



The Fetus Rights for Compensation in the Israeli Law

AIDA France Conference - Paris December 2015

Ilan Kaner. Adv

Basically, the right to claim for personal damages is given in the Israeli Law to a human being, from the moment of birth until the moment he dies.

What happens in cases that a Fetus was negligently hurt? One option is to say - It's O.K, it's just a Fetus, you can negligently hurt it and get out without paying compensation for the damage you caused... The other option is to say - you acted wrongfully, you caused damage, therefore you have to pay compensation. And if the Fetus can't sue - his parents can.

Actually, we face two different situations: the first one is where the Fetus dies because of the negligent act or omission before he was born, and the second is that he is born with defects which will inflict all his life.

Let's start with the second situation, and take a case in which a baby was born with defects which the doctors of his mother, during her pregnancy failed to discover. They didn't decipher correctly the Ultra-Sound, they didn't send the mother to the right tests etc.

If the doctors would have find that something was wrong, and there is a very good chance that the baby will have serious defects, they would, of course, tell the parents about it, and the parents will have the chance to decide, whether to terminate the

pregnancy or to bring the child to the world anyway.

But the doctors didn't see the problem, the parents did not have the information, they lost the chance to decide, and the child was born. The defects will inflict all his life. His salary would be lower than he was able to earn, he has greater expenses than he will have to spend for housekeeping or any other needs, and the question will be: is he entitled to compensation from the doctors that didn't carry out the tests or did not diagnose them correctly.

The Israeli Tort Law is based on the principle of restitution. If you negligently hurt me and now my hand is paralyzed - you have to pay compensation for the outcomes of this loss: if I earn €1000 less - you have to pay them. If I need €500 per month for housekeeping that I wouldn't have to spend if I had both hands - you have to pay them. You have to bring me financially to the point I would be in, assuming your wrongful act or omission wasn't done.

Now, in the case of a child that brings a claim against the doctors that didn't diagnose his defects while he was a Fetus - this principle doesn't fit: when he would say "Put me in the position in which I had to be if you acted professionally" what would it mean? If the doctors were acting professionally and find the problem



and told about it to his parents - this child would not be born at all....

Therefore, it brings this child to the point that he has to argue that it is "Death is better than my life". Would we accept this argument?

We have to remember, that there is a variety of possible situations that can be the result of the negligence: The child can be with brain damage, retarded or paralyzed, but he can also suffer from minor damage - like being little shorter than others... Who will decide if death is better than life for him?

And, would it be moral to put this child in the situation that he has to say "Better death than my life" in order to get compensation?

Furthermore: would it be fair to deny his rights just because proper behavior of the doctors would end with his not being born at all?

Of course, it is not only a legal question, but far more wide one. Moral and social questions are involved, the value of life, ethical questions, religious questions, you name it.

Some 30 years ago, the Israeli Supreme Court decided that although the situation does not fit the idea of restitution, it would be fair to recognize the rights of the child rather than ignoring them. And by this precedent - the child can sue damages for the wrongful acts or omissions of the doctors during him

being a Fetus, in those cases where he suffers from serious defects.

The result of this judgment looks to be fair and right. However, the main difficulties did not disappear: what would be a defect serious enough to decide that for this child - death would be better than life? And what about the main principle of restitution ?

There is another problem: if you recognize the Fetus right to sue the doctors after he is born - what would prevent him from suing his parents for their decision to bring him to the world with his defects?

This anomaly brought a legal change three years ago. The Supreme Court decided, that it will be no more the child's right but the parents' right for damages. The child can't sue anymore for the negligence of the doctors. His parents can. The compensation is more or less the same: The legal assumption is that the parents will have greater expenses regarding this child because of his defects, and even to support him when he is grown up and earns lower salary than others.

Now - the child doesn't have to say - "Death is better than my life", but the parents have to say - "If the doctor would have given us the information during the pregnancy, we would decide to terminate it". In other words - "Dear son, you were unwanted"...

This, of course, is far from being a perfect solution, and although the



damage is paid, there are many difficulties with the new precedent:

The main problem is that the money goes to the parents for their losses. When the compensation is granted to the child - it was his money, and the authorities are involved. They watch what the parents are doing with the money that should be spent only for the child. Now, when the money goes to the parents, for their losses, what would prevent them to take the money and go to a nice vacation in Hawaii?

This question leads us to the other situation, where the Fetus that was negligently hurt died before he was born. This issue is far more challenging, because it deals with the question of the value of a Fetus' life.

As mentioned before, the right of claim is given to a human being. In the Israeli Law - you are a human being from the moment you are born, till the moment you die. The Fetus, in this regard, was never a human being. Therefore, he has no right of claim, and we face a Lacuna. Would it be fair to decide, that you can be negligent treating a Fetus and if it dies - you don't have to pay compensation? Remember: when someone suffers body damage - he gets compensation. When his watch is broken - he is compensated. Would you regard the loss of a Fetus lesser than a watch?

This serious question may rise in many fields of negligence. Not only medical negligence, but take for

example a simple car accident or any other tort: A mother goes in the street and because of constructions negligence - a stone falls from the building and hurts her. The Fetus she carries - dies. Would the constructor have to compensate the parents for the loss of the Fetus? A woman in the 8th month of pregnancy is involved in a car accident and the Fetus she carries dies. Who can sue for this loss?

The problem is that the Tort-Law usually compensates only the person who was directly wounded. Only in special cases, under very strict conditions, one is entitled to compensation for his reaction to a damage caused to his family relative. He has to prove, that because of his reaction, he suffers very serious mental disability or illness. Of course, the parents that lost the Fetus don't necessarily meet this conditions and in those cases the "Value" of the Fetus is zero. Is that fair?

In one case where the Fetus died before he was born because of medical negligence, this doctrine was widened by the Supreme Court, which decided that in this special case - the parents are entitled to compensation even if they don't meet those remarkable conditions of mental illness.

But it is not yet a judgment that generally recognizes the Fetus value, and what we try to do is to make it a general rule, which will recognize the value of a Fetus life.