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Prenatal Injuries From Passive Tobacco Smoke: Establishing a Cause of Action for Negligence

INTRODUCTION

Recent medical studies¹ have reported the discovery of harmful effects that passive or involuntary smoking² can have on a fetus. Some of these effects include prenatal³ injuries such as low birth weight,⁴ variations in body length,⁵ an increase in the possibility of severe congenital malformations, and even perinatal⁶ mortality.⁷ Newly discovered medical evidence in this area can aid in developing a potential cause of action in tort for negligence causing prenatal injuries.

Part I of this Comment outlines the development of a cause of action for prenatal injuries.⁸ Part II discusses various statutory and constitutional theories imposing liability for injuries resulting from the passive intake of tobacco smoke.⁹ Part III fuses the two bodies of law discussed in Parts I and II and advances theories of liability for prenatal injuries from passive smoke.¹⁰

¹ See *infra* notes 77-88 and accompanying text.

² Fielding & Phenow, *Health Effects of Involuntary Smoking*, 319 (no. 22) *NEW ENG. J. MED.* 1452 (Dec. 1, 1988) (Passive or involuntary smoking "occurs when non-smokers are exposed to the tobacco smoke of smokers in enclosed environments."); Comment, *Adding Smoke to the Cloud of Tobacco Litigation—A New Plaintiff: The Involuntary Smoker*, 23 *VAL. U.L. REV.* 111, 112 (1988) ("An involuntary smoker is one who involuntarily inhales cigarette smoke as a consequence of another's direct or active smoking.").

³ Prenatal is defined as "occurring, existing, or taking place before birth." *WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY* 929 (9th ed. 1983).

⁴ See *infra* notes 5, 80, 81, 84, and 86 and accompanying text.

⁵ Schwartz-Bickenbach, Schulte-Hobein, Abt, Plum, & Nau, *Smoking and Passive Smoking During Pregnancy and Early Infancy: Effects on Birth Weight, Lactation Period, and Cotinine Concentrations in Mother's Milk and Infant's Urine*, 35 *TOXIC. LETTERS* 73 (1987).

⁶ Perinatal is defined as "occurring in, concerned with, or being in the period around the time of birth." *WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY* 874 (9th ed. 1983).

⁷ Letter to the editor from Daniel S. Seidman, M.D., 320 (no. 19) *NEW ENGL. J. MED.* 1287 (May 11, 1989) (in response to Fielding & Phenow, *supra* note 2).

⁸ See *infra* notes 15-46 and accompanying text.

⁹ See *infra* notes 47-67 and accompanying text.

¹⁰ See *infra* notes 68-120 and accompanying text.

Various tort theories¹¹ enable one to impose liability for injuries from voluntary tobacco smoke, but only theories of liability regarding passive smoking are addressed herein. Statutory and constitutional theories are the most widely used bases of liability in attempts to recover for injuries resulting from passive smoking. However, their success has been limited.¹² Even though none of these cases involve an action by a fetus, they are analogous to this proposition in that all the plaintiffs request some type of relief from the damaging effects of others' smoke.¹³ Negligence has been unused as the sole basis for liability for injuries from passive smoke. The areas of recovery for prenatal injuries and liability for injuries from passive smoke can be combined to develop a cause of action for negligence resulting in prenatal injuries from passive smoke.¹⁴

I. A CAUSE OF ACTION FOR PRENATAL INJURIES

In 1884, the majority of courts refused to acknowledge a cause of action for prenatal injuries of any kind.¹⁵ This view was followed for over sixty years,¹⁶ but gradually the decisions shifted to the opposite conclusion, which firmly established the right to bring an action for injuries incurred in utero.¹⁷ The recognition of this right, however, depends upon viability, which is the point at which courts will allow an action to be brought,¹⁸ and proof of the essential elements of any negligence action—duty, breach of duty, causation, and damage.¹⁹

The question of whether an injured fetus has a right of action was first encountered in *Dietrich v. Inhabitants of Northampton*.²⁰ Justice Oliver Wendell Holmes of the Massachusetts Supreme Ju-

¹¹ Comment, *supra* note 2, at 114-25 (theories include enterprise liability, strict liability, alternative liability, and *res ipsa loquitur*).

¹² See *infra* notes 47-66 and accompanying text.

¹³ *Id.*

¹⁴ See *infra* notes 68-120 and accompanying text.

See, e.g., *Dietrich v. Inhabitants of Northampton*, 138 Mass. 14 (1884).

¹⁶ See *Bonbrest v. Kotz*, 65 F. Supp. 138 (D.D.C. 1946).

¹⁷ See *Amann v. Faidy*, 114 N.E.2d 412, 415 (Ill. 1953) (a child suffering prenatal injuries and born alive has a right of action for negligence); *infra* notes 30-45 and accompanying text.

¹⁸ See *infra* notes 30-45 and accompanying text.

¹⁹ Comment, *Recognizing a Cause of Action for Preconception Torts in Light of Medical and Legal Advancements Regarding the Unborn*, 53 UMKC L. REV. 78, 93 (1984).

²⁰ 138 Mass. 14 (1884) (wrongful death action by a woman 4 1/2 months pregnant whose fall on a negligently maintained highway resulted in premature birth of her child).

dicial Court authored the opinion, which was followed for over sixty years.²¹ The court held that an unborn child incapable of surviving on its own has no separate existence and is not a person in its own right.²² Therefore, no duty of care could be owed to a fetus.²³

In the sixty years following *Dietrich*, courts offered additional reasons²⁴ for denying a cause of action. Some courts indicated that a cause of action by the fetus is unnecessary since the mother can recover for all her injuries, including those to the fetus.²⁵ Proof problems²⁶ and the fears of unsubstantiated claims concerned other courts.²⁷ Others stood behind the principle of stare decisis and the lack of relevant legislation.²⁸ However, criticism of this view began to increase²⁹ until the 1946 case of *Bonbrest v. Kotz*,³⁰ which rejected the *Dietrich* approach.

In *Bonbrest*, the infant was injured while being removed from the womb, and died shortly thereafter. The court declined to follow *Dietrich*,³¹ holding that the child was not "part" of the mother because it had demonstrated the ability to survive outside the

²¹ The sudden change in this well-established rule occurred in 1946 in *Bonbrest*, 65 F. Supp. at 138.

²² *Dietrich*, 138 Mass. at 15; see also Comment, *supra* note 19, at 80 (discusses the evolution of prenatal tort causes of action).

²³ *Dietrich*, 138 Mass. at 15. Although Justice Holmes reportedly believed that there was no remedy derived from common law, one court believed it more accurate to note "that there was no English authority on either side of the question." *Amann*, 114 N.E.2d at 416.

²⁴ See generally Comment, *supra* note 19, at 81 (reasons offered by courts for denying a cause of action).

²⁵ See *Kirk v. Middlebrook*, 100 S.W. 450 (Mo. 1907); *Lipps v. Milwaukee Elec. Ry. & Light Co.*, 159 N.W. 916 (Wis. 1916).

²⁶ See *Stanford v. St. Louis-San Francisco Ry.*, 108 So. 566 (Ala. 1926) (overruled in *Husky v. Smith*, 265 So. 2d 598 (Ala. 1972) and *Wolfe v. Isbell*, 280 So. 2d 759 (Ala. 1973)); *Magnolia Coca Cola Bottling Co. v. Jordan*, 78 S.W.2d 944 (Tex. 1935) (overruled in *Leal v. Pitts Sand and Gravel, Inc.*, 419 S.W.2d 822 (Texas 1967)).

²⁷ See cases cited *supra* note 26.

²⁸ See *Drobner v. Peters*, 133 N.E. 567 (N.Y. 1921); *Berlin v. J.C. Penney Co.*, 16 A.2d 28 (Pa. 1940). See generally 62 AM. JUR. 2D *Prenatal Injuries* § 4, at 616 (1972) (doctrine of stare decisis rejected).

²⁹ Justice Bogg's dissent in *Allaire v. St. Luke's Hosp.*, 56 N.E. 638, 640 (Ill. 1900), would have allowed recovery for injuries inflicted four days before birth. In *Dietrich*, the fetus was only 4 1/2 months old and did not survive. Justice Boggs distinguished *Dietrich* using the viability issue. *Allaire*, 56 N.E. at 642. *Allaire* was overruled in *Amann v. Faidy*, 114 N.E.2d 418 (Ill. 1953).

³⁰ 65 F. Supp. 138 (D.D.C. 1946).

³¹ *Id.* at 140. *Dietrich* was distinguished on the grounds that 1) the fetus in *Dietrich* was not viable at the time of injury, and 2) the *Dietrich* fetus was injured indirectly through its mother, not directly by the physician to the fetus as in *Bonbrest*.

womb. Therefore, the fetus was determined to be viable thus giving it standing to bring an action for any injuries.³² *Bonbrest* was then distinguished from *Dietrich* in part because of the viability of the fetus, which has been interpreted by some courts as a limitation on recovery.³³

Following *Bonbrest*, courts developed various theories allowing recovery for prenatal injuries, but were often troubled by the viability requirement. Some courts allowed recovery for prenatal injuries incurred *any* time after conception.³⁴ Many courts now reject the viability limitation, which requires the fetus to be viable at the time of injury and, for various reasons, allow an action for prenatal injuries inflicted at any stage of fetal development as long as the child is born alive.³⁵ Since viability is determined by all known methods at the very moment of injury, and not merely by the age of the fetus, some courts find the viability rule practically impossible to apply.³⁶ Other courts adhere to the biological theory in which the fetus is a separate entity from the moment of conception.³⁷ Another approach by courts allows recovery because claims for injuries prior to fetal viability are no less substantial than those for injuries occurring after fetal viability.³⁸

However, some jurisdictions still adhere to the viability rule.³⁹ For example, in *Orange v. State Farm Mutual Automobile Insurance Co.*,⁴⁰ the court characterized the issue to be "whether an injury to a viable unborn child of the insured is an injury to 'a

³² *Id.*

³³ See, e.g., *Tursi v. New England Windsor Co.*, 111 A.2d 14 (Conn. Super. Ct. 1955); *Steggall v. Morris*, 258 S.W.2d 577 (Mo. 1953).

³⁴ See *Kelly v. Gregory*, 125 N.Y.S.2d 696 (N.Y. App. Div. 1953). This case rejected the viability requirement because the court thought the problem of legal separability of the mother and fetus could be eliminated by using biological separability. Using medical knowledge concerning conception and fetal development, the court determined that separability begins at conception because the fetus is a separate being and only relies on the mother for protection and nutrients. *Id.* at 697. See generally Annotation, *Liability for Prenatal Injuries* 40 A.L.R. 3d 1222 (1971).

³⁵ See *Hornbuckle v. Plantation Pipe Line Co.*, 93 S.E.2d 727 (Ga. 1956); *Smith v. Brennan*, 157 A.2d 497 (N.J. 1959); *Sylvia v. Gobeille*, 220 A.2d 222 (R.I. 1966).

³⁶ See *Smith*, 157 A.2d at 504.

³⁷ See *Bonbrest*, 65 F. Supp. at 140-41; *Puhl v. Milwaukee Auto. Ins. Co.*, 99 N.W.2d 163 (Wis. 1959).

³⁸ See *Sylvia*, 220 A.2d at 224.

³⁹ See *Orange v. State Farm Mut. Auto. Ins.*, 443 S.W.2d 650 (Ky. 1969), *rev'd on other grounds*, *Bishop v. Allstate Ins. Co.*, 623 S.W.2d 865 (Ky. 1981); *Damasiewicz v. Gorsuch*, 79 A.2d 550 (Md. 1951); *Williams v. Marion Rapid Transit, Inc.*, 87 N.E.2d 334 (Ohio 1949).

⁴⁰ 443 S.W.2d 650 (Ky. 1969).

member of the family of the insured.'"⁴¹ The insurance company sought a determination of whether it had a duty to defend an insured wife under an automobile liability policy. The wife was sued by her husband for the wrongful death of her unborn child; the husband was the administrator of the child's estate. The policy had an exclusion clause containing the terms "family" and "household."⁴² Relying on precedent,⁴³ the court stated "[o]nce the stage of viability is reached the fetus is regarded as a legal 'person' with a separate existence of its own."⁴⁴ Therefore, the fetus was a member of the class excluded by the insurance policy, and the insurer did not have a duty to defend the action nor did it have any liability.⁴⁵

Nonetheless, the law is now well-established that a fetus has a right of action for prenatal injuries that are negligently inflicted. This is true whether the action is brought for common law negligence, under negligence statutes, or under wrongful death statutes.⁴⁶

II. LIABILITY FOR INJURIES FROM PASSIVE TOBACCO SMOKE

Various statutory and constitutional theories may impose liability for injuries resulting from the intake of involuntary tobacco smoke. These are the most widely used bases of liability for this cause of action. Although there has been no action by a fetus, the theories are analogous to a proposed action by a fetus in that relief is requested for damage from the effects of passive smoke.

A. *Statutory Theories*

Fetuses' claims for various injuries have not had much success when the action is brought under a specific statute. Although the following cases do not involve passive smoke, they demonstrate possible barriers to recovery for prenatal injuries. In *Singleton v.*

⁴¹ *Id.* at 650.

⁴² *Id.* at 651 (The exclusionary clause provided that the insurance policy did not apply "to bodily injury to the insured or any member of the family of the insured residing in the same household.").

⁴³ The court relied on its previous decision in *Mitchell v. Couch*, 285 S.W.2d 901 (Ky. 1955).

⁴⁴ *Orange v. State Farm Mut. Auto. Ins.*, 443 S.W.2d 650, 651 (Ky. 1969), *rev'd on other grounds*, *Bishop v. Allstate Ins. Co.*, 623 S.W.2d 865 (Ky. 1981).

⁴⁵ *Id.* at 652.

⁴⁶ See Annotation, *supra* note 34, at 1228 (discusses theories on which liability for prenatal injuries has been based).

Ranz,⁴⁷ the court held that an unborn fetus is not a "person" within the meaning of the Florida Wrongful Death Act,⁴⁸ thus barring the cause of action.⁴⁹ However, the mother had a legal cause of action for injury to her body because the fetus was "living tissue of the body of the mother."⁵⁰ The absence of a live birth in *Witty v. American General Capital Distributors, Inc.*,⁵¹ also prevented an action by the fetus under the Texas Wrongful Death Act⁵² and the Texas Survival Act.⁵³

*Carroll v. Tennessee Valley Authority*⁵⁴ did not allow an action by an adult for failure to maintain a smoke-free work environment under the Federal Employee's Compensation Act.⁵⁵ The negligence claims were barred by an applicable exclusivity provision.⁵⁶ In *Harman v. Daniels*,⁵⁷ an action under the Civil Rights Act⁵⁸ was not allowed by an infant who received injuries in utero because the fetus was not a "person" entitled to the constitutional protections of the Act.⁵⁹

B. Constitutional Theories

Actions based on constitutional amendments normally are as difficult to maintain as those based on statutory actions, but in *Avery v. Powell*,⁶⁰ the court allowed a cause of action for cruel and unusual punishment under the eighth amendment.⁶¹ An inmate brought an action against prison officials alleging that exposure to environmental tobacco smoke subjected him to cruel and unusual punishment.⁶² The defendants' motion to dismiss claims under the

⁴⁷ 534 So. 2d 847 (Fla. Dist. Ct. App. 1988).

⁴⁸ FLA. STAT. ANN. § 768.19 (West 1986).

⁴⁹ *Singleton*, 534 So.2d at 847-48.

⁵⁰ *Id.* at 848.

⁵¹ 727 S.W.2d 503 (Tex. 1987).

⁵² *Id.* at 504, citing TEX. CIV. PRAC. & REM. CODE ANN. § 71.002.

⁵³ *Id.* at 506, citing TEX. CIV. PRAC. & REM. CODE ANN. § 71.021.

⁵⁴ 697 F. Supp. 508 (D.D.C. 1988).

⁵⁵ *Id.* at 511, citing 5 U.S.C. § 8101 *et seq.*

⁵⁶ *Id.* (FECA provides a comprehensive and exclusive remedy for federal employees who suffer work-related "injury or death.").

⁵⁷ 525 F. Supp. 798 (W.D. Va. 1981).

⁵⁸ *Id.* at 800-01, citing 42 U.S.C. § 1983.

⁵⁹ *Id.*

⁶⁰ 695 F. Supp. 632 (D.N.H. 1988).

⁶¹ *Id.* at 640.

⁶² *Id.* at 633.

fourteenth amendment for denial of liberty rights without due process⁶³ also was denied.⁶⁴

However, actions were disallowed under the first and fifth amendments in *Federal Employees for Non-Smokers' Rights (FENSR) v. United States*.⁶⁵ The court followed the reasoning of *Gasper v. Louisiana Stadium and Exposition District*⁶⁶ in holding that denial of the plaintiffs' right to petition the government for relief was not an infringement on rights under the first amendment. Nor under the fifth amendment was there a denial of life, liberty, or property without due process of law.⁶⁷

The cases discussed above represent possible hurdles a fetus must overcome in order to maintain a cause of action under a constitutional or statutory theory. Therefore, the establishment of a cause of action for negligence for prenatal injuries from passive smoke is necessary for relief in view of the limited success of statutory and constitutional theories.

III. A CAUSE OF ACTION FOR PRENATAL INJURIES RESULTING FROM PASSIVE SMOKE

A cause of action for negligence for prenatal injuries resulting from passive tobacco smoke should be available by borrowing established concepts from two areas of the law: recovery of damages for prenatal injuries and liability for injuries from passive smoke. This extrapolation of these two areas is consistent with their underlying rationales, as will be demonstrated.

A. Duty/Breach of Duty

The archaic theory that the fetus was a part of the mother, had no separate existence of its own, and therefore, was not a "person" to whom a duty could be owed has been discarded by the courts.⁶⁸ All jurisdictions permitting the recovery of damages for prenatal injuries either recognize the existence of a separate

⁶³ *Id.* at 641.

⁶⁴ *Id.* at 644.

⁶⁵ 446 F. Supp. 181, 185 (D.D.C. 1978).

⁶⁶ 577 F.2d 897 (5th Cir. 1978) (finding no constitutional right to stop smoking by others in the New Orleans Superdome while a performance is in progress).

⁶⁷ *Federal Employees for Non-Smokers' Rights v. United States*, 446 F. Supp. 181, 185 (D.D.C. 1978).

⁶⁸ See *supra* note 15 and accompanying text.

entity⁶⁹ (contingent upon the viability limitation)⁷⁰ or, "rely[ing] on a basic sense of justice,"⁷¹ recognize "that a child has a legal right to begin life with a sound mind and body."⁷²

It follows from a recognition of a child's right to begin life in good health that the general duty of care owed to a developing fetus can be breached. Medical evidence points to ways that the breach of the duty of care might occur. Evidence of the effects of tobacco smoke on the unborn infant⁷³ indicates that injuries to a fetus from passive smoke may constitute a breach of duty to the fetus in much the same way as the breach of duty occurs with adults. Most of the prenatal injury cases involve negligence by physicians⁷⁴ or automobile accidents in which the fetus was injured.⁷⁵

B. Causation

More problematic than establishing a breach of duty to the unborn by passive tobacco smoke is proof of causation. However, this causal connection can be proven with medical evidence linking passive smoke and fetal injuries.

⁶⁹ See *Kelly v. Gregory*, 125 N.Y.S.2d 696 (App. Div. 1953); *supra* note 35.

⁷⁰ See *supra* note 33.

⁷¹ Comment, *supra* note 19, at 85.

⁷² *Smith v. Brennan*, 157 A.2d 497, 503 (N.J. 1959); see also *Womack v. Buchhorn*, 187 N.W.2d 218 (Mich. 1971); *Sylvia v. Gobeille*, 220 A.2d 222, 223 (R.I. 1966).

⁷³ See *infra* notes 77-88 and accompanying text. In order to attribute these health risks to the exposure to cigarette smoke, whether passive or direct, a reliable means of testing is necessary. The most promising biochemical marker of tobacco smoke is cotinine, a metabolic by-product of nicotine. Cotinine from direct or passive exposure can be accurately measured in serum, urine, or saliva.

A 1986 study demonstrated the effect of involuntary smoke from the father on birth weight. The average birth weight was reduced by 120 grams per pack of cigarettes (or cigarette equivalent) smoked per day. Martin and Bracken performed a similar study and concluded that passive smoke exposure during pregnancy doubles a nonsmoker's risk of having a growth-retarded infant and reduces birth weight by 24 grams. Even though this amount may not be clinically significant, it increases the risk of the fetus aborting during gestation.

Other studies have confirmed these findings of reduced birth weight in addition to relating passive smoke to variations in body length, an increase in severe congenital deformities, and perinatal mortality. This evidence demonstrates that the health risks to a fetus are significant and warrant substantial public concern.

⁷⁴ See *Scott v. McPheeters*, 92 P.2d 678 (Cal. Dist. Ct. App. 3d 1939); *Bonbrest v. Kotz*, 65 F. Supp. at 138 (D.D.C. 1946).

⁷⁵ See *Amann v. Faidy*, 114 N.E.2d 412 (Ill. 1953); *Mitchell v. Couch*, 285 S.W.2d 901 (Ky. 1955); *Keyes v. Constr. Serv., Inc.*, 165 N.E.2d 912 (Mass. 1960); *Womack*, 187 N.W.2d 218; *Smith*, 157 A.2d 497; *Leal v. C.C. Pitts Sand & Gravel, Inc.*, 419 S.W.2d 820 (Tex. 1967).

If the wrongful conduct of another interferes with [the right to begin life with a sound mind and body], and it can be established by competent proof that there is a causal connection between the wrongful interference and the harm suffered by the child when born, damages for such harm should be recoverable by the child.⁷⁶

The health risks of exposure to environmental tobacco smoke are now widely known through publication of the Surgeon General's Report of 1986⁷⁷ and the findings of the National Academy of Sciences.⁷⁸ These reports similarly concluded that the involuntary inhalation of cigarette smoke is harmful,⁷⁹ with the Surgeon General's Report stating more specifically that it can cause diseases such as lung cancer even in nonsmokers.⁸⁰ Respiratory illness has been noted by other studies as an adverse effect.⁸¹ A recent report by the Environmental Protection Agency confirms these previous studies and states that "passive smoke is one of the largest sources of indoor-air pollution"⁸² and "presents a health hazard to workers and others."⁸³ It follows that these dangers also pose a threat to the unborn child. Therefore, extensive research has been done on direct effects of maternal smoke throughout pregnancy and during development of the fetus.⁸⁴

Causation must be proven through a reliable means of testing, which connects these health risks to the exposure to cigarette smoke, whether passive or direct.⁸⁵ Such testing has demonstrated

⁷⁶ *Smith*, 157 A.2d at 503.

⁷⁷ U.S. DEPT. OF HEALTH AND HUMAN SERVICES, *THE HEALTH CONSEQUENCES OF INVOLUNTARY SMOKING: A REPORT OF THE SURGEON GENERAL* (1986) (a report finding that involuntary smoking may cause health problems).

⁷⁸ NATIONAL RESEARCH COUNCIL, COMMITTEE ON PASSIVE SMOKING, *ENVIRONMENTAL TOBACCO SMOKE: MEASURING EXPOSURES AND ASSESSING HEALTH EFFECTS* (1986) (a report noting the harmful effects of environmental tobacco smoke).

⁷⁹ See *supra* notes 77, 78 and accompanying text.

⁸⁰ See Fielding & Phenow, *supra* note 2, at 1453.

⁸¹ See Martin & Bracken, *Association of Low Birth Weight with Passive Smoke Exposure in Pregnancy*, 124 AM. J. EPID. 633, 633 (Oct. 1986).

⁸² Friend, *EPA: Indoor Smoke is Big Pollutant*, USA Today, June 20, 1989, at 1A.

⁸³ Friend & Collins, *Workplaces Become New Battleground*, USA Today, June 22, 1989, at 1A.

⁸⁴ See generally J. Haddow, Knight, Palomaki, & P. Haddow, *Estimating Fetal Morbidity and Mortality Resulting from Cigarette Smoke Exposure by Measuring Cotinine Levels in Maternal Serum*, 281 PROG. CLIN. BIOL. RES. 289 (1988); Schwartz-Bickenbach, Schulte-Hobein, Abt, Plum & Nau, *supra* note 5 (negative effects include low birth weight, postnatal growth impairment, increased chance of premature birth and perinatal morbidity).

⁸⁵ See generally J. Haddow, Knight, Palomaki, & P. Haddow, *supra* note 84, at 289 (illustrates the problems in conducting a reliable test and recommends the cotinine test as the most effective).

that involuntary smoke exposure during pregnancy reduces birth weight significantly,⁸⁶ and also "doubles a nonsmoker's risk of having a growth-retarded infant."⁸⁷ Additionally, passive smoke increases the possibility of severe congenital deformities and even perinatal mortality.⁸⁸

C. Damages

As in any negligence action, damages resulting from a legally cognizable injury must be proven.⁸⁹

The measure of damages [for prenatal injuries is] embraced within three general elements: (a) compensation for the injury and resulting impairment of mind and body, (b) compensation for the cost of care necessitated by the injury and impairment including the cost of probable future care, and (c) deprivation of normal life expectancy.⁹⁰

Damages for impairment of mind and body may include any physical damages that could occur from congenital malformations or premature birth, and "loss of the capacity for mental and physical development."⁹¹ Compensation for the cost of care includes "medical and nursing care and after minority" any costs necessary for living independently, such as the cost of food, clothing, and shelter.⁹² Deprivation of normal life expectancy may result in damages when the prenatal injuries are so severe that life expectancy is shortened. Therefore, "[a]ll damages representative of a usual personal injury action should be recoverable."⁹³

D. Liability and Possible Tortfeasors

Beyond establishing the elements of a cause of action for negligent infliction of prenatal injuries from passive smoke, it must

⁸⁶ See Rubin, Krasilnikoff, Leventhal, Weile, & Berget, *Effect of Passive Smoking on Birth-Weight*, 8504 (no. 2) THE LANCET 415 (Aug. 23, 1986); Haddow, Knight, Palomaki, & McCarthy, *Second-Trimester Serum Cotinine Levels in NonSmokers in Relation to Birth Weight*, 159 (no. 2) AM. J. OBSTET. GYNECOL. 481 (Aug. 1988); *supra* notes 5, 80, 81, and 84.

⁸⁷ Martin & Bracken, *supra* note 81, at 640.

⁸⁸ See *supra* note 7.

⁸⁹ See Comment, *supra* note 19, at 97.

⁹⁰ *Sox v. United States*, 187 F. Supp. 465, 469 (E.D.S.C. 1960).

⁹¹ *Id.*

⁹² *Id.*

⁹³ Comment, *supra* note 19, at 97.

be determined who might be liable for those injuries. Possible tortfeasors include a smoking parent,⁹⁴ an employer,⁹⁵ the cigarette manufacturer,⁹⁶ and facilities where smoking is not restricted.⁹⁷ "Any person not protected by immunity may be held liable for causing prenatal injuries, if the elements of actionable negligence are proved."⁹⁸

An action against the father for prenatal injuries from passive smoke may encounter barriers, such as statutory exclusions, if the "unemancipated minor child cannot sue his parent for a personal tort."⁹⁹ A few cases have addressed the parent's right to recover damages,¹⁰⁰ suggesting that the mother may be able to sue the father for any prenatal injuries caused by the father's tobacco smoke; however, there are no holdings to this effect. *Roofeh v. Roofeh*¹⁰¹ involved parents and the effects of involuntary tobacco

⁹⁴ See generally *Allaire v. St. Luke Hospital*, 56 N.E. 638 (Ill. 1900) (possible liability of the mother for prenatal injuries) overruled in *Amann v. Faigy*, 114 N.E.2d 418 (Ill. 1953); *Roofeh v. Roofeh*, 525 N.Y.S.2d 765 (N.Y. Sup. Ct. 1988) (husband sought order of protection against wife to prevent her from smoking near him or their children).

⁹⁵ See generally *Carroll v. Tennessee Valley Auth.*, 697 F. Supp. 508 (D.D.C. 1988) (employee brought suit against employer for failure to maintain a smokeless work environment); *Federal Employees for Non-Smoker's Rights (FENSR) v. United States*, 446 F. Supp. 181 (D.D.C. 1978) (groups and nonsmokers opposed to smoking brought suit to restrict smoking in federal buildings to specified areas); *Shimp v. New Jersey Bell Tel. Co.*, 368 A.2d 408 (N.J. Super. Ct. Ch. Div. 1976) (employee sought and was granted an injunction requiring her employer to initiate a smoking ban); *Witty v. American Gen. Capital Dist., Inc.*, 727 S.W.2d 503 (Tex. 1987) (mother of deceased fetus brought action against her employer to recover for prenatal injuries to the child).

⁹⁶ See generally Comment, *The Liability of Cigarette Manufacturers for Lung Cancer: An Analysis of the Federal Cigarette Labeling and Advertising Act and Preemption of Strict Liability in Tort Against Cigarette Manufacturers*, 76 Ky. L.J. 569 (1987-88) (analysis of plaintiffs' strict liability claims against cigarette manufacturers based on inadequate warnings and design defects); Comment, *supra* note 2, at 112 (third party involuntary smoker should be able to sue cigarette manufacturers under the tort theory of enterprise liability).

⁹⁷ See *Avery v. Powell*, 695 F. Supp. 632 (D.C.N.H. 1988) (inmate brought suit against prison officials alleging that environmental tobacco smoke subjected him to cruel and unusual punishment and deprived him of liberty). See generally *Gasper v. Louisiana Stadium & Exposition*, 577 F.2d 897 (5th Cir. 1978) (action to discontinue smoking in the New Orleans Superdome).

⁹⁸ 62 AM. JUR. 2D *Prenatal Injuries* § 20, at 627 (1980).

⁹⁹ *Id.* at note 16 (citing 59 AM. JUR. 2D *Parent and Child* § 151 (1987)). Annotation, *Liability for Prenatal Injuries* 40 A.L.R. 3D 1222, 1252 (right of action by a child). *But see Rigdon v. Rigdon*, 465 S.W.2d 921 (Ky. 1970) (the parental immunity rule, which precluded a child from suing a living parent in tort, was annulled with exceptions), The liability of a mother to her child during pregnancy will not be discussed because it does not involve passive or involuntary smoke.

¹⁰⁰ See *Snow v. Allen*, 151 So. 468 (Ala. 1933); *Birmingham Baptist Hosp. v. Branton*, 118 So. 741 (Ala. 1928); *Davis v. Murray*, 113 S.E. 827 (Ga. 1922); *Dietrich v. Inhabitants of Northampton*, 138 Mass. 14 (Mass. 1884).

¹⁰¹ 525 N.Y.S.2d 765 (N.Y. Sup. Ct. 1988).

smoke. The husband sought a protective order against his wife to prevent her from smoking both in his presence and in the presence of their children. The court refused to grant the order as requested by the husband, but did restrict the mother's smoking to certain areas, attempting to maintain the health of the husband and children.¹⁰²

Since "[i]t is the employer who owes the duty to provide its employees a safe place to work",¹⁰³ an employer also may be liable for this new tort. The first case by an employee against an employer regarding the health hazards of passive smoke was *Shimp v. New Jersey Bell Telephone*.¹⁰⁴ The plaintiff, a secretary for the phone company, was allergic to cigarette smoke. She sought an injunction to prevent her fellow employees from smoking on the job.¹⁰⁵ Under the Occupational Safety and Health Act (OSHA)¹⁰⁶ enacted in 1970, it is an employer's duty "to eliminate all foreseeable and preventable hazards."¹⁰⁷ The court then took judicial notice that smoking is dangerous to the health of a significant number of workers.¹⁰⁸ Therefore, the court granted the injunction concluding that this was not a risk incidental to employment that the employee voluntarily assumed.¹⁰⁹

Finding liability for damage to a fetus has not yet been successful. In *Witty v. American General Capital Distributors, Inc.*,¹¹⁰ the mother of a deceased fetus brought suit against her employer for prenatal injuries to the child and for individual claims of loss of support and companionship, mental distress, emotional trauma, and property damage for the loss of the unborn child.¹¹¹ These claims failed under the Texas Wrongful Death Act¹¹² and the Texas Survival Act¹¹³ because the fetus was not an "individual" or "per-

¹⁰² *Id.* at 769.

¹⁰³ *Barnes v. Liberty Mut. Ins.*, 468 So. 2d 124 (Ala. 1985).

¹⁰⁴ 368 A.2d 408 (N.J. Super. Ct. Ch. Div. 1976).

¹⁰⁵ *Id.* at 409.

¹⁰⁶ 29 U.S.C. § 651-78.

¹⁰⁷ *Shimp*, 368 A.2d at 410.

¹⁰⁸ *Id.* at 414.

¹⁰⁹ *Id.* at 411.

¹¹⁰ 727 S.W.2d 503 (Tex. 1987).

¹¹¹ *Id.* at 504.

¹¹² *Id.* (Wrongful Death Act, TEX. CIV. PRAC. & REM. CODE ANN. § 71.002, does not allow recovery for the death of a fetus).

¹¹³ *Id.* at 506 (Under TEX. CIV. PRAC. & REM. CODE ANN. § 71.021, damages are recoverable only if there is a live birth).

son" under the Wrongful Death Act¹¹⁴ and because there was no subsequent live birth.¹¹⁵

Cigarette manufacturers no longer enjoy complete immunity from suit, and may be held liable for the death of cigarette smokers.¹¹⁶ This recognition of the hazardous consequences of smoking¹¹⁷ and increased public awareness will similarly result in the acknowledgment of the harmful effects of passive smoking as well.

Although "the right to smoke in public places is not a protected right,"¹¹⁸ the court in *Gasper v. Louisiana Stadium and Exposition District*¹¹⁹ denied relief to a group of nonsmokers who wanted to prohibit tobacco-smoking in the New Orleans Superdome. However, the court stated:

We assume that the Superdome authorities, if they saw fit, could prohibit smoking in the facility, or the City of New Orleans in the exercise of its police power could prohibit smoking in public stadiums, or the State of Louisiana could enact a similar statute of state wide application. No such rule, city ordinance, or state statute has been enacted.¹²⁰

The essential elements of any cause of action for negligence can be proven. Therefore, recovery should be allowed for prenatal injuries resulting from passive tobacco smoke.

CONCLUSION

Today, the right of a fetus to bring suit for negligently inflicted prenatal injuries is firmly established¹²¹ even though some jurisdictions still adhere to the viability requirement.¹²² This right also should be inclusive of actions in tort for negligence for injuries caused by the harmful, possibly fatal,¹²³ effects of passive or involuntary tobacco smoke. These effects have been noted and con-

¹¹⁴ *Id.* at 504 (The court examined legislative intent and determined that the words "individual" and "person" in TEX. CIV. PRAC. & REM. CODE ANN. § 71.002(b) do not encompass an unborn fetus.).

¹¹⁵ *Id.* at 506.

¹¹⁶ See *supra* note 96 and accompanying text.

¹¹⁷ *Id.*

¹¹⁸ *Craig v. Buncombe County Bd. of Educ.*, 343 S.E.2d 222, 223 (N.C. App. 1986).

¹¹⁹ 577 F.2d 897 (5th Cir. 1978).

¹²⁰ *Id.* at 898.

¹²¹ See *supra* notes 29-38 and accompanying text.

¹²² See *supra* notes 33 and 39.

¹²³ See *supra* notes 6-7 and accompanying text.

clusively proved by medical researchers only in the last few years,¹²⁴ with the Surgeon General recognizing these findings in his 1986 report.¹²⁵ This medical evidence cannot be ignored and, as the general public's awareness of the dangers of passive smoke increases, a new recognition of liability for these injuries will emerge. An individual may possess a greater awareness of the risk of harm than the general public if notice is given by the mother that passive smoke is damaging to the health of her unborn child. Thus, a stronger case is presented because direct or superior knowledge increases the standard of care for a reasonable person, as well as establishing that the injuries were foreseeable.¹²⁶

It is the duty of any person to assume liability for all injuries proximately caused by his or her negligent act. An injured fetus must be given an opportunity to prove the elements of a negligence action in order to have a means of redress. As medical knowledge increases with new research, proof of these injuries will become easier to establish. "A child has a fundamental right to live in an environment free from filth, health hazards and danger."¹²⁷ This right should not exclude the unborn child because proper development of the fetus is highly dependent upon its environmental surroundings.¹²⁸

Therefore, through the fusion of the areas of recovery for prenatal injuries and liability for passive smoke injuries, the courts should acknowledge that a viable cause of action for negligence truly exists for prenatal injuries inflicted by passive tobacco smoke.

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¹²⁴ See *supra* notes 80-86 and accompanying text.

¹²⁵ See *supra* note 77.

¹²⁶ See generally W. PROSSER, LAW OF TORTS § 32 (4th ed. 1971).

¹²⁷ *In re MLM v. Kuchera*, 682 P.2d 982, 990 (Wyo. 1984) (dispute over parental rights with respect to three daughters).

¹²⁸ See *supra* note 84 and accompanying text.