to envisage a situation in which the father will be held liable to his own child for a wrong done by him to the mother before or at the time of conception[130], it is necessary to make a special exception from the general rule as to the effect of the knowledge of a parent in respect of pre-conception injury. Where the father is himself the defendant (and there is liability to the mother) knowledge of the risk should not preclude liability.

(J) PROFESSIONAL NEGLIGENCE

Special position of the medical profession

94. We have been made very aware during our consultation with the medical profession that they fear that our proposals, if implemented by legislation, will lay them open to harassment by speculative claims. We have already made it clear that our proposals will probably not extend the liability which in our view the common law would have laid upon a person whose negligence had caused pre-natal injury, but we sympathise with the doctors' fears lest legislation creating a new cause of action should lead to claims being made which would not have been contemplated at common law. We also discovered a not unnatural

[129] See para. 56 above.
[130] See para. 88 above.

tendency in the profession to assume that in some way legislation would exact a higher standard of care from the medical profession than that demanded of it by the common law. By making liability to a child depend upon liability to the parent we have ensured that this feared consequence of legislation will be avoided. The common law demands of a professional man that he should exercise such care as accords with the standards of reasonably competent medical men at the time unless he himself has in fact greater than average knowledge of any risks in which case his duty will be that much greater[131]. Our proposed legislation demands no more. It retains the ruling in *Roe* v. *Minister of Health*[132]. In that case phenol had percolated through an invisible crack in an ampoule containing an anaesthetic which when used in preparation for a minor operation paralysed the patient from the waist down. The anaesthetist was aware of the dangers of contamination from phenol and visually examined the ampoule before giving the anaesthetic. He was not, however, aware of the possibility that there might be invisible cracks in the ampoule. The risk could have been easily and cheaply avoided by colouring the phenol. He was held not to have been negligent in not having the phenol coloured because the risk of invisible cracks had not at the date of the operation been drawn to the attention of the profession. Morris L.J. emphasised that "care has to be exercised to ensure that conduct in 1947 is only judged in the light of knowledge which then was or ought reasonably to have been possessed"[133].

Conflict of interest between mother and foetus

95. Another very real fear, which the medical profession has, is that they will be placed in difficulties if any conflict of interest arises, as it frequently does, between the interests of the mother and foetus. These fears also are, we think, misplaced. We do not think that any doctor who, exercising responsible care, resolved such a conflict in accordance with a received body of medical opinion would be liable either to the mother or to the child.

Conclusion as to professional negligence

96. Despite our belief that any special protection for the medical profession is strictly unnecessary, we can see some merit in making it clear in the legislation (which will do no more than codify, in this context, the role of the common law) that where a doctor (or, indeed, anyone else acting in a professional capacity as, for example, a nurse) acts carefully and in accordance with received professional opinion as to the treatment and advice appropriate and justifiable in the circumstances of the particular case, he shall not be held to have been in breach of his duty. The danger of such legislation is that it may leave it open to argument that if a doctor does not act in accordance with received professional opinion, perhaps because he is in advance of his time, he is, therefore, necessarily guilty of a breach of duty. The draft clauses preclude any such contention.

(K) THE ASSESSMENT OF DAMAGES

The measure of damages

97. As we said in paragraph 32 above claims for damages for pre-natal injury should be equated as closely as possible with claims for damages for personal

[131] See generally, *Winfield and Jolowicz on Tort*, 9th ed. (1971) at p. 61 and the cases there cited.
[132] [1954] 2 Q.B. 66.
[133] *ibid.*, at p. 92.

injury. Damages, therefore, should be assessed as if the injuries had been inflicted upon the child at birth; damages should be assessed as if the child had been born without the disabilities due to the pre-natal fault and those disabilities had been inflicted tortiously immediately after its birth. This does no more than state what would almost certainly be the way in which damages would be assessed by the application of the ordinary legal principles of assessment.

Loss of expectation of life

98. In our Working Paper No. 47 we adverted to the question of the stillborn child and pointed out that, so long as legislation was framed in terms of a living plaintiff, there could be no question of any claim arising on behalf of a stillborn child[134]. The legislation we propose is so framed. We went on to point out that as the law now stands there might be some practical difficulty in a case where there was doubt as to whether a foetus ever achieved an independent life of its own. A life, however brief, followed by death caused by an actionable injury, would result in the vesting in the child of a cause of action for loss of expectation of life which would survive to his estate. We think that a cause of action for loss of expectation of life of a child who only survived birth by a few hours or even minutes is a possible eventuality which it is most desirable to avoid. In our report on the assessment of damages in personal injury litigation[135] we have advised the total abolition of any right to damages for loss of expectation of life[136]. We think that, in relation to claims for damage for pre-natal injury, the desirability of implementing this proposal is even stronger than it is in relation to claims for damages for personal injury. If the legislation proposed in our report on damages is not implemented but that proposed in this report is, the draft Bill annexed to this report contains a provision precluding the recovery of damages for loss of expectation of life in claims for pre-natal injury unless the plaintiff survives birth for 48 hours.

Provisional damages

99. The medical evidence we have received makes it clear that predisposition to subsequent defect of mental or physical faculty should be included in any definition of disability such as will ground a claim for pre-natal injury. A child born of a mother who has been subjected to radiation may, in later life, develop cancer, as may a child whose mother has taken certain drugs. If all that can be shown is that a child has, because of the defendant's negligence, a predisposition to disease then, as the law at present stands, he can only be compensated for the chance that he may, in later life, develop the disease. In our report on the assessment of damages we have pointed out that compensation based on the mere chance that something will happen inevitably results in the plaintiff being over-compensated or under-compensated[137] and we have advised that a new power should be given to courts to make awards of provisional damages[138]. We think that implementation of this recommendation is particularly desirable in respect of claims for pre-natal injury.

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[134] Working Paper No. 47, para. 36.

[135] *Report on Personal Injury Litigation—Assessment of Damages*. Law Com. No. 56; (1973) H.C. 373.

[136] *ibid.*, paras. 99 and 107(*a*). Draft Clause 3.

[137] *ibid.*, para. 232.

[138] *ibid.*, paras. 239–243. Draft Clause 6.

Conclusion as to damages

100. Damages should be assessed as if the pre-natal injury had been inflicted after a birth without the disabilities due to the pre-natal wrong. If there is, at the time when any legislation implements our proposals, still existing a right to damages for loss of expectation of life, such a claim should only be given to a plaintiff who has suffered pre-natal injury if he survives birth by 48 hours.

(L) LIMITATION OF ACTIONS

The present law

101. The Limitation Act 1939 provides that periods of limitation run from "the date on which the cause of action accrued"[139]. No definition or explanation of "accrued" is given. Older authorities show that the period begins to run "from the earliest time at which an action could be brought"[140]. "A cause of action arises, therefore, at the moment when a state of facts occurs which gives a potential plaintiff a right to succeed against a potential defendant. There must be a plaintiff who can succeed, and a defendant against whom he can succeed."[141] Where a tort is actionable only on proof of special damage, time does not therefore begin to run until the damage is caused.

Claims in respect of personal injury

102. The Law Reform (Limitation of Actions etc.) Act 1954, in part implementing the recommendations of the Tucker Committee[142], laid down a special period of limitation for actions for damages for "personal injuries". The shorter period of three years was substituted for the previous one of six years. "Personal injuries" is, in part, defined to include "any disease and any impairment of a man's physical or mental condition"[143].

Special provisions in relation to claims for damages for personal injury

103. Causes of action in tort which require proof of special damage do not accrue until the damage is caused. Therefore, as we have pointed out in paragraphs 32 and 76 above, if a child is injured because of the negligent manufacture of a pram, it does not matter that it was manufactured perhaps many years previously: time runs from the date of injury. It is, however, the date at which the injury is caused not the date at which it is discovered that governs the beginning of the limitation period. In such cases a man's right of action might be barred before he knew he had it. In some cases of personal injury, particularly where the injury consisted of an illness, such as pneumoconiosis undiagnosed at the time it was caused, this resulted in manifest injustice. Special provisions to meet these cases were, therefore, enacted by the Limitation Act 1963[144] which was amended by the Law Reform (Miscellaneous Provisions) Act 1971[145]. We do not think it is necessary to burden this report with an account of the somewhat complicated provisions of this legislation.

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[139] The Limitation Act 1939 (c. 21), s.2(1).
[140] *Reeves* v. *Butcher* [1891] 2 Q.B. 509 per Lindley L.J. at p. 511.
[141] *Winfield and Jolowicz on Tort*, 9th ed. (1971) p. 659.
[142] *Report of the Committee on the Limitation of Actions;* (1949) Cmd. 7740.
[143] The Law Reform (Limitation of Actions, etc.) Act 1954 (c. 36), s. 2.
[144] 1963 c. 47.
[145] 1971 c. 43.

The disability of minority

104. In general periods of limitation do not run against persons under a disability. Minority is a disability at law[146]. Time does not, therefore, normally begin to run against an infant plaintiff until he reaches the age of 18. In actions for damages for personal injuries, however, a special rule at present applies to persons under the disability of minority (or unsoundness of mind). The limitation period begins to run against a minor at the date when the cause of action accrues "unless the plaintiff proves that the person under a disability was not, at the time when the right of action accrued to him, in the custody of a parent"[147]. In this context the words "in the custody of a parent" mean no more nor less than "in the care of a parent" and denote a state of fact; whether a minor is in the care of anyone does not depend on whether that person was exercising powers of control, but it suffices if the circumstances are such that he was in a position in fact to exercise powers of control should he desire to do so[148].

The Report of the Law Reform Committee

105. In May of this year the Twentieth Report of the Law Reform Committee[149] was presented to Parliament. It recommends the retention of the three year period and a "date of knowledge" test. It further recommends that the court should have a discretion to override a defence of limitation notwithstanding that the plaintiff has not sued within three years of his date of knowledge. Of greatest importance to our report are the recommendations of the Law Reform Committee that the rule whereby time runs against a person under a disability who is in the custody of a parent should be abolished.

Application of the law to claims for pre-natal injury

106. Implementation of our recommendations, as formulated in the draft Bill annexed, would clearly mean that the cause of action for pre-natal injury would arise at birth and whatever period applied to the claim would begin to run from that moment. We think that a claim for damages for pre-natal injury should, so far as possible, be treated in the same way as claims for damages for personal injury and we so recommend. There does not seem to us to be a distinction in principle between a claim by a very young child for personal injury and a claim by a new-born child for pre-natal injury. Clearly the considerations which have led to the Law Reform Committee's recommendation that a "date of knowledge" test should remain apply with equal, if not greater, force to claims for pre-natal injury. The protection given to claims for personal injury should clearly apply also to claims for pre-natal injury.

The "custody of a parent" rule

107. Whatever the merits of the rule that time runs against an infant in the custody of a parent when the cause of action accrues might have in the case of personal injury happening to a living child (and we agree with the Law Reform Committee that its demerits outweigh its merits), we are clearly of the view that it would be inappropriate to a claim for damages for pre-natal injury. Applying the rule to such a claim it is difficult to envisage a case in which it would be possible to prove that a child was not in the custody of a parent when his cause of

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[146] Limitation Act 1939 (c. 21), s.22.
[147] *ibid.*, as amended by Law Reform (Limitation of Actions, etc.) Act 1954 (c. 36,) s.2.
[148] *Todd* v. *Davison* [1972] A.C. 392.
[149] *Interim Report on Limitation of Actions: Personal Injury Claims;* (1974) Cmnd. 5630.

action accrued, namely at birth. The rule would therefore, in effect, limit all claims for pre-natal injury (subject to any extension in respect of lack of knowledge) to three years from birth even in a case where the child was taken out of parental control very shortly after birth. If the recommendation of the Law Reform Committee is implemented it should clearly apply to claims for pre-natal injury. However, even if it is not implemented generally we think that there should be specific legislation excepting claims for pre-natal injury from this provision.

Conclusion as to limitation of actions

108. In relation to limitation of actions claims for pre-natal injury should be treated in general in the same way as claims for personal injury. Whether the rule as to "custody of a parent" is abolished generally or not, it should, in any event, not apply to claims for pre-natal injury.

(M) Transitional Provisions

Conclusion: transitional provisions

109. In paragraph 8 above we expressed the opinion that without legislation the common law would probably provide a remedy for a plaintiff suffering from pre-natal injury caused by another's fault. For the reasons stated in the following paragraph we conclude, however, that legislation is desirable. We recommend that any legislation implementing our report should apply to all causes of action accruing after the passing of the Act (that is to say to all births on or after that date irrespective of when the fault occurred). For such births there should be no cause of action for pre-natal injury save under the Act. For any cause of action accruing before the passing of the Act all rights the plaintiff had at common law will be retained.

(N) The Desirability of Legislation

Legislation desirable

110. In our working paper we expressed the provisional view that for a variety of reasons legislation was desirable. On consultation there was almost unanimous support for our provisional view. The reasons which have confirmed us in our provisional view can now be stated thus:—

(*a*) In the absence of an English authority there is doubt whether a child has a cause of action at all for personal injuries caused before birth. There is American and Irish authority that no action would lie[150] but more recent authority is in favour of a cause of action. One cannot forecast in what circumstances the question will arise in the future but most claims for damages for personal injuries are, as we have pointed out in our report on the assessment of damages[151], compromised and do not result in litigation. Because a decision against an infant plaintiff on this question would result in the total defeat of his claim, the doubt

[150] In Eire the Civil Liability Act 1961 s. 58 now provides that a cause of action shall lie, viz:—

"For the avoidance of doubt it is hereby declared that the law relating to wrongs shall apply to an unborn child for its protection in like manner as if the child were born, provided the child is subsequently born alive."

[151] *Report on Personal Injury Litigation—Assessment of Damages.* Law Com. No. 56; (1973) H.C. 373, para. 27.

will, we think, be bound to have an impact upon the terms of settlement of any claim which is made in the fututre until it is resolved by litigation or legislation.

(*b*) Although recent decisions in other common law jurisdictions have been in favour of permitting a cause of action in respect of pre-natal injury, the bases upon which the cause of action has been held to be founded have varied. Whilst in most American States the current has set strongly in favour of the recognition of such a cause of action, the reasoning has been founded on the recognition of the foetus as a legal entity separate from the mother[152]. On the other hand, a recent decision of the Supreme Court of Victoria[153], in holding that in law a child could recover damages for brain injury allegedly caused in a road accident seven and a half months before birth, founded its decision primarily on the basis that a claim in negligence can be brought by a living plaintiff in respect of a disability with which he was born, even though the disability was caused by the earlier negligent conduct of the defendant[154].

(*c*) The cost of law reform should not fall upon an individual litigant if this can be avoided. Thus where a doubt exists as to what the law is on an important topic such as this, there is a strong case for resolving that doubt by legislation.

(*d*) The fact situation which will give rise to the first claim litigated to judgement cannot be foreseen, but, whatever it is, the decision upon it will almost certainly leave a number of ancillary questions unanswered. It is, we think, desirable that as many of these questions as can be foreseen should be answered before they arise.

(*e*) Our advice upon some of the questions relating to the physical identity of mother and foetus[155] as well as being different from our provisional conclusions will, if implemented, involve departures on social grounds, from the answers which would probably result from the application of legal principles to the situations envisaged. The danger that the issue as to whether a mother can be liable in negligence to her own child will come before the courts at an early date is a real one. It would arise in any case where pre-natal injury is alleged to have been caused in a road accident resulting in part from the mother's negligence; the insured mother would almost certainly be sued for contribution by the defendant in the child's action and her liability would depend upon whether she "would if sued have been liable"[156] in respect of the pre-natal injury[157]. We have little doubt that, in any such proceedings, a court would hold that there was liability upon the mother with the consequence that, by

[152] In America this has led a court to allow a cause of action for the wrongful "death" of an eight-month-old viable foetus stillborn as a consequence of injury. See *White* v. *Yup* (1969) 458 P. 2d. 617.

[153] *Watt* v. *Rama* [1972] V.R. 353.

[154] Although Gillard J., whilst he stated his adherence to the principle of the action accruing only to a person in being, was prepared, if necessary, to base his decision on the American formula.

[155] See paras. 53–71 above.

[156] Law Reform (Married Women and Tortfeasors) Act 1935 (c. 30), s. 6(1) (*c*).

[157] In fact we do recommend in para. 64 above that a child should be entitled to sue his mother in the single case of her causing pre-natal injury by the negligent driving of a motor car, but a decision of a court on the point based upon the common law would, of course, settle the principle for all those other possible claims which we wish to exclude.

litigation, the result so strongly opposed by the Family Division judges, would be achieved. If our advice as to a mother's potential liability to her own child is accepted, this furnishes a strong argument in favour of legislation additional to those we have already referred to above.

PART VI. Summary of Recommendations

111. The following is a summary of the recommendations in this Report with cross references to the Clauses which implement them in the draft Bill annexed at Appendix 1.

(1) Legislation should deal with the rights of a living person and no rights should be given to the foetus. (Para. 32 and Clause 1(1))

(2) The general principle should be that wherever pre-natal injury is caused intentionally, negligently or by a breach of statutory duty there should be liability for that injury. (Para. 34)

(3) As a general rule, whenever there is liability in tort at common law to a parent for an act or omission which causes pre-natal injury, the child should be entitled to recover damages. (Paras. 45 and 75 and Clause 1(1) (2) and (3))

(4) Liability to the child ought not to be excluded merely because the mother has herself suffered no actionable injury. (Para. 46 and Clause 1(3))

(5) As a general rule, whenever a breach of statutory duty owed to a parent causes pre-natal injury to the child, he should be entitled to recover damages for his disability. In the same way as we recommend for actions in tort at common law (see (3) above) liability to the child should depend upon liability in tort to the parent. (Paras. 52 and 75 and Clause 1(1) (2) and (3))

(6) As a general rule, legislation should not permit a right of action by a child against its own mother for pre-natal injury. (Para. 63 and Clause 1(1))

(7) As an exception to the general rule (stated in (6) above), where a mother causes pre-natal injury to her child by her negligent driving of a motor vehicle, she should be liable to her child. (Para. 64 and Clause 2)

(8) If a mother is liable to her child for her negligent driving, any person jointly liable with her should have a right to claim contribution from her. (Para. 64 and Clause 2)

(9) A mother's negligence should be available as a partial defence to a tortfeasor where her fault has contributed to her child's pre-natal injury. (Para. 66 and Clause 1(7))

(10) In an action by a child for pre-natal injury a defendant should be entitled to rely upon a contractual term binding on the mother excluding or limiting his liability either towards her or towards her unborn child. (Para. 71 and Clause 1(6))

(11) In an action by a child for pre-natal injury a defendant should be able to rely upon a mother's voluntary assumption of risk. (Para. 71 and Clause 1(3))

(12) The rule that a tortfeasor "takes his victim as he finds her" should apply where a pregnant woman is injured by the defendant's fault; the fact that she is bearing a child should be treated as one of her "characteristics and constitution". (Para. 74 and Clause 1(1) (2) and (3))

(13) Pre-conception injury to a parent causing pre-natal injury to a child shall found a cause of action in the child only if the parents or either of them neither knew nor ought to have known at the time of conception of the risk of a child being born disabled as a result of the relevant injury. (Para. 78 and Clause 1(2) (*a*) and 1(4))

(14) Where a father is sued for pre-natal injury caused prior to or at conception, the limitation on liability for pre-conception injury resulting from the parent's knowledge (stated in (13) above) should not apply. (Para. 93 and Clause 1(4))

(15) There should be no claim for pre-natal injury otherwise than at the suit of the first generation. (Para. 80 and Clause 4(3))

(16) No legislation resulting from our recommendations should interfere with the scheme of the Nuclear Installations Act 1965, but, in the light of our report and any legislation implementing it, consideration should be given to its amendment. (Para. 84 and Clause 3(3))

(17) There should be no liability for "wrongful life". (Paras. 89 and 90 and Clause 1(2) (*b*))

(18) Where a disability is caused at conception by a wrongful act, then there should be liability. (Para. 91 and Clause 1(2) (*a*))

(19) A father should not be exempt from liability to his child. (Para. 93 and Clause 1 (1) (2) and (3))

(20) There should be a special provision codifying, in the context of pre-natal injury, the common law rule that a person acting in a professional capacity is not liable for negligence if he acts in accordance with the then received professional opinion. (Para. 96 and Clause 1(5))

(21) Damages should be assessed as if the pre-natal injury had been inflicted after a birth without the disabilities due to the pre-natal wrong. (Para. 100 and Clause 3(1))

(22) There should be no claim for damages for loss of expectation of life unless the plaintiff survives birth by 48 hours. (Para. 100 and Clause 3(2))

(23) For the purpose of the limitation of actions, claims for pre-natal injury should be treated in the same way as claims for personal injury. The "custody of a parent" rule should not apply to claims for pre-natal injury. (Para. 108 and Clause 3(1))

(24) Legislation implementing our report should apply to all causes of action accruing after the passing of the Act. (Para. 109 and Clause 3(3))

(25) For the reasons stated we consider that legislation is desirable. (Para. 110)

(*Signed*) SAMUEL COOKE, *Chairman.*
CLAUD BICKNELL.
AUBREY L. DIAMOND.
DEREK HODGSON.
NORMAN S. MARSH.

J. M. CARTWRIGHT SHARP, *Secretary.*
14 *June* 1974.

APPENDIX 1

Draft Congenital Disabilities (Civil Liability) Bill

ARRANGEMENT OF CLAUSES

Clause

1. Civil liability to child born disabled.
2. Liability of woman driving when pregnant.
3. Supplementary provisions.
4. Interpretation.
5. Citation and extent.

DRAFT

OF A

BILL

To make provision as to civil liability in the case of children born disabled in consequence of some person's fault.

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Civil liability to child born disabled.

1.—(1) If a child is born disabled as the result of such an occurrence before its birth as is mentioned in subsection (2) below, and a person (other than the child's own mother) is under this section answerable to the child in respect of the occurrence, the child's disabilities are to be regarded as damage resulting from the wrongful act of that person and actionable accordingly at the suit of the child.

(2) An occurrence to which this section applies is one which—

(*a*) affected either parent of the child in his or her ability to have a normal, healthy child; or

(*b*) affected the mother during her pregnancy, or affected her or the child in the course of its birth, so that the child is born with disabilities which would not otherwise have been present.

EXPLANATORY NOTES

Paragraph 110 of the report sets out the reasons why it is thought desirable to clarify the law relating to civil liability for a child's disabilities arising from a pre-natal incident.

Clause 1

1. This clause establishes the basis of civil liability where a child is born disabled in consequence of the intentional act, or the negligence or the breach of statutory duty, of some person before the child's birth. In so doing it gives effect to paragraphs 34, 45, 48 and 52 of the report. The expression "born disabled" is defined in clause 4(1).

2. There can be no liability unless the child is born alive (paragraph 32 of the report). This effect is achieved by the opening words of subsection (1) and the definitions of "born" and "birth" in clause 4(2)(a).

3. In accordance with the conclusion of paragraph 63 of the report, there can under this clause be no case of a mother being liable to her own child. Such liability is excluded in the clause by the words in parenthesis in the third line of subsection (1). Liability of the father is not excluded (paragraph 93).

4. The liability of the defendant is a derivative one, in that the combined effect of subsections (1) to (3) is to make liability to the child depend on a pre-existent liability to one or other of the parents in respect of the matters giving rise to the disabled birth. Thus in accordance with paragraphs 45, 52 and 75 of the report, there is no nexus of legal duty, whether at common law or under statute, as between the defendant and the child "*in utero*".

5. By subsection (1) the disabled birth must be the result of "an occurrence", which must have been before the child's birth and have been one of a kind falling within subsection (2). The paragraphs of that subsection distinguish between (*a*) matters arising before conception, and (*b*) matters arising when the child's mother is pregnant or during the actual process of childbirth. In the former case it could be an injury to either parent, as for example by irradiation, damaging his or her progenitive capacity; or the transmission to the child of some disease from which the father suffered at the time of intercourse. In the latter case it could only be a matter involving the mother, as for example irradiation, with consequent damage to the foetus; the administration to her of a drug with teratogenic effects on the child "*in utero*"; a street accident causing her to give birth prematurely, with consequent trauma to the child; or physical damage to the child during childbirth, as by the negligent handling of instruments.

6. The clause gives the child no right of action for "wrongful life" (see paragraphs 89 and 90 of the report). Subsection (2)(*b*) is so worded as to import the assumption that, but for the occurrence giving rise to a disabled birth, the child would have been born normal and healthy (not that it would not have been born at all).

7. Again by subsection (1), the child's cause of action arises only if the defendant is "answerable" in respect of the particular occurrence which gave rise to the child's congenital disabilities. Subsections (3) to (5) specify the cases in which the defendant is, or is not, "answerable" for this purpose.

(3) Subject to the following subsections, a person (here referred to as "the defendant") is answerable to the child if he was liable in tort to the parent or would, if sued in due time, have been so; and it is no answer that there could not have been such liability because the parent suffered no actionable injury, if there was a breach of legal duty which, accompanied by injury, would have given rise to the liability.

(4) In the case of an occurrence preceding the time of conception, the defendant is not answerable to the child if at that time either or both of the parents knew the risk of their child being born disabled (that is to say, the particular risk created by the occurrence); but this does not apply where the child's father is himself the defendant.

(5) The defendant is not answerable to the child, for anything he did or omitted to do when responsible in a professional capacity for treating or advising the parent, if he took reasonable care having due regard to then received professional opinion applicable to the particular class of case; but this does not mean that he is answerable only because he departed from received opinion.

(6) Liability to the child under this section may be excluded or limited by contract made with the mother to the same extent and subject to the same restrictions as liability in her own case; and a contract term which could have been set up by the defendant in an action by the mother, so as to exclude or limit his liability to her, operates in his favour to the same, but no greater, extent in an action under this section by the child.

(7) If in the child's action under this section it is shown that the mother shares the responsibility for its being born disabled, the damages are to be reduced to such extent as the court thinks just and equitable having regard to the extent of her responsibility; and where this subsection applies, the court (or jury, if there is one) shall determine the total damages and the extent of the reduction.

8. Subsection (3) gives effect to paragraphs 45, 52 and 75 of the report by means of a general provision that the defendant must have been actually or potentially liable in tort to one or other of the child's parents. The subsection deals with certain subsidiary points as follows:—

(i) liability to the second generation (paragraph 80 of the report) is excluded by the definition of "liability" in clause 4(3) as excluding liability under this legislation;

(ii) in accordance with paragraph 46 of the report, the child's right of action is not prejudiced by the inability of the mother to sue,—as for example where she immediately pre-deceased the child, or can claim no actionable damage (because the occurrence in question was not one which caused any injury to her).

9. Effect is also given by subsection (3) to paragraph 74 of the report, in that liability to the mother connotes liability to the disabled child; and the defendant is presumed "to take the mother as he finds her". As against him, the fact of her being pregnant is treated as belonging to her "characteristics and constitution", so that it is not open to him to say either that he did not know her to be pregnant, or that the damage to her child was not foreseeable.

10. By subsection (4) provision is made for a defence, to an action at the suit of the child, founded on proof that either or both of the parents knew the risk of their child being born disabled, and accepted it (paragraphs 71 and 93 of the report). The defence is available only in the case of an occurrence preceding conception by the mother; it would not be open in the rare case where the defendant was the father himself.

11. Subsection (5) clarifies the position of professional defendants (especially, but not exclusively, members of the medical profession). They are not liable in respect of a disabled birth in so far as the advice or treatment given to the parent was in accordance with then received professional opinion (paragraph 96 of the report). This is believed to accord with the position in relation to actions for negligence at common law.

12. Subsection (6) gives effect to paragraph 71 of the report in preserving the defendant's right to rely on exclusion of his liability by contract with the mother. The defence is available in so far as he may have excluded his liability to the mother herself, or to her child arising out of any tort committed against her.

13. Subsection (7) provides a partial or complete defence on grounds equivalent (for this context) to "contributory negligence" and gives effect to paragraph 66 of the report. The child's damages awarded against the defendant are to be reduced, to whatever extent seems just and equitable in the circumstances, by reference to any degree of responsibility which can be attributed to the mother.

Liability of woman driving when pregnant.

2. A woman driving a motor vehicle when she is pregnant is to be regarded as being under the same duty to take care for the safety of her child as the law imposes on her with respect to the safety of other people; and if in consequence of her breach of that duty her child is born with disabilities which would not otherwise have been present, those disabilities are to be regarded as damage resulting from her wrongful act and actionable accordingly at the suit of the child.

EXPLANATORY NOTES

Clause 2

14. It is inherent in clause 1 that a woman cannot under that clause be liable to her own disabled child, since liability to the child is in all cases derived from a breach of legal duty owed to the parent. By clause 2 an exception is made from this general rule in the case of a disabled birth arising from the mother's negligent driving of a motor vehicle (see paragraphs 59–61 and 64 of the report).

Supplementary provisions.

3.—(1) Liability to a child under this Act is to be regarded—

(*a*) as respects all its incidents and any matters arising or to arise out of it; and

(*b*) subject to any contrary context or intention, for the purpose of construing references in enactments and documents to personal or bodily injuries and cognate subject-matter,

as liability for personal injuries sustained by the child immediately after its birth.

(2) No damages shall be recoverable under this Act in respect of any loss of expectation of life, unless the child lives for at least 48 hours.

(3) This Act applies in respect of births after (but not before) its passing; and in respect of any such birth it replaces any law whereby a person may be liable to a child in respect of disabilities with which it is born, except that nothing in this Act affects the operation of the Nuclear Installations Act 1965 as to liability for, and compensation in respect of, injury or damage caused by occurrences involving nuclear matter or the emission of ionising radiations.

1965 c.57

EXPLANATORY NOTES

Clauses 3 *to* 5

15. These clauses contain supplementary, interpretative and formal provisions. It is thought that they explain themselves without the aid of notes. They comprise material related to paragraphs 33, 84, 100, 108 and 109 of the report.

Interpretation.

4.—(1) References in this Act to a child being born disabled or with disabilities are to its being born with any deformity, disease or abnormality, including predisposition (whether or not susceptible of immediate prognosis) to physical or mental defect in the future.

(2) In this Act—

(*a*) "born" means born alive (the moment of a child's birth being when it first has a life separate from its mother), and "birth" has a corresponding meaning; and

(*b*) "motor vehicle" means a mechanically propelled vehicle intended or adapted for use on roads.

(3) The references in section 1(3) to liability do not include liability by virtue of this Act.

Citation and extent.

5.—(1) This Act may be cited as the Congenital Disabilities (Civil Liability) Act 1974.

(2) This Act does not extend to Scotland or Northern Ireland.

APPENDIX 2

Organisations and Persons who submitted written comments on Working Paper No. 47.

The Rt. Hon. Lord Reid, C.H.
The Rt. Hon. Lord Widgery, O.B.E., Lord Chief Justice of England
The Rt. Hon. Sir George Baker, O.B.E., President of the Family Division
The Rt. Hon. Lord Justice Stephenson
The Rt. Hon. Lord Justice Ormrod
The Hon. Mr Justice Graham
The Hon. Mrs. Justice Lane, D.B.E.

The General Council of the Bar
The Law Society
The Society of Public Teachers of Law
  Mr. J. A. Jolowicz. Torts Sub-Committee
  Professor P. M. Bromley, Dr. Olive M. Stone, Professor D. Lasok — Family Law Sub-Committee
The Society of Conservative Lawyers

Professor H. R. Hahlo, Institute of Comparative Law, McGill University
Professor R. F. V. Heuston, University of Dublin
Mr R. C. Hines, Cambridge House Legal Advice Centre
Mr. P. T. Hurst, Messrs. Hurst & Walker, Solicitors
Mr. R. H. Griffith Jones, Leeds University
Messrs. Linklaters & Paines, Solicitors
Dr. L. Lotter, Rechtsanwalt
Mr. P. M. North, Oxford University
Ontario Law Reform Commission
Mr. A. L. Polak, Solicitor
Mr. W. V. Rendel, Messrs. Parker Garrett & Co., Solicitors
Messrs. Richardson & Sweeney, Solicitors
Mr. E. Veitch, The Queen's University of Belfast
Mr. Alan Wharam, Leeds Polytechnic
Mr. G. V. C. Young, Office of the Director of Law Reform, Belfast

The Royal College of Physicians
  Dr. J. F. Loutit, C.B.E., D.M., F.R.C.P., F.R.S.
  Dr. R. G. Miller, M.D., F.R.C.P.
  Professor T. E. Oppé, F.R.C.P.
  Professor L. B. Strong, M.D., F.R.C.P.

The Royal College of Surgeons of England
Royal College of Obstetricians & Gynaecologists
Royal College of Pathologists
Royal College of Psychiatrists
Royal College of General Practitioners
Royal College of Midwives

Faculty of Radiologists
The British Institute of Radiology
The British Society of Dental Radiology
British Medical Association
General Medical Council

Sir John Peel, K.C.V.O., F.R.C.P., F.R.C.S., F.R.C.O.G.
Professor Sir Douglas Hubble, K.B.E., M.D., F.R.C.P.
Professor Sir Dennis Hill, F.R.C.P., F.R.C., Psych. D.P.M.
Mr E. A. Williams, F.R.C.S., F.R.C.O.G.

The Medical Defence Union
The Medical Protection Society
The Medical & Dental Defence Union of Scotland
Department of Health & Social Security

Dr. F. D. Beddard, M.R.C.P., M.R.C.S., R.H.B.
Dr. A. McGregor, M.B., B.S., D.T.M. & H., D.P.H.
Dr. D. Mansel-Jones, M.B., B.S.
Dr. R. R. Trussel, M.D., Ch.M., F.R.C.O.G.
Dr. G. Wynne Griffith, M.D., D.P.H.

Professor S. G. Clayton, M.D., M.S., F.R.C.S., F.R.C.O.G. President of the Royal College of Obstetricians & Gynaecologists
Professor D. R. Laurence, M.D., F.R.C.P.
Professor R. W. Smithells, F.R.C.P., D.C.H.
Mr. Norman Capener, C.B.E., F.R.C.S.
Mr G. Chamberlain, M.D., F.R.C.S., M.R.C.O.G.
Mr. P. Diggory, F.R.C.S., F.R.C.O.G.
Dr. R. G. Edwards, Ph.D.
Mr N. H. Harris, F.R.C.S.
Dr. C. R. Kay, M.D., F.R.C.G.P.
Dr. F. H. Kemp, M.D., F.R.C.P., F.F.R.
Mr. J. J. F. O'Sullivan, B.A.O., M.R.C.O.G.
Dr. J. W. T. Seakins, M.A., Ph.D.

Medicines Commission
Committee on Safety of Medicines
The Pharmaceutical Society of Great Britain
Association of the British Pharmaceutical Industry
The Worshipful Society of Apothecaries of London

Dr. P. M. F. Bishop, D.M., F.R.C.P., F.R.C.O.G.

Proprietary Association of Great Britain
The Boots Company Ltd.

Department of the Environment
Department of Trade & Industry
The Lord Chancellor's Office
Mr. W. A. Leitch, C.B., Office of the Parliamentary Draftsmen, Belfast
Welsh Office
Civil Aviation Authority
British Railways Board

Trades Union Congress

Lloyds'
British Insurance Association
British Insurance Law Association
Royal Insurance Company Ltd.

Women's National Commission
The National Council of Women of Great Britain
National Federation of Business & Professional Women's Clubs of Great Britain & Northern Ireland
Married Womens' Association
The Society for the Protection of Unborn Children

The Methodist Church, Department of Christian Citizenship
British Council of Churches, Social Responsibility Department

Mr. J. H. Fisher
Mrs. V. M. Fuchter
Mrs. D. J. Gaunt
Mrs. N. J. Holme
Mr. D. V. Prestwich
Mr. J. D. Wilson
Mrs. M. Wynn

APPENDIX 3

Participants in the Colloquium at the Royal Society of Medicine on 19 March 1973

LEGAL PARTICIPANTS

The Rt. Hon. Lord Widgery O.B.E., Lord Chief Justice of England
The Rt. Hon. Sir George Baker O.B.E., President of the Family Division.
The Hon. Mrs. Justice Lane D.B.E.

General Council of the Bar — Mr. C. M. Clothier Q.C.
Mr. J. D. Stocker, M.C., T.D., Q.C., (now The Hon. Mr. Justice Stocker)

Law Commission — The Hon. Mr. Justice Cooke
Mr. Claud Bicknell O.B.E.
Mr. A. L. Diamond
Mr. Derek Hodgson Q.C. (Chairman of the Colloquium)
Mr. Norman Marsh Q.C.
Mr. J. Churchill
Mr. J. L. Yelland

Scottish Law Commission — Professor T. B. Smith, Q.C., F.B.A.

MEDICAL PARTICIPANTS

Royal Society of Medicine — Sir Hedley Atkins K.B.E., M.Ch., P.P.R.C.S.

Anatomy — Professor Ruth Bowden, D.Sc.,
Professor of Anatomy,
Royal Free Hospital School of Medicine
Professor W. J. Hamilton, M.D., F.R.C.O.G.
Professor Emeritus of Anatomy,
University of London.

Endocrinology — Dr. G. I. M. Swyer, D.Phil., D.M., F.R.C.P.
Consultant Endocrinologist,
Department of Obstetrics & Gynaecology,
University College Hospital.

General Practice — Dr. John Woodall, F.R.C.G.P.,
President, Section of General Practice,
Royal Society of Medicine.

Genetics — Professor Sir Cyril Clarke, K.B.E., P.R.C.P., F.R.S.,
President, Royal College of Physicians.
Professor of Medicine and Director of
Nuffield Unit of Medical Genetics,
University of Liverpool.

Obstetrics & Gynaecology	— Dame Josephine Barnes, D.B.E., DM. F.R.C.P., F.R.C.S., F.R.C.O.G., Consultant Obstetrician & Gynaecologist, Charing Cross Hospital. Mr. Ian Jackson, F.R.C.S., F.R.C.O.G., Consultant Obstretrician & Gynaecologist, Middlesex Hospital. Professor Sir John Stallworthy, F.R.C.S., F.R.C.O.G., Nuffield Professor of Obstetrics & Gynaecology, University of Oxford.
Odontology	— Professor G. R. Seward, M.D.S., F.D.S., Professor of Oral Surgery, London Hospital.
Paediatrics	— Professor L. B. Strang, M. D., F.R.C.P., Professor of Paediatrics & Consultant Paediatrician, University College Hospital. Professor A. W. Wilkinson, Ch.M., F.R.C.S. (Ed.), F.R.C.S., Nuffield Professor of Paediatric Surgery, Hospital for Sick Children, Great Ormond Street.
Pharmacology	— Dr. G Edward Paget, M.D., Director, Inveresk Research International. (Formerly Managing Director, Smith Kline & French Laboratories Ltd.) Professor Owen L. Wade, M.D., F.R.C.P., F.R.C.P.I. (Hon.), Professor of Clinical Pharmacology, University of Birmingham. Member, Committee on Safety of Drugs. Dr. Miles Weatherall, M.A., D.M., D.Sc., F.I. Biol., Deputy Director, Wellcome Research Laboratories.
Psychiatry	— Professor Desmond A. Pond, M.D., F.R.C.P., Professor of Psychiatry, The London Hospital.
Radiology	— Dr. J. Hillyer Smitham, F.F.R., D.M.R.E., Consultant Radiologist, Queen Charlotte's and Chelsea Hospitals.

APPENDIX 4

Persons who attended the Interdisciplinary Study Group at the Institute of Advanced Legal Studies on 18 June 1973.

Professor J. N. D. Anderson O.B.E., Q.C., LL.D., F.B.A., (In the Chair)

The Rt. Hon. Lord Simon of Glaisdale
The Hon. Mr. Justice Cooke
The Hon. Mr. Justice Finer

Mr. Claude Bicknell, O.B.E.,
Mr. A. L. Diamond
Master A. S. Diamond
Sir Denis Dobson, K.C.B., O.B.E., Q.C.
Mr. Quentin Edwards
Mr. Derek Hodgson, Q.C.
Master I. H. Jacob
Professor D. H. N. Johnston
Professor O. R. McGregor
Mr. Norman Marsh, Q.C.

The Rev. Theodore Davey C.P., S.T.L.
Professor The Rev. G.R. Dunstan D.D., F.S.A.,
The Rev. Chancellor E. Garth Moore
The Rev. R. Murray S.J.

Dr. R. G. Bird, Ph.D., D.T.M. & H.
Professor W. F. Bodmer, Ph.D.
Dr. R. G. Edwards, Ph.D.
Dr. Venetia France, M.Sc., Ph.D.
Dr. D. Martyn Lloyd-Jones, M.D., M.R.C.P., M.R.C.S.
Dr. Anne Mclaren, D.Phil.
Dr. E. T. Slater, C.B.E., M.D., F.R.C.P., D.P.M.
Dr. D. A. J. Tyrrell, M.D., F.R.C.P., F.R.C.Path., F.R.S.

APPENDIX 5

Participants in the meeting held on 25 July 1973 at the Royal College of Obstetricians and Gynaecologists.

Royal College of Obstetricians and Gynaecologists

Professor S. G. Clayton, M.D., M.S., F.R.C.S., F.R.C.O.G., (In the Chair)
Dame Josephine Barnes, D.B.E., D.M., F.R.C.P., F.R.C.S., F.R.C.O.G.
Mr. E. A. J. Alment, F.R.C.O.G.

Royal College of Physicians

Dr. J. H. Edwards, F.R.C.P.
Dr. P. R. Evans, C.B.E., M.D., F.R.C.P.
Dr. R. G. Miller, M.D., F.R.C.P.

Royal College of Surgeons of England

Mr. N. L. Capener, C.B.E., F.R.C.S.
Mr. Walpole Lewin, M.S., F.R.C.S.
Professor A. W. Wilkinson, Ch.M., F.R.C.S. (Ed.), F.R.C.S.

Royal College of Pathologists

Dr. D. A. L. Bowen, F.R.C.P. (Ed.), M.R.C.Path.
Dr. Magnus Haines, M.D., F.R.C.O.G., F.R.C.Path.
Professor V. Marks, D.M., F.R.C.P. (Ed.), M.R.C.Path.

Royal College of Psychiatrists

Dr. P. H. Connell, M.D., F.R.C.Psych.
Dr. P. Graham F.R.C.Psych.
Professor A. K. M. Macrae, F.R.C.P. (Ed.), F.R.C.P. (Glas.), Dip. Psych. (Ed.)

Royal College of General Practitioners

Dr. R. Carr, D.Obst., D.C.H.
Dr. C. R. Kay, M.D., F.R.C.G.P.
Dr. G. I. Watson O.B.E., F.R.C.G.P., D.T.M. & H.

Faculty of Radiologists

Dr. G. M. Ardran, M.D., F.R.C.P., F.F.R.
Dr. T. J. Deeley, F.F.R.

Faculty of Anaesthetists

Dr. P. Flintan D. A., M.R.C.G.P.
Dr. J. F. Nunn, Ph.D., M.D., F.F.A., D.A.
Professor J. G. Robson, F.F.A., D.A.

The Association of the British Pharmaceutical Industry

Dr. O. Morton, M.B., M.R.C.G.P.
Mr. J. A. Smith, F.P.S.
Mr. J. D. Spink, M.P.S.

Medical Defence Union

Dr. Philip H. Addison, M.R.C.S., L.R.C.P.
Professor R. S. Illingworth, M.D., F.R.C.P., D.C.H.
Mr. A. R. L. Mirams (Messrs. Hempsons, Solicitors)

The Medical Protection Society

Mr. W. G. Hawkins, T.D.
Professor Sir John Stallworthy, F.R.C.S., F.R.C.O.G.

British Medical Association

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