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Torts

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TORTS

by

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I. PRODUCTS LIABILITY

THE Supreme Court of Texas has held in *McKisson v. Sales Affiliates, Inc.*,[1] as the United States Court of Appeals for the Fifth Circuit had predicted that it would do,[2] that the maker of any product, as well as the maker of food and drugs, would be subject to strict liability to the ultimate consumer or user for physical harm caused by a defective and unreasonably dangerous condition of such product, thereby eliminating the requirement of privity of contract. Justice Norvell, in writing the opinion for the court, quoted with approval the latest pronouncement on this subject in the revised edition of the *Restatement of Torts*. The court accepted the notion that liability should be regarded as tortious in nature rather than contractual, and therefore made no effort to justify the position taken on warranty principles, *i.e.*, principles that would be applicable for commercial and intangible losses. Justice Norvell made it clear that he was speaking about defective products which cause *physical harm*. Since the court holds that this liability attaches to a product that is defective and unreasonably dangerous, it is hoped that trial judges will discontinue the practice of submitting an issue inquiring about unfitness or unsuitability, and will substitute therefor an issue as to whether the product in question was "defective and unreasonably dangerous." It must be a bad product in the sense that the sale of such product pursuant to the directions and warnings given would have been negligent conduct if the maker had been fully aware of the condition and the dangers thereof that were found to exist at the trial. If, in other words, the utility of a product is outweighed by the dangers involved in its use, the maker is subject to liability, however excusable he was for being ignorant or unaware of the dangers, and even if some of the risks were scientifically unknowable at the time of the production and sale of the product. The fact that the maker was not negligent, and was excusably ignorant of the condition or the dangers thereof, is immaterial. While some courts have without doubt extended strict liability even further, and while it is possible that the Supreme Court of Texas may do so by way of extending strict liability to anticipated and unanticipated injuries from good products, such as often occurs when a person is allergic to an ingredient in some drug or cosmetic, the court has for the time being limited its holding to *physical* harm caused by *unreasonably dangerous products*. The product in the case was a permanent wave preparation, and the evidence was regarded as sufficient to support the jury finding that the solution was not reasonably fit for giving permanent

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[1] 416 S.W.2d 787 (Tex. 1967). For further discussion, see Teofan, *Commercial Transactions*, this *Survey*, at footnote 30.

[2] Putman v. Erie City Mfg. Co., 338 F.2d 911 (5th Cir. 1964).

waves. The court no doubt thought that "not reasonably fit" and "unreasonably dangerous" were sufficiently similar in meaning with reference to the particular problem to justify affirmance of the trial court's judgment.

In *McKisson*, as well as in a companion case, *Shamrock Fuel & Oil Sales Co. v. Tunks*,[3] the court followed the view of the *Restatement of Torts*[4] regarding contributory negligence as a defense, quoting from the *Restatement* as follows: "Contributory Negligence of the plaintiff is not a defense when such negligence consists merely in a failure to discover the defect in the product, or to guard against the possibility of its existence."[5]

In *McKisson* the jury found that the defective condition in the permanent wave preparation was one that the plaintiff, as a beauty parlor operator, should have been on guard against. In the companion case of *Shamrock Fuel & Oil Co.*, the product was adulterated kerosene. The jury found that the minor plaintiff was contributorily negligent in directing his brother to pour the kerosene upon a smouldering stick, and that such negligence was the proximate cause of his injuries sustained as a result of the explosion. It was argued that this should be regarded as a finding of "improper use," and not simply negligence in failing to guard against a possible defect. The court concluded that it was unnecessary to decide whether or not *improper use*, as well as *use with knowledge of a defective condition*, would bar recovery since the issue was too broadly submitted to make it possible to identify the reasons various jurors might have had for concluding that there was contributory negligence. The court of civil appeals said that plaintiff would be barred if he misused the product, that is, "if, by reason of the manner in which he used the product, he would have been injured had the kerosene conformed to the statutory standard."[6] It is submitted that in such a situation the maker would not be liable simply because the "defective condition" would not be a factual cause of the damaging event and thus contributory negligence as a defense would be unnecessary. It is enough to say here that there are a number of unanswered problems related to the general question about where risks of losses should be allocated to a non-negligent maker when the damaging event was factually caused by the negligence of the user.

Subsequent to the decisions of *McKisson* and *Shamrock Fuel & Oil Sales Co.*, the supreme court held that the maker or other seller of a defective product is not only strictly liable for personal injuries but is also subject to strict liability for physical harm to property of the ultimate consumer or user.[7] In deciding this case, the court specifically overruled *Brown v. Howard*,[8] and *Cruz v. Ansul Chemical Co.*[9]

[3] 416 S.W.2d 779 (Tex. 1967). For further discussion, see Teofan, *Commercial Transactions*, this *Survey*, at footnote 33.

[4] RESTATEMENT (SECOND) OF TORTS § 402A, comment *n* (1965).

[5] *Id.* at 356.

[6] Shamrock Fuel & Oil Sales Co. v. Tunks, 406 S.W.2d 483, 490 (Tex. 1966).

[7] Frankin Serum Co. v. Hoover & Son, 418 S.W.2d 482 (Tex. 1967). This was a venue case involving a serum injected into twenty-five registered bulls. Almost immediately all twenty-five reacted violently and eleven died.

[8] 285 S.W.2d 752 (Tex. Civ. App. 1956) *error ref. n.r.e.* This case involved an insecticide sprayed on cows.

[9] 399 S.W.2d 944 (Tex. Civ. App. 1966) *error ref. n.r.e.*

II. Medical Malpractice

Informed Consent. In general, any surgical procedure performed on a mentally competent adult without his consent is actionable as a battery. However desirable such operation might be from a medical standpoint, the doctor is also subject to liability for any unintended consequence of such operation notwithstanding the very best care was exercised in the performance of such operation. But there is considerable diversity of opinion about the liability of a physician who obtains the consent of a mentally competent person, or the consent of a duly authorized legal representative of an incompetent, to a particular surgical procedure if he fails to make a full disclosure of the risks involved in such procedure. There has been an ever-increasing amount of litigation based on the failure of the physician to give full information prior to undertaking a particular operation, and the courts, in the handling of this litigation, have not agreed either about the appropriate theory of recovery—whether negligence or battery—or about the particular requirements of a cause of action pursuant to one or the other of such theories. In *Wilson v. Scott*[10] it was found that plaintiff Scott suffered from impaired hearing in his left ear and consulted his physician. After consultation, an operation was performed and a complete loss of hearing resulted. Scott sued, arguing that his right to refuse the operation was violated because the preoperative warning was not complete enough to justify the conclusion that his consent was an informed consent. Scott was not without authority from other jurisdictions in support of his position. In *Gray v. Grunnagle*[11] the Supreme Court of Pennsylvania was presented with a claim of paralysis from the waist down resulting from an exploratory laminectomy by an orthopedic surgeon for the purpose of discovering what should be done to correct a condition of atrophy of the leg muscles. The court, following some other decisions, held that a physician must make a full disclosure of risks involved in the absence of an emergency. Perhaps even that court would have said in a proper case that a full disclosure would not be necessary if found to be therapeutically improper in view of the patient's condition and emotional nature. But, apparently, the burden of proof would be on the physician to justify non-disclosure of all the risks either because of an emergency or because of the danger to the patient from so doing. Neither situation was involved either in *Gray v. Grunnagle* or *Wilson v. Scott*. The Supreme Court of Texas held that the plaintiff has the burden of proving by expert medical evidence: (1) that there was a failure to disclose information about the risks that a reasonable medical practitioner of the same school and same or similar community under the same or similar circumstances would have disclosed; (2) causation; and (3) damages. The court said that this recovery would have to be based on a negligence theory rather than a battery theory. Thus, consent given to a surgical procedure always prevents recovery on a theory that the operation violated a dignitary right of the individual to make his own

[10] 412 S.W.2d 299 (Tex. 1967), *noted in* 21 Sw. L.J. 843 (1967).
[11] 423 Pa. 144, 223 A.2d 663 (1966).

decision. Apparently, the battery theory becomes applicable when no expression of consent whatsoever is given to a particular operation. The effect of this decision seems to be: (1) that when consent, however uninformed, is given to an operation, recovery cannot be had on a battery theory; (2) that plaintiff has the burden of showing that there was a failure to disclose a particular risk involved; (3) that the risk was one that reasonable medical physicians of the same school would have disclosed, meaning that plaintiff must produce a medical expert to testify that such a failure was improper; (4) that plaintiff would not have consented if the disclosure had been made because otherwise the failure to disclose would not be a factual cause of the unintended consequences of the operation; and (5) that some harm was suffered other than harm that is necessarily undergone in an operation of the kind in question. Unfortunately, the arguments in support of and against these positions cannot be explored here, but the decision is an important one in this area of the law.

A case of equal importance on the issue of consent is *Drummond v. Hodges*,[12] decided by the Dallas court of civil appeals. In that case one of the issues was whether the doctor undertook to perform a hemorrhoid operation without the authorization of the patient, and the jury found, notwithstanding the doctor's testimony, that the patient consented both orally and in writing, and notwithstanding his signature on a consent form, that the doctor undertook the operation without the patient's authorization. The only evidence to support the finding was the patient's own testimony that he did not see anything on the papers he signed. The court held that no probative effect could be given to the patient's statement about this and that his signature on the consent form must be regarded as conclusive in the absence of pleading and proof of fraud, accident, mistake, undue influence, or mental incapacity *in connection with the signing of the authorization.* It is, of course, quite likely in a situation of this kind that a patient will not read a consent form. Moreover, it appears that the patient testified that the matter was discussed with him and he did not want anything done about it. Since most of his troubles apparently resulted from another cause, of which he was aware, the court's position on this issue seems quite questionable.

There was another holding in *Drummond* of some interest. The operation was performed by an osteopath who was engaged in general surgery. The jury found, on the basis of evidence of a medical doctor, an allopath, that "a reasonably prudent doctor would not have performed such extensive hemorrhoid surgery under the circumstances." The argument, of course, for defendant was that the testimony of a medical doctor, an allopath, was not admissible against an osteopath. In holding that the evidence was admissible, the court said:

> The methods and technique of the two schools of surgery of the type involved here are substantially the same. It was also brought out that doctors of the school of osteopathy study and practice surgery in accordance with

[12] 417 S.W.2d 740 (Tex. Civ. App. 1967).

> methods laid down in many textbooks written by medical doctors. To obtain a license to practice, doctors of the two schools must take the same examination. The testimony also shows that Dr. Gillium has attended the Allopathy Mayo Clinic in Rochester, Minnesota, for study and observation of surgery cases.[13]

I suggest that the holding is sound. There should be a *minimum standard of conduct* for all those engaged in the general practice; that is, all those licensed by law to act in every way in the practice of medicine. Anyone who engages in the general practice, except in an area where he specializes, should be allowed to testify as to whether another doctor who also engages in the general practice has followed proper procedures.

Limitations. Overruling two prior cases, the supreme court held that the cause of action based on a doctor's negligence for leaving a surgical sponge in the area of the surgery accrued at the time the patient discovered such sponge rather than at the time of the operation for the purpose of determining when the action for damages was barred by limitations.[14] The court narrowly limited its decision to the situation before it and said: "We hold that the cause of action for negligent leaving of a foreign object in a patient's body by a physician accrues when the patient learns of, or, in the exercise of reasonable care and diligence, should have learned of the presence of such foreign object in his body."[15] It was argued that the time of the accrual of the cause of action in question could not be distinguished from a case of cancer that develops several years after an automobile accident from an apparently non-injurious trauma. But the court said the negligent act, if not the injury, was known at the time of the automobile accident. The court further pointed out that passage of time is not serious in the foreign-object situation because it is a peculiar type of case which is not particularly susceptible to fraudulent prosecution. Judge Griffin did not think a distinction should be made between different kinds of personal injury situations, and Judge Walker believed that because a different interpretation had been squarely and repeatedly made by the courts, it should be for the legislature to amend the limitations statute to take care of "special hardship" cases.

III. Injuries Resulting from Dangerous Conditions of Tangible Property—The Duty of Care

The Possessor's Duty to Employees of Independent Contractors. The possessor of tangible properties, real or personal, is under the general duty of exercising care to those using his property with his permission and for business reasons. Such persons are normally referred to as "invitees." As to invitees generally, the only significant limitation is the *Halepeska* doctrine,[16] which is that the possessor has no duty of care to guard against injuries from a dangerous condition as fully appreciated by the invitee at the time

[13] *Id.* at 746.
[14] Gaddis v. Smith, 417 S.W.2d 577 (Tex. 1967).
[15] *Id.* at 580.
[16] Halepeska v. Callihan Interests, Inc., 371 S.W.2d 368 (Tex. 1963).

he encountered the condition as it was by the possessor. Therefore, the possessor satisfies his duty of care by notifying the invitees of dangers not otherwise discovered and appreciated. But employees of independent contractors present a special problem and must be treated independently. They are invitees in the sense that they are using the property with permission and for business reasons. In *Houston Electric Railway v. Reinle*[17] it had been held that notice to an independent contractor by an occupier of land of dangers that were likely to be encountered on the land in the performance of a contract was, as a matter of law, insufficient to satisfy the occupier's duty of care. Adequate notice of the dangers likely to be encountered had to be given to each employee. In *Delhi-Taylor Oil Corp. v. Henry*[18] the supreme court overruled *Reinle*. The injured employee in *Delhi* was engaged in welding operations when a dragline bucket, operated by another employee, punctured a pipeline of the occupier-defendant. The pipeline contained highly inflammable gas, which ignited, and the plaintiff was seriously burned. The supreme court concluded that the evidence in the record established conclusively that this dangerous condition was as well known to the independent contractor and his foreman as it was to the occupier, and then held that this knowledge satisfied the occupier's duty of care as a matter of law. The court reaffirmed *Halepeska* and then proceeded to overrule *Reinle* by adopting the principle that an *adequate warning to an independent contractor* discharges as a matter of law the occupier's duty to employees of the independent contractor. The court recognized that an issue of fact might sometimes exist as to the adequacy of the warning, but if the warning is such as to give full notice to the independent contractor of the dangers involved, the sole responsibility for preventing injuries thereafter is on the independent contractor whose liability would be governed by the Texas workmen's compensation laws. This principle was based on the notion that the doctrine of *Reinle* imposes an intolerable burden on the possessor.

I would agree that the imposition of a duty to notify each and every employee in every kind of a situation would be an unreasonable requirement, but there is a middle ground that the court could have taken. The court could have said that the possessor has the same duty of ordinary care to employee-invitees as it has to invitees generally, subject only to the *Halepeska* limitation. The question as to whether ordinary care requirements would be satisfied in a particular situation by simply giving adequate notice to the independent contractor could be for the jury except when reasonable men could not disagree. In some situations it could be relatively easy to put up some kind of a notice on or near the dangerous condition in addition to advising the independent contractor. There is often a tendency for courts to conclude that there should be no duty to do something simply because in most situations of that generic kind ordinary care requirements would be satisfied by doing something less burdensome. But the answer to this is that the appellate courts can say in such situations that

[17] 113 Tex. 456, 258 S.W. 803 (1924).
[18] 416 S.W.2d 390 (Tex. 1967).

there is no reasonable basis for a jury finding of negligence. Perhaps they could have so said in *Delhi*.

The alternatives here are either that there is no duty to do anything more than warn the independent contractor in all cases or that the question is one of whether ordinary care requirements are satisfied in the particular case by a warning to the independent contractor. The practical difficulties involved in dealing with each situation as it arises may sometimes justify a rule of no duty to do something, particularly when in nearly all such situations reasonable men would agree that ordinary care requirements would be satisfied by doing something less burdensome. On the other hand, it is at least arguable that greater willingness on the part of appellate courts to disregard jury findings of negligence would produce less injustice to individual litigants and would induce greater care and fewer accidents.

The Duty of a Bailor of Personal Property to Employees of the Bailee. The supreme court has granted a writ of error from a decision by the Tyler court of civil appeals involving a problem closely related to *Delhi*.[19] An employee of an oil drilling company was injured when he fell from a wooden ladder leading to the top of a portable steel tank furnished by the defendant, Humble Oil & Refining Co. The tank was furnished for the storage of the mud additive required for carrying out the drilling contract. The jury found in the trial of the case that Humble's failure to equip the tank with a steel ladder was negligence, and that this negligence was a proximate cause of the plaintiff's injuries. The court of civil appeals held that since the tank was furnished by Humble for its own business purpose, Humble had the "legal obligation to use ordinary care in making the chattel safe and forestall personal injury to the servants of an independent contractor who is using the chattel in accordance with the purposes for which it was supplied."[20] While the jury found that the dangers involved in the use of the equipment as furnished by Humble were not as open and obvious to the injured employee at the time of the accident as they were to Humble, it appears that the dangers were fully appreciated by the drilling company, the contractor. Therefore, it is quite possible that *Delhi* will be regarded as controlling by the supreme court. However, the problem presented is not precisely the same. In *Delhi* it can reasonably be argued that the condition itself that resulted in the injury could not be regarded as unreasonably dangerous so long as one in the use of the premises in the manner authorized had actual knowledge of it and appreciation of the dangers involved. The issue was whether it should be the duty of the independent contractor or the occupier of land to protect employees of the independent contractor from the dangers involved. In *Humble* the contention was that Humble, a bailor, was negligent in supplying dangerous equipment for use by the independent contractor in carrying out the contract between the parties.

However, the duty of the supplier of personal property to those injured

[19] Humble Oil & Ref. Co. v. Whitten, 415 S.W.2d 287 (Tex. Civ. App. 1967).
[20] *Id.* at 291.

while using the same regarding open and obvious dangers has not been unlike that of the occupier of land to invitees. In the *Restatement of Torts* the position is taken that one who supplies a chattel to others to use for any purpose is under a duty to exercise reasonable care to inform them of its dangerous character if, but only if, he has no reason to expect that those for whose use the chattel is supplied will discover its condition and realize the danger involved.[21] Thus, notice to the bailee himself of any dangers not likely to be discovered would normally be sufficient to satisfy the supplier's duty. But a very important qualification is made to this general rule. If the supplier knows or has reason to know that the chattel is unlikely to be made reasonably safe before being put to a use which the supplier should expect it to be put, then he is subject to liability to those whom the supplier should expect to use it and who are ignorant of the dangerous character of the chattel. The jury finding that Humble was negligent in supplying the tank might probably be regarded as encompassing a finding that the equipment as furnished was not likely to be made reasonably safe before being used, and so the result in *Humble* may well be regarded as consistent with the *Restatement of Torts*.

But is it consistent with *Delhi*? If an occupier of land can justifiably be found negligent in failing to guard against the likelihood that an independent contractor would not keep his employees adequately informed about a particular danger, there would seem to be just as much justification for holding him liable as the supplier of personal property who is found to be negligent in failing to guard against the likelihood that the bailee will not adequately inform his employees. There is the difference already suggested. It is the difference between guarding against a dangerous condition, the utility of which outweighs the dangers involved, as in *Delhi*, and a dangerous condition that ought to have been eliminated altogether by someone. This is, however, a hard proposition to sustain in the face of the *Halepeska* doctrine which would deny recovery to the knowledgeable plaintiff in the latter type of situation. On the other hand, the notion that an invitee on land must be regarded as accepting the risk simply because he elected under the circumstances to take a chance by way of exposing himself to an obvious danger is not to me an acceptable proposition.[22] I would hope, therefore, that it would be limited narrowly and confined to the situation that gave rise to its birth in Texas.[23]

Duty of Owner of Pipeline Easement To Guard Against Uses of the Surface That Are Likely to Result in Accidents. In *Phillips Pipe Line Co. v. Razo*,[24] the supreme court reversed a decision by the Tyler court of civil

[21] RESTATEMENT (SECOND) OF TORTS § 388, comment *a*, at 306 (1965).

[22] *See* Keeton, *Assumption of Risk and the Landowner*, 22 LA. L. REV. 108 (1961).

[23] Another case, Olivier v. Snowden, 416 S.W.2d 584 (Tex. Civ. App. 1967), involves a problem similar to both *Delhi* and *Humble*. The court of civil appeals held in this case that an employee of a general contractor who was allowed to use an unsafe scaffold of a subcontractor could recover from the subcontractor. The case was more like *Humble* in the sense that the scaffold itself was unsafe for the purpose for which it was being used. On the other hand, it was more like *Delhi* in that the defendant subcontractor could be regarded as in possession and control of the scaffold. The defendant had not surrendered possession and control.

[24] 420 S.W.2d 691 (Tex. 1967).

appeals[25] pertaining to the tort liability of the holder of a pipeline easement. Plaintiff was injured when a bulldozer operated by his employer hit and ruptured a buried ethylene pipeline of the defendant, Phillips Pipe Line Co. The jury found at the trial that Phillips was negligent in (1) failing to bury its line to a proper depth; (2) failing to inspect properly; and (3) failing to give proper warning of the presence of the pipeline. The court of civil appeals concluded that the evidence adduced at the trial was sufficient to support the jury findings of negligence in failing to bury its line to the proper depth and in failing to give proper warning of the presence of the pipeline. It then held that an easement holder, not being in exclusive possession of the land, owed the duty of ordinary care to others who may come on the property and, therefore, the jury findings established a breach of the easement holder's duty.

In reversing, the supreme court concluded that the evidence was insufficient as a matter of law to justify a finding of negligence as to depth, a subject outside the scope of this Article. It then held that the owner of an easement, holding as he does the dominant estate, has no duty to guard against a use of the surface that the landowner has no right to grant until it has *actual notice* thereof. There was evidence introduced at the trial to show that Phillips failed to take customary precautions to guard against abnormal or extraordinary or dangerous uses by the landowner and those on the premises with the approval of the landowner. Specifically, the pipeline was underneath a roadway and there was evidence to show that it was customary to install a marker when a pipeline goes under a roadway. There was also evidence to show that Phillips was aware of the fact that another pipeline on the land was under construction, so the court was unwilling to conclude in the particular circumstance that there was no negligence. The no-duty rule that the court adopts seems similar in character to the no-duty rule in *Delhi*. Both adopt rules of law that simplify the settlement of disputes and avoid the difficult and involved tasks of evaluating the defendant's conduct in a type of case where someone else is primarily responsible for guarding against the kind of accident that resulted in the plaintiff's injuries.

IV. Tort Liability for Pre-Natal Injuries

At early common law there was no right to recover for injuries to a child before birth, and the Supreme Court of Texas in 1935 so held, basing its decision on the general ground that an actor owes no duty to an unborn child.[26] This no-duty rule was justified in part on the notion that life begins only after birth—after one breathes and has independent circulation —and in part on practical difficulties involved in the judicial process of establishing factual causation in many situations, and preventing recovery on fraudulent and fictitious claims. In *Leal v. Pitts Sand & Gravel, Inc.*[27]

[25] Phillips Pipe Line Co. v. Razo, 409 S.W.2d 565 (Tex. Civ. App. 1966). For further discussion, see Flittie, *Oil and Gas*, this *Survey*, at footnote 7.

[26] Magnolia Coca Cola Bottling Co. v. Jordan, 124 Tex. 347, 78 S.W.2d 944 (1935).

[27] 419 S.W.2d 820 (Tex. 1967).

the 1935 decision was overruled. The claimants, who brought an action for wrongful death, were the parents of a child who was alleged to have been viable at the time of injury, the mother being advanced to six or seven months' pregnancy. The child was born alive and then died two days later. Justice Steakley observed that Justice Cadena had comprehensively presented for recognition the case of a right of action for prenatal injuries under the particular facts presented.[28] In *Leal* the court recognized the existence of a cause of action when (1) the child was viable at the time of the injury, and (2) the child was born alive. When these two circumstances co-exist, then the child, if he lives, can recover in his own right for the damages resulting from such injury, and presumably the parents have a separate cause of action just as they would when any minor child is injured. Moreover, if the child dies after birth, the parents can recover such damages as are usually recoverable when a minor child receives injury that results in death.

It is important to note what the court does not decide as well as what the court did decide. As Chief Justice Barrow pointed out in the majority opinion of the court of civil appeals, following prior decisions of the supreme court, some authorities do not recognize a cause of action for prenatal injuries unless the foetus was viable at the time of injury. This is again based on the notion that the child has no independent existence until such date. I would suggest that it is completely immaterial when the injury to the foetus occurred following conception. A negligent actor who breaches a duty of care to a pregnant woman should be regarded as breaching a duty of care to an unborn child so long as the child is subsequently born alive. There is no need to answer the theological question as to when a foetus becomes a person. The point is that when he is born he is a person; and the fact that his injury occurred before he became such is highly irrelevant. The actor can reasonably foresee that when he causes injury to a pregnant woman he may also injure a foetus that will ultimately result in an injured person. There is some support for allowing an action for previability injury if the child is born alive,[29] and good sense would seem to dictate such a conclusion. There is nothing novel about saying that if harm to a person not yet in being is reasonably foreseeable from defendant's conduct, such conduct would constitute a breach of duty to such person when he is born.

The court did not undertake to express an opinion as to whether there could be a wrongful death recovery or a recovery on behalf of the child on the theory of separate existence if a viable foetus is so injured as to prevent a live birth. The principle justification for permitting a recovery when the child is born alive is to avoid the completely unsound result of providing no monetary recovery for a permanently injured child with an impaired earning capacity but a relatively normal life expectancy. There is no need for a recovery in behalf of a person, if indeed the foetus is such, who never had a conscious existence. Moreover, as a practical matter, there is no

[28] 413 S.W.2d 825, 827 (Tex. Civ. App. 1967).
[29] Hornbuckle v. Plantation Pipe Line Co., 212 Ga. 504, 93 S.E.2d 727 (1956).

need for a separate wrongful death recovery in behalf of parents in the light of our notions about damages for wrongful death. I would therefore suggest that the action would serve primarily a punitive purpose, and often in situations where no purpose would be served by punishing the actor.