Washington University Law Review

Volume 68
Issue 1 *Symposium on Criminal Discovery*

January 1990

Maternal Prenatal Negligence Does Not Give Rise to a Cause of Action, Stallman v. Youngquist, 125 Ill. 2d 267, 531 N.E.2d 335 (1988)

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CASE COMMENTS

MATERNAL PRENATAL NEGLIGENCE DOES NOT GIVE RISE TO A CAUSE OF ACTION

Stallman v. Youngquist, 125 Ill. 2d 267, 531 N.E.2d 355 (1988)

In *Stallman v. Youngquist*,[1] the Supreme Court of Illinois held that a child has no cause of action against her mother for unintentionally inflicted prenatal injuries, ignoring that the parental immunity doctrine already barred such a suit.[2]

The plaintiff's mother, Bari Stallman, was approximately five months pregnant with the plaintiff, Lindsay Stallman, when the mother's automobile collided with another car.[3] As a result of the collision, the plaintiff suffered serious and permanent injuries.[4] Lindsay Stallman[5] instituted a negligence action against her mother and the third-party motorist[6] to recover for injuries sustained during the automobile collision.[7]

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1. 125 Ill. 2d 267, 531 N.E.2d 355 (1988).

2. The scope of this comment is limited to the Illinois Supreme Court's refusal to recognize a cause of action on behalf of children against their mothers for the unintentional infliction of prenatal injuries. However, the issue of parental immunity is relevant to a discussion of whether a cause of action exists, and is thus discussed *infra* at notes 42-44, 58, 72-79 and accompanying text. For a general discussion of the parental immunity doctrine in Illinois, see Note, Stallman v. Youngquist: *Parent-Child Tort Immunity: Will Illinois Ever Give this Doctrine the Examination and Analysis It Deserves?*, 19 J. MARSHALL L. REV. 807 (1986).

This comment does not address intentional prenatal torts. *See* Carpenter v. Bishop, 290 Ark. 424, 426, 720 S.W.2d 299, 300 (1986) (child may recover from mother for intentional harm inflicted *inter utero*) (dictum); Note, *Maternal Rights and Fetal Wrongs: The Case Against Criminalization of Fetal Abuse*, 101 HARV. L. REV. 994, 1004 n.65 (1988). In addition, the issue of possible criminal charges against a mother for fetal negligence is beyond the scope of this comment. *See Fetal Abuse*, A.B.A. J., Aug. 1989, at 39; *Pregnant? Go Directly to Jail*, A.B.A. J., Nov. 1, 1988, at 20; Note, *Of Woman's First Disobedience: Forsaking a Duty of Care to Her Fetus—Is this a Mother's Crime?*, 53 BROOKLYN L. REV. 807 (1987); Note, *Maternal Rights and Fetal Wrongs: The Case Against Criminalization of Fetal Abuse*, 101 HARV. L. REV. 994 (1988); Comment, *Criminal Liability of a Prospective Mother for Prenatal Neglect of a Viable Fetus*, 9 WHITTIER L. REV. 363 (1987).

3. *Stallman*, 125 Ill. 2d at 268, 531 N.E.2d at 355. The driver of the other car was Clarence Youngquist. *Id.*

4. The accident caused the fetus to be thrown about in its mother's womb. *Id.* at 269, 531 N.E.2d at 356. As a result, the plaintiff was born prematurely and suffered serious intestinal injuries. *Id.*

5. The plaintiff brought suit by her father and next friend Mark Stallman. *Id.* at 268, 531 N.E.2d at 355.

6. The plaintiff instituted a negligence action against Bari Stallman and Clarence Youngquist as codefendants. Clarence Youngquist, however, was not a party to the appeal. *Id.*

The Circuit Court of Cook County granted the defendant-mother's motion for summary judgment and the Appellate Court of Illinois for the First District reversed.[8] Bari Stallman then filed a petition for leave to appeal the appellate court decision.[9] On appeal, the Supreme Court of Illinois reversed the appellate court decision[10] and *held*: a fetus, subsequently born alive, has no cause of action against its mother for the unintentional infliction of prenatal injuries.[11]

Historically, courts denied a fetus recovery against any defendant for the negligent infliction of prenatal injuries on the ground that a mother and fetus comprised a single legal entity.[12] Beginning in 1946, this com-

7. *Id.*

8. In Count II of her complaint, the plaintiff alleged that her mother was negligent and that the plaintiff's injuries arose outside the family relationship, because at the time of the injury she was not yet a part of the family. Thus, the plaintiff contended that the doctrine of parental immunity was inapplicable. Stallman v. Youngquist, 129 Ill. App. 3d 859, 859-61, 473 N.E.2d 400, 400-01 (1987). The First Circuit Court dismissed this count of the negligence action based on the parental immunity doctrine. *Id.* The first appellate court [hereinafter *Stallman I*] held that the circuit court erred in dismissing Count II. The court remanded for a determination of the applicability of the parental immunity doctrine. Specifically, the court ruled that the plaintiff should have the opportunity to prove that her mother's act of driving fell outside the family relationship. *Id.* at 864, 473 N.E.2d at 403. On remand, the circuit court granted the mother's motion for summary judgment on Count II. Stallman v. Youngquist, 152 Ill. App. 3d 683, 685, 504 N.E.2d 920, 921 (1988). Plaintiff appealed this decision. *Id.* Reversing, the second appellate court [hereinafter *Stallman II*] held that an unemancipated minor child's suit for damages against a parent operating a motor vehicle falls under an exception to the parental immunity doctrine. *Id.* at 692, 504 N.E.2d at 925. The court emphasized that its abrogation of parental tort immunity on the facts of the case did not "create a new legal duty where none previously existed." *Id.* at 694, 504 N.E.2d at 926. *See infra* note 58.

9. *Stallman*, 125 Ill. 2d at 268, 531 N.E.2d at 355. The court granted the petition for leave pursuant to Illinois Supreme Court Rule 315. *Id.*

10. *Id.*

11. *Id.* at 280, 531 N.E.2d at 361. The supreme court found it unnecessary to reach the issue concerning parental immunity. *Id.* at 269, 531 N.E.2d at 355. *See infra* note 59 and accompanying text. However, insofar as *Stallman I* and *Stallman II* purported to change the Illinois parent-child immunity doctrine, the judgments were vacated. *Id.* at 271, 531 N.E.2d at 356.

12. *See* Dietrich v. Northampton, 138 Mass. 14 (1884). *Dietrich* represents the first American decision to consider the question of recovery for negligent infliction of prenatal injuries. In *Dietrich*, a child was born prematurely and subsequently died due to injuries sustained by the mother. *Id.* at 15. The wrongful death action was based on a statute allowing any "person" to maintain an action against the negligent party for loss of one's life. *Id.* at 14. Justice Holmes held that the fetus was still part of the mother when the injury occurred and therefore did not constitute a "person" within the meaning of the statute. *Id.* at 16. Justice Holmes, however, indicated that a person may in some circumstances owe a civil duty to a fetus and thereby incur "conditional prospective liability" in tort to an unborn. *Id.* at 15. *See also* Stanford v. St. Louis S.F.R. Co., 214 Ala. 618, 108 So. 566 (1926); Allaire v. St. Lukes Hosp., 184 Ill. 359, 56 N.E.2d 638 (1900) (overruled by Amann v. Faidy, 415 Ill. 422, 144 N.E.2d 412) (1953) (no action for prenatal injuries against defendant hospital even if fetus was only days away from birth)); Buel v. United Rys. Co., 248 Mo. 126, 154 S.W. 71 (1913); Magnolia Coca Cola Bottling Co. v. Jordan, 124 Tex. 347, 78 S.W.2d 944 (1935); Lipps v. Milwaukee Elec.

mon-law tradition of denying recovery for prenatal injuries resulting from third-party negligence began to erode. In the landmark decision of *Bonbrest v. Kotz*,[13] the District Court for the District of Columbia held a third party liable for injuries to a viable fetus subsequently born alive.[14] The court questioned the "legal fiction"[15] of the single entity rule and explicitly recognized a viable fetus as an entity legally separate from its mother.[16] Noting that, as a general rule, tort law provides a remedy for inflicted wrongs,[17] the court questioned, "what right [could be] more inherent, and more sacrosanct, than that of the individual in his possession and enjoyment of his life, his limbs and his body?"[18]

Subsequent decisions consistently adopted the *Bonbrest* analysis.[19] Illi-

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Ry. & Light Co., 164 Wis. 272, 159 N.W. 916 (1916); RESTATEMENT OF TORTS § 869 (1938) (adopting *Dietrich* holding); Beal, *"Can I Sue Mommy?" An Analysis of a Woman's Tort Liability for Prenatal Injuries to Her Child Born Alive*, 21 SAN DIEGO L. REV. 325, 328 (1984); Annotation, *Liability for Prenatal Injuries*, 40 A.L.R. 3d 1222, 1226 (1971). *But see* RESTATEMENT (SECOND) OF TORTS (1979) (one who tortiously causes harm to an unborn child, subsequently born alive, is liable to the child for such harm).

The conferring of a legal right, or "legal personality," upon a person by the court begins at birth. However, in some areas of the law, such as property law, these rights may vest before birth, provided the fetus is subsequently born alive, if such vesting benefits the infant. One scholar has referred to this prenatal vesting as a "legal fiction." *See* Beal, *supra*, at 328. In addition, the medical profession considers a fetus as a separate patient from the mother. Ament, *The Right to Be Well Born*, 2 J. LEGAL MED. 24, 25 (1974).

13. 65 F. Supp. 138 (D.D.C. 1946).

14. *Id.* at 142. In *Bonbrest*, the infant's father and next friend brought a negligence action against physicians for injuries that occurred when the plaintiff was negligently taken from her mother's womb. *Id.* at 139.

15. *Id.* at 142. Although the court termed the single entity rule a "rather anomalous doctrine," it did not completely expunge the rule. Rather, it distinguished Dietrich v. Northampton, 138 Mass. 14 (1884) based on the viability of the fetus at the time of injury. 65 F. Supp. at 139, 140.

16. *Id.* at 140-41. The court defined "viability" as the point at which the fetus can survive outside the womb. *Id.* at 140 n.8 (citing AMERICAN ILLUSTRATED MEDICAL DICTIONARY 483, 1605 (Dorland 19th ed.)).

17. *Id.* at 141.

18. *Id.* at 142. The court relied in part on the Canadian case of Montreal Tramways v. Leveille, 4 Dom. L.R. 337 (1933). In *Montreal Tramways*, a woman in her seventh month of pregnancy fell from a tram to the street as a result of the tram operator's negligence. Two months later, the woman bore a child with club feet. The Supreme Court of Canada reasoned that "it is but natural justice that a child, if born alive and viable should be allowed to maintain an action in the courts for injuries wrongfully committed upon its person while in the womb of its mother." *Id.* at 345, *quoted in Bonbrest*, 65 F. Supp. at 142. The court rejected the argument that lack of precedent and the possibility of bad faith suits justify denying a cause of action. 65 F. Supp. at 142-43.

19. *See, e.g.*, Prates v. Sears, Roebuck & Co., 19 Conn. Supp. 487, 118 A.2d 633 (Conn. Super. Ct. 1955); Renslow v. Mennonite Hosp., 67 Ill. 2d 348, 367 N.E.2d 1250 (1977); Keyes v. Construction Serv., Inc., 340 Mass. 633, 165 N.E.2d 912 (1960); Steggall v. Morris, 363 Mo. 1224, 258 S.W.2d 577 (1953); Leal v. C.C. Pitts Sand & Gravel, Inc., 419 S.W.2d 820 (Tex. 1967).

nois courts proved no exception to this developing trend. In *Amann v. Faidy*,[20] the Illinois Supreme Court permitted the administratrix of a child's estate to recover damages for negligently inflicted prenatal injuries to a viable fetus.[21] The court reached this conclusion despite the child's death soon after birth.[22]

Both the *Bonbrest* and the *Amann* courts required viability as a prerequisite to recovery.[23] Recently, however, courts have departed from the viability requirement.[24] In *Daley v. Meier*,[25] the Illinois Court of Appeals held that a child could maintain an action to recover damages for prenatal injuries that occurred prior to viability.[26] The *Daley* court first ex-

20. 415 Ill. 422, 114 N.E.2d 412 (1953).

21. *Id.* at 423-24, 114 N.E.2d at 413. In *Amann*, the plaintiff's mother and the defendant had an automobile accident caused by the defendant's negligence. The accident injured the plaintiff, eventually causing his death shortly after birth. *Id.*

The court advanced four reasons for allowing recovery:

> (1) an unborn viable child, being capable of independent physical existence, should be regarded as a separate entity from the mother; (2) the law recognizes the separate existence of an unborn child for the purpose of protecting his property rights and to protect him against criminal conduct; (3) a wrong is inflicted for which there is no remedy unless there is recognition of the legal right of a child to commence life unimpaired by physical or mental defects caused by the negligence of others while it was a viable child *en ventre sa mere*; and (4) lack of precedent should not bar recovery where a wrong has been committed.

Id. at 428-29, 114 N.E.2d at 416. The court defined a viable fetus as "one sufficiently developed for extra-uterine survival, normally a *foetus* of seven months or older." *Id.* at 431, 114 N.E.2d at 417 (citing STEDMAN, MEDICAL DICTIONARY 1234 (Taylor 16th ed. 1946)).

The court specifically rejected the single entity rule espoused in Dietrich v. Northampton, 138 Mass. 14 (1884). *Id.* at 431-32, 114 N.E.2d at 417. The court also rejected the difficulty of proving causality as a sufficient basis for denying recovery. *Id. See also* Chrisafogeorgis v. Brandenberg, 55 Ill. 2d 368, 304 N.E.2d 88 (1973) (permitted wrongful death action for stillborn child who, as a viable fetus, was injured by a negligent third party); Comment, *Wrongful Birth: The Emerging Status of a New Tort*, 8 ST. MARY'S L.J. 140, 141 n.5 (1976) (by 1972, courts in each jurisdiction that addressed the issue of unintentional prenatal injuries recognized a cause of action for wrongful death).

22. In the same year as the *Amann* decision, the Illinois Supreme Court extended its holding to a situation in which the child survived the prenatal injuries. *See* Rodriquez v. Patti, 415 Ill. 496, 496, 114 N.E.2d 721, 721 (1953).

23. *See supra* notes 16, 21 and accompanying text.

24. *See, e.g.*, Fallaw v. Hobbs, 113 Ga. App. 181, 147 S.E.2d 517 (1966); Torigan v. Watertown News Co., 352 Mass. 446, 225 N.E.2d 926 (1967); Womack v. Buchhorn, 384 Mich. 718, 187 N.W.2d 218 (1971); Smith v. Brennan, 31 N.J. 353, 157 A.2d 497 (1960); Sinkler v. Kneale, 401 Pa. 267, 164 A.2d 93 (1960). *See also* Beal, *supra* note 12, at 331-32; Annotation, *supra* note 12.

25. 33 Ill. App. 2d 218, 178 N.E.2d 691 (1961).

26. *Id.* at 224, 178 N.E.2d at 694. *See also* Rapp v. Hiemenz, 107 Ill. App. 2d 382, 246 N.E.2d 77 (1969); Sana v. Brown, 35 Ill. App. 2d 425, 183 N.E.2d 187 (1962).

The plaintiff's mother in *Daley* was approximately one month pregnant when she was involved in an automobile collision. 33 Ill. App. 2d at 219, 178 N.E.2d at 692. As a result of the accident, the

amined numerous cases from other jurisdictions that considered and rejected the rationale for distinguishing the rights of viable and nonviable fetuses.[27] Recognizing that dictum in *Amann* stressed viability,[28] the court nevertheless found the viability distinction[29] unsound on the ground that a child exists, separate from its mother, at the moment of conception.[30]

In *Renslow v. Mennonite Hospital*,[31] the Supreme Court of Illinois further expanded recovery for prenatal injuries and permitted a child to maintain a cause of action for injuries resulting from third-party negligence that occurred before conception.[32] The defendants, a hospital and its laboratory director, transfused the plaintiff's mother with an incompatible blood type eight years before the plaintiff's birth.[33] As a result of the transfusion the plaintiff suffered serious injuries.[34] Finding the harm to the plaintiff a reasonably foreseeable effect of the transfusion,[35] the

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plaintiff was born with subnormal mental facilities, had not developed properly, and would have required special medical care throughout his life. *Id.*

27. 33 Ill. App. 2d at 220, 223, 178 N.E.2d at 692-94. The court looked to case law from other jurisdictions that had addressed the issue of viability. *See* Hornbuckle v. Plantation Pipe Line Co., 212 Ga. 504, 93 S.E.2d 727 (1956) (child born after receiving tortious injuries any time after conception has a cause of action); Bennett v. Hymer, 101 N.H. 483, 147 A.2d 108 (1958) (infant subsequently born alive can maintain action to recover for prenatal injuries even if it had not reached viability at the time of injury); Smith v. Brennen, 31 N.J. 353, 157 A.2d 497 (1960) (viability distinction has no real justification and is therefore irrelevant in determining liability for wrongful conduct); Sinkler v. Kneale, 401 Pa. 267, 164 A.2d 93 (1960).

28. *Daley*, 33 Ill. App. 2d at 223, 178 N.E.2d at 694.

29. *See supra* notes 16, 21 and accompanying text.

30. 33 Ill. App. 2d at 220-23, 178 N.E.2d at 692-94. The court considered medical evidence and the difficult application of the viable/nonviable distinction significant reasons for rejecting the viability requirement. *Id.* at 220, 178 N.E.2d at 692. The *Daley* court, however, attempted to make its holding consistent with the supreme court's decision in Amann v. Faidy, 415 Ill. 422, 114 N.E.2d 412 (1953). The court stated, "[a]lthough the opinion in Amann v. Faidy does stress viability, we believe it should be considered in the light of its over-all reasoning and tenor." *Id.* at 223, 178 N.E.2d at 694. The court also relied on *Amann* for its reasoning that lack of precedent and difficulty in proving causation should not bar recovery. *Id.*

31. 67 Ill. 2d 348, 367 N.E.2d 1250 (1977).

32. *Id.* at 349, 353, 367 N.E.2d at 1251, 1253.

33. *Id.* at 349, 350, 367 N.E.2d at 1251. On one or two occasions, the doctor transfused the plaintiff's mother with Rh-positive blood. Her blood type, however, was Rh-negative, which was incompatible with and sensitized by the Rh-positive blood. *Id.*

34. *Id.* At birth, the plaintiff's injuries included jaundice and hyperbilirubinemia. She required an immediate and complete blood transfusion. The plaintiff also suffered from permanent organ, brain, and nerve damage. *Id.*

35. *Id.* at 353, 367 N.E.2d at 1253. The court defined "duty" as " 'not sacrosanct in itself, but only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection.' " *Id.* at 357, 367 N.E.2d at 1254 (quoting W.

court held that the defendant owed a duty of care to the plaintiff because of the defendant's occupation.[36] The supreme court expressly rejected viability as a condition for recovery.[37] In addition, the court found illogical the concept of barring recovery for negligence occurring prior to conception because the defendants would have been liable had the same conduct occurred after conception—an event wholly beyond the defendants' knowledge.[38] Reasoning that the law is not "static" in this area,[39] the court recognized the "right to be born free from prenatal injuries foreseeably caused by a breach of duty to the child's mother."[40]

Although courts generally have recognized a cause of action against a third party for prenatal negligence,[41] the right to bring suit for maternal negligence has not been widely litigated. Unlike the issue of third-party liability, maternal liability is complicated by the parental immunity doctrine, which bars a child's suit against his parents.[42] The doctrine gener-

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PROSSER, TORTS § 53, at 325-26 (4th ed. 1971)). *See* Prosser, *Palsgraf Revisited*, 52 MICH. L. REV. 1, 15 (1953).

The court noted that it had long recognized a duty is owed "to one foreseeably harmed though he be unknown and remote in time and place." 67 Ill. 2d at 357, 367 N.E.2d at 1254-55 (citing Skinner v. Anderson, 38 Ill. 2d 455, 231 N.E.2d 588 (1967) and Wintersteen v. National Coopersage & Woodenware Co., 361 Ill. 95, 103, 197 N.E. 578, 582 (1935)). The supreme court agreed with the findings of the appellate court, which emphasized that the defendants were a doctor and a hospital and "there was no showing 'that the defendants could not reasonably have foreseen that a teenage girl would later marry and bear a child and that the child would be injured as a result of the improper blood transfusion.'" *Renslow*, 67 Ill. 2d at 350, 367 N.E.2d at 1251 (quoting the lower court's opinion, 40 Ill. App. 3d 234, 239, 351 N.E.2d 870, 874 (1976)). *But see* Cunis v. Brennen, 56 Ill. 2d 372, 308 N.E.2d 617 (1974) (duty and foreseeability are not identical).

36. 67 Ill. 2d at 357, 367 N.E.2d at 1255. Prior to *Renslow*, the Illinois courts granted a fetus a cause of action against a third party for negligence simply by assuming a duty existed. The courts focused on the legal existence of the party owed the duty. The courts did not concentrate on who owed the duty nor on the scope of the duty. In *Renslow*, however, the supreme court changed the emphasis from the plaintiff's existence to the defendant's duty. *Id.* at 354-57, 367 N.E.2d at 1253-55.

37. *Id.* at 353, 367 N.E.2d at 1253. This decision thus effectively overrules Amann v. Faidy, 415 Ill. 422, 144 N.E.2d 412 (1953). *See supra* notes 20-22 and accompanying text.

38. 67 Ill. 2d at 357, 367 N.E.2d at 1255. *See supra* note 35.

39. 67 Ill. 2d at 357, 367 N.E.2d at 1254. The court found the concept of legal duty changing in such areas as products liability as well as prenatal torts. *Id.*

40. *Id.* at 357, 367 N.E.2d at 1255.

41. *See supra* notes 13-40 and accompanying text.

42. *See* Hewellette v. George, 68 Miss. 703, 711, 9 So. 885, 887 (1891) (parent immune from child's personal injury suit); McKelvey v. McKelvey, 111 Tenn. 388, 393, 77 S.W. 664, 665 (1903) (parental immunity protects parent's "moderate chastisement"); Roller v. Roller, 37 Wash. 242, 245, 79 P. 788, 789 (1905) (parent immune from suit by child for rape). For a discussion of the history and development of the parental immunity doctrine in the United States, see Beal, *supra* note 12, at

ally protects the autonomy of the family from judicial interference.[43] Most jurisdictions, however, have limited or completely abrogated the doctrine.[44] Because the child's right to sue has significance only if the parent can be held liable, the availability of a cause of action and the parental immunity doctrine are interrelated.

The only courts that have considered the existence of a cause of action for maternal prenatal negligence separated this issue from the question of parental immunity, but they reached different conclusions. In *Grodin v. Grodin*,[45] the Michigan Court of Appeals first addressed a child's right to recover from his mother on the basis of prenatal negligence.[46] The mother in *Grodin* used prescription drugs during her pregnancy that caused the plaintiff to develop brown and discolored teeth.[47] The court held that a child's mother bears the same tort liability as a third party for

333-35; Note, *Parent-Child Torts in Texas and the Reasonable Prudent Parent Standard*, 40 BAYLOR L. REV. 113, 114-17 (1988) [hereinafter Note, *Parent-Child Torts in Texas*].

43. In upholding parental immunity, courts have emphasized the importance of preserving the harmony and autonomy of the family unit from state interference. *See, e.g., Hewellette*, 68 Miss. at 703, 9 So. at 887; Bahr v. Bahr, 478 S.W.2d 400, 402 (Mo. 1972); *Roller*, 37 Wash. at 245, 79 P. at 789. Other underlying policies of the parental immunity doctrine include: (1) protection of parental discretion and authority, *see* Barlow v. Iblings, 261 Iowa 713, 716, 156 N.W.2d 105, 107 (1968); *McKelvey*, 111 Tenn. at 389, 77 S.W. at 664; (2) prevention of fraudulent and collusive claims, *see* Dennis v. Walker, 284 F. Supp. 413, 417 (D.D.C. 1968); Hastings v. Hastings, 33 N.J. 247, 251, 163 A.2d 147, 150 (1960); (3) preservation of the family exchequer, *see* Orefice v. Albert, 237 So. 2d 142, 145 (Fla. 1970); *Roller*, 37 Wash. at 244, 79 P. at 789; (4) alternative relief through criminal action or removal of custody, *see* Pedigo v. Rowley, 101 Idaho 201, 205, 601 P.2d 560, 564 (1980); (5) the possibility of parental inheritance from the child, *see* Nocktonick v. Nocktonick, 227 Kan. 758, 761, 611 P.2d 135, 137 (1980); *Roller*, 37 Wash. at 245, 79 P. at 789; and (6) the analogous interspousal tort immunity doctrine, *see* Downs v. Poulin, 216 A.2d 29, 32 (Me. 1966); *Roller*, 37 Wash. at 243, 79 P. at 789. *See generally* Beal, *supra* note 12, at 335; Hollister, *Parent-Child Immunity: A Doctrine in Search of Justification*, 50 FORDHAM L. REV. 489, 495-96 (1982).

44. Hollister, *supra* note 43, at 528; Note, *Parent-Child Torts in Texas*, *supra* note 42, at 116-17 & n.25 (providing thorough survey of current status of doctrine in all states). For discussions of the treatment of parental immunity in specific states, see Grobart, *Parent-Child Tort Immunity in Illinois*, 17 LOY. U. CHI. L.J. 303 (1986); Note, *Parent-Child Torts in Texas*, *supra* note 42; Comment, Rousey v. Rousey: *The District of Columbia Joins the National Trend Towards Abolition of Parental Immunity*, 37 CATH. U.L. REV. 767 (1988); Comment, *Parental Immunity: The Case for Abrogation of Parental Immunity in Florida*, 25 U. FLA. L. REV. 794 (1973).

45. 102 Mich. App. 396, 301 N.W.2d 869 (1981).

46. *Id.* at 402, 301 N.W.2d at 871.

47. *Id.* at 398, 301 N.W.2d at 870. Roberta Grodin, mother of the plaintiff, took tetracycline during her pregnancy, causing the tooth discoloration. The child originally sued his mother and the doctor who administered the drug. However, the doctor was not a party to the appeal because the court dismissed the case on summary judgment. The amended complaint against Grodin asserted that she negligently failed to seek prenatal care, to request a pregnancy test, and to inform the doctor that she was pregnant. *Id.*

negligently inflicted prenatal injuries.[48] The *Grodin* court reasoned that previous case law did not limit the class of persons potentially liable for negligently inflicted injuries, but referred only to wrongful acts of "another."[49] Because the court refused to distinguish a mother from other third-party tortfeasors,[50] it permitted the child to maintain a cause of action for negligence against his mother.[51] Although Michigan has generally abrogated parental immunity,[52] the court remanded the case for a determination of whether the suit would be barred under an exception.[53]

In *Stallman v. Youngquist*,[54] the Supreme Court of Illinois considered for the first time whether a child may maintain a cause of action against her mother for injuries resulting from prenatal negligence.[55] Despite the trend toward greater recovery in prior decisions,[56] the court refused to recognize a cause of action.[57] Unlike Michigan's law, the parental immu-

48. *Id.* at 397, 301 N.W.2d at 870.

49. *Id.* The court cited Womack v. Buckhorn, 384 Mich. 718, 187 N.W.2d 218 (1971) (right to sue for negligent infliction of injury by *another*) and Smith v. Brennan, 31 N.J. 353, 364, 157 A.2d 497, 503 (1960) (cause of action for wrongful conduct of *another* that interferes with the right to begin life with a sound body and mind).

50. 102 Mich. App. at 397, 301 N.W.2d at 870. The court concluded that "the litigating child's mother would bear the same liability for injurious, negligent conduct as would a third person."

51. *Id.* The Michigan Supreme Court recognized that a child has the right to begin life with a sound body and mind, and that if wrongful conduct interferes with that right the child is entitled to damages. *Id. See* Amann v. Faidy, 415 Ill. 422, 114 N.E.2d 412 (1953); *supra* notes 25-30 and accompanying text.

52. Though the court focused on tort law, it is because parental immunity does not act as a complete bar that the Michigan court's decision has meaning. The Michigan Supreme Court partially overruled the doctrine of parental immunity in Plumley v. Klein, 388 Mich. 1, 199 N.W.2d 169 (1972). The *Plumley* decision provides two exceptions to the general ability of a child to sue his parents: "(1) where the alleged negligent act involves an exercise of reasonable parental authority over the child; and (2) where the alleged negligent act involves an exercise of reasonable parental discretion with respect to the provision of food, clothing, housing, medical and dental services and other care." *Plumley*, 388 Mich. 8, 199 N.W.2d 169.

53. 102 Mich. App. at 401, 301 N.W.2d at 871. Under the second *Plumley* exception, the appropriate jury question on remand in *Grodin* is whether the defendant's behavior involved ordinary or reasonable parental discretion. *Id.* In discussing the reasonableness of alleged negligent conduct, the court determined that "[t]he reasonableness of the risk of harm whether analyzed in terms of duty, proximate cause or a specific standard of care turns on how the utility of the defendant's conduct is viewed in relation to the magnitude of the risk thereby created." *Id.* at 400-01, 301 N.W.2d at 870-71. The court continued: "In any case where there might be a reasonable difference of opinion regarding how that balance should be resolved, the question is for the jury . . . ." *Id.* (citing Moning v. Alfono, 400 Mich. 425, 254 N.W.2d 759 (1977)).

54. 125 Ill. 2d 267, 531 N.E.2d 355 (1988).

55. *Id.* at 279-80, 531 N.E.2d at 361.

56. *See supra* notes 20-51 and accompanying text.

57. 125 Ill. 2d at 280, 531 N.E.2d at 361.

nity doctrine in Illinois, with few exceptions, would bar such a suit.[58] Viewing the existence of a cause of action and parental immunity as separate issues, however, the court addressed only the "preliminary issue" of whether a cause of action exists.[59]

In its cause of action analysis, the *Stallman* court created a dichotomy in fetal rights on the basis of the defendant's identity.[60] The court characterized the fetus as distinctly separate from its mother when the fetus institutes a cause of action against a negligent third party.[61] Conversely, the court refused to classify a fetus as an entity separate from its mother when the mother is the defendant.[62] The court grounded this distinction on the unique relationship that exists between a pregnant woman and her fetus.[63] Imposing a duty on a mother to prevent negligent injury to her fetus, the court determined, would result in an unprecedented intrusion into the privacy and autonomy of women.[64] On the contrary, holding a third party liable for prenatal injuries would further the interests of both

58. In Illinois, the doctrine of parental immunity still acts as a bar to a child's negligence suit. Setinc v. Masny, 185 Ill. App. 3d 15, 540 N.E.2d 937 (1989); Ackley v. Ackley, 165 Ill. App. 3d 231, 518 N.E.2d 1056 (1988). Illinois courts, however, have permitted suits in five limited circumstances: (1) when the injury results from willful and wanton misconduct, (2) when the injury is inflicted outside the family relationship and is not directly connected with a family purpose, (3) when the parent breaches a duty owed to the general public, (4) when the parent-child relationship is dissolved through death, and (5) when a third party seeks contribution from an allegedly negligent parent. *See Stallman II*, 129 Ill. App. 3d 859, 864, 473 N.E.2d 400, 403-04 (1984); Grobart, *supra* note 44, at 313-18. *See also* ILL. REV. STAT ch. 70, para. 53 (1985). Relying on the second exception, the appellate court in *Stallman II* permitted Lindsay Stallman to prove that her mother's conduct fell outside the scope of the family relationship. *Stallman II*, 129 Ill. App. 3d at 864, 473 N.E.2d at 403.

59. 125 Ill. 2d at 270, 531 N.E.2d at 356. The court defined the two issues before it as "the status of the parental immunity doctrine in Illinois and the tort liability of mothers to their children for the unintentional infliction of prenatal injuries." *Id.* at 268, 531 N.E.2d at 355.

The court found it "unnecessary . . . to reach the issue concerning the status of the parental immunity doctrine." *Id.* at 269, 531 N.E.2d at 355. Additionally, the Illinois Supreme Court accused the *Grodin* court of failing to separate the application of Michigan's partial abrogation of the parental immunity doctrine from the question of a cause of action for maternal prenatal negligence. *Id.* at 274, 531 N.E.2d at 358.

60. *Id.* at 275-76, 531 N.E.2d at 359.

61. *Id.* at 276-77, 531 N.E.2d at 359.

62. *Id.* at 277, 531 N.E.2d at 359. The court condemned the Michigan Court of Appeals in *Grodin* for treating a fetus and a pregnant woman as strangers for the purpose of tort liability. *Id.* at 274-75, 531 N.E.2d at 358.

63. *Id.* at 278-79, 531 N.E.2d at 360. The court explained that "[n]o other plaintiff depends exclusively on any other defendant for everything necessary for life itself. No other defendant must go through biological changes of the most profound type, possibly at the risk of her own life, in order to bring forth an adversary into the world." *Id.* at 278, 531 N.E.2d at 360.

64. *Id.* The court noted that recognition of a legal duty on the part of the mother would infringe upon the mother's actions. *Id.*

the mother and the child without infringing upon the defendant's right to personal autonomy.[65]

The court reasoned further that even if a legal duty on the part of the mother exists, it would be impossible to establish a judicial standard of conduct to determine when a mother has breached this legal duty.[66] In reaching this conclusion, the court considered two factors. First, the court addressed the difficulty of defining a basic standard of conduct for women of different socio-economic backgrounds.[67] Because the circumstances in which women conceive and give birth vary greatly,[68] the court concluded that no uniform standard is appropriate.[69] Second, the court found no way to prevent prejudicial and stereotypical beliefs about the reproductive abilities of women from interfering with a jury's ability to determine objectively a woman's negligence during her pregnancy.[70] For these reasons, the court concluded that the legislature was better equipped to determine the contours of any legally cognizable duty on the part of a mother to her fetus.[71]

The Illinois Supreme Court incorrectly denied a cause of action against mothers for negligently inflicted prenatal injuries suffered by their children. Initially, the court erroneously separated the parental immunity analysis from the question of whether a cause of action exists.[72] By characterizing the cause of action question as a threshold issue, the court ignored the parental immunity doctrine altogether. Yet parental immunity and the recognition of this cause of action are interdependent concepts. The court's own arguments for its result evidence this interdependence; the reasons it gives for denying a cause of action are in

65. *Id.*

66. *Id.* at 277-78, 531 N.E.2d at 360.

67. *Id.* at 279, 531 N.E.2d at 360. According to the court, these socio-economic groups include well-educated and ignorant, rich and poor, and women who have access to good health care and prenatal care and those who do not. *Id.*

68. *Id.* The court provided examples of some factors: whether a pregnancy was planned or unplanned, whether a woman knew she was pregnant soon after conception or after several months, and whether she had extensive financial resources. *Id.*

69. *Id.*

70. *Id.* at 278, 531 N.E.2d at 360. The court did not explain what stereotypes or prejudices it foresaw affecting this determination.

71. *Id.* at 280, 531 N.E.2d at 361.

72. *See supra* note 59 and accompanying text. The lower courts had addressed only parental immunity. The appellate court in *Stallman II*, however, implied that a cause of action exists for an unemancipated minor child against a parent operating a motor vehicle. The court's assumption that a cause of action is available follows from its recognition that the plaintiff could sue by asserting an exception to parental immunity. *See supra* note 8.

essence the arguments for a parental immunity doctrine.[73] The error in such a convoluted approach is confirmed by its anomalous results.[74] Further, because the parental immunity doctrine in Illinois acts as a complete bar to recovery for children suing their parents,[75] the court's cause of action analysis is moot. Whether a cause of action exists is irrelevant if the child is prohibited from recovering against its parent.

Although the *Stallman* court would have reached the same conclusion under the current status of Illinois' parental immunity doctrine,[76] its reluctance to address that issue appears disingenuous. The court's reliance on a cause of action analysis may represent its response to the more than thirty jurisdictions that have limited or abrogated the parental immunity doctrine.[77] Anticipating a potential modification of the parental immunity doctrine in Illinois,[78] the court possibly chose the cause of action rationale to ensure that mothers will not be liable for prenatal negligence should subsequent courts limit parental immunity.[79]

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73. *Compare supra* note 43 (the policies underlying parental immunity) *with supra* notes 60-70 and accompanying text (the reasons the *Stallman* court cited for denying a cause of action). For example, the court's reluctance to fashion a judicial standard for prenatal care is comparable to the concern behind parental immunity of imposing outside standards on parental conduct. *See supra* note 43. *Cf.* Beal, *supra* note 12, at 357 (recognition of a duty of prenatal care is "consistent with [the] policy justifications as set forth in [the] decisions abolishing parental immunity").

The sole exception is the court's argument that a standard of prenatal care would interfere with the mother's right to personal autonomy. *See supra* note 64 and accompanying text. Should Illinois abrogate the parental immunity doctrine—and along with it the justifications for the doctrine—this argument alone likely would not support the court's result. Even the *Stallman* court placed little emphasis on the autonomy rationale.

74. The anomaly of *Stallman*'s result can be illustrated. If Bari Stallman's two-year old child were riding in the car when it collided with the other vehicle, and the trip involved affairs outside the family relationship—that is, the parental immunity doctrine did not apply—the already-born child could recover. Thus, under *Stallman*, a child's ability to sue depends on the parental immunity doctrine if the injury occurred after birth; if, however, the injury was prenatal, the child has no cause of action.

75. *See supra* note 58 and accompanying text.

76. The supreme court could have achieved the same result, preventing suit against the mother, simply by reversing and vacating the appellate court decision. Thus, the supreme court had the opportunity to reject explicitly the judicially created exception to the parental immunity doctrine. Instead, the court denied recovery on a different theory, finding no cause of action, and vacated the lower court's decision that modified the doctrine. *See supra* note 11.

77. *See supra* note 44 and accompanying text.

78. The appellate court in *Stallman II* appeared willing to adopt the exceptions to parental immunity. *See supra* note 58. As that court noted, "Illinois courts have tended to restrict rather than expand the application of the parent-child tort immunity doctrine." *Stallman II*, 129 Ill. App. 3d 859, 864, 473 N.E.2d 400, 403 (1984).

79. For example, even if a mother negligently injured her fetus outside the family relationship, which ordinarily would constitute an exception to the parental immunity bar, the supreme court's

In addition to the court's failure to discuss the parental immunity doctrine, its decision to limit tort liability of mothers, based solely on a cause of action analysis, is unsound. First, the court disregarded prior prenatal injury case law by creating two mutually exclusive categories for fetal recovery rights.[80] The court failed to extend the right of a fetus to bring a cause of action on its own behalf by resurrecting the outdated common-law approach, which viewed the fetus and the mother as a single entity.[81] When a party brings a cause of action on behalf of an injured fetus, the status of the defendant, as a third party or mother, should be irrelevant to the cause of action analysis. The cause of action arises from negligence; the parental immunity doctrine dictates when one may sue.

Second, the court overemphasized a mother's right to privacy and failed adequately to consider the child's interest.[82] The court asserted that if a legal duty existed, "[a]ny action which negatively impacted on fetal development would be a breach of the pregnant woman's duty to her developing fetus."[83] Any such action, however, would not necessarily result in liability. Negligence is a "failure to do what the reasonable

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holding in *Stallman* would prevent the child's suit because the child did not have a cause of action (*i.e.*, the mother owed the child no duty) in the first place. However, a brother or sister subjected to the same negligent conduct would have recourse against the mother.

80. Prior courts had recognized a child's cause of action for wrongful prenatal injuries as stemming from the fetus' general right to be born well and free from injury. *See supra* notes 31-40, 45-53 and accompanying text. The Supreme Court of Illinois had explicitly recognized this right as well. Amann v. Faidy, 415 Ill. 422, 144 N.E.2d 412 (1953). Although the Michigan Court of Appeals was the only other court faced with the issue of maternal liability, the Illinois court chose not to follow the nonbinding Michigan decision.

The *Stallman* court's distinction, based on the identity of the defendant, appears nonsensical because the court arbitrarily created mutually exclusive categories that are not easily applicable. For example, in *Stallman*, the fetus sued both the mother and another driver. If the court permitted the fetus to recover damages from the driver, the fetus necessarily becomes a "person." However, the fetus is not permitted to recover from its mother, because it is not a separate being. Thus, the same fetus, subsequently born alive, is and is not a "person" at the same time. As another example, a mother could take a drug, unintentionally causing her fetus injuries, and the child would possess no cause of action. However, if a doctor administered the drug, the child could maintain a cause of action against the doctor. The court did not acknowledge the anomalous ramifications of its decision.

81. *See supra* note 12 and accompanying text. The court ignored that, under the single entity rule, a child cannot sue even a third party for prenatal negligence.

82. The overriding importance of the child's interest was plainly emphasized by the Illinois Supreme Court in Amann v. Faidy, 415 Ill. 422, 144 N.E.2d 412 (1953), which recognized that a child has a right to recover for the infliction of a wrong. *See supra* notes 20-21 and accompanying text.

83. *Stallman*, 125 Ill. 2d at 276, 531 N.E.2d at 359.

person would do under the same or similar circumstances."[84] The court could have fashioned a general standard of conduct for pregnant women and left reasonableness a question of fact for the jury.[85] The court never addressed why the generally accepted "reasonableness" standard for negligence would not operate effectively in the present context.[86] The closeness of the tortfeasor to the victim, upon which the court focuses,[87] actually helps define the reasonableness standard as opposed to making it inoperative.

Third, the court's hesitance to create a legal duty because of socioeconomic distinctions among pregnant women[88] and possible jury prejudice[89] is unsound. In all tort actions that reach a jury, the jury's composition consists of people from varied backgrounds, with different perspectives and biases.[90] Because the judicial system in general relies on the jury process, it is inconsistent to conclude, in the instant case, that a jury's prejudice and background might engender an inequitable result.[91]

Finally, the court denied a child a cause of action against his mother for negligently inflicted prenatal injuries based on the premise that such a legal duty "had never before been recognized in [the] law."[92] The court ignored its earlier declaration in *Amann v. Faidy*[93] that "lack of precedent should not bar recovery where a wrong has been committed."[94]

In holding that a child has no cause of action against her mother for prenatal injuries, the Supreme Court of Illinois both ignored the disposi-

84. PROSSER AND KEETON ON TORTS § 32, at 175 (W. P. Keeton, 5th ed. 1984) [hereinafter PROSSER AND KEETON] (citations omitted).

85. *See* PROSSER AND KEETON, *supra* note 84, § 32, at 173; *id.* § 37, at 235-38; Beal, *supra* note 12, at 355, 364 (standard of "what a reasonable and prudent person would do under the same or similar circumstances"); Note, *Parent-Child Torts in Texas, supra* note 42, at 125-26 (reasonable prudent parent standard); Comment, *The "Reasonable Parent" Standard: An Alternative to Parent-Child Tort Immunity*, 47 U. COLO. L. REV. 795, 805 (1976) (reasonable parent standard).

86. *See supra* note 66 and accompanying text.

87. *Stallman*, 125 Ill. 2d at 278-79, 531 N.E.2d at 360.

88. *See supra* notes 67-69 and accompanying text.

89. *See supra* note 70 and accompanying text.

90. The sixth amendment to the Constitution requires that a jury venire consist of a "fair cross-section" of the population. U.S. CONST. amend. VI.

91. PROSSER AND KEETON, *supra* note 84, § 37, at 235-38. *See also* Note, *Parent-Child Torts in Texas, supra* note 42, at 126 (jury's "collective wisdom" adequately protects both parent's and child's interests).

92. *Stallman*, 125 Ill. 2d at 276, 531 N.E.2d at 359.

93. 415 Ill. 422, 114 N.E.2d 412 (1953). *See supra* notes 20-22.

94. 415 Ill. at 428, 429, 114 N.E.2d at 416.

tive parental immunity doctrine and reversed a clear trend in prenatal cause of action precedent.

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