CASE NOTES

WATT v. RAMA[1]

Tort—Negligence—Duty of Care—Plaintiff en ventre sa mere at time of negligent conduct—Claim for injuries at and after birth caused by such conduct —Whether duty of care owed to plaintiff not to injure plaintiff while en ventre sa mère—*'Person'*.

In May, 1967 a pregnant woman was the driver of a car involved in an accident. The injuries she sustained rendered her a quadraplegic. Seven and a half months later, her daughter was born with brain damage and epilepsy. The child sought damages from the driver of the other car involved in the accident, alleging that he had been negligent and that she had suffered injury as a result of the accident 'and/or' her mother's inability to have a normal pregnancy and labour. The question of whether a cause of action is available to a living plaintiff for injuries inflicted before birth had never before been subject to decision in Australia. A preliminary hearing before the Full Court of the Victorian Supreme Court was held to determine whether or not the plaintiff, Watt, was owed a duty of care by the defendant, Rama. The Court held that a duty was owed, whether the injury was caused in the initial impact or at the time of the delivery of the child.

The element of duty in the tort of negligence establishes the interests deemed worthy of protection by the law. No duty is owed not to be careless, but often a duty not to harm others by carelessness is said to arise. If, in a certain situation, the existence of such a duty is denied, this means that one may act as 'negligently' as one pleases and still escape liability for the consequences of such behaviour. Thus, had the court in *Watt v. Rama*[2] decided that the defendant owed no duty of care to the plaintiff, the decision would have meant that, in Australia, injury negligently inflicted before birth is not deemed worthy of compensation, even if the child were subsequently born alive.[3]

For the purposes of the hearing, it was assumed that the facts alleged by the plaintiff had been established. The issues of breach of duty and causation were thus postponed until after the validity of the cause of action had been determined. The plaintiff, relying on the principles of *Donoghue v. Stevenson*[4] claimed that she was owed a duty of care, which attached and become applicable to her on birth. The defendant maintained that at the time of the accident the plaintiff was not a legal 'person' capable of bringing an action or possessing the correlative rights implied by a duty of care, and so could not be owed such a duty. The Court decided for the plaintiff unanimously, no judge

[1] [1972] V.R. 353. Supreme Court of Victoria, Full Court, Winneke C.J., Pape and Gillard JJ.

[2] *Ibid.*

[3] Where injury is carelessly inflicted on the foetus and it is later stillborn, no duty is owed and thus no liability imposed in Australia. This damage may, however, constitute an element in the mother's claim in respect of her own injuries.

[4] [1932] A.C. 562; [1932] All E.R. Rep. 1 (H.L.).

distinguishing between the two types of antenatal injury for which she sought recovery.[5] However, the approach taken by the majority did differ from that of Gillard J.

Winneke C.J. and Pape J. first examined the persuasive authority presented to the court, but resolved the issue by resorting to 'the basal principles involved in the tort of negligence'.[6] They maintained that the duty element in negligence arises from a relationship between parties, but only in those circumstances where it is reasonably foreseeable that lack of care by one party is likely to result in injury to another party to the relationship. In other words, a duty is owed only to those within the foreseeable range of injury. Assuming such a relationship to exist, where the careless act and consequent injury occur contemporaneously (as is commonly the case) the duty arises and is breached at the time of the careless act. Where the act and consequent injury do *not* occur together, the act (since it is reasonably foreseeable that it may cause injury) imposes a contingent duty which would vest at the time actual injury is suffered by a now-specific plaintiff.

In this case, the Chief Justice and Pape J. thought that it was reasonably foreseeable that Rama's careless driving might injure a pregnant woman and equally the child she was carrying. Thus, his negligent act created a potential duty (to a potential plaintiff). On birth the child attained rights correlative to a duty; she sustained injury and at this stage the duty arose and the breach of this duty occurred. As a basis for this concept of a potential duty crystallizing on birth, an analogy was drawn with product liability cases such as *Donoghue v. Stevenson*[7] and *Grant v. Australian Knitting Mills Ltd.*[8] Their Honours claimed that in such cases the negligent act, although committed at the time of manufacture, created a potential duty which did not 'crystallize' until the product was used and the damage suffered. It was quite possible that the eventual consumer would not have been born (or even conceived) when the original act causing the subsequent injury was effected. Using this analogy, the majority judgment considered that it had adequately disposed of the defendant's contention that duty of care presupposes the existence of someone possessing a right to be owed a duty and another person owing that duty at the time of the negligent act.

However, the product liability comparison does not appear to be on all fours with the situation presented to the court. In *Watt v. Rama*[9] the damage was actually done—according to one of the alternative allegations—at the time of the accident. In *Donoghue v. Stevenson*[10] the original negligent act did not become complete, or actionable, until the damage was done. The majority in the present case seem to be saying that compensation is usually granted when damage is suffered owing to negligence. But where damage has been inflicted upon an entity '*in esse*' a further condition—birth—is imposed before an action may lie and compensation can be awarded. Thus damage incurred will not be legally recognized until a legal personality deemed capable of sustaining injury comes into being. The defective products analogy usefully indicates how the concept of 'potential duty' can adequately cope with the situation where a time interval arises between the careless act and the consequent injury. As has been

[5] Namely, direct injury to the foetus at the time of accident and injury incurred during childbirth because of the damage suffered by the plaintiff's mother.
[6] [1972] V.R. 353, 359.
[7] [1932] A.C. 562; [1932] All E.R. Rep. 1.
[8] [1936] A.C. 85; [1935] All E.R. Rep. 209 (P.C.).
[9] [1972] V.R. 353.
[10] [1932] A.C. 562; [1932] All E.R. Rep. 1.

shown, it also illustrates that the plaintiff need not necessarily be *'in esse'* at the time of the negligent act. But the analogy hardly seems relevant to the other concept upon which the majority seem to be relying—the concept of 'legal damage' which only occurs at birth, when the injured is able to bring an action.[11]

In his somewhat longer judgment Gillard J. first considered the position in the light of the principles extracted from *Donoghue v. Stevenson,*[12] as amplified and applied in three further cases.[13] In summary, His Honour said that no tort of negligence can exist *unless* and *until damnum*[14] occurs. If a person is injured in a road accident, the two questions posed in *Donoghue v. Stevenson*[15] to determine liability[16] are varied slightly. The query now becomes 'Was the plaintiff a member of a class of persons that the defendant, as a reasonable man, should have foreseen to be within the area of potential danger and risk of injury if reasonable care was not taken?' If so, Gillard J. maintained that it was immaterial whether the plaintiff was in existence at the time of the fault or not.[17] To answer this question His Honour, employing Lord Pearson's approach in the *Dorset Yacht* case[18] reversed the normal order of inquiry (duty, breach and then damage) by commencing with an examination of the damage element of the case.[19] When he finally turned to consider the duty element, His Honour agreed with the majority in their conclusion. This was that the unborn are among that class of persons which a reasonable man would foresee as likely to be injured by careless driving. In support of this conclusion, Gillard J. referred to the situation of parents driving home their newly born child, who is in a bassinet and hidden from view. He maintained that in this instance a defaulting driver would be just as ignorant of the baby in the bassinet as he would be of the unborn child. His Honour considered that it would be unreasonable to attribute different legal responsibilities according to the varying legal capacities of the injured, whether newly born or unborn.

Although Mr Justice Gillard's approach to, and discussion of, this case is more detailed than that of the majority, both judgments pursue the same line

[11] Compare *Margarine Union G.m.b.H. v. Cambay Prince Steamship Co. Ltd* [1969] 1 Q.B. 219 in which the plaintiff acquired title to a shipment of copra only at the time when the goods were unloaded. The defendant shipowners had negligently failed to fumigate their vessel adequately and in consequence the copra had been seriously damaged. The plaintiff failed to recover for the loss incurred. The Court held that the plaintiff was neither the owner of the goods nor was in possession of them at the time the damage took place, and thus had no title to sue. It should be noted that different policy factors may operate when one considers defective products in a commercial setting, where a contractual remedy is normally available.

[12] [1932] A.C. 562; [1932] All E.R. Rep. 1.

[13] *Hay (or Bourhill) v. Young* [1943] A.C. 92 (H.L.); *Chapman v. Hearse* (1961) 106 C.L.R. 112; [1962] A.L.R. 379 (H.C.); *Home Office v. Dorset Yacht Co. Ltd* [1970] A.C. 1004; [1970] 2 All E.R. 294 (H.L.).

[14] Gillard J. had earlier (at p. 363) distinguished between *injuria* and *damnum*, stating that *damnum* is proof of some loss, damage or injury for which the law will provide compensation.

[15] [1932] A.C. 562; [1932] All E.R. Rep. 1.

[16] These questions being (1) Is it reasonably foreseeable that this act is likely to injure my 'neighbour'? (2) Is the person injured a 'neighbour'?

[17] To support this statement Gillard J. relied on *Donoghue v. Stevenson* [1932] A.C. 562; [1932] All E.R. Rep. 1 and *Grant v. Australian Knitting Mills Ltd* [1936] A.C. 85; [1935] All E.R. Rep. 209.

[18] *Home Office v. Dorset Yacht Co. Ltd* [1970] A.C. 1004; [1970] 2 All E.R. 294.

[19] His Honour may have adopted this approach to avoid a discussion of whether or not the plaintiff was a person whilst *en ventre sa mere*. The learned judge also cites with approval Lord Pearson's own reasons for using this method of inquiry [1972] V.R. 353, 372, 373.

of reasoning to refute the defendant's argument that a *persona juridica* must exist at the time of the fault. All the judges agree that the tort is not complete until damage occurs; they maintain that in this case the damage is suffered at birth to a legal 'person' capable of bringing an action and of being owed a duty, the injury sustained whilst *en ventre sa mere* being 'an evidentiary incident in the causation of damage at birth'.

Gillard J. advanced an additional reason for finding in favour of the plaintiff. By referring to cases in criminal and property law, as well as decisions under certain statutory provisions, the learned Judge was of opinion that the unborn were sufficiently protected under the common law to be considered legal persons, possessing rights correlative to a duty. Therefore, *on birth*, these persons would be entitled to obtain compensation for a breach of the duty owed to them at the time of injury (that is, when the accident occurred or, on the alternative allegation, during labour). On this analysis, birth provides a person in being with the capacity to institute legal proceedings but it does not furnish proof of *damnum*; it is not the stage at which damage is suffered. It should be emphasised that Gillard J. said that he did not think it necessary to rely on this reasoning, or at least that he preferred his first view. Moreover, he stressed that the unborn child could only be recognized as a legal personality if subsequently born alive, and if such recognition is for the child's benefit. By imposing these restrictions on recovery, His Honour avoided the difficulties which recognition of the legal capacity of the foetus has caused in America. There appears to be considerable indecision in the United States regarding the stage at which the foetus should be regarded as a legal entity. Although the prevalent opinion favours the view that the foetus beomes a person only when viable—that is, capable of living independently from its mother—medical advances and decisions recognizing personality from the time of conception have prevented the possibility of any clear statement of the position.[20] Further, recognition of the foetus when viable has given rise to a number of actions for wrongful death of a stillborn foetus.[21] It has been argued that if such actions are not permitted, negligent behaviour causing injury would impose liability whilst similar behaviour causing death would not attract legal responsibility (in tort) and thus 'the greater the harm, the better the chance of immunity, and the tort-feasor could foreclose his own liability'.[22] The validity of this argument need not be assessed since it is clear from *Watt v. Rama* that such actions would not be entertained at present in a Victorian court, because the overriding condition that the foetus be born alive could not be satisfied and would prevent an action from being brought.

Mr Justice Gillard's alternative view may, however, provoke some indecision regarding the time at which the cause of action accrues. Normally, time begins to run when the cause of action is complete, and in most negligence cases the last event required to complete the action is the infliction of damage. The majority view, and Mr Justice Gillard's first ground, indicate that the tort arises at birth, when the damage is deemed to be suffered. According to Mr Justice Gillard's second view, if infliction of damage finalizes the tort, then time would run from the negligent act and deprive the plaintiff of several months in which to bring the action. However, the condition that the foetus be born alive

[20] See Gordon, 'The Unborn Plaintiff' (1965) 63 *Michigan Law Review* 579; Bennett, 'The Liability of the Manufacturers of Thalidomide to the Affected Children' (1965) 39 *Australian Law Journal* 256, 263 and also *White v. Yup* (1969) 458 P. 2d 617.

[21] *Ibid.*

[22] *White v. Yup* (1969) 458 P. 2d 617, 622.

may be regarded as the last event which completes the tort and thus, on this analysis also, time would begin to run only from birth.

It has already been noted that the plaintiff in this case sought recovery for two types of pre-natal injury. In England, legislation has been proposed[23] which would extend the area of actionable injury to cover a wider range of damage. Compensation is recommended for

(i) Negligence in the manufacture of drugs used by women before and during pregnancy;

(ii) Negligence in infecting pregnant women with diseases such as German measles;

(iii) Negligence in diagnosis leading to harmful use of X-ray and similar treatments;

(iv) Negligence in medical treatment before and during child birth; and finally

(v) Negligence caused by the mother's own behaviour during pregnancy.

There seems to be no reason why the decision in *Watt v. Rama*[24] should not be extended to cover all these situations, though there may be some theoretical difficulty in applying Mr Justice Gillard's alternative reasoning to some injuries, for example, to the mother's ova before conception. It is regrettable, however, that the appeal to the Privy Council, which had been instituted was withdrawn so that an authoritative answer for the whole of Australia was not obtained, at least to the most common type of problem that is likely to occur.

It seems possible that the significance of this case may have been overestimated in some quarters. *Watt v. Rama*[25] should not be construed as legal recognition of the right to *life* of a foetus, nor, therefore, should it be considered relevant to the current controversy regarding abortion. All judges condition recovery on the survival of the 'plaintiff'—the right they are granting is one of compensation, not life. Undeniably the law is empowered, and functions, to limit liability to the circumstances it deems worthy of legal attention. As J. M. Finnis comments, 'The law can, without contradiction or legal logical absurdity, confer legal personality on whatever it wishes, human or non-human, and under whatever restrictions or conditions it sees fit.'[26]

From *Watt v. Rama*[27] it appears that the law is not yet prepared to grant the foetus the right not to killed, it merely establishes that a living plaintiff has a right to complain of negligent injury occurring before birth.

One of the most interesting aspects of this case is the manner in which the court dealt with the duty concept. The element of duty has long been considered the expression of a judicial value judgment as to whether or not liability ought to be imposed in the circumstances presented to the court. Often, the foreseeability formula has been so heavily relied upon that it is misleadingly regarded as the sole determining factor in establishing the existence (or absence) of a duty of care. Recently however, an increasing amount of attention has been paid to the other factors the courts take into consideration. Such an attitude is generally deemed desirable, not only because it would lead to clearer and simpler judgments, but also because a more accurate appraisal of the factors involved in limiting liability would reduce the function of the

[23] See Law Reform Commission (England) *Working Paper* 47, (1972).
[24] [1972] V.R. 353.
[25] *Ibid.*
[26] J. M. Finnis, 'Three Schemes of Regulation' in Noonan (ed.) *The Morality of Abortion* (1970) 199.
[27] [1972] V.R. 353.

foreseeability concept to a more realistic level and prevent its continued misuse.[28]

The Supreme Court was presented with an ideal opportunity for acknowledging the actual motivating elements which determine the existence of a duty of care. Several factors tended toward a decision favouring the plaintiff. The harm suffered was physical, the act causing injury was positive and the defendant driver was no doubt insured. Authority in other countries favoured recovery,[29] while decisions in criminal and property law also protected the unborn. Probably the strongest argument for compensation was the influence of the concept of 'natural justice', which Lamont J. explained in *Montreal Tramways v. Leveille.*[30] He there said, 'If a child after birth has no right of action for pre-natal injuries we have a wrong inflicted for which there is no remedy . . . If a right of action be denied to the child, it will be compelled, without any fault on its part, to go through life carrying the seal of another's fault and bearing a very heavy burden of infirmity and inconvenience without any compensation therefor.'

Regrettably, the majority in *Watt v. Rama*[31] refrained from all comment on such policy factors and relied solely on the foreseeability test. Although Gillard J. raised the natural justice consideration, and fleetingly discussed the function of policy in duty questions, his comments were tentative and played no prominent part in his judgment. Thus, while the actual decision in this case is highly praiseworthy, the staid approach adopted by the court may be regarded as a disappointing reminder that Australia is not yet prepared to follow promising overseas developments[32] in dealing with the duty concept in negligence.

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RATTEN v. R.[1]

Criminal Law—Admissibility of Evidence—Relevant Facts—Hearsay—Res Gestae.

That tide, which generated such fundamental reforms of the Law of Evidence in England[2] that it was likened to a 'hurricane of a velocity and turbulence

[28] The dangers of overestimating the foreseeability test and the function of the duty element in negligence are fully discussed in an article by Fleming 'Remoteness and Duty; The Control Devices in Liability for Negligence' (1953) 31 *Canadian Bar Review* 471. For other discussions of the duty concept see Buckland, 'The Duty to Take Care' (1935) 51 *Law Quarterly Review* 637; W. L. Morison, 'A Re-examination of the Duty of Care' (1948) 11 *Modern Law Review* 9; Atiyah, *Accidents, Compensation and the Law* (1971).

[29] *Pinchin v. Santam Insurance Co. Ltd* [1963] (2) S.A. 254; *Montreal Tramways v. Leveille* [1933] 4 D.L.R. 339; *Duval v. Seguin* [1972] 26 D.L.R. (3d) 418; *Bonbrest v. Kotz* (1946) 65 Fed. Supp. 138.

[30] [1933] 4 D.L.R. 339, 345.

[31] [1972] V.R. 353.

[32] See, for example, statements made in *Hedley Byrne & Co. Ltd v. Heller & Partners Ltd* [1964] A.C. 465, 536 (H.L.); *Home Office v. Dorset Yacht Co. Ltd* [1970] A.C. 1004, 1058, 1025, 1026.

[1] [1972] A.C. 378. Judicial Committee of the Privy Council; Lord Reid, Lord Hodson, Lord Wilberforce, Lord Diplock and Lord Cross of Chelsea. It is also reported in [1971] 3 W.L.R. 930; [1971] 3 All E.R. 801; and in (1971) 45 A.L.J.R. 692.