‘POSITION OF AN EMBRYO (FOETUS) IN PRIVATE LAW: A COMPARATIVE ANALYSIS’

BY

MAGDALENA DUGGAN

(mgr, LLM, Postgrad Dip in French Law, Specialist Dip in Teaching, Learning and Scholarship)

THESIS OFFERED FOR THE DEGREE OF

DOCTOR OF PHILOSOPHY

SCHOOL OF LAW
FACULTY OF ARTS, HUMANITIES AND SOCIAL SCIENCES
UNIVERSITY OF LIMERICK

SUPERVISOR
EOIN QUILL (BCL, LLB, LLM)

SUBMITTED TO THE UNIVERSITY OF LIMERICK
NOVEMBER 2018
ABSTRACT

The concept of ‘foetal rights’ is most frequently associated with the notion of ‘foetal right to life’ and the problem of legality of abortion. Seemingly, such is also the tone of the Irish scholarly debate, where the question of foetal prerogatives is almost always examined in the context of Article 40.3.3° of Bunreacht Na hÉireann and the corresponding legislation. Hence, the debate focuses upon public law protection of the right to life of the unborn, secured by the State.

From a more general perspective, determining moral status of the foetus under private law of any country can prove a difficult and controversial task, in both legal theory and in practice. This problem becomes more and more relevant in the current reality, marked by significant developments in the field of perinatology and reproductive medicine. The legislatures’ answer to these incredible advancements is not straightforward. Does tort, contract or family law of jurisdiction X, Y or Z accept that the unborn object of such potentially harmful interventions enjoys certain rights in an independent manner? Or else, does the law simply attempt to safeguard the rights of a potential, future natural person? Does recognition of the corresponding foetal rights in other areas of private law (e.g.: succession) additionally support the foetal personality (capacity) theory? Finally, is acknowledgement of foetal personality (capacity) essential from the pragmatic point of view?

The answers to these questions are not likely to emerge from the constitution-centred Irish scholarly debate. Accordingly, this research project examines the private law dimension of foetal rights from a doctrinal perspective and in a comparative context, while using examples of the corresponding solutions adopted in other selected jurisdictions, most notably in England and Wales, France and Poland. The research, which examines the law in force as of the 1 May 2018, also tackles the above presented hypotheses concerning possible recognition of foetal personality (capacity). Furthermore, the comparative approach implies formulation of certain de lege ferenda remarks, which justify broadening the scope of such protection. It is hoped that thanks to this research project the Irish academic discourse about the rights of an embryo (foetus) could be complemented and enriched.

The author ultimately supports the hypothesis, whereby – on the grounds of private law of Ireland and all the other jurisdictions examined – an embryo (foetus) acquires individual rights of patrimonial character, indicated by the law in a concrete manner - either by the statute or through caselaw. Such sui generis construction should not, however, be associated with foetal personality (capacity) per se. Equally, the author does not accept a stance, whereby an embryo (foetus) should be treated as the part of the maternal organism, as if the law protected solely the future natural person. The catalogue of rights and benefits acquired by an embryo (foetus) universally combines elements of the continental concepts of expectative of rights and negotium claudicans (limping legal act), most notably, exercising the rights in questions will be solely possible in the event of subsequent live-birth.
DECLARATION

The substance of this thesis is the original work of the author and due reference and acknowledgement has been made, where necessary, to the work of others. No part of this thesis has previously been accepted for any degree nor has it been submitted for any other award.

This thesis includes excerpts from three original articles that have been published in peer reviewed journals.


As the sole (lead) author I was responsible for the ideas, development and writing up of all the three above-listed publications.

Magdalena Duggan

________________________

Date: ____________________
ACKNOWLEDGMENTS

Undoubtedly, this thesis would not have come into existence without generous help and support of a number of individuals and institutions.

First of all, I would like to thank my academic supervisor, Eoin Quill, for his continuous assistance throughout all stages of my postgraduate studies at the University of Limerick. His contributions, detailed, accurate comments, constructive criticism, great sense of humour and, above all, overwhelmingly positive and accommodating attitude towards my research have always been of great value to me. I could not have possibly wished for a better supervisor.

Secondly, I would like to acknowledge the Faculty members of the School of Law of the University of Limerick, particularly, Laura Donnellan and Dr Una Woods, and the administrative officers – Suzanne Nicholas-Barry and Carol Huguet, whose help I consider inestimable. In addition, thanks go to the members of the Centre for Teaching and Learning of the University of Limerick, especially to Prof Sarah Moore and Dr Mary Fitzpatrick for their professional guidance that I received as a participant of the Specialist Diploma in Teaching, Learning and Scholarship programme. It came at critical times in the writing of this thesis and progressing my academic career.

Thirdly, I wish to express my sincere gratitude to the School of Law for the financial support that I received in the course of my doctoral research at the
University of Limerick. My financial security turned out to be crucial during the attempts to complete the thesis.

Fourthly, I would like to acknowledge and thank my former lecturers from the Faculty of Law and Administration of the University of Łódź for providing me with sound knowledge of private law of continental legal system during my six-year studies in Poland. It was vital while pursuing a doctoral project in the field of comparative private law. I am particularly grateful to Prof Biruta Petrykowska-Lewaszkiewicz and Prof Małgorzata Pyziak-Szaflinska from the Department of Civil Law, and to my aunt - Prof Urszula Promińska from the Institute of Industrial Property Law.

Fifthly, my thoughts always go to my Family in Poland, who, over numerous years of my studies at three different universities, have always been able to offer me their love, patience and strength. I particularly appreciate the contributions towards the medical elements of my thesis offered by my mother, Dobromira, a specialist consultant in paediatrics and possibly the most hard-working and broadly talented physician that I have ever come across. I am also indebted to my father Maciej, brother Miłosz, sister-in-law Dominika and grandmother Izabela for their emotional support and technical assistance. In addition, I should not forget to mention all the colleagues and friends both in Ireland and Poland, who have been constantly providing me with help and inspiration.
Finally and most importantly, I would like to thank my three wonderful boys – my husband (and best friend) Brendan, and our sons - Edward and Alfred, to whom this thesis is dedicated.
PART 1: INTRODUCTION

Preface.........................................................................................................................2

Chapter 1: Embryo (Foetus) in Medical and Social Sciences.................................5

1. Beginning of a New Human Life in Medical Sciences.................................5

2. Beginning of a New Human Life in Philosophy and Religion......................7

2.1 Religion.............................................................................................................9

2.1.1 Christian Tradition on the Example of the Roman Catholic Church........9

2.1.2 Muslim Tradition......................................................................................18

2.2 Philosophy..................................................................................................21

2.2.1 The Humanity and Personhood Arguments........................................24
Chapter 2: Embryo (Foetus) and the Law

1. Legal Consequences of Live-Birth and Stillbirth
   1.1 Roman Law
   1.2 Contemporary Law
      1.2.1 WHO Guidelines
      1.2.2 Poland and Other Continental Jurisdictions
      1.2.3 Ireland and Other Common Law (Mixed)

2. Legal Protection of an Embryo (Foetus)
   2.1 Embryo (Foetus) and International (European) Law
      2.1.1 United Nations Law
      2.1.2 Council of Europe Law
         2.1.2.1 European Court of Human Rights Caselaw
      2.1.3 European Union Law
   2.2 Embryo (Foetus) and National Law
      2.2.1 Public versus Private Law
      2.2.2 Embryo (Foetus) and Public Law
         2.2.2.1 Abortion
         2.2.2.2 Foetal Assault and Foeticide
         2.2.2.3 Crimes Pertaining to Performance of ART
PART 2: EMBRYO (FOETUS) AND THE LAW OF TORTS

Preface...........................................................................................................104

Chapter 1: The Notion of ‘Antenatal Injuries’.................................................109

1. Compensation for Loss of an Heir.........................................................109
2. Compensation for Wrongful Death of a Foetus......................................112
3. Evolution of The Liability in Tort: The Child as a Claimant...............125

3.1 Ireland And Other Common Law Jurisdictions.................................125

3.1.1 Initial Restrictions: Walker v Great Northern Railway

Co. of Ireland ..........................................................................................125

3.1.2 Gradual Developments: Caselaw and Legislation..........................128

3.1.2.1 England and Wales...............................................................128

3.1.2.2 Ireland..................................................................................137

Textual Interpretation of Article 40.3.3°.............................................141
2. Paternal Liability for Antenatal Injuries ..................................................211

2.1 The Damage ..........................................................................................211

2.2 Paternal Liability for Antenatal Injuries under Law of the
Jurisdictions Examined ..............................................................................214

3. Parental Liability for Antenatal Injuries in the Context of Assisted
Reproduction ..............................................................................................215

Chapter 3: Liability for Antenatal Injuries Resulting From a Road Traffic
Accident .......................................................................................................218

1. The Damage ..............................................................................................218

2. Liability for Antenatal Harm Resulting from a Road Traffic Accident
under Common Law ..................................................................................219

3. Liability for Antenatal Harm Resulting from a Road Traffic Accident
under Continental Law ..............................................................................221

Chapter 4: Liability for Antenatal Injuries Resulting From a Medical
Error .............................................................................................................224

1. Liability for Antenatal Injuries Resulting from Pre-Conception
Occurrences ..................................................................................................226

1.1. The Damage ..........................................................................................226

1.2 Recognition of Compensatory Claims ..................................................227

2. Liability for Antenatal Injuries Resulting from Pre-Implantation
Occurrences ..................................................................................................233

3. Liability for Antenatal Injuries Resulting from Occurrences during the
Pregnancy and Labour ...............................................................................238

3.1 Damage ....................................................................................................238

3.1.1 Occurrences during the Pregnancy .....................................................238
3.1.2 Occurrences during the Labour

3.2 The Duty of Care and the Element of Fault

(Unlawfulness)

3.3 Causal Nexus

Conclusions

PART 3: EMBRYO (FOETUS) AND FAMILY LAW

Preface

Chapter 1: Embryo (Foetus) and the Expectant Parents

1. Who Are ‘Parents’?

2. Who Are ‘Legal Parents’?

2.1 Establishing Legal Motherhood

2.2 Establishing Legal Paternity

2.3. Legal Consequences of Establishing Filiation

3. Legal Parents of an Embryo (Foetus)

3.1. Establishing Filiation Before Birth

3.1.1 Poland and Other Continental Jurisdictions

3.1.2 Ireland and Other Common Law (mixed) Jurisdictions

3.2 Rights of the Expectant Parents in Respect of an Embryo (Foetus)

3.2.1 Parental Authority (Custody) in Respect of an Embryo (Foetus)

3.2.2 Parental Right to Consent to Foetal Therapy
3.2.3 Parental Rights in Respect of an Embryo In Vitro

Chapter 2: Embryo (Foetus) and the State’s Agents Acting in Loco Parentis

1. Agents of the State Acting In Loco Parentis
   1.1 Roman Genesis of Curatorship
   1.2 Common Law Genesis of Wardship

2. Agents of an Embryo (Foetus)
   2.1 Poland and Other Continental Jurisdictions
      2.1.1 Curator Ventris under Polish Law
      2.1.2 Curator Ventris under German and Italian Law

2.2 Ireland and Other Common Law (Mixed) Jurisdictions
   2.2.1 Warding an Embryo (Foetus) under the Law of England and Wales
   2.2.2 Hypothetical Alternatives to Wardship
   2.2.3 The Position of Irish Law

Conclusions

PART 4: EMBRYO (FOETUS) AND THE LAW OF SUCCESSION

Preface

Chapter 1: Succession Rights of an Embryo (Foetus) in Roman Law

1. The Notion of Postumi
2. Postumi as Heirs under the Rules of Roman Testate Succession......357

3. Postumi as Heirs under the Rules of Roman Intestate Succession....360

Chapter 2: Succession Rights of an Embryo (Foetus) in Poland and Other
Continental Jurisdictions.................................................................365

1. Succession Rights of an Embryo (Foetus) in Polish Law.................365

2. Succession Rights of an Embryo (Foetus) in German and Italian
Law...............................................................................................371

3. Succession Rights of an Embryo (Foetus) in French
Law...............................................................................................373

Chapter 3: Succession Rights of an Embryo (Foetus) in Ireland and Other
Common Law (Mixed) Jurisdictions.................................................376

1. Succession Rights of an Embryo (Foetus) in the Law of England, Wales
and Scotland .....................................................................................376

2. Succession Rights of an Embryo (Foetus) in Irish Law....................380

Chapter 4: Position of a Posthumously Conceived (Implanted) Embryo
under Succession Law......................................................................385

Conclusions.......................................................................................404

PART 5: CONCLUDING OBSERVATIONS

1. Remarks De Lege Lata.................................................................410

2. Remarks De Lege Ferenda...........................................................432

Bibliography.......................................................................................439
# LIST OF ABBREVIATIONS

## SOURCES OF LAW

### Judgments

- **A 2d** - Atlantic Reporter, 2nd series (United States)
- **A&E** - Adolphus & Ellis’ Queen’s Bench Reports, New Series (England and Wales)
- **AC (HL)** - Law Reports House of Lords (England and Wales)
- **AD 2d** - Appellate Division Reports, 2nd series (New York, United States)
- **All ER** - All England Law Reports (England and Wales)
- **BCCA** - British Columbia Court of Appeal (Canada)
- **BGHZ** -Amtliche Sammlung des Bundesgerichtshof in Zivilsachen (Germany)
- **BMLR** - Butterworths Medico-Legal Reports (England and Wales)
- **Bull Civ** - Bulletin Civil de la Cour de Cassation (France)
- **CA** - Court of Appeal (England and Wales)
- **Cal 3d** - California Reports, 3rd series (United States)
- **Cal Rptr** - California Reporter (United States)
- **Camp** - Campbell's Nisi Prius Cases (England and Wales)
- **Ch** - Law Reports, Chancery Division, 3rd Series (England and Wales)
- **ChD** - Law Reports, Chancery Division, 2nd Series (England and Wales)
- **Cir** - Circuit Court of Appeals (United States)
- **CMLR** - Common Market Law Reports (European Union)
- **D** - Recueil de jurisprudence Dalloz (France)
- **DLR** - Dominion Law Reports (Canada)
- **DLR 3d** - Dominion Law Reports, 3rd series (Canada)
- **ECHR** - European Court of Human Rights (caselaw)
- **ECR** - European Court Reports (European Communities, EU)
- **EHRR** - European Human Rights Reports (Counsel of Europe)
- **ER** - English Reports (England and Wales)
- **EWCA Civ** - Court of Appeal (Civil Division) (England and Wales)
- **EWHC** - England and Wales High Court (Administrative Court) (revision)
<table>
<thead>
<tr>
<th>Abbr</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>F 2d</td>
<td>Federal Reporter, 2nd series (United States)</td>
</tr>
<tr>
<td>F Supp</td>
<td>Federal Supplement (United States)</td>
</tr>
<tr>
<td>Fam</td>
<td>Law Reports Family Division (England and Wales)</td>
</tr>
<tr>
<td>FCR</td>
<td>Family Court Reporter (England and Wales)</td>
</tr>
<tr>
<td>Fla Stat Ann</td>
<td>Florida Statutes Annotated (United States)</td>
</tr>
<tr>
<td>FLR</td>
<td>Family Law Reports (England and Wales)</td>
</tr>
<tr>
<td>IEHC</td>
<td>High Court of Ireland Decisions</td>
</tr>
<tr>
<td>IESC</td>
<td>Supreme Court of Ireland Decisions</td>
</tr>
<tr>
<td>III</td>
<td>Illinois Reports (United States)</td>
</tr>
<tr>
<td>ILRM</td>
<td>Irish Law Reports Monthly</td>
</tr>
<tr>
<td>Ind</td>
<td>Indiana Reports (United States)</td>
</tr>
<tr>
<td>IR</td>
<td>Irish Reports (Ireland)</td>
</tr>
<tr>
<td>JCP</td>
<td>Jurisclasseur Périodique (France)</td>
</tr>
<tr>
<td>KB</td>
<td>Law Reports King’s Bench (England and Wales)</td>
</tr>
<tr>
<td>LR</td>
<td>Law Recorder (Ireland)</td>
</tr>
<tr>
<td>M</td>
<td>Morison's Dictionary of Decisions (Scotland)</td>
</tr>
<tr>
<td>Mass</td>
<td>Massachusetts Reports (United States)</td>
</tr>
<tr>
<td>Miss</td>
<td>Mississippi Reports (United States)</td>
</tr>
<tr>
<td>NC</td>
<td>North Carolina Reports (United States)</td>
</tr>
<tr>
<td>NE 2d</td>
<td>North Eastern Reporter, 2nd series (United States)</td>
</tr>
<tr>
<td>NE</td>
<td>North Eastern Reporter (United States)</td>
</tr>
<tr>
<td>NJ</td>
<td>A New Jersey Appellate Court (United States)</td>
</tr>
<tr>
<td>NJWSC</td>
<td>New South Wales Supreme Court (Australia)</td>
</tr>
<tr>
<td>NJW</td>
<td>Neue Juristische Wochenschrift (Germany)</td>
</tr>
<tr>
<td>NP</td>
<td>Nowe Prawo (Poland)</td>
</tr>
<tr>
<td>NSWLR</td>
<td>New South Wales Law Reports (Australia)</td>
</tr>
<tr>
<td>NSWSC</td>
<td>New South Wales Supreme Court (Australia)</td>
</tr>
<tr>
<td>NW</td>
<td>North Western Reporter (United States)</td>
</tr>
<tr>
<td>NY 2d</td>
<td>New York Supplement, 2nd series (United States)</td>
</tr>
<tr>
<td>NY</td>
<td>New York Supplement (United States)</td>
</tr>
<tr>
<td>NYS 2d</td>
<td>New York Supplement, 2nd series (United States)</td>
</tr>
<tr>
<td>Ohio St 3d</td>
<td>Ohio State Reports, 3rd series (United States)</td>
</tr>
<tr>
<td>OJ</td>
<td>Official Journal of the European Communities</td>
</tr>
<tr>
<td>Abbreviation</td>
<td>Description</td>
</tr>
<tr>
<td>--------------</td>
<td>-------------</td>
</tr>
<tr>
<td>Okl</td>
<td>Oklahoma Reports (United States)</td>
</tr>
<tr>
<td>OSN</td>
<td>Orzecznictwo Sądu Najwyższego (Poland)</td>
</tr>
<tr>
<td>OSNC</td>
<td>Orzecznictwo Sądu Najwyższego Izba Cywilna (Poland)</td>
</tr>
<tr>
<td>OSNCP</td>
<td>Orzecznictwo Sądu Najwyższego Izba Cywilna (Poland)</td>
</tr>
<tr>
<td>OSP</td>
<td>Orzecznictwo Sądów Polskich (Poland)</td>
</tr>
<tr>
<td>OSPiKA</td>
<td>Orzecznictwo Sądów Polskich i Komisji Arbitrażowych (Poland)</td>
</tr>
<tr>
<td>OTK</td>
<td>Orzecznictwo Trybunału Konstytucyjnego (Poland)</td>
</tr>
<tr>
<td>P 2d</td>
<td>Pacific Reporter, 2nd series (United States)</td>
</tr>
<tr>
<td>P 3d</td>
<td>Pacific Reporter, 3rd series (United States)</td>
</tr>
<tr>
<td>P/Pac</td>
<td>Pacific Reporter (United States)</td>
</tr>
<tr>
<td>Pick</td>
<td>Pickering’s Reports Massachusetts (United States)</td>
</tr>
<tr>
<td>QB</td>
<td>Law Reports Queen’s Bench, 3rd Series (England and Wales)</td>
</tr>
<tr>
<td>RCA</td>
<td>Responsabilité civile et assurances (France)</td>
</tr>
<tr>
<td>Rec Lebon</td>
<td>Recueil des Decisions du Conseil d'Etat (France)</td>
</tr>
<tr>
<td>SC (HL)</td>
<td>Session Cases, House of Lords (Scotland)</td>
</tr>
<tr>
<td>SC</td>
<td>Session Cases (Scotland)</td>
</tr>
<tr>
<td>SCR</td>
<td>Supreme Court Reports (Canada)</td>
</tr>
<tr>
<td>SE 2d</td>
<td>South Eastern Reporter 2nd series (United States)</td>
</tr>
<tr>
<td>SE</td>
<td>South Eastern Reporter (United States)</td>
</tr>
<tr>
<td>Sim &amp; St</td>
<td>Simons &amp; Stuart's Vice Chancellor's Reports (England and Wales)</td>
</tr>
<tr>
<td>So</td>
<td>Southern Reporter Second Series (United States)</td>
</tr>
<tr>
<td>Sup Ct Cal</td>
<td>Supreme Court of California (United States)</td>
</tr>
<tr>
<td>SW 2d</td>
<td>South Western Reporter, 2nd series (United States)</td>
</tr>
<tr>
<td>SW 3d</td>
<td>South Western Reporter, 3rd series (United States)</td>
</tr>
<tr>
<td>Tex</td>
<td>Texas Reports (United States)</td>
</tr>
<tr>
<td>US</td>
<td>Reports of Cases in the Supreme Court (United States)</td>
</tr>
<tr>
<td>VersR</td>
<td>Versicherungsrecht (Germany)</td>
</tr>
<tr>
<td>Ves</td>
<td>Vesey Junior's Chancery Reports</td>
</tr>
<tr>
<td>VR</td>
<td>Victorian Reports (Australia)</td>
</tr>
<tr>
<td>Wis</td>
<td>Wisconsin Reports (United States)</td>
</tr>
<tr>
<td>WLR</td>
<td>Weekly Law Reports (England and Wales)</td>
</tr>
</tbody>
</table>
Legislation

B.G.B. - German Civil Code 1900
Cz.F.C. - Czech Family Code 1963
F.C.C. - French Civil Code 1804
F.Crim.C. - French Criminal Code 1994
HFEA 1990 - Human Fertilisation and Embryology Act 1990
HFEA 2008 - Human Fertilisation and Embryology Act 2008
I.C.C. - Italian Civil Code 1942
P.C.A.P. - Polish Code of Administrative Procedure 1960
P.Crim.C. - Polish Criminal Code 1997
P.C.C. - Polish Civil Code 1964
P.C.C.P. - Polish Code of Civil Procedure 1964
P.F.C. - Polish Family Code 1964

JOURNAL TITLES

AAS - Acta Apostolicae Sedis
AJCL - American Journal of Comparative Law
BMC - Medicine BioMed Central Medicine
BMJ - British Medical Journal
CFLQ - Child and Family Law Quarterly
CLJ - California Law Journal
CLR - California Law Review
CRDF - Cahiers de la Recherche sur les Droits Fondamentaux
DULJ - Dublin University Law Journal
Edin LR - Edinburgh Law Review
ICLQ - International and Comparative Law Quarterly
IFLJ - Irish Family Law Journal
IJ - Irish Jurist
IJLS - Irish Journal of Legal Studies
ILQ - Irish Law Quarterly
<table>
<thead>
<tr>
<th>Acronym</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>ILT</td>
<td>Irish Law Times</td>
</tr>
<tr>
<td>J Dev Phys Disabil</td>
<td>Journal of Developmental and Physical Disabilities</td>
</tr>
<tr>
<td>J Med Ethics</td>
<td>Journal of Medical Ethics</td>
</tr>
<tr>
<td>JME</td>
<td>Journal of Medical Ethics</td>
</tr>
<tr>
<td>LQR</td>
<td>Law Quarterly Review</td>
</tr>
<tr>
<td>Med LR</td>
<td>Medical Law Review</td>
</tr>
<tr>
<td>MLJI</td>
<td>Medico-Legal Journal of Ireland</td>
</tr>
<tr>
<td>MLR</td>
<td>Modern Law Review</td>
</tr>
<tr>
<td>NLJ</td>
<td>New Law Journal</td>
</tr>
<tr>
<td>RPEiS</td>
<td>Ruch Prawniczy Ekonomiczny i Socjologiczny</td>
</tr>
<tr>
<td>SLT</td>
<td>Scots Law Times</td>
</tr>
<tr>
<td>Tennessee L Rev</td>
<td>Tennessee Law Review</td>
</tr>
<tr>
<td>Wash L Rev</td>
<td>Washington Law Review</td>
</tr>
<tr>
<td>West J Med</td>
<td>Western Journal of Medicine</td>
</tr>
</tbody>
</table>

**OTHER**

<table>
<thead>
<tr>
<th>Acronym</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>AID</td>
<td>Artificial Insemination Donor</td>
</tr>
<tr>
<td>AIH</td>
<td>Artificial Insemination Husband or Homologous</td>
</tr>
<tr>
<td>ART</td>
<td>Assisted Reproductive Techniques</td>
</tr>
<tr>
<td>art/arts</td>
<td>article/articles</td>
</tr>
<tr>
<td>asp</td>
<td>Acts of Scottish Parliament</td>
</tr>
<tr>
<td>c</td>
<td>circa, chapter</td>
</tr>
<tr>
<td>CDF</td>
<td>Congregatio Pro Doctrina Fidei</td>
</tr>
<tr>
<td>CECOS</td>
<td>Centre d’Etude et de Conservation des Oeufs et du Sperme</td>
</tr>
<tr>
<td>ch</td>
<td>chapter</td>
</tr>
<tr>
<td>Cmd</td>
<td>Command</td>
</tr>
<tr>
<td>CMV</td>
<td>cytomegalovirus</td>
</tr>
<tr>
<td>CRG</td>
<td>Constitution Review Group</td>
</tr>
<tr>
<td>CTG</td>
<td>Cardiotocography</td>
</tr>
<tr>
<td>CUP</td>
<td>Cambridge University Press</td>
</tr>
<tr>
<td>D</td>
<td>Digest</td>
</tr>
<tr>
<td>Abbreviation</td>
<td>Full Form</td>
</tr>
<tr>
<td>--------------</td>
<td>-----------</td>
</tr>
<tr>
<td>DES</td>
<td>diethylstilbestrol</td>
</tr>
<tr>
<td>Dist</td>
<td>Distinctio</td>
</tr>
<tr>
<td>ECHR</td>
<td>European Convention of Human Rights</td>
</tr>
<tr>
<td>ECJ</td>
<td>European Court of Justice</td>
</tr>
<tr>
<td>ECtHR</td>
<td>European Court of Human Rights</td>
</tr>
<tr>
<td>ed/eds</td>
<td>editor/editors</td>
</tr>
<tr>
<td>edn</td>
<td>edition</td>
</tr>
<tr>
<td>EEG</td>
<td>Electroencephalogram</td>
</tr>
<tr>
<td>EXIT</td>
<td>Ex Utero Intrapartum Treatment</td>
</tr>
<tr>
<td>FAS</td>
<td>Foetal Alcohol Syndrome</td>
</tr>
<tr>
<td>FASD</td>
<td>Foetal Alcohol Spectrum Disorder(s)</td>
</tr>
<tr>
<td>FHS</td>
<td>Foetal Hydantoin Syndrome</td>
</tr>
<tr>
<td>G</td>
<td>Gai Institutiones</td>
</tr>
<tr>
<td>HC</td>
<td>High Court</td>
</tr>
<tr>
<td>HIV</td>
<td>Human Immunodeficiency Virus</td>
</tr>
<tr>
<td>IUGR</td>
<td>Intrauterine Growth Retardation</td>
</tr>
<tr>
<td>IV</td>
<td>intravenous</td>
</tr>
<tr>
<td>KJV</td>
<td>King James Version</td>
</tr>
<tr>
<td>LSD</td>
<td>Lysergic Acid Diethylamide</td>
</tr>
<tr>
<td>MIT</td>
<td>Massachusetts Institute of Technology</td>
</tr>
<tr>
<td>n</td>
<td>footnote</td>
</tr>
<tr>
<td>ONIAM</td>
<td>Office National d’Indemnisation des Accidents Médicaux</td>
</tr>
<tr>
<td>OUP</td>
<td>Oxford University Press</td>
</tr>
<tr>
<td>p</td>
<td>page</td>
</tr>
<tr>
<td>para/paras</td>
<td>paragraph/paragraphs</td>
</tr>
<tr>
<td>PGD</td>
<td>Preimplantation Genetic Diagnosis</td>
</tr>
<tr>
<td>PL</td>
<td>Patrologia Latina</td>
</tr>
<tr>
<td>PRL</td>
<td>People’s Republic of Poland</td>
</tr>
<tr>
<td>PVL</td>
<td>periventricular leukomalacia</td>
</tr>
<tr>
<td>PWN</td>
<td>Państwowe Wydawnictwo Naukowe</td>
</tr>
<tr>
<td>quest</td>
<td>question</td>
</tr>
<tr>
<td>reg</td>
<td>regulation</td>
</tr>
<tr>
<td>Repl Vol</td>
<td>Replacement Volume</td>
</tr>
</tbody>
</table>
rev - revised
s/ss - section/sections
SC - Supreme Court
SCM - Student Christian Movement
SI - Statutory Instrument
trs - translator/s
TTTS - Twin to Twin Transfusion Syndrome
vol - volume
# TABLE OF CONSTITUTIONAL PROVISIONS

## COMMON LAW JURISDICTIONS

Constitution of Ireland (*Bunreacht na hÉireann*) 1937

**Article**

<table>
<thead>
<tr>
<th>Article</th>
<th>Page Numbers</th>
</tr>
</thead>
<tbody>
<tr>
<td>40.3.1°</td>
<td>147</td>
</tr>
<tr>
<td>40.3.2°</td>
<td>122n</td>
</tr>
<tr>
<td>40.3.3°</td>
<td>60, 72n, 96, 119, 119n, 121, 123, 139-155, 207, 337-339, 339n, 346, 421, 422, 431, 437</td>
</tr>
<tr>
<td>41</td>
<td>147, 262, 263</td>
</tr>
<tr>
<td>41.3.1</td>
<td>262n</td>
</tr>
<tr>
<td>42.1</td>
<td>262n</td>
</tr>
</tbody>
</table>

Constitution of the United States 1787

Fourteenth Constitutional Amendment.............................22n

## CONTINENTAL JURISDICTIONS

Basic Law for the Federal Republic of Germany 1949

**Article**

<table>
<thead>
<tr>
<th>Article</th>
<th>Page Numbers</th>
</tr>
</thead>
<tbody>
<tr>
<td>6.1</td>
<td>262n</td>
</tr>
<tr>
<td>6.2</td>
<td>262n</td>
</tr>
</tbody>
</table>

Constitution of the Republic of Poland 1997

**Article**

<table>
<thead>
<tr>
<th>Article</th>
<th>Page Numbers</th>
</tr>
</thead>
<tbody>
<tr>
<td>18</td>
<td>262n</td>
</tr>
<tr>
<td>38.1</td>
<td>262n</td>
</tr>
<tr>
<td>TABLE OF JUDGMENTS</td>
<td></td>
</tr>
<tr>
<td>---------------------</td>
<td></td>
</tr>
<tr>
<td>COMMON LAW AND MIXED JURISDICTIONS</td>
<td></td>
</tr>
<tr>
<td>A and B v Eastern Health Board [1998] 1 IR 464</td>
<td>265n</td>
</tr>
<tr>
<td>Allaire v St Luke’s Hospital [1900] 56 NE (Ill) 638</td>
<td>131-132</td>
</tr>
<tr>
<td>Alock and Others v Chief Constable of South Yorkshire [1992] 1 AC 310 (HL)</td>
<td>118-119, 118n, 119n</td>
</tr>
<tr>
<td>Amann v Faidy [1953] 415 Ill 422, 114 N.E. 2d 412</td>
<td>132</td>
</tr>
<tr>
<td>Arkansas Department of Human Services v Collier [2003] 95 SW 3d 772</td>
<td>77n</td>
</tr>
<tr>
<td>Attorney General’s Reference Number 3 of 1994 (Court of Appeal, Criminal Division, 29 November 1995) [1996] QB 581</td>
<td>75</td>
</tr>
<tr>
<td>Attorney General’s Reference Number 3 of 1994 [1997] 3 All ER 936</td>
<td>76</td>
</tr>
<tr>
<td>Attorney General v X [1992] 1 IR 1</td>
<td>145, 151, 152</td>
</tr>
<tr>
<td>AZ v BZ [2000] 150, 725 NE 2d 1051</td>
<td>301n</td>
</tr>
<tr>
<td>Bagley v North Hertfordshire Health Authority [1986] NLJ 1014</td>
<td>117-118</td>
</tr>
<tr>
<td>Baker v Bolton [1808] 1 Camp 493; 170 ER 1033 (Nisi Prius)</td>
<td>113</td>
</tr>
<tr>
<td>Becker v Schwartz [1978] 46 NY 2d 401</td>
<td>167n</td>
</tr>
<tr>
<td>Bergstresser v Mitchell [1978] 577 F 2d 8th Cir</td>
<td>229-230</td>
</tr>
<tr>
<td>Biggs v McCarty [1882] 86 Ind 352</td>
<td>376n</td>
</tr>
<tr>
<td>Blasson v Blasson [1864] 46 ER 534</td>
<td>376n</td>
</tr>
<tr>
<td>Blood v Secretary of State for Health (HC, 28 February 2003)</td>
<td>395, 395n</td>
</tr>
<tr>
<td>Bonbrest v Kotz [1946] 65 F Supp 138</td>
<td>131</td>
</tr>
<tr>
<td>Bruce v Melville [1677] Mor 14880 (22 February and 24 July 1677)</td>
<td>380n</td>
</tr>
<tr>
<td>Burton v Islington Health Authority [1991] 1 QB 638</td>
<td>128n</td>
</tr>
<tr>
<td>Burton v Islington Health Authority and De Martell v Merton and Sutton Health Authority [1992] 3 All ER 832 [1993]</td>
<td>115n, 133-134, 136, 194, 420</td>
</tr>
</tbody>
</table>
Bury Metropolitan Borough Council v D [2009] EWHC 446 (Fam).................................................................................................328-330, 329n
C v S [1988] QB 135..........................................................................................................................................................130, 322
Cataford v Moreau [1978] 114 DLR (3d) 585.................................................................169n
Centre for Reproductive Medicine v U [2002] EWHC 36 ..............................................393n
Cherry (Guardian ad litem) v Borsman [1992] 99 DLR 4th 487 (BCCA) ..............173
Cotter v Ahern [1976] ILRM 248..............................................................................................120
Curlender v Bio-Science Laboratories [1980] 165 Cal Rptr 477 ..............166-167
D (A Minor) v Berkshire County Council [1987] 1 All ER 20 ..........................324-327
Davis v Davis [1992] 842 SW 2d 588 .................................................................302-303, 305, 344
De Martell v Merton and Sutton Health Authority [1992] 3 All ER 820 ..........128
Deal v Sexton [1907] 144 NC 159, 56 SE 691 ..............................................................376n
Deutsche Genossenschaftsbank v Burhhope [1995] 1 WLR 1580 .....................413n
Dietrich v Inhabitants of Northampton [1884] 138 Mass 14 ..................127
Dobson v Dobson (Litigation Guardian) [1999] 2 SCR 753 ............................220-221
Doe v Clarke [1795] 126 ER 617 ......................................................................................377n
Donoghue v Stevenson [1932] AC 562 (HL Sc) ................................................126
Dunne v National Maternity Hospital [1989] ILRM 735 ............................243, 243n
Duval v Seguin [1972] 26 DLR (3d) 418 .................................................................130n
Elliot v Joicey [1935] SC (HL) 57...........................................................................405
Fitzpatrick v National Maternity Hospital [2008] IEHC 62 .............................244
Gibson v Gibson [1698] 2 ER 1173...........................................................................376n
Gleitman v Cosgrove [1967] 49 NJ 22, 227A 2d 689 .............................................166
Grieve v Salford Health Authority [1991] 2 Med LR 295 ...............................117n
Haberson v Parke-Davis Inc [1983] 656 P 2d 483 .................................................168n
Hale v Hale [1692] 24 ER 25 .........................................................................................376n
Hall v Hancock [1834] 32 Mass (15 Pick) 255 .................................................376n
Hanrahan v Merck Sharp & Dohme [1988] ILRM 629 ......................................121
Magnolia Coca Cola Bottling Co. v Jordan [1935] 124 Tex 347, 78 SW 2d 944.................................................................................................................. 127n
Marsh v Kirby [1634] 21 ER 512................................................................. 376n
MAW v Western Sydney Area Health Service [2000] NSWSC 358............ 386n
McDonnell v Ireland [1998] 1 IR 134......................................................... 121n
McKay v Essex AHA [1982] 1 QB 1166..................................................... 128n, 168-169, 170
Meskell v CIE [1973] IR 121................................................................... 120-121
Miss D (The Irish Times, 10 May 2007)..................................................... 210n, 265n
Montreal Tramways v Léveillé [1933] 4 DLR 337.................................. 130-131, 133, 249n
Mountstewart v Mackenzie [1707] Mor 14903........................................... 380n
MR v TR and Others [2006] IEHC 359..................................................... 151n, 238n
Murphy v McInerney Construction Ltd [2008] IEHC 323....................... 122n
Murray v Ireland [1991] ILRM 465........................................................... 255n
Murray v Marshall [1555] M 16226............................................................. 332
Norris v Attorney General [1984] IR 36.................................................... 148, 263n
North Somerset Council v LW and Others [2014] EWHC 1670 (Fam)...... 330-331
North Western Health Board v HW and CW [2001] 3 IR 622................. 339-340
O’Mahony v Bon Secours Hospital [2001] IESC 62................................. 244
Park v Chessin [1977] 60 AD 2d 80.......................................................... 167n
Paton v British Pregnancy Advisory Service Trustees and Another [1979] QB 276................................................................................................. 50n, 51, 322, 405, 419
Pigs Marketing Board v Donnelly [1939] IR 413....................................... 123n
Piper v Hoard [1887] 107 NY 73, 13 NE 626......................................... 376n
PP v Health Service Executive [2014] IEHC 622................................. 339n
Quinn v Mid-Western Health Board [2005] IESC 19......................... 244n, 251-253
R v Bourne [1939] 1 KB 687.................................................................. 143-144
R v Davidson [1969] VR 667.................................................................. 144
R v Tait [1990] 1 QB 290..................................................................... 75
Rainey et al v Horn [1954] 72 So 2d 434, 221 Miss 269

Re a Ward of Court (withholding medical treatment) (No 2) [1995] ILRM 401

[1996] 2 IR 79

Re Burrows [1895] 2 Ch 497

Re CH (Contact: Parentage) [1996] 1 FLR 596

Re Estates of Elsa and Mario Rios [1985] Los Angeles City P680682 and P680683

Re a Ward of Court (withholding medical treatment)

Re J (A Minor) (Wardship: Medical Treatment) [1991] Fam 33


Re S (Adult: Refusal to Medical Treatment) [1992] 3 WLR 806

Re Salaman [1908] 1 Ch 4

Renslow v Mennonite Hospital [1976] 351 NE 2d 870

Rochdale Healthcare NHS Trust v C [1997] 1 FCR 274

Roche v Roche [2010] IESC 10

Roe v Wade [1973] 410 US 113

S v Distillers Co. (Biochemicals) Ltd [1969] 3 All ER 1142 [1970] 1 WLR 114

Sindell v Abbott Laboratories [1980] 26 Cal 3d 588

Sion v Hampstead Health Authority [1994] 5 Med LR 170

Sophie Everard v HSE [2015] IEHC 592

South Western Area Health Board v K and Another (unreported, 19 July 2002, High Court)

SPUC v Grogan [1989] IR 753

St George’s Healthcare NHS Trust v S and R v Collins and Others, ex parte S [1998] 3 All ER 673

State v Horne [1984] 282 SC 444, 319 SE 2d 703

Sweeney v Duggan [1997] 2 ILRM 211

Temple Street v D and Another [2011] IEHC 1

The Attorney General (SPUC) v Open Door Counselling Ltd & Dublin Well-Woman Centre Ltd [1988] IR 593

The George and Richard [1871] LR 3 A&E H66
The State (at the prosecution of C Bruto
n) v A Judge of Circuit Court and P Bruto
(unreported, July 1984)..........................312n
Tredget and Tredget v Bexley Health Authority [1994] 5 Med LR 178............119n
Trower v Butts [1823] 1 Sim & St 181 57 ER 72..........................376n, 377
Turpin v Sortini [1982] 643 P 2d 954 (Sup Ct Cal)..........................167-168
Tuohy v Courtney [1994] 3 IR 1, 47.............................................122n
U v Centre for Reproductive Medicine [2002] EWCA Civ 565.......................393-394
Villar v Gilbey [1905] 2 Ch 301; [1906] 1 Ch 583; [1907] AC 139 (HL); [1907] All
ER 779.............................................................................377-379
Walker v Great Northern Railway Co. of Ireland [1891] 28 LR, IR
69 ..................................................................................126-127, 127n, 128, 130, 137
Wallis v Hodson [1740] 26 ER 472............................................377
Watt v Rama [1972] VR 353....................................................129, 133n, 421
Whitby v Mitchell [1890] LR 44, ChD 85 (CA)......................................383-384
Williams v Marion Rapid Transit Inc [1949] 87 NE 2d 334.....................132, 132n
Williams v Ocean Coal Ltd [1907] 2 KB 422.....................................179
Williams v State of New York [1966] 18 NY 2d 481...............................162n
W v Ireland (No 2) [1997] 2 IR 141.............................................121n
Yeager v Bloomington Obstetrics and Gynaecology Inc. [1992] 585 NE 2d
969..........................................................230n
Zepeda v Zepeda [1963] 190 NE 2d 849.............................................162, 162n

CONTINENTAL JURISDICTIONS

Poland

A Wolter’s Gloss to the Judgment of the Polish Supreme Court of 4 April 1966
[1966] 12 NP 1613......................................................................156n, 316n, 418n
Guidelines of the Polish Supreme Court of 8 May 1969 [1972] OSN 129...........181
19..............................................................................199n, 417
<table>
<thead>
<tr>
<th>Title</th>
<th>Page(s)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Judgment of the Polish Supreme Court of 8 October 1952, C756/51 [1953] 5 NP 70</td>
<td>156n</td>
</tr>
<tr>
<td>Judgment of the Polish Supreme Court of 8 January 1965, II CR 2/65 [1967] 9 OSpIKA 220</td>
<td>156</td>
</tr>
<tr>
<td>Judgment of the Polish Supreme Court of 4 April 1966, II PR 139/66 [1966] 9 OSNCP 158</td>
<td>156n, 176n, 177n</td>
</tr>
<tr>
<td>Judgment of the Polish Supreme Court of 7 October 1971, III CRN 225/71 [1972] 3 OSNCP 59</td>
<td>108</td>
</tr>
<tr>
<td>Judgment of the Polish Supreme Court of 14 October 1974, II CR 415/74 (unreported)</td>
<td>251n</td>
</tr>
<tr>
<td>Judgment of the Polish Supreme Court of 12 January 1977, II CR 671/76 (unreported)</td>
<td>251n</td>
</tr>
<tr>
<td>Judgment of the Polish Supreme Court of 26 June 2001 [2001] 2 OSNC 26</td>
<td>428n</td>
</tr>
<tr>
<td>Resolution of the Polish Supreme Court (Full Civil Chamber) of 6 December 1952 [1953] 2(31) OSN 6</td>
<td>284n</td>
</tr>
<tr>
<td>Resolution of the Seven Judges of the Polish Supreme Court from 27 October 1983 [1984] 6 OSNC 86</td>
<td>277n</td>
</tr>
<tr>
<td>Resolution of the Seven Judges of the Supreme Court of 28 January 1987 (unreported)</td>
<td>178n</td>
</tr>
<tr>
<td>Resolution of the Polish Supreme Court of 30 November 1987 [1988] 2-3 OSNC 23</td>
<td>177-178</td>
</tr>
</tbody>
</table>
France


Judgment of the *Conseil d'État* of 19 February 2003 [2003] Rec Lebon 41……………………………………………………………………………………………………171n


Judgment of the French Supreme Court of 25 June 2002 [2002] JCP II 10155……………………………………………………………………………………………………74n

Judgment of the French Supreme Court of 8 July 2008 [2008] I Bull Civ 796……………………………………………………………………………………………………171n

Germany


Judgment of the German Supreme Federal Court of 22 November 1983 [1984] NJW 658……………………………………………………………………………………………………172n

Judgment of the German Supreme Federal Court of 28 January 2015 (XII ZR 201/13)........................................................................................................................................217n

EUROPEAN COURT OF HUMAN RIGHTS

A, B and C v Ireland [2010] ECHR 2032.................................................................51n
Boso v Italy [2002] ECHR 846..............................................................................51n
Brügemann and Scheuten v Germany [1977] 3 EHRR...............................54-55
21......................................................................................................................51n, 301n
H v Norway European Commission of Human Rights, 19 May 1992...........51n
Maurice v France [2005] ECHR 683.................................................................171n
Norris v Ireland [1989] 13 EHRR 186..............................................................263n
Open Door and Dublin Well-Woman v Ireland [1993] 15 EHRR 244.........51n
Paton v United Kingdom [1980] 3 EHRR 408....................................................50-51
Tysiąc v Poland [2007] 45 EHRR 42.................................................................51n, 102n
Vo v France [2005] 40 EHRR 12....................................................................51-54

EUROPEAN COURT OF JUSTICE

Case C-34/10 Oliver Brüstle v Greenpeace eV [2011] OJ C362/5...........63-64
4685..................................................................................................................59-61
Society for the Protection of Unborn Child Ireland Ltd v Grogan (No 2) [1991]
CMLR 849..........................................................................................................152n
# TABLE OF
## PRIMARY AND SECONDARY LEGISLATION

- **Abortion Act 1967 (England, Wales and Scotland)**
  - Section
    - 1(1) .................................................. 74n
    - 1(1)(a) .............................................. 93n
    - 1(1)(b) .............................................. 93n
    - 1(1)(c) .............................................. 93n
    - 1(2) ............................................... 93n
    - 1(4) ............................................... 93n
    - 3(1)(b) ............................................ 93n
    - 4(2) ............................................... 93n
    - 5(2) ............................................... 93n

- **Act Concerning Social Insurance from Work Accidents and Occupational Illnesses 2002 (Poland)**
  - .................................................. 178

- **Act No 2002-305 of 4 March 2002 Concerning Parental Authority (France)**
  - .................................................. 296n

- **Act No 94-654 of 29 July 1994 concerning the donation and utilisation of elements and products of the human body, the medical assistance in procreation and the prenatal diagnosis (France)**
  - .................................................. 389, 389n

- **Article**
  - 8 .................................................. 389n

- **Act of 7 January 1993 on Family Planning, Protection of the Human Foetus and the Conditions for Abortion Admissibility (Poland)**
  - **Article**
    - 4a(1)(2) .............................................. 92n
    - 4a(2) .............................................. 92n
    - 4a §1 ............................................... 72n
    - 6 .................................................. 416
Act of 30 August 1996 Amending the Act of Family Planning, Protection of the Human Foetus and the Conditions for Abortion Admissibility and Amending Other Statutes (Poland). ................................................................. 417n

Section

2(1) .............................................................................................................. 417n

Act on the Procedure in Family Matters and in Matters of Non-Contentious Jurisdiction (Germany) 2008 ............................................................ 276n

§182(1) ........................................................................................................ 276n

Assisted Decision-Making (Capacity) Act 2015 (Ireland) .................. 311, 311n

Section

86(6)(a) .................................................................................................... 339n
86(6)(b) .................................................................................................... 339n

Austrian Civil Code 1811 ........................................................................ 416n

§22 ............................................................................................................. 416n

Austrian Criminal Code 1768 (Theresiana) ........................................... 69

Birth-Related Neurological Injury Compensation Act 1987 (United States) ........................................................................................ 257n

§38.2-5000 ................................................................................................ 257n

Birth-Related Neurological Injury Compensation Act 1989 (United States) ........................................................................................ 257n

§766-302(2) ................................................................................................ 257n

Births and Deaths Registration (Northern Ireland) Order 1976 ........... 46, 46n, 397n

Section

2(2) ........................................................................................................... 46n

Births and Deaths Registration Act 1953 (England and Wales) .......... 45n, 397n

Section

10 ............................................................................................................. 275n
41 ............................................................................................................. 45

California Civil Code (United States) ....................................................... 167

Section

43(1) ........................................................................................................ 92n
3281 ........................................................................................................ 167
Child Care Act 1991 (Ireland) ................................................................. 334, 334n
Children and Young Persons Act 1969 (England, Wales, Scotland and Northern Ireland) ................................................................. 325n
Section
1(2)(a) ......................................................................................... 325, 326, 327
70 ................................................................................................. 326
Children Act 1989 (England, Wales, Scotland and Northern Ireland) ................................................................. 276n, 279n
Section
3(1) ................................................................................................. 279n
4(1)(a) ......................................................................................... 276n
108(6)(7) ..................................................................................... 325n
Children Act 2001 (Ireland) ................................................................. 92n
Section
3(1) ................................................................................................. 92n
Children Act 2004 (England, Wales, Scotland and Northern Ireland) ................................................................. 92n
Section
65(1) ................................................................................................. 92n
Children and Family Relationships Act 2015 (Ireland) ............... 269n, 274, 277
Section
4 ................................................................................................. 274n
5(7) ................................................................................................. 274n
11 ................................................................................................. 277
49 ................................................................................................. 276, 276n, 288n
88 ................................................................................................. 275n
Children’s Ombudsman Act 2000 (Poland) ...................................... 92n, 284n
Article
2(1) ................................................................................................. 92, 284
Civil Code of Quebec 1991 (Canada) .................................................. 435n
Article
191 ................................................................................................. 435n
Civil Liability Act 1961 (Ireland) ......................................................... 427, 434

Section
48 ........................................................................................................... 182
48(1) .................................................................................................... 139, 139n, 180
49(1)(a) ................................................................................................. 182
58 ........................................................................................................... 94, 122, 123, 137, 138, 139, 142, 155, 158, 180, 221, 232, 421

Civil Registration Act 2004 (Ireland) ..................................................... 46n, 272

Section
2(1) .................................................................................................... 46, 46n
63 ......................................................................................................... 272

Code of Civil Obligations 1933 (Poland) ................................................... 176

Article
162 ..................................................................................................... 176

Code of Social Aid and Families 2012 (France) ....................................... 171

Article
L114-5 ................................................................................................. 171n

Code of Public Health 1953 (France) ...................................................... 73n, 92, 292n, 297n

Article
L1111-4 ............................................................................................... 292n
L152-8(3) .............................................................................................. 78n
L2131-1 ............................................................................................... 93n
L2131-4 ............................................................................................... 93n
L2131-4(2) ........................................................................................... 93n
L2141-4 ............................................................................................... 297n
L2141-4 I ............................................................................................. 299n
L2141-5 ............................................................................................... 299n
L2141-6 ............................................................................................... 93n, 297n, 299n
L2141-10 ................................................................................................ 93n
L2151-1 ............................................................................................... 78n
L2151-5 ............................................................................................... 78n
L2212-1 ............................................................................................... 73n, 93n
L2212-10 .............................................................................................. 73n
Congenital Disabilities (Civil Liability Act) 1976 (England, Wales and Northern Ireland) ................................................................. 93n, 136, 136n, 137, 158, 169, 201

Section

1. ......................................................................................... 420
1(1) ................................................................................ 194, 219n
1(2)(b) ............................................................................... 169
1(4) ................................................................................... 93, 214
1(5) .................................................................................. 242n
1A .................................................................................... 237, 420

2. .................................................................................. 93, 216, 219, 219n, 420
2(a) ................................................................................ 232
4. ...................................................................................... 232

4(1) .................................................................................. 158
4(2)(a) ............................................................................. 114, 114n

4(3) .................................................................................. 420n
4(5) .................................................................................. 136

Consumer Protection Act 1987 (England, Wales, Scotland and Northern Ireland) ................................................................. 137, 137n

Section

6(3) .................................................................................. 137

Criminal Code 1532 (Carolina) ........................................................................ 69

Article

133 .................................................................................. 69

Criminal Justice Act (Northern Ireland) 1945 ................................................. 71n

Section

25 ...................................................................................... 71n, 94
26 ...................................................................................... 71n

Criminal Justice Act 1972 (England and Wales) .............................................. 76, 76n

Section

36 ...................................................................................... 76
1384-1..............................................................................................................224n
French Criminal Code 1791.................................................................70
French Criminal Code 1992.................................................................78n

Article
511-16........................................................................................................78n
511-17........................................................................................................78, 78n
511-18........................................................................................................78n

General Principles of Civil Law Act (Poland) 1950.................................416n

Article
6 §1.............................................................................................................416n

German Civil Code 1900...........................................................................271n, 223n, 319, 343n, 347, 412, 419

§1.............................................................................................................416n
§104...........................................................................................................412n
§104-2.......................................................................................................412n
§108...........................................................................................................429n
§823-1.....................................................................................................157, 157n, 224n
§823-2.....................................................................................................224n
§1591......................................................................................................271n
§1592......................................................................................................275n
§1593......................................................................................................275n
§1594......................................................................................................275n
§1594-4...................................................................................................281
§1599......................................................................................................281n
§1600......................................................................................................276n
§1600-5...................................................................................................277n, 278
§1618a....................................................................................................271n
§1626......................................................................................................290
§1626a.....................................................................................................290n
§1627......................................................................................................290
§1629......................................................................................................279n
§1631......................................................................................................279n
§1632......................................................................................................279n
§1664-1..................................................................................................................209
§1774.........................................................................................................................319n, 320
§1912.........................................................................................................................320
§1923............................................................................................................................371, 405

German Criminal Code 1871.........................................................................................54
German Criminal Code 1998........................................................................................73n

Section
218...............................................................................................................................73n
218a.............................................................................................................................73n

German Particular Code 1507........................................................................................69

Guardianship of Infants Act 1964 (Ireland).................................................................276

Section
6B..................................................................................................................................288n
11(2)(a).......................................................................................................................276n

Habsburgian Criminal Code 1786 (Leopoldina).........................................................70
Habsburgian Criminal Code 1787 (Josephina)............................................................70

Health (Family Planning) Act 1979 (Ireland)............................................................146, 146n

Section
10..................................................................................................................................146
10(c)................................................................................................................................146n

Housing Associations Act 2000 (Poland).................................................................428, 428n

Article
19(1).............................................................................................................................428

Human Fertilisation and Embryology (Statutory Storage Period for Embryos and Gametes) Regulations 2009 (England, Wales, Scotland and Northern Ireland), SI No 1582 of 2009........................................................................................................298, 298n

Human Fertilisation and Embryology Act 1990 (England, Wales, Scotland and Northern Ireland)........................................71n, 77, 93, 137n, 269n, 277n, 297n, 297, 298, 392, 401

Section
3(3)(a)..........................................................................................................................78n
3(3)(c)............................................................................................................................78n
3(3)(d)............................................................................................................................78n
4(1)(a)........................................................................................................391
4(1)(b)........................................................................................................391
14(1)(c).................................................................................................297n
14A(3).................................................................................................297n
17(1)(c).................................................................................................297n
24(4)........................................................................................................392
28(5)........................................................................................................395
28(5A).................................................................................................395, 396, 397
28(5A)(a)..............................................................................................395
28(5A)(a)-(f).......................................................................................395
28(5A)(c)..............................................................................................395n
28(5A)(d)(i)..........................................................................................395n
28(5A)(d)(ii).......................................................................................396n
28(5A)(e)..............................................................................................396n
28(5A)(f)..............................................................................................396n
28(5B)....................................................................................................396, 397
28(5C)....................................................................................................396n, 397
28(5D)....................................................................................................396n, 397
28(5E)....................................................................................................396n
28(5I)....................................................................................................397, 397n
28(6)(b)...............................................................................................390, 395
29(3B)....................................................................................................397
30(1)........................................................................................................399n
30(1)(2) – 30(1)(7)...............................................................................399n
37...........................................................................................................71
Schedule 3................................................................................................391
Schedule 3, para 2...............................................................................297n
Schedule 3, para 2(1)(c).......................................................................299n
Schedule 3, para 4(1)............................................................................298n
Human Fertilisation and Embryology Act 2008 (England, Wales, Scotland and Northern Ireland) .......................................................... 77n, 93, 137

Section

1(2)(1)(b) ............................................................................................................ 93n
14(4)(10) ............................................................................................................ 95n
33(1) ................................................................................................................ 93n
34(1) ................................................................................................................ 93n
35 ...................................................................................................................... 277n
37(1)(d)(i) ........................................................................................................... 95n
38 ...................................................................................................................... 277n
44(1)(d)(ii) ....................................................................................................... 95n
47 ...................................................................................................................... 93n
57(1) ................................................................................................................ 93n
57(2) ................................................................................................................ 93n

Human Fertilisation and Embryology Authority (Disclosure of Donor Information) Regulations 2004 (England, Wales, Scotland and Northern Ireland), SI No 1582 of 2004 ................................................................. 217n

Human Fertilisation and Embryology (Deceased Fathers) Act (England, Wales, Scotland and Northern Ireland) 2003 ................................................................. 395

Human Rights Act 1998 (England, Wales, Scotland and Northern Ireland) .................................................................................. 195n, 395

Section

4(2) ................................................................................................................... 195n
10 ..................................................................................................................... 195n

Immigration Act 1999 (Ireland) ........................................................................ 153

Section

3(11) .................................................................................................................. 153

Infant Life (Preservation) Act 1929 (England and Wales) ....................... 76n, 93

Section

1(1) .................................................................................................................. 76, 94n

Italian Civil Code 1942 .................................................................................. 107n, 271n, 343n, 372n, 416n

Article

1 ....................................................................................................................... 283, 416n
231..........................................................................................275n
232..........................................................................................275n
254..........................................................................................281
269..........................................................................................276n
320..........................................................................................290, 293n, 321
321..........................................................................................320
462..........................................................................................372, 375n
687..........................................................................................372n
715..........................................................................................372
769..........................................................................................107
784..........................................................................................107

Law 40 concerning Medically Assisted Procreation 2004 (Italy)................300n
Law on the Termination of Pregnancy 1981 (the Netherlands).................74, 74n
§2........................................................................................................74n
Land and Conveyancing Law Reform Act 2009.................................382, 382n
Section
18(1)(c).........................................................................................383n
Law Reform (Miscellaneous Provisions) (Scotland) Act 1968..............369n
Section
18(1)..........................................................................................380n
Liability Act 1961 (Section 49) Order 2014 (Ireland), SI No 6 of 2014.......182n
Loi n° 75-17 du 17 janvier 1975 relative à l'interruption volontaire de la grossesse
1975 (France)..................................................................................70, 70n
Loi n° 2001-588 du 4 juillet 2001 relative à l'interruption volontaire de grossesse et
da la contraception (France)..........................................................73, 73n
Loi n° 2002-303 du 4 mars 2002 relative aux droits des malades et à la qualité du
système de santé (France)..........................................................116n, 171
Article
1.................................................................................................171n
Loi no° 2005-102 du 11 février 2005 (France)...................................171n
Article
2.................................................................................................171n
Lord Ellenborough’s Act 1803 (United Kingdom of Great Britain and Ireland) ....................................................................................................................71
Louisiana Civil Code (United States) ..................................................................................................................................................371n

Article
26.........................................................................................................................................................................................371n

Louisiana Revised Statutes 1950, No 9 (United States) ........................................................................................................306
§123..................................................................................................................................................................................306, 306n
§126..................................................................................................................................................................................306n
§129..................................................................................................................................................................................306n
§131..................................................................................................................................................................................306n

Lunacy Regulation (Ireland) Act 1871..............................................................................................................................311n

Medical Doctors and Dentists Act 1996..............................................................................................................................292n

Article
4.......................................................................................................................................................................................246n
33......................................................................................................................................................................................292n
34(6)..................................................................................................................................................................................292n
34(7)..................................................................................................................................................................................205
37......................................................................................................................................................................................205

Mental Health Act 1983 (England, Wales, Scotland and Northern Ireland) .........197

Section
2.......................................................................................................................................................................................197

Motor Vehicles (Third Party Insurance) Act 1942 (Australia) .........................220n

Offences Against the Person Act 1837 (United Kingdom of Great Britain and Ireland) ................................................................................................................................71

Offences Against the Person Act 1861 (United Kingdom of Great Britain and Ireland) ................................................................................................................................71, 71n, 143n, 146, 151

Section
16..................................................................................................................................................................................75
58..................................................................................................................................................................................71, 71n, 146n
59..................................................................................................................................................................................71, 71n, 146n

Ombudsman for Children Act 2000 (France) .........................................................92n
Ombudsman for Children Act 2002 (Ireland) ................................................................. 92n
Section
2(1) ................................................................................................................................. 92n
Ordinance No 2005-759 of 4 July 2005 concerning Filiation Law Reform (France) ................................................................. 217n
Ordinance of February 1731 (France) ................................................................. 374
Article
5 ........................................................................................................................................ 374
Ordinance of Villers-Cotterets 1539 (France) ..................................................... 374
Article
133 .................................................................................................................................. 374
Pennsylvania Consolidated Statutes 2012 .............................................................. 168n
Section
8305(b) ......................................................................................................................... 168n
Polish Civil Code 1964 ................................................................................................. 44, 44n, 116n, 156, 156n, 176, 317, 365n, 412n
Article
8 ...................................................................................................................................... 417, 424
8 §1 .................................................................................................................................. 116n, 416, 418
8 §2 .................................................................................................................................. 92n, 280n, 417n
9 ...................................................................................................................................... 44
11 ...................................................................................................................................... 412n
12 ...................................................................................................................................... 412n
13 ...................................................................................................................................... 412n
13 §1 ................................................................................................................................. 367n
15 ...................................................................................................................................... 314
18 §1 ................................................................................................................................. 429n
29 ...................................................................................................................................... 426n
32 ...................................................................................................................................... 406n
39 ...................................................................................................................................... 426n
91 ...................................................................................................................................... 428n
98 §1 .................................................................................................................................. 279n
101 §3 .................................................................................................................................. 367
103........................................................................................................429n
156........................................................................................................367
355 §2.....................................................................................................246n
415........................................................................................................224n
436 §1.....................................................................................................221
436 §2.....................................................................................................223n
446........................................................................................................181
446 §2.....................................................................................................177
446¹........................................................................................................156, 158,
177, 198, 206, 221, 227, 228
922 §2.....................................................................................................366n
924........................................................................................................366
925........................................................................................................366n
927 §1.....................................................................................................365
927 §2.....................................................................................................92n, 365, 368
928........................................................................................................426n
928 §2.....................................................................................................406n
972........................................................................................................365
1012.....................................................................................................366
1015.....................................................................................................367, 370
1015 §1..................................................................................................367n, 370
1015 §2..................................................................................................367n
1018 §3..................................................................................................366n
1022.....................................................................................................366, 406

Polish Code of Administrative Procedure 1960...............................44
Polish Code of Civil Procedure 1964..................................................313n
Article

310........................................................................................................314
599........................................................................................................346

Polish Criminal Code 1997.................................................................74
Article

152 §2.....................................................................................................92n
152 §3.....................................................................................................92n
Human Tissues and Cells Traceability Requirements, Notification of Serious Adverse Reactions and Certain Technical Requirements Regulations 2007 (Ireland), SI No 598 of 2007 .................................................................94, 94n

Registration of Births, Deaths and Marriages (Scotland) Act 1965........46n, 386n

Section 56(1) ..............................................................................................................46n

Registry Office Records Act 2014 (Poland).........................................................288n

Article 61(1) ..............................................................................................................288n

Resolution of the Minister for Health Regarding Forms and Scope of Medical Documentation Kept in Medical Institutions as well as Data-Processing Procedures 2006 (Poland).................................................................43

Appendix

Point 3 .......................................................................................................................43n

Road Traffic Act 1909 (Germany).................................................................222n

§ 7 ..........................................................................................................................222n

Road Traffic Act 1988 (England, Wales, Scotland and Northern Ireland).....219n

Section 143 .............................................................................................................219n

Road Traffic Act 2016 (Ireland).................................................................221

Section 4(1) .............................................................................................................221n

Status of Children Act 1987 (Ireland)

Section 10 ..............................................................................................................276n

46 ............................................................................................................................275

46(1) ......................................................................................................................401

46(2) ........................................................................................................................275n
Still-Birth (Definition) Act 1992 (England and Wales) ...........................................

Section

1(1) ................................................................................................................. 46n
4(2) ............................................................................................................... 46n

Stillbirths Registration Act 1994 (Ireland) ......................................................... 46

Section

1..................................................................................................................... 46

Succession (Scotland) Act 1964 ........................................................................ 380n

Succession Act 1965 (Ireland) ......................................................................... 380n, 381, 437

Section

3(2) ................................................................................................................. 380, 381, 382, 384, 401, 421, 437
120(5) ........................................................................................................... 406n

The Law Amending Civil Code of 3 December 2001 (France) ..................... 373, 373n

Thirty-fourth Amendment of the Constitution (Marriage Equality) Act 2015
(Ireland) .......................................................................................................... 262n

Treating Infertility Act 2015 (Poland) ......................................................... 78, 78n, 217n, 269n, 282

Article

2(1)(2) ........................................................................................................... 297n
2(1)(15) ........................................................................................................ 297n
18(1) ............................................................................................................ 387n
18(2) ............................................................................................................ 78n
19 .................................................................................................................... 299n
21(3)(2) ........................................................................................................ 387n
23(3) ............................................................................................................ 297n
25(2) ............................................................................................................ 78n
33 .................................................................................................................... 387n
36(1) ............................................................................................................. 297n, 299n
37(5) ........................................................................................................... 217n

Trusts (Scotland) Act 1961 ............................................................................ 380n

Section

5(2)(c) ........................................................................................................... 380n

Wisconsin Statutes and Annotations ............................................................ 334

§48.193 (1)(c) .............................................................................................. 334
§48.235 (1)(f) .............................................................................................................334n
Workmen’s Compensation Act 1897 (United Kingdom of Great Britain and Ireland)...........................................................................................................................................179
TABLE OF INTERNATIONAL CHARTERS,
CONVENTIONS, DECLARATIONS AND
RECOMMENDATIONS

American Convention on Human Rights 1969 ..........................................................49

Article

4(1)..........................................................................................................................49

Convention for the Protection of Human Rights and Dignity of the Human Being
with regard to the Application of Biology and Medicine: Convention on Human
Rights and Biomedicine 1997 ........................................................................55, 55n, 57, 58

Article

1..........................................................................................................................55, 58
5..........................................................................................................................56
11.........................................................................................................................56
12.........................................................................................................................56
14.........................................................................................................................57
18.........................................................................................................................57

Convention for the Protection of Human Rights and Fundamental Freedoms
1950 ......................................................................................................................49n

Article

2..........................................................................................................................50, 51, 52, 53, 53n, 54
2(1).........................................................................................................................49, 50
6..........................................................................................................................195n
8..........................................................................................................................54, 55, 263n, 329, 329n, 390, 395
27(2)......................................................................................................................50
Council of Europe Recommendation 1046/1986 on the use of human embryos and foetuses for diagnostic, therapeutic, scientific, industrial and commercial purposes........................................................................................................... 58, 58n

Point 10........................................................................................................................................................................... 59n
  14(a)(2)........................................................................................................................................................................... 59n
  14(a)(4)........................................................................................................................................................................... 59n

Council of Europe Recommendation 1100/1989 on the use of human embryos and foetuses in scientific research........................................................................................................... 59n

League of Nations World Child Welfare Charter 1924............................................................. 48n

UNESCO Declaration on the Human Genome and Human Rights 1997................. 48

Article 2........................................................................................................................................................................... 48


Article 1........................................................................................................................................................................... 47

United Nations Declaration of the Rights of the Child 1959.............................. 48n

United Nations Universal Declaration of Human Rights 1948................ 48, 48n

Article 3........................................................................................................................................................................... 48
# TABLE OF EC/EU LEGISLATION

Treaty Establishing the European Economic Community, Treaty Establishing the European Community

<table>
<thead>
<tr>
<th>Article</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>59</td>
<td>60, 392</td>
</tr>
<tr>
<td>60</td>
<td>60, 392</td>
</tr>
</tbody>
</table>

Solemn Declaration to the Protocol 17 to the Treaty on European Union 1992

<table>
<thead>
<tr>
<th>Article</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>149n</td>
</tr>
</tbody>
</table>

Treaty on the Functioning of the European Union

<table>
<thead>
<tr>
<th>Article</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>57</td>
<td>60n</td>
</tr>
</tbody>
</table>


<table>
<thead>
<tr>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>62n</td>
</tr>
</tbody>
</table>


<table>
<thead>
<tr>
<th>Paragraph</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>36</td>
<td>64n</td>
</tr>
<tr>
<td>42</td>
<td>64n</td>
</tr>
</tbody>
</table>


<table>
<thead>
<tr>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>255n</td>
</tr>
</tbody>
</table>


<table>
<thead>
<tr>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>62n, 64</td>
</tr>
</tbody>
</table>
Directive 2004/23 of 31 March 2004 on setting standards of quality and safety for the donation, procurement, testing, processing, preservation, storage and distribution of human tissues and cells

Article 6(2)(c)


Paragraph 36


Point 2


PART 1

INTRODUCTION
Preface

The transition of two gametes into an embryo, foetus and, finally, a child can be described as one of the most fascinating aspects of human physiology. In addition, thanks to continuous, rapid developments in the field of medical sciences, this process is gradually becoming less and less obscure. Nowadays, one can witness the moment of fertilisation and cell division happening in a Petri dish or select (reject) embryos possessing a certain genetic trait for the purpose of subsequent implantation. Once the embryo has been implanted in the uterus, its further development can be closely and thoroughly monitored during ultrasound examinations - now commonly available in 3D (or even 4D) resolution.

While, at the time of writing this thesis, it is rather easy to visualise the contents of a womb during the pregnancy, it is still rather uneasy to determine when human life truly begins and, accordingly, what status should be awarded to an embryo (foetus). For many centuries the two issues have remained at the forefront of heated debate amongst scholars and authorities representing diverse academic disciplines, to include, for instance, scientists, philosophers, theologians, ethicists and, finally, also lawyers. The opinions cited in the relevant literature can be described as highly non-uniform. At times, an embryo (foetus) will be perceived as an insignificant ‘cluster of cells’ or as a part of a female body; other times it will be described as a potential bearer of rights or, in other words, as an entity that shares our common humanity, and, thus, it is ‘on the way to
becoming an individual’.¹ Finally, some will argue that an embryo (foetus) should be correlated with a natural person from the moment of conception and, hence, from this moment on, its rights should be both acknowledged and duly safeguarded.

From a legal perspective, it could be argued that due to the previously acknowledged scientific progress, determination of foetal status can no longer be seen as a merely theoretical process but as a burning question of practical relevance.² At the same time, the law, itself, has not, to date, been able to provide a straightforward answer on when the new human life begins.

The present, introductory part of the thesis consists of three chapters. The first chapter looks at an embryo (foetus) as a subject of scientific, religious and philosophical discourse. It is hoped that these initial observations will set the general context of the research. In addition, the author assumes that the scientific and metaphysical status of an embryo (foetus) may be, in some ways, related to the legal one.

On that account, the second chapter serves to outline the body of law pertaining to antenatal rights. The author begins the analysis from placing the topic in a broader perspective of international (European) law and she subsequently narrows the scope of the analysis to domestic law of the selected, diverse

² O Nawrot, Nienarodzony na Ławie Oskarżonych (Wydawnictwo Adam Marszałek 2007) 6.
jurisdictions. A preliminary conclusion is formed, whereby, similarly to the case of philosophers and theologians, legal scholars tend to identify the term of foetal rights with the term of foetal right to life, which is embedded in the domain of public – i.e.: constitutional and criminal – law. The author consequently decides to turn her attention to private law, as the niche as yet largely unfilled in the present context, and completes the chapter by presenting the central research question together with some preliminarily formed hypotheses.

The third, final chapter of the introductory part looks at how this thesis has been organised. The author explains the methodology applied in the course of her studies and sketches both the structure and order of its subsequent components. The chapter ends with clarification of some general, nonetheless, fundamental terms that appear throughout the text.
CHAPTER 1
Embryo (Foetus) in Medical and Social Sciences

1. Beginning of a New Human Life in Medical Sciences

On its first encounter, the process resulting in creation of a new human being, a descendant of two human parents, begins at the moment of conception (fertilisation); in other words, we could well argue that life begins when an ovum fuses with a sperm. On the other hand, the moment at which this new human being begins an existence of its own is universally identified with the moment of birth, provided that it is born alive.

Nonetheless, what seems to be an axiom from a layperson’s point of view, might not be equally obvious to a scientific researcher. Some of those who disagree with the former standpoint claim that both ovum and sperm can already be regarded as ‘living’ entities; the others point to the well-established physiological observation, whereby not every product of conception will, in fact, acquire a human form, i.e. it will not transfer into a proper embryo to later develop into a foetus and, ultimately, into a child. As has been reported, ten to twelve percent of all pregnancies terminate naturally at the embryonic stage due to the so-called ‘blighted ovum’. In such cases, although an early ultrasound scan might not detect

---

3 Also referred to as ‘fecundation’ or ‘syngamy’.
4 See: GR Dunstan, ‘The Human Embryo in the Western Moral Tradition’ in Dunstan and Seller (n 1) 40.
any potential abnormalities, as the pregnancy progresses, the embryo never develops.\(^5\)

Furthermore, according to some researchers, a new life does not begin at the point of fertilisation but at the point of emergence of the so-called ‘primitive streak’. The streak, being a forerunner of both the neural tube and the nervous system, consists of cells that are formed at the axis of a fertilised ovum during the gastrulation period of a human pregnancy. It is often underlined that until the streak emerges, one is rather encountered with the previously mentioned ‘cluster of cells’, paradoxically described as ‘not one entity, not multiple entities, either’.\(^6\) Once the emergence takes place, twinning becomes no longer possible and, thus, an individual entity materialises.

Finally, some medical practitioners focus on the ‘neurological’ criterion, which has been derived by analogy from the case of brain death. Namely, it has been argued that if brain death is considered as a primary premise for establishing the moment of death of a human being, then logic would suggest that emergence of a functional foetal brain that typically occurs during the eighth week of gestation, should be regarded as a premise demarcating the proper beginning of a new human life.\(^7\)

Thus, firstly, it should be observed that, in spite of clear and straightforward scientific facts concerning different stages of prenatal human development, one

\(^5\) See: Nawrot (n 2) 140.
\(^6\) Ibid 148.
\(^7\) See: T Kushner, ‘Having a Life versus Being Alive’ (1984) 1 JME 5, 5 and Nawrot (n 2) 164.
cannot point to any universal biological or medical definition that would help us to settle the question of when a new life begins. However, from the scientific perspective, one could definitely argue that prenatal development is a gradual and continuous process; hence, a proposition, whereby a combination of human cells should be equated with a fully formed human organism, capable of surviving in the extrauterine environment, would – more than likely – be rejected by the scientists.

2. Beginning of a New Human Life in Philosophy and Religion

Equally, the status of an embryo (foetus) was, is and will undoubtedly remain a subject of a lively philosophical discourse. Moreover, it could be, prima facie, contended that the leading philosophical stances on the matter examined would, quite naturally, be linked to the religious ones.⁸

In opposition to scientists, philosophers and theologians are not likely to treat ‘the one in the womb’ merely as a ‘body’ or an ‘organism’. Here, deciding when a new life begins serves predominantly to determine the moral status of an embryo (foetus). This status can be regarded, in the first place, as deriving from the human origins of the latter; or in other words, from its belonging to the species of the genus Homo sapiens. In this sense, one could argue that – whether as a ‘cluster of cells’ or as a fully formed foetus shortly before birth, the intrauterine life undisputedly remains a human life.

Hence, the concept of a foetal status is further linked to the concept of foetal personhood. In this case, the decisive criterion would not be belonging to a particular genus or species, but possessing certain features, or, according to some philosophers, certain cognitive abilities, that characterise not only humans, but also persons. As a consequence, two related questions have emerged out of the philosophical (religious) debate – the first one: of when a new life begins, and the second one: of when a new person begins.

As will be further elaborated, while arguing for or against recognition of foetal personhood, commentators frequently rely on the so-called value argument. Namely, those who assume that an embryo (foetus) is a valuable being – in a sense that its value derives from its mere existence – would also claim that such 'valuable' existence cannot be deliberately ended by another person. In consequence, it is clear that in those particular domains the discourse on foetal personhood is predominantly focused on the issue of foetal right to life and, ergo, on the ethicality of pregnancy termination.⁹

Despite being clearly focused on the last-mentioned issue, due to the scientific advancements, philosophers, theologians and religious authorities begin, nonetheless, to draw more attention to assisted reproduction, particularly to the practices that can potentially affect the integrity and, hence, the moral status of the human conceptus. The examples of such ethically debatable procedures include: cryopreservation and destruction of human embryos as well as embryo

⁹However, it could be observed that some of the most prominent philosophers, including Emmanuel Kant, never directly addressed the issue examined. See, for example: AW Wood, *Kant's Ethical Thought* (CUP 1999) 370.
experimentation and research, especially creation of clones or human-animal hybrids\(^9\) and chimeras.\(^{10}\)

Before continuing the analysis, it should be also clarified that, since presenting all philosophical (religious) positions concerning the moral status of an embryo (foetus) would be sufficient to form a separate thesis, the author will consider solely the most popular and frequently cited standpoints.

### 2.1 Religion

#### 2.1.1. Christian Tradition on the Example of the Roman Catholic Church

It seems appropriate, to refer, in the first place to Christianity, as the religion is characterised by the largest number of adherents. It is also the predominant religion of some of the jurisdictions examined and substantial in the others.\(^{12}\) It can be initially noted that from among all the Christian denominations, the largest one, i.e. the Roman Catholic Church, has been associated with particularly firm views on the issue of the moral status of a human embryo (foetus).

---

\(^9\) An organism combining cells that originate from a human and a non-human.

\(^{10}\) An organism combining cells that originate from different zygoes.


In line with the Church's official teaching propounded by its clerical authorities, a new human life, regarded as a gift from the God, is always sacred and it truly and properly begins at the moment of conception. As the Congregation for the Doctrine of the Faith\textsuperscript{13} explained in its 1974 statement: '(f)rom the time that the ovum is fertilized, a life is begun which is neither that of the father nor of the mother; it is rather the life of a new human being with his own growth'.\textsuperscript{14} Moreover, according to the cited authorities, such standpoint should be adhered to by the legislatures, in the course of enacting national laws.\textsuperscript{15}

In defence of the sacredness of human life, the Roman Catholic doctrine disapproves of all assisted reproductive techniques (ART). As is frequently maintained, not only do they interfere with dignity of humans \textit{in statu nascendi}, but they also undermine the significance of marital sexual cohabitation.\textsuperscript{16} The Church equally condemns all forms of scientific intervention involving artificially created human embryos, such as, for instance: genetic (chromosomal)
manipulations or creation of surplus embryos for the purposes of medical research.17

Unsurprisingly, since its early beginnings the Church has been strongly against clinically induced abortions, even if such are performed in the presence of criminal or therapeutic indications.18 It has been affirmed that the primordial value of foetal life can only be compromised in cases where the pregnant woman’s own life is at danger due to a medical emergency.19 In line with the Christian doctrine, in such case a physician would be entitled to save the woman’s life, even if the administered treatment resulted in terminating the life of an embryo (foetus). In this context Catholics often invoke the so-called ‘principle of double effect’, which comes into operation in situations where an act, otherwise legitimate,20 may imply a foreseeable but unintended occurrence.21 The act producing the double effect can be, nonetheless, authorised, as long as the good resulting from it outweighs the evil accidentally caused or as long as there exists


20 Here: life-saving medical intervention.
21 Here: death of the foetus.
a sufficient reason for causing the evil.\textsuperscript{22} It is argued that, in the context of abortion, the physician’s act would be justified, provided that it was solely aimed at avoiding termination of both lives, without directly intending to terminate the life \textit{in utero}.\textsuperscript{23}

Nonetheless, it should also be noted that under historic Canon law, being the body of laws and regulations of the Roman Catholic Church, an early abortion was punished less severely than an abortion performed at later stages of the pregnancy. This inconsistency seems to have emerged from the past scholarly debate of whether a spiritual soul, whose possession distinguishes humans from all other species, descended into the body at the time of conception or, alternatively - at some later point of the embryonic (foetal) development. The ensoulment debate was allegedly ignited by a pre-Christian division between a formed embryo (\textit{embryo formatus}) and an unformed embryo (\textit{embryo informatus}), which was acknowledged and further investigated by some early followers of the Christian school of thought.\textsuperscript{24}

\textsuperscript{22} The last-mentioned premise is usually being referred to as the ‘proportionality criterion’. According to Stanford Encyclopedia of Philosophy, its application boils down to determining, whether the extent of the harm is ‘adequately offset’ by the magnitude of the good. In other words, the good and evil effects should nearly be of equivalent value and no disproportion should occur. Nonetheless, it should be noted that the criterion discussed has not always been interpreted harmoniously in the theological doctrine. See: ‘Double Effect’ in Stanford Encyclopedia of Philosophy <https://plato.stanford.edu/entries/double-effect/> accessed 10 November 2018. See also: J Mangan, ‘An Historical Analysis of the Principle of Double Effect’ (1949) 10 Theological Studies 61.


\textsuperscript{24} The two terms originated from the ancient studies of human physiology, conducted, \textit{inter alia}, by Aristotle and Hippocrates, which led to an observation, whereby intrauterine growth was gradual and started from creation of an early embryonic structure. See: Dunstan (n 4) 41; Soane (n 1) 77.
The initial stance, promoted, for example, by Saint Clement of Alexandria in the second century, was that souls pre-existed humans and they were subsequently introduced to their bodies by angels ‘presiding over generation’.25

Clement’s line of argumentation was further developed by two other second-century scholars, namely: Tertullian and Saint Gregory of Nyssa. Tertullian, in principle, agreed that a soul was already present at the moment of conception. However, similarly to Gregory, he maintained that it could not pre-exist the body, since the processes of fertilisation and ensoulment happened simultaneously.

According to the last-mentioned theologian, a soul represented a seedling given by the prospective parents (more particularly, by the father) to the offspring at the very beginning of that offspring’s life. Therefore, as he further surmised, both foetal body and foetal soul were formed in the womb, where they also developed at an identical pace.26 In consequence, the soul was regarded as having existed from the beginning, even if, as assumed Gregory, it was only able to manifest its existence at some point after formation of the foetus had been completed.27 At the same time, neither Tertullian, nor Gregory were willing to affirm that an unformed embryo (foetus) could be fully regarded as homo (a human being).

---

26 Ibid 112-113.
27 This view could be deducted from a passage of Gregory's work, entitled: On the Making of Man (De Opificio Hominis), where he declares that a human soul ‘(...) even if not visibly recognised by any manifestation of activity it nonetheless is there; for even the form of the future man is there potentially.’ See: Jones (n 25) 115.
The above cited hypotheses did not stand the test of time. As the discourse continued in the fourth-century, it was denied that a soul derived from one’s parents, and affirmed that it derived from the God. This stance ultimately provoked the question previously posed, i.e. at what stage of the pregnancy did a foetal soul began its proper existence? The leading response, supported, for example, by Lactantius was that ensoulment took place at some time between conception and birth; however, initially that time was not determined in any precise manner. Further support for deviation from the second-century stance can be found in a passage written by an anonymous author – nota bene, attributed to Saint Augustine of Hippo - who relied on the story of Biblical Adam, the ancestor of all humans. In line with the Book of Genesis, God firstly created Adam’s body from the dust of the ground, to later blow a ‘breadth of life’, identified with a soul, into his nostrils.

This standpoint was further deliberated upon in the late Middle Ages, i.e. at the time when Christian theologians began to rediscover the cultural and philosophical heritage of the ancient civilisations. Most remarkably, Aristotle’s studies, including the previously discussed distinction between formed and unformed embryos, influenced Saint Thomas Aquinas, who, in his famous theological compendium, *Summa Theologæ*, described a corresponding distinction between an animated embryo (foetus) that had already acquired a human soul, and an unanimated (unensouled) one. As could be observed, some

---

28 Ibid 117.
29 Ibid 119-120. As reported by Jones, similar reasoning was followed in the fifth century by Theodoret of Cyrus.
of the conclusions reached by Aquinas bear resemblance to those previously reached by Aristotle and Gregory of Nyssa, whereas others can be regarded as unique to him and rather innovatory, considering the times he lived in.

Perhaps the most significant point that can be deducted from the passages of *Summa* devoted to animation, is that – in Aquinas's opinion – the process did not happen instantly, but gradually and consisted in 'a succession of souls'.\(^{31}\) Clearly inspired by Aristotelian school of thought, the scholar insisted that the earliest embryo was in possession of a vegetative (nutritive) soul, which was later transformed into a sensitive (animal) soul, to eventually take a form of a human (intellectual) soul.\(^{32}\) Also on the authority of Aristotle, in *Commentarium in Sententiiis* Aquinas further claimed the entire process of ensoulment to last around forty days in case of a male embryo (foetus) and eighty days – in case of a female one.\(^{33}\)

As could be well speculated, Aquinas accepted the core of the theory submitted by Saint Gregory of Nyssa; most notably, he agreed that an embryo possessed a soul from the moment of conception and that, from this moment on, both body and soul were subject to continuous intrauterine development. However, unlike Gregory, Aquinas came up with his own hypothesis – again, somehow uprooted from the Aristotelian philosophy - whereby the power to thrive inside the womb

\(^{31}\) Jones (n 25) 120.

\(^{32}\) The above distinction appears, *inter alia*, in Aristotle's work entitled *On the Generation of Animals*. His other study, *De Anima* ('On the Soul'), is also directly referred in the passages 1a 76.1 and 76.3 of the *Summa*.

\(^{33}\) T Aquinas, *Commentarium in Sententiiis*, Book III, Dist III, quest 5, art 2  
was not being generated by the embryo (foetus), itself, but by the soul of its creator, here: of its father.\textsuperscript{34} Furthermore, as was previously observed, according to Gregory, an unformed embryo could be regarded as a potential human being, even if its soul had not yet manifested itself. Aquinas, on the other hand, postulated that until the time of formation of the intellectual soul, there was no living body and no man, even a man \textit{in spe}. Thus, only a fully formed and animated foetus deserved, in the eyes of Aquinas, to be described as ‘indisputably human’.\textsuperscript{35}

Accordingly, an important question that emerged from the above described dogma of the so-called delayed animation was whether terminating the life \textit{in utero} in its earliest form could be morally equated with terminating the life of an already ensouled foetus. In response, while discussing a passage from the Book of Exodus on punishment for antenatal injuries,\textsuperscript{36} Aquinas observes that: ‘(h)e that strikes a woman with child does something unlawful: wherefore if there results the death either of the woman or of the \textit{animated} foetus, he will not be excused from homicide, especially seeing that death is the natural result of such a blow’.\textsuperscript{37}

As commentators report, the Church’s views on the issue, reflected by both the works of the Catholic moralists and past versions of the Canon Code, lacked consistency in the past, but the division between animated and unanimated

\textsuperscript{34} Jones (n 25) 120-121.
\textsuperscript{35} Dunstan (n 4) 43.
\textsuperscript{36} See: Exodus 21:22-25.
embryos appeared in both the official documents and the doctrinal writing for many centuries to come. For example, in his Bull issued in 1588 – i.e. nearly three hundred years after the death of Saint Thomas Aquinas - Pope Sixtus V abolished the different degrees of culpability attached to early, as opposed to late, pregnancy terminations. However, the doctrine’s reaction to the amendment was not uniform and the view was further relaxed by Sixtus’s papal successor, Gregory XIV. Similarly, evidence suggests that until the seventeenth century an animated embryo (foetus) enjoyed the right to life in its absolute scope; namely, it could not be aborted even at the expense of putting the life of the pregnant woman in jeopardy.

The theological debate concerning the criterion of ensoulment continued, in principle, until the mid-nineteenth century. Then, in line with the 1854 Bull, entitled *Apostolicae Sedis* and authored by Pope Pius IX, it became *ex cathedra* irrelevant to the issue of the moral status of an embryo (foetus). Consequently, the amended and still binding version of the Canon Code provides that a procurer of a complete abortion, irrespective of the stage of the pregnancy, incurs a *latae sententiae* excommunication.

---

38 Dunstan (n 4) 50-51.
39 Such a firm stance can be found, for example, in the works of John of Naples, who was a Dominican scholar living at the turn of the thirteenth century. One century later a similar view was expressed by Saint Antoninus, the Archbishop of Florence. See: Nawrot (n 2) 103. As will emerge from the subsequent chapter of this part, the theory of delayed animation had also influenced historic criminal law on abortion not only in predominantly Catholic, continental countries but also in common law jurisdictions.
40 The criterion discussed largely lost its importance in the light of the official affirmation of the Dogma of Immaculate Conception. The still supported Dogma, which was pronounced in the same year in another papal Bull, entitled *Ineffabilis Deus* (‘The Ineffable God’), describes Blessed Virgin Mary as a woman conceived without original sin, which may further suggest that she possessed a spiritual soul from the moment of conception. See, for example: Dunstan (n 4) 48 and Dominan and Montefiore (n 19) 77.
Finally, in its previously cited 1974 statement, the CDF equally confirmed that, due to the ensoulment conundrum, early terminations of pregnancies were treated more leniently under past Canon law. At the same time, it was firmly underlined that the Catholic Church’s authorities had always perceived abortion as cardinal violation of the Divine (natural) law and, hence, it was unanimously regarded as a grave sin. While condemning procured abortions, the Congregation left the problem connected with the moment of animation aside, while perceiving it as a philosophical and moral rather than a scientific one.

2.1.2 Muslim Tradition

Equal attention should be now drawn to the second most popular religious group of the world, i.e. Islam. With reference to the countries where Sharia (Sharīʿah) constitutes a predominant source of law, the observations presented below can be treated as referring to both the religious and legal stance on the issue of antenatal rights.

Here, the discourse on when the life begins centres around the notion of janīn, which can be literally translated as ‘a thing that has been veiled or covered’ and which, in general terms, represents a new human life developing in the womb. At the same time, the moment when a janīn begins its proper existence has not been

---

42 Flannery (n 14) 4.
43 Ibid.
44 Such as, for instance: Saudi Arabia, Iran, Iraq, Afghanistan, Pakistan or Malaysia.
45 It should be recalled that Sharia (Sharīʿah) is a religious legal system uprooted in the Muslim prophecy and largely inspired by the Quran and the Hadith.
46 And its plural form of ajinnah.
unanimously determined. The literature on Muslim jurisprudence cites three leading diverse standpoints.\footnote{Ibid 246.}

As was reported by the first group of commentators, the term discussed represents an embryo (foetus) at all stages of pregnancy and, hence, a \textit{janīn} is said to exist from the moment of conception. The second group, represented by the founder of the Muslim school of legal thought, Al-Shafi‘ī, describes \textit{janīn} as an entity which has reached three crucial stages of its uterine development described in the Quran and which bears a number of distinct characteristics. Namely, in the beginning each human being is represented as ‘a drop of fluid’ (\textit{nutfah}), which subsequently turns into ‘something that clings and adheres to the uterine wall’ (\textit{alaqah}), in order to finally reach the shape resembling a chewed lump of food (\textit{mudghah}).\footnote{‘Man we did create from a quintessence (of clay). Then we placed him as (a drop of) sperm in a place of rest, firmly fixed [or the nutfa stage in the womb]. Then we made the sperm into a clot of congealed blood [alaqa]; then of that clot we made a (foetus) lump [mudgha]; then we made out of that lump bones and clothed the bones with flesh; then we developed out of it another creature. So blessed be God, the Best to create!’ See: The Holy Quran, 23: 12-14. The English translation according to SN Mohd Nor, \textit{The Ethics of Human Cloning with Reference to the Malaysian Bioethical Discourse} (Brill 2006) 228.} Apart from reaching the above stages of prenatal advancement, a \textit{janīn} must also possess some visible human features, such as an eye or a finger. Finally, according to the third group of scholars, represented for instance by Al-Nuwayri, a conceived but unborn human being can only be referred to as a \textit{janīn}, if the process of ensoulment had been completed, which, in consonance with the prophetic tradition, is supposed to take place around one-hundred-and-twenty days post conception.\footnote{According to Ebrahim, the second concept should be regarded as the most plausible; it is also the closest one to the scientific definition of an embryo (foetus). See: Ebrahim (n 47) 246-247.}

\footnote{48 Ibid 246.} \footnote{49 Ibid 246.} \footnote{49 ‘Man we did create from a quintessence (of clay). Then we placed him as (a drop of) sperm in a place of rest, firmly fixed [or the nutfa stage in the womb]. Then we made the sperm into a clot of congealed blood [alaqa]; then of that clot we made a (foetus) lump [mudgha]; then we made out of that lump bones and clothed the bones with flesh; then we developed out of it another creature. So blessed be God, the Best to create!’ See: The Holy Quran, 23: 12-14. The English translation according to SN Mohd Nor, \textit{The Ethics of Human Cloning with Reference to the Malaysian Bioethical Discourse} (Brill 2006) 228.} \footnote{50 According to Ebrahim, the second concept should be regarded as the most plausible; it is also the closest one to the scientific definition of an embryo (foetus). See: Ebrahim (n 47) 246-247.}
Pursuant to the religious Muslim tradition, a *janîn* enjoys the right to life. In consequence, a pregnant woman cannot be executed before she gives birth.\(^5\) Similarly, starting from the fourth month of the pregnancy, abortion is, in principle, prohibited and criminalised, save in cases when the pregnancy constitutes a threat to the life or health of the pregnant woman or if the woman’s already existing child (children) is being breastfed and the new pregnancy would impede on maternal lactation resources.\(^6\) Acts of aggression towards a prospective mother, both direct and indirect, which are capable of causing a miscarriage or premature labour, are subject to harsh penalties.\(^7\) Finally, a miscarried or stillborn *janîn* must, irrespective of its form, be treated and buried with dignity.\(^8\)

In conclusion, it can be observed that despite some past and present terminological uncleanness, a product of conception remains a precious value for both Catholics and Muslims. Foetal right to life, being the most commonly analysed antenatal prerogative, has been universally safeguarded by the two religions. However, the right discussed does not have an absolute character. Under very limited circumstances – and, according to the Roman Catholic tradition, solely in the case of a real, direct threat to maternal life - priority must be given to the right of equal value.

\(^5\) Ibid 248.
\(^6\) Ibid 255-256.
\(^8\) The penalties discussed take either a form of *Al-Ghurrah* or *Diyyah Kâmilah* (the so-called 'Full Blood Money') in case where the conceptus has already reached the stage of ensoulment. See: Ebrahim (n 47) 248.
The now irrelevant, although still unresolved ensoulment dilemma did, in the past, have an influence on Canon law. At the same time, the doctrine on animation is still acknowledged under the system of Sharia, where legal protection of the foetus seems to be stronger past the fourth month of gestation.

2.2 Philosophy

As could be deducted from the preceding passage, the moral status of an embryo (foetus) has remained within the realms of philosophical studies since the times of Ancient Greece. Nonetheless, it is true to say that it was not until the second half of the twentieth century, when philosophers began to somehow ‘rediscover’ the concept of foetal rights, but essentially, of the foetal right to life, while assessing the metaphysical dimension of the embryo (foetus) - pregnant woman relationship.

Undoubtedly, the contemporary trend to focus upon the right to life in the present context could be partially contributed to the second-wave feminism, whose beginnings date back to the nineteen sixties. To recall, unlike the first-wave feminism, which commenced in the early nineteenth century and which is ordinarily associated with the global women’s suffrage movement, the second wave targeted gender-related inequalities in other areas of everyday life, while

55 The second wave of feminism was reportedly ignited in 1963 by Betty Friedan’s work, entitled: ‘The Feminine Mystique’; nonetheless, some commentators associate the beginning of the movement with Simone de Beauvoir’s famous critique of patriarchy, published in 1949 under the name ‘The Second Sex’. In time, the writers joined forces with numerous well-known social and political activists, including Bell Hooks or the acclaimed ‘Mother of Feminism’ - Gloria Steinem.
exploring issues such as female sexuality (including also female reproductive choices) or the position of men and women within the family and workplace.

More and more academic attention began to be drawn to ontological aspects of the abovementioned biases, which ultimately paved the way to the feminist philosophy. As a result, the conflicting rights approach or, from the feminist perspective, particularly, the conflicting maternal and foetal rights approach, became more frequently adhered to in the philosophical discourse. Moreover, since, during the time discussed, abortion undeniably became more of a political and legal affair, it was all the more appropriate, if not necessary, to reflect also on its ethical aspects.

It could be, *prima facie*, argued that, when tackling the topic of ‘the pregnant woman vis-à-vis the foetus’, contemporary philosophers attempt two separate questions. Namely, some of them put their mind predominantly to the more

---

56 The most frequently cited feminist philosophers and theorists include, for instance: Germaine Greer, Julia Kristeva and Iris Marion Young.

57 Due to their predominantly liberal views, feminists have been traditionally regarded as natural supporters of the right to abortion and, thus, as opponents of the more conservative anti-abortion regulations. Such a cliche might not, however, be entirely true, since some of the contemporary feminist societies, such as the Feminists for Life (Ireland, the United States) or Women for Life (Great Britain) openly criticise unrestricted access to abortion, which they regard as the ‘bigger evil’ for women...

58 The social and cultural changes initiated in the nineteen sixties had a considerable impact on the abortion law in numerous countries worldwide. Out of the many national statutes that legalised the procedure in question one should mention, in particular: Abortion Act 1967 (England, Wales and Scotland), the Parliamentary Acts enacted in Eastern (1972) and Western Germany (1974) or Act No 75-17 of 18 January 1975 concerning pregnancy termination (France). Between 1962 and 1972 abortion was also legalised, for instance, in Denmark, Finland, Canada and Australia. Finally, it would be hard to avoid references to the landmark 1973 judgment issued by the Supreme Court of the United States in the 1973 case of *Roe v Wade*, [1973] 410 US 113, where it was declared that the state laws of Texas criminalising abortion largely violated the constitutional right of privacy, implicitly guaranteed by the due process clause, commonly known as the Fourteenth Constitutional Amendment. See also: D Harsch, ‘Society, the State and Abortion in East Germany’ (1997) 102(1) The American Historical Review 53, 53.
general issue of the foetal moral status in order to establish whether (or under what conditions) a conceptus could be regarded as a person. Others might treat the example of pregnancy termination – here: perceived as a true conflict of rights – as the starting point for all further deliberations. In such scenarios the research would boil down to juxtaposing foetal interests (existence) with the maternal ones (existence, health, autonomy, etc.) and deciding which ones should prevail and why.

However, as will be further demonstrated, the majority of philosophers do initially adhere to some general standpoint on the moral status of an embryo (foetus), while accepting or questioning the relevant personhood criteria. If the so-called maternal-foetal conflict is being examined in due course,\textsuperscript{59} the preliminary declaration allows a given thinker to decide to what extent foetal personhood and the corresponding foetal right to life may interfere with the pregnant woman’s rights to self-autonomy, control over her own body, etc.

At first blush, we could distinguish between four mainstream schools of philosophical thought on the issue of foetal moral status.\textsuperscript{60} To begin from two most radical ones, we encounter ultra-conservatists as opposed to ultra-liberalists. According to the former stance, the rights of an embryo (foetus) will take priority over those of a pregnant woman. An ultra-conservative scholar will

\textsuperscript{59} Usually from the abortion perspective.

\textsuperscript{60} Obviously, one should also mention two opposite standpoints entrenched in the political and social debate on the topic of unborn human life, particularly on the topic of pregnancy termination. Namely, one can be either ‘pro-life’, i.e. condemning availability of legal abortion, while giving priority to the rights of an embryo (foetus) or ‘pro-choice’, i.e. supporting unrestricted access to legal abortion, while giving priority to the rights of the pregnant woman. These terms will not, however, be applied in the present thesis.
condemn procurement of abortion in any, even the most tragic scenarios. According to the latter stance, embryos and foetuses have no moral status and no rights and, hence, they can be treated in an instrumental manner, for instance, can be donated, destroyed and experimented upon. An ultra-liberal scholar will maintain that unrestricted personal freedom prevails over any rights and freedoms enjoyed by non-persons or potential persons. Consequently, he will not regard abortion as immoral, even if it is to be performed due to most trivial reasons. In addition to these extreme positions, the literature also mentions two compromise ones, i.e.: moderate conservatism and moderate liberalism, whose followers have adopted a middle course. 

2.2.1 The Humanity and Personhood Arguments

As was previously alluded to, for many contemporary philosophers the crux of the matter lays in determining whether an embryo (foetus) is a human being, or, more commonly, where its humanity is taken for granted, whether it is a person. The positive answer could be, prima facie, followed by an assertion, whereby a conceptus also enjoys the right to life, which would, in turn, render abortion immoral. 

---

Interestingly, numerous scholars looked at the issue examined from a purely biological perspective. Further analysis led to emergence of the so-called psychological criterion of foetal personhood, closely identified with the concept of ‘psychological-self’. It should be explained that the ‘psychological-self’ possesses a ‘capacity for conscious experience’, which is acquired thanks to intrauterine development of a human brain. At the same time, there is no uniform position as to the specific stage at which one can be a fully human being or a proper person.

In line with the minimalist view, also referred to as ‘the theory of essentialism’, represented, for instance, by Baruch Brody, conscious experience, at least at a primitive level, will suffice. Hence, Brody postulates that humanity, in general terms, starts at around the sixth week of gestation, which, however, does not prevent him from condemning abortion in the majority of cases.

Meanwhile, in line with the stricter, or, we shall say, maximalist view, represented, for instance, by David Boonin, a human foetus does not enjoy any moral status until an organised cortical brain activity becomes detectable, i.e. until sometime between the twenty-fifth and the thirty-second week of gestation. In support of the ‘delayed humanity’ hypothesis, Boonin asserts that a foetus only becomes a human once it is capable of expressing desires, ergo, once it develops

---

65 Except for a case of a threat to maternal life.
more complex neurological structures that facilitate that process.\textsuperscript{67} The cited philosopher classifies all desires as either occurrent, i.e.: concrete and thus, communicated at a particular time and place,\textsuperscript{68} or dispositional, i.e. implied and, thus, often communicated unknowingly.\textsuperscript{69} He argues that foetal desires, which essentially boil down to the desire to exist, are purely dispositional, in a sense of being expressed without any conscious realisation. In conclusion, if assuming that a foetus with a functioning brain can express, its – however abstract – desire to live, then, from this time onwards its right to life should be recognised and safeguarded.\textsuperscript{70}

According to Mary Ann Warren – a philosopher most often associated with the psychological criterion of personhood – an embryo (foetus) can be undisputedly treated as a human being. Nonetheless, even if after the first few weeks of gestation it begins to resemble a miniature man, its existence can be still described as purely biological. It is because, writes Warren, even at that stage a foetus may not yet exercise any of the vital mental functions, essentially characterising persons, namely: consciousness,\textsuperscript{71} reasoning, the ability to communicate as well as presence of self-concepts and self-awareness.\textsuperscript{72} Therefore, although foetal life can be valued by others, a foetus cannot, itself, ‘have experiences’\textsuperscript{73} or value its own life.\textsuperscript{74}

\textsuperscript{67} Ibid.
\textsuperscript{68} E.g. a desire to read this thesis until the end.
\textsuperscript{69} E.g. a desire to live a good, long and healthy life.
\textsuperscript{70} See: Boonin (n 66) 115 et seq. See also: Beckwith (n 63) 146.
\textsuperscript{71} In particular, the capacity to feel pain.
\textsuperscript{72} Warren (n 62) para 30.
\textsuperscript{74} Ibid 131.
The first of the two most powerful arguments submitted by the cited philosopher can be reduced to the following logical implication: if it is, *prima facie*, immoral to end a person’s life, then, *a contrario*, it is not immoral to end the life of a non-person. Lack of adequate mental life prevents a foetus from being classified as a person and, as a deduction, pregnancy termination should never be regarded as ethically wrong.\(^{75}\)

Secondly, Warren addresses a hypothesis, whereby terminating a pregnancy could be, *prima facie*, rendered immoral, as it would mean ending the life of a potential person.\(^{76}\) She rejects it with the help of an accompanying thought experiment: if a space explorer was captured by a population of aliens, whose scientists threatened to steal his tissue in order to produce thousands of his clones (i.e. potential persons), the explorer would surely be entitled to escape, while depriving these potential persons of their right to life. In the end, it is claimed that foetal right to life cannot, in any event, be derived from the potential personhood; just like the right to vote in general elections cannot be granted to a minor, merely because he has potential of reaching the age of majority.\(^{77}\) To conclude, according to Warren, it is not unlawful to kill a potential person.\(^{78}\)

The opponents of the psychological criterion have, nonetheless, rightly argued that its application may lead to illogical and potentially disastrous consequences. Namely, if we accept that the quality of being a human (person), which guarantees

---

\(^{75}\) Warren (n 62) para 35.

\(^{76}\) Ibid para 41.

\(^{77}\) Ibid para 43.

\(^{78}\) Ibid para 45.
enjoyment of the right to life, is, in principle, contingent upon development of certain mental capacities, we could argue that it is ethical to kill a mentally disabled individual or the one remaining in a coma, or in persistent vegetative state.\textsuperscript{79} To provide an argument in Warren’s defence, it could be then proposed that, in order to enjoy the right to life, one needs to possess the mere capacity (i.e. the potential) to exercise the five enumerated mental functions.\textsuperscript{80} At the same time, if we further accept that all of them need to be – even truly potentially – present, could we regard, for instance, an individual suffering from congenital analgesia\textsuperscript{81} as a non-person and argue against his right to life?

While entertaining the question of the moral status of an embryo (foetus), Ronald Dworkin, on the other hand, decides to avoid references to foetal personhood, while rendering the discourse on its existence as ‘too ambiguous to be helpful’.\textsuperscript{82} In order to avoid further confusion, he proposes to focus instead on a more relevant, in his view, question, namely: whether (or when) and with what consequences could an embryo (foetus) be regarded as an intrinsically valuable being.\textsuperscript{83}

As an aside, it should be explained that the notion of ‘intrinsic value’ is often correlated with ‘substance view’ supporters, as opposed to ‘Anti-Equality Advocates’ (AEAs).\textsuperscript{84} As Beckwith explains, according to the former school of...

\textsuperscript{80} In other words, due to their impaired health, some individuals’ mental life can be passive.
\textsuperscript{81} Permanent and complete inability to experience pain.
\textsuperscript{83} Ibid 22.
\textsuperscript{84} Beckwith (n 63) 130-131.
thought, all human beings begin their existence at the moment of conception and, from that moment on, they should be already perceived as intrinsically valuable.\textsuperscript{85} (IVHBs). This value is further associated with 'holding a property, or immediately exercisable mental capacity to function in a certain way'.\textsuperscript{86} In contrast, an AEA would argue that the value discussed is an extraneous human characteristic, whose acquisition is accidental, i.e. it depends on reaching certain milestones in development or meeting certain specific conditions.\textsuperscript{87}

Substance view followers maintain, on the other hand, that acquisition of the above described ‘mental life’ capacities remains irrelevant to the moral status of a human being. As Beckwith further speculates, it is because living organisms come to an existence ‘all at once’ and maintain their identity throughout all stages of development before and after birth. Hence, one remains a truly human being from the moment of conception, when one becomes ‘(…) a unified organism with its own intrinsic purpose and basic capacities, whose parts work in concert for the perfection and perpetuation of its existence as a whole’.\textsuperscript{88} As far as personhood is concerned, rather than a potential person, an embryo (foetus) is

---

\textsuperscript{85} Ibid 139.

\textsuperscript{86} Ibid 139-140.

\textsuperscript{87} This standpoint is supported, for instance, by Dean Stretton, who, in the course of his polemic with Patrick Lee relies on an interesting thought experiment, in which scientists artificially create a new species of primates, whose brains are similar to the human ones. However, since the brains of these animals cannot exercise certain key capacities, their mental life remains nearly non-existent. Stretton further hypothesises what would happen in a case, where the higher brain of such an entity was replaced by the higher brain of a human adult. It is further proposed that, as a result of the transplant, the entity concerned, which, due to the lack of proper mental life had originally been a non-intrinsically valuable being (\textit{ergo}, a non-person), acquired certain mental capacities. These transformed it into an intrinsically valuable being, (\textit{ergo}, a person). In that way, Stretton argues that although an embryo (foetus) remains, \textit{prima facie}, the same organism at all stages of the gestation, it is not a person \textit{ab initio}. See: D Stretton, ‘The Argument from Intrinsic Value: A Critique’ (2000) 14(3) Bioethics 228, 238-239.

perceived as a person with potential, even if such would never actualise, for instance, due to premature death or physical (mental) disability.\(^9^9\) To simplify, one becomes a person by nature and not by achievement.\(^9^0\)

Returning to Dworkin’s line of argumentation, possessing intrinsic value is further linked to possessing interests and, in turn, to enjoying rights.\(^9^1\) The above correlation is also said to impinge upon our moral status, to put it simply: before we have interests, we cannot be regarded as persons.\(^9^2\) Dworkin correspondingly argues that, in general terms, the right to life derives from one’s interest in their continuing existence.

To apply the abovementioned hypotheses in the present context, Dworkin does not reject the view, whereby embryos and foetuses have lives, however, they do not possess individual interests in living. It is because their lives do not present any particular value to them, or, in other words, from the foetal perspective, both existence and non-existence remain virtually indifferent factors.\(^9^3\)

---

\(^9^9\) Beckwith (n 63) 134.
\(^9^0\) As John Finnis puts it, a human zygote represents ‘a dynamic integrated system’, which remains separate to the ovum and the sperm, even if it generated from a pair of them and, in time, will be producing new sets of either of them. Hence, conception should be regarded as ‘a perfectly clear-cut beginning to which each one of us can look back and in looking back see how, in a vividly intelligible sense, “in my beginning is my end”’. See: J Finnis, The Rights and Wrongs of Abortion: A Reply to Judith Thomson’ 2(2) Philosophy and Public Affairs 117, 144-145.
\(^9^1\) Beckwith (n 63) 145, quoting Dworkin (n 82) 11-15.
\(^9^2\) The interest-centred approach to foetal personhood has also been favoured by Bonnie Steinbock, who, similarly to Dworkin, defines interests as major ‘desires, preferences, concerns and goals’ thanks to which we can cherish our life, as long as we are aware of them. Steinbock further explains that in order to have interests, it is necessary to possess capacity for ‘at least rudimentary wants’. On that account, she concludes that, as opposed to a non-conscious and non-sentient foetus, a sentient and conscious one could be, *prima facie*, regarded as having interests in continuing existence. However, argues Steinbock, in case of a potential clash, foetal interests must be treated as inferior to the maternal ones, since a woman is never compelled to continue the pregnancy at all expenses, such as her own life or health. See: B Steinbock, ‘Mother-Fetus Conflict’ in Kuhse and Singer (n 73) 136-139.
\(^9^3\) Dworkin (n 82) 18-19.
As far as the abortion debate is concerned, the cited scholar draws his particular attention to the reasoning behind the conservative stance. Conservatists are subsequently divided into two separate groups: those, who perceive abortion as violation of the foetal right to life and those, who rely on the more universal ‘sanctity of human life’ argument. Dworkin further argues that, since the majority of anti-abortion advocates are willing to still authorise its procurement in the most exceptional circumstances, they, in fact, all seem to promote the last-mentioned claim. On the other hand, from Dworkin’s own point of view, although human life is precious, its alleged ‘sacredness’ does not seem to be sufficient justification of the abortion prohibition. In all the instances, personal rights and liberties, particularly the pregnant woman’s right not to carry the pregnancy to term, must be given equal consideration.

While appreciating the above described ‘interest-orientated’ approach, Michael Tooley, on the other hand, similarly to Boonin, draws a connection between having interests and having desires. In short, he argues that one will not have interests in one’s continuing existence without having an equivalent desire. Therefore, since an embryo (foetus) lacks self-consciousness, it equally lacks the ability to either possess or to express its desire to exist; *ergo*, it does not enjoy any serious right to life.95

---

94 In particular, if the pregnancy constitutes a threat to maternal life or if it resulted from rape (incest).

95 As a counterargument against Tooley’s desire-based theory of foetal personhood, Patrick Lee cites an example of an indoctrinated slave. It is argued that, although the slave might not, himself, be aware of his right to life, it would be still immoral to kill him. Lee further argues that to hold that infringement of someone’s rights ‘is more closely connected with what truly harms the individual rather than with what he (she) desires’. See: Beckwith (n 63) 147.
Moreover, as an Anti-Equality Advocate, Tooley regards the one in the womb as an ‘actively potential’ person or, in other words, as a being that is not yet a person but that possesses all the positive characteristics necessary to reach the status of becoming one in the future.\(^96\) In order to place this argument within the context of abortion, he further argues that: ‘(...) destruction of a fully active potentiality for personhood, rather than being morally comparable to the destruction of a person, is not morally wrong’.\(^97\)

Nonetheless, it is important to note that, although the above described arguments might, prima facie, resemble the ones submitted by Boonin, Warren or Dworkin, Tooley’s liberalism reaches by far the most radical point, when he declares that, since newborn babies also lack self-consciousness, an early infanticide could be sometimes regarded as the lesser evil.\(^98\)

Finally, when touching upon the issue of ‘potentiality’ in the present context, some philosophers consider not only the value attached to the life in utero, but also the one attached to the hypothetical, future life after birth. The abovementioned argument, which is commonly referred to as ‘future like ours’,\(^99\) was initially proposed by Don Marquis.\(^100\) Due to its many aspects, Marquis’s standpoint is not going to be discussed here in greater detail. In summary, the

---

\(^{96}\) M Tooley, ‘Personhood’ in Kuhse and Singer (n 73) 119.
\(^{97}\) Tooley (n 96) 123.
\(^{98}\) Tooley (n 96) 124-125. Warren, on the contrary, considers infanticide as morally unjustifiable, for two reasons, first, because newborn children are ‘very close to being persons’ and second, because after the child’s birth the ‘maternal-foetal’ conflict ceases to exist. See: Warren (n 63) para 47 (Postscript).
\(^{99}\) Or the ‘deprivation argument’.
\(^{100}\) See: Marquis (n 79).
For thorough critique of the ‘future like ours’ argument, see, for example: Boonin (n 66) 56-85.
cited philosopher stands back from the ‘psychological criterion’. Instead, he argues that performing an abortion prevents the future of a human zygote – i.e. its gradual transformation into an embryo, a foetus, a child and, ultimately, into an adult – from materialising. As a result, if one's life is ended inside the womb, one will never be able to undertake any activities or encounter any joys that could otherwise constitute one's life experience.\textsuperscript{101} Marquis, accordingly, concludes that depriving a human \textit{conceptus} of the ‘future like ours’ renders abortion morally impermissible.\textsuperscript{102}

\subsection*{2.2.2 The Conflicting Rights Arguments}

Supposing that foetal humanity, personhood and, consequently, also foetal right to life are hypothetically acknowledged with the help of the hitherto examined criteria, could we still manage to justify abortion, while invoking the pregnant woman’s right of control over her own body? This approach could be best illustrated by Judith Jarvis Thomson’s best-known work entitled ‘A Defense of Abortion’.\textsuperscript{103}

Peculiarly, if considering the abovementioned title, Thomson starts her analysis by assuming that ‘the foetus has already become a human person well before birth’;\textsuperscript{104} moreover, she is even willing to hypothesize that embryos and foetuses could be regarded as persons right from the moment of conception. Nonetheless,

\textsuperscript{101} Marquis (n 79) 189.
\textsuperscript{102} Ibid 202.
\textsuperscript{104} Ibid 48.
unlike the previously cited philosophers, Thomson argues that, even as a person, a *conceptus* does not enjoy the right to life, which, in turn, would render abortion morally permissible.

Similarly to Stretton and Warren, in support of her theses Thomson relies on numerous thought experiments. Thus, a potential reader is further asked to imagine that he wakes up in a hospital bed attached to an unconscious, famous violinist. In this purely fictional scenario, the violinist had been diagnosed with a fatal kidney failure and, due to the reader’s particularly rare blood group, he could only be rescued by the reader alone. The reader is subsequently instructed that, as a result of the violinist’s grave condition, he had been kidnapped by the Society of Music Lovers and that the violinist’s circulatory system had been plugged into his own in an attempt to remove the deadly toxins. Unfortunately for the reader, in order to succeed, he would have to remain attached to the violinist for the period of nine months.  

While it remains clear that the violinist attached to the body of Thomson’s potential reader is intended to represent an embryo (foetus) attached to the body of a pregnant woman, it is not entirely straightforward how to interpret the abovementioned allegory from the foetal status (foetal rights) perspective. The central argument that could be, *prima facie*, deducted from Thomson’s piece seems to be that even assuming that the right to life of another outweighs the right of control over one’s own body, one is never compelled to provide others

---

105 Ibid 49.
with necessary resources for their survival.\textsuperscript{106} Since the reader had not, in the first place, agreed to the use of his kidneys by the sick violinist, he might wish to be unplugged from the violinist at any time and cannot be restrained from doing so. As is further underlined, although allowing the violinist to use one’s own kidneys in order to save him might be treated as an act of kindness, people are not morally required to be Good, Very Good or, indeed, Splendid Samaritans to one another.\textsuperscript{107}

The right to control one’s own body is subsequently emphasised by the second thought experiment. This time, Thomson asks her reader to imagine ‘people-seeds’,\textsuperscript{108} who are capable of ‘drifting about in the air like pollen’\textsuperscript{109} and may implant themselves in the reader’s house, unless he uses adequate forms of precaution, such as mesh screens. However, in very rare circumstances, where one of the screens turns out to be defective, a person-plant would not be still entitled to take roots in the reader’s house, due to not having obtained permission to do so in the first place. Similarly, it is proposed that an embryo (foetus) conceived as a result of an involuntary sexual act or of failed contraception method would not automatically be ‘entitled’ to the use of maternal body or to support from the prospective parents, unless such permission was granted by her (them).

\textsuperscript{106} To put it in Thomson’s own words: ‘(…) the fact that for continued life that violinist needs the continued use of your kidneys does not establish that he has a right to be given the continued use of your kidneys’. See: Thomson (n 103) 55.
\textsuperscript{107} Ibid 64.
\textsuperscript{108} Ibid 59.
\textsuperscript{109} Ibid 59.
Thomson gradually comes to her central conclusion, whereby in cases, where an embryo (foetus) does not enjoy the right to use of the maternal body, the pregnant woman would not be obliged to ‘make large sacrifices, of health, of all other interests and concerns, of all other duties and commitments (...) in order to keep another person alive’. 110

At the end of the article, reference is made again to the question of foetal moral status. Thomson reveals that her initial assumption, whereby a conceptus is a human being from the moment of conception, was being feigned all along, and she subsequently denies it. She consequently argues that a very early abortion should not be seen as ‘killing of a person’, i.e. as an example of morally questionable conduct. 111

Unsurprisingly, the ‘unconscious violinist’ allegory ignited heated discussion amongst philosophers; nonetheless, deciding whether the criticism expressed was legitimate remains outside the scope of this thesis. In brief, two particular arguments submitted by Thomson seem to be the bone of contention.

First, according to some scholars, since there is no causal connection between the potential reader’s conduct and the violinist’s poor health, there is no duty on the reader’s part to play the ‘Good Samaritan’. On the other hand, a woman, who voluntarily engaged in a sexual relationship is partially responsible for the resulting pregnancy and for that reason alone, she would be seen as, prima facie,

110 Ibid 61-62.
111 Ibid 66.
obliged to nurture her foetus.\textsuperscript{112} Secondly, others maintain that Thomson somehow overlooked a crucial distinction between denying the use of one’s body to another human being, in a sense of allowing him to die, as opposed to deliberately ending the life of another human being. As those philosophers argue, abortion, has to be always regarded as direct killing and, thus, it cannot be justified by referring to the woman’s right of control over her body.\textsuperscript{113}

To summarise, this section provides a very concise portrayal of some major philosophical attitudes towards the issue of foetal moral status. Despite the brevity, the author’s goal was to demonstrate two important aspects of the debate in question. The first and more general one is the lack of any harmonious, clear-cut answers. Each of the arguments presented is equally contentious; each one deserves to be more thoroughly considered. As a result, we are being encountered with initial theories, which are followed by polemics, which eventually lead to some arguments \textit{ad vocem}, usually accompanied by more – subsequently disputed – proposals. Ironically, even powerful, abstract images of sick violinists, people-seeds, space explorers or animals with transplanted human cortices do not help us to come up with any substantial conclusions as to when a person and personal rights truly begin.

The second, more specific, one is the dominant abortion context and the resulting tendency to associate foetal rights solely (or predominantly) with the right to life.

\textsuperscript{112} See, for example: Warren (n 62) para 15. For an opposing view, see also, for example: MO Little, ‘Abortion, Intimacy, and the Duty to Gestate’ (1999) 2(3) Ethical Theory and Moral Practice, Ethics: Meta, Normative and Applied 295.

\textsuperscript{113} See, for example: Brody (n 64) 27-30; Finnis (n 90) 124 et seq.
It can be argued that such an approach may be directly linked to the above described inconsistencies. As Richard Wertheimer correctly observes, the dispute on morality of abortion can never be resolved since, the submitted arguments are ‘equally strong and equally weak, for they are the same arguments that can be pointed in either of two directions’, in a sense that the conservative’s argument is the liberal’s argument turned completely inside out.\footnote{See: R Wertheimer, ‘Understanding the Abortion Argument’ (1971) 1(1) Philosophy and Public Affairs 67, 85.} In conclusion, adhering to one of the opposite stances does not seem to be a logical preference but rather ‘a way of responding to certain facts’.\footnote{Ibid.}
CHAPTER 2
Embryo (Foetus) and the Law

1. Legal Consequences of Live-Birth and Stillbirth

Setting aside the philosophical and religious discourse, pregnancy followed by birth of a new human being has been universally regarded as a significant event from the legal point of view.

The law does not, however, determine when life begins, which implies serious difficulties for scholars attempting to determine the legal status of an embryo (foetus). Such lack of precision does not – at the same time – mean that the latter is not, in any sense, protected by the law. This author will rather argue that such protection cannot be seen as uniform, since its individual aspects are being realised by different branches to which the law, in its entirety, has been divided.

As was previously explained, the moment of birth is commonly understood as a complete separation of a foetus from a female body. Stillbirth, on the other hand, occurs when a foetus that died in utero or during the delivery exits the maternal organism.\textsuperscript{116} Once born alive, a child will gain the status of an independent, natural person and will be able to exercise legal prerogatives in his own name and for his own benefit. Among such prerogatives, there will also be those – analysed in the forthcoming parts of the thesis – resulting from pre-birth or even

\textsuperscript{116} It should not be confused with a spontaneous loss of an embryo (foetus) before the twentieth week of the pregnancy, which is popularly referred to as a miscarriage.
pre-conception occurrences. On that account, the author finds it important to, firstly, consider a number of both historic and currently binding legal definitions of the terms: ‘live-birth’ and ‘stillbirth’. These guidelines may, in turn, help us to indicate the point at which the law crystallises and to determine further consequences of being born alive, as opposed to being stillborn.

1.1 Roman Law

The Romans universally described all human beings as *persona* and further divided them into two major categories, i.e. freemen (*liberi, ingenui*) and slaves (*servi*). However, only the first-mentioned category possessed legal personality and, therefore, were capable of enjoying rights of any kind. Slaves, on the other hand, despite being classified as humans, remained subject to the law governing things (*res*).

Also from the Roman point of view, birth was considered to be a fact of fundamental importance. At the moment of birth, civil and personal statuses were determined, which enabled the newborn child to become a beneficiary of those rights and freedoms which were intrinsic to its status.

---

117 Interestingly, in everyday Latin the word *persona* represented a mask worn by actors of Roman theatres.
In order to be regarded as a person, an infant *ingenuus* not only had to be born but he had to be born alive and viable, i.e. capable of living outside the womb even for a brief moment. At the times of the Early Principate, human viability was assessed with recourse to diverse legal criteria, introduced by two – then leading – schools of jurists: Proculians and Sabinians. According to the followers of the former school, in order to be declared viable, a newborn had to be able to cry, whereas for the latter school of scholars - any bodily movement, but particularly breathing, sufficed. Finally, the newborn child also had to possess a human silhouette, since disfigured or severely handicapped individuals, described by Paulus as ‘monstrous or portentous’, were not considered to belong to a class of children.

In contrast to children born alive and viable, stillborn children were ordinarily considered to have never been born and have never been conceived. Thus, under no circumstances could they be classified as offspring in order to become future beneficiaries of any secured rights.

---

120 It is worth noting that the last mentioned stance was eventually approved on the grounds of Justinian’s Digests.

121 D. 1, 5, 14: (Paulus 4 sent) *Non sunt liberi, qui contra formam humani generis converso more procreantur: veluti si mulier monstruosum aliquid aut prodigiosum enixa sit (...).* In the second part of this Digest Paulus argues, however, that individuals born with additional limbs were still considered as children. (...)*Partus autem, qui membrorum humanorum officia ampliavit, aliquatenus videtur effectus et ideo inter liberos connumerabitur.* The English translation according to A Watson (ed), *The Digest of Justinian*, vol 1 (University of Pennsylvania Press 1998).

122 D. 50, 16, 129: (Paulus 1 ad 1 Jul et Pap) *Qui mortui nascuntur, neque nati neque procreati videntur, quia numquam liberi appellari potuerunt.*
1.2 Contemporary Law

1.2.1 WHO Guidelines

Historic, legal definitions of live-birth and stillbirth were initially ambiguous and varied from country to country, as different legislatures decided to adopt different criteria for the purpose of the corresponding statutes. These, most notably, included: probable duration of the pregnancy prior to birth, weight of a newborn child or various signs of the child’s viability.

Achieving legal clarity and coherence in the area examined became possible thanks to the World Health Organisation’s (WHO) guidelines concerning the two terms in question. As was underlined, the guidelines, which were drafted mainly for the purpose of national statistics, also served to reflect continuous developments in the field of medical sciences. For that reason, they were also later approved by various prominent health bodies, including, for instance, the International Federation of Gynaecology and Obstetrics.\textsuperscript{123}

According to the WHO’s guidelines, live-birth should be described as: ‘a complete expulsion or extraction from its mother of a product of conception, irrespective of the duration of the pregnancy, which after such separation, breathes or shows any evidence of life, such as beating of the heart, pulsation of the umbilical cord

or definite movement of the voluntary muscles'.\textsuperscript{124} It remains irrespective of whether the umbilical cord has been cut or whether the placenta is still attached to the wall of the uterus. Stillbirth, on the other hand, occurs when the above described signs of life cannot be established at or after the moment of birth, provided that twenty-eighth week of gestation in a given case has been completed.\textsuperscript{125}

As will be evidenced in the forthcoming passages, many legislatures worldwide amended previous legal definitions of ‘live-birth’ and ‘stillbirth’ in line with the cited guidelines. Hence, the two WHO’s definitions were frequently cited verbatim in domestic statutes.

\textbf{1.2.2 Poland and Other Continental Jurisdictions}

As an example, the above cited definitions – in their original wording – have been adopted by the Polish lawmaker. Most notably, they can be found in the amended Ministerial Resolution concerning the Exercise of Medical Profession and the Procedure of Civil Registration of Births 2006.\textsuperscript{126} As can be deducted from the resolution’s relevant passages, the child’s viability, or its ability to live for any

\begin{flushleft}


\textsuperscript{126} See: Resolution of the Minister for Health Regarding Forms and Scope of Medical Documentation Kept in Medical Institutions as well as Data-Processing Procedures, 21 December 2006, Official Journal of the Republic of Poland, No 2006.247.1819, point 3 of the appendix.
\end{flushleft}
determined period of time, are not essential to confirm that the child was born alive.

Since none of the core statutes, including the Polish Code of Administrative Procedure 1960\textsuperscript{127} and the Polish Civil Code 1964,\textsuperscript{128} define either live-birth or stillbirth, the abovementioned resolution is commonly used as a point of reference. However, as follows from an established clinical and administrative practice, assessment of the newborn child’s bodily functions (reflexes) will be typically performed by medical practitioners, who assisted with the delivery. Hence, a physician or midwife will be, most often, authorised to declare whether a given child was born alive, was stillborn or whether a miscarriage occurred. At the same time, it should be observed that – particularly in cases of diagnosed congenital pathologies – the abovementioned assessment may, in fact, prove indecisive. In cases where it is performed for private law purposes, some assistance may be drawn from article 9 P.C.C., whereby the child will be presumed to have been born alive. Before the court, the burden of rebutting the presumption is placed on the person who alleges the fact of stillbirth.\textsuperscript{129}

Finally, as should also be acknowledged, the French legislature – alongside the ‘born alive rule’ also maintained the criterion of viability of the newborn child,

\textsuperscript{128} Polish Civil Code 1964, Official Journal of the Republic of Poland No 1964.16.93 with subsequent amendments; hereinafter P.C.C.
which is necessary to exercise rights under domestic private law. Here, the last-mentioned term is to be understood as the child’s ability to live at his own expense outside the womb.

1.2.3 Ireland and Other Common Law (Mixed) Jurisdictions

In some common law jurisdictions legal definitions of ‘stillbirth’ can be found in statutes pertaining to civil registration of births. However, as opposed to their continental counterparts, none of these Acts define ‘live-birth’, whose meaning needs to be deducted *a contrario* from the stillbirth definitions; neither do they determine what signs of life have to be present (or absent) while assessing a newborn (stillborn) child. As will be further demonstrated, while establishing stillbirth, duration of pregnancy and lack of viability remain two principal premises. Some of the countries adhere to an additional birthweight criterion.

In England and Wales the currently binding definition of stillbirth is included in section 41 of the Births and Deaths Registration Act 1953, whereby a stillborn child is to be understood as a child born after reaching the twenty-fourth week of pregnancy, who did not at any time following separation from its mother’s body

---


131 According to Jones, the imprecise definition of ‘stillbirth’ across the United Kingdom implies serious practical difficulties for the medical practitioners. Interpretational problems occur, particularly, at times when an embryo (foetus) had died *in utero* at an earlier stage of the pregnancy but was not evacuated from a female body until after the twenty-fourth week. Such scenarios can accompany, for instance, incomplete foetal resorption or selective foetal reduction that can occur in case of a multiple pregnancy. In response, British medical and legal authorities (including the Royal College of Midwives and the Department of Health) issued practical guidelines, whereby midwives are not obliged to register stillbirth in the above cited scenarios, as long as early foetal death is medically verified and (or) duly documented. See: SR Jones, ‘Registration of Stillbirths: What Midwives Need to Know’ (2005) 13(11) British Journal of Midwifery 691, 691.

132 Births and Deaths Registration Act 1953 (c 20 1 and 2 Eliz 2).
breathe or show any other ‘signs of life’. In lieu of a more precise definition of ‘live-birth’, the legislature has opted for a rather unsatisfactory pleonasm, i.e. ‘live-birth’ stands for ‘birth of a child born alive’.\textsuperscript{133}

It should be added that identical wording of the two definitions in question was adopted by the Births and Deaths Registration Order 1976,\textsuperscript{134} in force in Northern Ireland and by the corresponding Scottish statute.\textsuperscript{135}

Finally, as far as Irish law is concerned, two consistent legal definitions of stillbirth can be found in section 1 of the Stillbirths Registration Act 1994,\textsuperscript{136} followed by section 2(1) of the Civil Registration Act 2004.\textsuperscript{137} These provisions describe a ‘stillborn child’ as a child, who, at the moment of birth, weighs at least 500 grams or who has reached a gestational age extending twenty-four weeks, but who is not showing any ‘signs of life’.

\textbf{2. Legal Protection of an Embryo (Foetus)}

The preceding passage explained how notions of ‘live-birth’ and ‘stillbirth’ were and are to be understood under the law of diverse jurisdictions. At the same time, as should be recalled, the law – in its entirety – also takes due consideration of

\textsuperscript{133}It should be explained that the currently binding definition of stillbirth under the law of England and Wales was amended by virtue of sections 1(1) and 4(2) of the Still-Birth (Definition) Act 1992. The amendment, replacing the previously stated twenty-eighth week of gestation with the twenty-fourth week, was aimed to reflect the ongoing scientific progress, which entails increased survival rates of children characterised with low birth weight. See: Jones (n 130) 691.

\textsuperscript{134}Births and Deaths Registration (Northern Ireland) Order 1976 (No 1041, NI 14), s 2(2).

\textsuperscript{135}Registration of Births, Deaths and Marriages (Scotland) Act 1965 (c 49), s 56(1).

\textsuperscript{136}Stillbirths Registration Act 1994 (No 1 of 1994), s 1.

\textsuperscript{137}Civil Registration Act 2004 (No 3 of 2004), s 2(1).
the existence of human life before birth. Accordingly, a question, which would naturally follow, concerns the areas and boundaries of protection offered by the law to an embryo (foetus) on both the macro (international) and micro (national) levels.

2.1 Embryo (Foetus) and International (European) Law

As could be observed at the outset, the body of international and European law concerning the issue examined, is, in fact, very limited. Such scarcity is owed to certain practicalities of the global legal cooperation. Namely, in most instances, signatories of international conventions and treaties are vested with the so-called ‘wide margin of appreciation’ in respect of regulating sensitive matters, such as, most notably, all aspects of human procreation. As a result, it is nearly impossible to determine if and how the international law secures the rights of an embryo (foetus). Most definitions of the terms: ‘child’ and ‘life’, used in the provisions of international and human rights law of both intergovernmental and supranational character, may additionally confirm the above hypothesis.

2.1.1 United Nations Law

In this context, it is appropriate to invoke, in the first place, Article 1 of the United Nations\textsuperscript{138} Convention on the Rights of the Child 1989,\textsuperscript{139} defining a child as ‘a

\textsuperscript{138} Hereinafter UN.
\textsuperscript{139} The United Nations Convention on the Rights of the Child, adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989; hereinafter UNCRC.
human being below the age of eighteen’. As could be well assumed, the term ‘human being’ is to be understood as offspring of human parents. However, the provision does not explain *expressis verbis*, whether a human embryo (foetus) can be equated with a human being and, hence, also with a child.

We should note that a similar, open-ended formulation had been initially introduced by Article 3 of the Universal Declaration of Human Rights 1948, which was also drawn up under the auspices of the UN. The provision acknowledges that ‘everyone’ enjoys the right to life, liberty and personal security, without further specifying, whether these prerogatives are safeguarded from the moment of live-birth or from the moment of conception.

The same cautious approach is being visibly followed by some of the UN's specialised agencies and bodies. As an example, we could cite, in particular, Article 2 of the UNESCO Declaration on the Human Genome and Human Rights 1997, pertaining to ART, whereby the equally enigmatic ‘everyone’ enjoys the right to respect for their rights regardless of their genetic characteristics.

---

140 Unless, as it is further explained, majority can be attained earlier in compliance with the relevant law.
142 At the same time, it is interesting to note an excerpt from the Preamble of Declaration of the Rights of the Child 1959, whereby a child ‘by reasons of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection before as well as after birth’. As should be explained, the document’s initial text was originally approved in 1924 by the General Assembly of League of Nations – i.e. UN's predecessor – under the name World Child Welfare Charter. Its extended and amended version was subsequently enacted by the UN in 1959, to eventually lay the foundations for the previously mentioned 1989 Convention.
143 The United Nations Educational, Scientific and Cultural Organisation.
For comparative purposes, these provisions could be juxtaposed with the rather exceptional Article 4(1) of the American Convention on Human Rights 1969, acknowledging that ‘(e)very person has the right to have his life respected’. As was, however, explained in the reminder of the passage, the right to life is legally protected both before and after birth.

The terminological ambiguities, which have been, *prima facie*, overlooked by the drafters of the UN documents, could be, more than likely, linked to the fact that abortion has been legalised by a vast majority of its members. As a result, identifying the moment of conception as the beginning of protection of human life could no longer be regarded as a universally approved solution.

### 2.1.2 Council of Europe Law

#### 2.1.2.1 European Court of Human Rights Caselaw

A similar conclusion could be drawn from analysis of some topically linked rulings delivered by the European Court of Human Rights. There, the notion of foetal rights has been predominantly assessed in the light of Article 2(1) of the European Convention on Human Rights 1950, whose opening passage

---

144 The American Convention on Human Rights of 22 November 1969, also referred to as the Pact of San José, UNTS vol 1144, 123 <https://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.pdf> accessed 10 June 2016. As should be clarified, the Convention binds twenty-four (out of thirty-five) member nations of the Organisation of American States that have so far ratified it.

145 Hereinafter ECtHR.

provides that ‘(e)veryone's right to life shall be protected by the law’. Unsurprisingly, the interpretational difficulties, presented below, stem from the lack of accompanying definitions, explaining what is meant by ‘life’ and ‘everyone’s’.

It is appropriate to mention, in the first place, the 1980 seminal decision, which was issued by the Commission of Human Rights in the case of *Paton v United Kingdom*.147 There, a prospective father, William Paton, sought an injunction against the British Pregnancy Advisory Service (BPAS) in order to prevent his estranged pregnant wife from undergoing an abortion against his own wishes. After exhausting the remedies under the domestic law148 Mr Paton addressed the ECtHR, while claiming, *inter alia*, that the State violated Article 2 of the ECHR by legalising abortion and, thus, denying any legal protection to the embryo (foetus).

His complaint under the provision examined was, nonetheless, rendered manifestly ill-founded within the meaning of Article 27(2) of the ECHR.149 In particular, the Commission refused to determine whether a foetus, *qua* foetus, could be regarded as enjoying the right to life in line with the first sentence of Article 2(1) of the ECHR.150 It was, however, underlined that foetal right to life must be assessed in conjunction with the analogous right enjoyed by the pregnant woman. Otherwise, vesting an embryo (foetus) with absolute,

147 *Paton v United Kingdom* [1980] 3 EHRR 408; hereinafter *Paton v UK*.
148 The injunction was ultimately refused by Sir George Baker P during the proceedings before the Family Division of the High Court. See: *Paton v British Pregnancy Advisory Service Trustees and Another* [1979] QB 276.
149 *Paton v UK* (n 147) para 24.
150 Ibid para 23.
unconditional protection would exclude a possibility of performing a legal abortion even in cases where maternal life was at stake.\textsuperscript{151}

A similar line of reasoning to the one adopted in *Paton v UK* was subsequently followed in the ECtHR’s caselaw pertaining to the right to obtain a legal abortion under the Contracting Parties’ national laws,\textsuperscript{152} or the right to access information concerning abortion facilities in other jurisdictions.\textsuperscript{153} Finally, outside the abortion context, the Court unequivocally rejected a proposal, whereby the right to life in the meaning of Article 2 of the ECHR was enjoyed by cryopreserved embryos *in vitro*.\textsuperscript{154}

According to this author, the ECtHR’s careful approach to sensitive issues, such as foetal position amongst human rights, can be most vividly illustrated with recourse to its landmark 2004 judgment delivered in the case of *Vo v France*,\textsuperscript{155} where foetal right to life was examined outside the abortion context.

The facts of the case were the following. The applicant, Thi-Nho Vo, attended a routine antenatal examination in a public hospital during the sixth month of her pregnancy. Due to an administrative error, she had been mistaken with another patient, a Ms Thi Thanh Van Vo, who, at the same time and place, awaited removal of a contraceptive coil. As both women struggled to communicate in French, the

\textsuperscript{151} Ibid para 19.

\textsuperscript{152} See, for example: *H v Norway* (European Commission of Human Rights, 19 May 1992); *Boso v Italy* [2002] ECHR 846; *Tysiąc v Poland* [2007] 45 EHRR 42; *A, B and C v Ireland* [2010] ECHR 2032.

\textsuperscript{153} See, for example: *Open Door and Dublin Well-Woman v Ireland* [1993] 15 EHRR 244.

\textsuperscript{154} See: *Evans v United Kingdom* [2006] ECHR 200 [2007] 43 EHRR 21. The case will be more thoroughly examined in the fourth part of the thesis devoted to succession law.

\textsuperscript{155} *Vo v France* [2005] 40 EHRR 12; hereinafter *Vo*. 
applicant proceeded to the treatment room when, in fact, the ‘other’ Ms Vo had been referred. In the course of the mistakenly performed procedure, the applicant’s amniotic sac had been ruptured, which resulted in injuring the foetus and subsequent termination of the pregnancy on medical grounds.

Ms Vo brought criminal charges against the operating gynaecologist on the grounds of an unintentional foeticide and bodily harm which she had suffered during the erroneous intervention. The domestic criminal court and, subsequently, also the Cour de Cassation\textsuperscript{156} acquitted the accused of the former charge, whereas the latter was rendered statute-barred.

Before the ECtHR the applicant maintained that Article 2 of the ECHR should apply to an embryo (foetus) and that legalising performance of abortions under the domestic law must not hinder the State’s obligation to protect the unborn human life. In addition, she argued that France violated the abovementioned principle by failing to provide a criminal remedy in cases of wrongful foetal death. Although she could institute a claim for damages against the wrongdoer, in her view, the civil law remedy did not provide sufficient deterrence, if compared with other cases where a human being was deprived of its life due to another’s negligence.

With reference to the former claim, the ECtHR refused to acknowledge \textit{expressis verbis}, whether the right to life was enjoyed before birth. Instead, the judges

\textsuperscript{156} The French Supreme Court.
decided that it was ‘neither desirable, nor even possible to determine in the abstract’ whether an embryo (foetus) could be regarded as a person for the purposes of Article 2.\textsuperscript{157} Similarly, the judges refrained from providing any concrete guidelines as to when one becomes a person. The ECtHR pointed to diverse views on the beginning of human life, while also acknowledging varying standards of protection of an embryo (foetus) under the law of the Contracting Parties. As was further proposed, determining when one acquires the right to life comes ‘within a margin of appreciation’, which excludes a possibility to harmonise the law pertaining to foetal rights on a European level.\textsuperscript{158} At the end of their deliberations, the majority of the panel, while relying on the ‘even assuming’ formula,\textsuperscript{159} found that there had been no violation of the right to life in the case presented by Ms Vo.\textsuperscript{160}

With reference to the latter claim, according to the ECtHR, France did not breach its obligation stemming from Article 2, as the disciplinary measures and civil remedies were in place to overcome the lack of a criminal sanction in the scenario examined.\textsuperscript{161}

\textsuperscript{157} Vo (n 155) para 85.

\textsuperscript{158} Ibid para 82. This view was, nonetheless, opposed by Rees J, who proposed that interpretation of fundamental rights should not come under discretion of the contracting parties. See: Vo (n 155) Dissenting Opinion of Judge Ress (para 8).

\textsuperscript{159} Even assuming that Article 2 would be applicable to Ms Vo’s case.

\textsuperscript{160} The author should, nonetheless, acknowledge the particular lack of unanimity among the judges, while determining whether Article 2 of the ECHR would vest the right to life in an embryo (foetus). Rozakis J delivered a separate opinion, which was supported by Ress, Caflisch, Fischbach, Lorenzen and Thomassen JJ. Their views were counterargued by Costa and Traja JJ.

\textsuperscript{161} As the ECtHR put it, such obligation can be fulfilled, ‘if the legal system affords victims a remedy in the civil courts, either alone or in conjunction with a remedy in the criminal courts’, while allowing the victim to obtain damages, once the physician’s liability has been established. See: Vo (n 155) para 90. This was, again, criticised by Ress J who pointed to the diverse roles fulfilled by diverse remedies and to the importance of deterrence. See: Vo (n 155) Dissenting Opinion of Judge Ress (para 1).
On the margin, it should be observed that the approach of the majority of judges, who delivered the ruling in the case of Vo, was duly criticised by some of the commentators.\textsuperscript{162} Most notably, it has been argued that the ECtHR missed the opportunity to determine, whether the right to life, protected under Article 2 of the ECHR, could be equally understood as ‘the right to prenatal life’. While opting for the ‘diplomatic’ approach, the Court relied on its previous thematically related caselaw which touched upon the contentious issue of abortion. At no time was the right to life assessed in the present, wrongful foetal death context.\textsuperscript{163} This author agrees that the ECtHR was, more than likely, unwilling to touch upon the controversies stemming from the so-called ‘maternal-foetal conflict’ as well as the related notion of foetal viability. Obviously, the evasive tactic could not result in any satisfactory answer to the question of whether an embryo (foetus) falls within the scope of the provision examined.

As should be further noted, in the 1977 ruling delivered in the case of Brügemann and Scheuten v Germany\textsuperscript{164} the Commission of Human Rights also examined the possible links between foetal right to life and the right to respect for private and family life, secured by Article 8 of the ECHR. There, the applicant maintained that the 1971 amendment of German Criminal Code, which criminalised performance of abortions\textsuperscript{165} during the first trimester of gestation, was, \textit{inter alia}, incompatible with the last-mentioned provision. The Commission, again,

\textsuperscript{162} See, for example: JK Mason, ‘Case Commentary: What’s in a Name? The Vagaries of \textit{Vo v France}’ (2005) 17(1) CFLQ 97 or E Spain, ‘\textit{Vo v France}: Reasonable Settlement or Missed Opportunity?’ (2006) 2 IFLJ 16.
\textsuperscript{163} See: Mason (n 162) 97 and Spain (n 162) 19.
\textsuperscript{164} \textit{Brügemann and Scheuten v Germany} [1977] 3 EHR.
\textsuperscript{165} Save in specific circumstances.
restrained from determining the status of an embryo (foetus) under the ECHR, by stating that abortion should not be regarded as affecting solely the sphere of maternal privacy; once a pregnancy is established, the woman's private life becomes intrinsically linked to the life of her embryo (foetus). Ultimately, the Commission acknowledged no violation of Article 8 of the ECHR and stated that the disputed law remained within the boundaries of the State's discretion.

2.1.2.2 Oviedo Convention 1997

With respect to the body of corresponding documents, which were also drawn under the auspices of the Council of Europe, attention should be drawn, in the first place, to the Convention on Human Rights and Biomedicine 1997, more popularly referred to as the Oviedo Convention.166

As Article 1 of the CHRB generally explains, the Convention attempts to provide axiological foundations for regulating human rights on the national level, while addressing challenges brought by the developing medicine. The drafters also acknowledge importance of fundamental values, which are indispensable to all ‘human beings’ including life, dignity or physical integrity.

166 Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine of 4 April 1997, ETS No 164; hereinafter the CHRB. The Convention has been so far signed by thirty-five states and ratified by twenty-nine of them. As Madden explains, Ireland has not signed CHRB due to constitutional difficulties. See: D Madden, ‘Recent Developments in Assisted Human Reproduction: Legal and Ethical Issues’ (2002) 7(2) MLJI 53, 55-56.
167 Also referred to as ‘everyone’.
In addition, an equally undefined term of ‘person’ can be encountered in the text of Article 5. At the same time, since the provision pertains to consent to healthcare matters – with recourse being made to issues, such as obtaining adequate information or the right of withdrawal – we may speculate that, here, the word ‘person’ is to be understood as a human already born.

In the present context, however, reference should, most particularly, be made to the content of Chapter IV of the CHRB, entitled ‘Human Genome’. Its opening Article 11 prohibits all forms of discrimination against ‘a person’ on the grounds of his genetic heritage. Considering the subject matter of the Chapter, some commentators have argued that the scope of protection envisaged by the last-mentioned provision extends to a human embryo in vitro. For instance, one would not be allowed to select only normally developing embryos for the purposes of more generally understood ‘experimentation’.\textsuperscript{168}

According to Article 12, performance of predictive genetic testing (or scientific research) is only authorised for reasons pertaining to health. Hence, assumingly, some ART-related procedures – most importantly, Preimplantation Genetic Diagnosis (PGD) – would be classified as ‘predictive genetic testing’. Nonetheless, similarly to the case of the hitherto enumerated provisions, the wording of Article 12 does not clarify, who a ‘test subject’ is. As has been explained, further interpretation of the provision has been left to the Contracting Parties, proving that the Convention drafters recognise ‘the margin of appreciation’, which is

\textsuperscript{168} See also: Nawrot (n 2) 231.
reflected by varying attitudes to the issue of assisted reproduction under domestic legislation worldwide.\textsuperscript{169} Article 14, on the other hand, seems to explicitly refer to PGD, by prohibiting sex-selection of children conceived via ART, unless it is aimed to avoid passing on a serious, hereditary, gender-related disease.

Finally, according to Article 18, adequate protection must be guaranteed to embryos \textit{in vitro} that have been subjected to scientific research in all cases where such has been permitted under domestic law. At the same time, the provision neither specifies what ‘adequate protection’ consists of, nor does it list any of the potential obligations for the Contracting Parties that the provision may entail.

As could be observed, the terms ‘human being’, ‘person’ and ‘everyone’, still appearing in the text of the CHRB, had previously been subject to heated international debate. The lack of unanimity was particularly visible during preparatory works on the text of the Convention between 1991 and 1992. Some of the delegates insisted on using a formally defined term of ‘a human embryo’ in respect of provisions pertaining to unborn life in lieu of the three rather ambiguous terms. They also suggested including direct references to protection of an embryo (foetus) under the law regulating performance of abortions. Others, on the other hand, opted for the more open-ended formulations, while arguing that the Convention’s aim was to propose minimum standards of protection to be

considered by the Contracting Parties, and not to force any particular solutions upon them.\textsuperscript{170}

In June 1993 the Steering Committee on Bioethics (CDBI) decided that the expression 'human being' was to be interpreted broadly; i.e. as encompassing also an embryo (foetus). However, after some further deliberations, the CBDI changed its stance and affirmed the neutral wording of Article 1. Consequently, in the absence of any accompanying definitions, interpretation of these terms was eventually left to the Contracting Parties. As Nawrot reports, the Committee's decision might have been made amid fears that a broader definition would be incompatible with the more liberal abortion laws, which had already been adopted in many European jurisdictions. The last voting during the preparatory works took place in June 1995; since no more alterations to the text had been proposed at that stage, Article 1 of the CHRB – in its current version – was finally approved by the drafters.\textsuperscript{171}

On the margin, we may note that – prior to enactment of the CHRB – some pertinent guidelines concerning protection of an embryo (foetus) had been included in the Recommendation 1046, entitled: Use of human embryos and foetuses for diagnostic, therapeutic, scientific, industrial and commercial purposes, which was drawn in 1986 by the Council of Europe’s Parliamentary Assembly.\textsuperscript{172}

\begin{flushleft}
\footnotesize
\textsuperscript{170} Nawrot (n 2) 232.
\textsuperscript{171} Ibid 236.
\textsuperscript{172} See: Recommendation 1046/1986 on the use of human embryos and foetuses for diagnostic, therapeutic, scientific, industrial and commercial purposes.
\end{flushleft}
Most notably, the Recommendation provided that an embryo (foetus) was to be treated with respect due to its dignity.\textsuperscript{173} On that account, the Assembly also requested the Committee of Ministers\textsuperscript{174} to urge the governments of the Contracting Parties to legally limit the use of embryos (foetuses), as well as their tissues and organs, to solely therapeutic purposes.\textsuperscript{175} In addition, the Assembly condemned some of the most unethical uses of ART, such as: creation of surplus embryos solely for research purposes, creation of hybrids and chimeras, cloning or sex selection of embryos \textit{in vitro} via PGD in absence of any health-related indications.\textsuperscript{176}

\textbf{2.1.3 European Union Law}

Considering the original aims in which the first European Communities were established, it does not come as a surprise that rights of an embryo (foetus) under EC (and later EU) law, remained, for a long time, an issue of marginal importance. One should, nonetheless, acknowledge a 1991 ruling delivered by the European Court of Justice in the case of \textit{Society for the Protection of Unborn Children Ireland} <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=15080&lang=en> accessed 31 May 2017; hereinafter Recommendation 1046/1986.

\textsuperscript{173} Ibid point 10.

\textsuperscript{174} The decision-making body of the Council of Europe.


\textsuperscript{176} Recommendation 1046/1989, point 14(a)(4). As will be acknowledged in the forthcoming section, these activities were later criminalised under the law of numerous European jurisdictions.
There, three Irish student organisations were distributing contact details of British abortion clinics with the aim to assist pregnant women who sought to avail of the procedure outside the jurisdiction. Fourteen members and officers of these groups were subsequently sued by SPUC for an alleged violation of the right to life of the unborn, protected under Article 40.3.3° of Bunreacht Na hÉireann. At the final stage of the domestic litigation, the High Court – due to the existing cross-border element – referred the question of possible violation of EC law\textsuperscript{178} to the European Court of Justice. Before the ECJ, the defendants argued that distribution of the aforesaid data fell into the scope of Articles 59 and 60 of the (then binding) EEC Treaty, which safeguarded, \textit{inter alia}, the right to travel to another Member State in order to receive a service.

The ECJ confirmed that medical termination of pregnancy was to be treated as a service within the meaning of European Community law\textsuperscript{179} and, hence, it was to be encompassed by the provisions examined.\textsuperscript{180} Nonetheless, it was also decided that prohibition on distributing details of foreign abortion clinics did not constitute a restriction within the meaning of the EEC Treaty.\textsuperscript{181} It is because, according to the ECJ, Member States enjoyed discretion to curtail free movement of services for justified policy reasons. Hence, in the aftermath of the ruling, the Irish High Court was able to impose a permanent injunction on the defendant organisations. At the same time, as could be concluded, the case discussed did not

\textsuperscript{177} Society for the Protection of Unborn Child Ireland Ltd v Grogan [1991] ECR 4685; hereinafter \textit{SPUC v Grogan}.
\textsuperscript{178} As it then was.
\textsuperscript{179} \textit{SPUC v Grogan} (n 177); para 16.
\textsuperscript{180} Currently Article 57 of the Treaty on the Functioning of the European Union (hereinafter TFEU).
\textsuperscript{181} \textit{SPUC v Grogan} (n 177); para 26.
pertain to foetal right to life in the context of abortion admissibility or to any other foetal prerogatives under European law, but it rather focused on the scope of one of the fundamental freedoms, guaranteed by the EEC (now TFEU) Treaty.

While the cooperation between the Member States progressively expanded into numerous non-economic domains, the position of an embryo (foetus) slowly became an object of more interest for European law, particularly (if not exclusively) in the context of assisted reproduction.

With reference to the non-binding sources pertaining to ART, we could, in the first place, point to a body of resolutions adopted – over the years – by the European Parliament. It is particularly important to acknowledge two 1989 documents, first, the Resolution on the ethical and legal problems of genetic engineering, commonly known as the Rothley Report; and, second, the Resolution on artificial insemination ‘in vivo’ and ‘in vitro’, commonly known as the Casini Report.

As should be further explained, both documents stipulate granting protection to human embryos in vitro, while condemning their use for solely commercial purposes and for random experimentation. Moreover, according to the Casini Report, the restrictions imposed on performance of ART are intended to safeguard the interests of both the resulting children and the prospective parents.

---

184 Casini Report (n 183) para 36.
(particularly the mother). As was further suggested, a number of embryos selected for subsequent implantation in the uterus should be 'biologically adequate'. Finally, in both Reports it was proposed that that cryopreserved, surplus embryos were not to be experimented upon, but would be defrosted and allowed to perish.\textsuperscript{185} Attention should also be drawn to the collection of Parliamentary resolutions condemning human cloning, such as the most recent Resolution on human cloning 2000,\textsuperscript{186} whose point 2 describes therapeutic cloning as being contrary to the public policy of the EU.\textsuperscript{187}

As for Directives, one should mention a number of documents setting harmonised standards to be observed by the healthcare providers in the course of various activities involving the use of embryos \textit{in vitro}.\textsuperscript{188}

The gradual shift towards more comprehensive protection of artificially generated human embryos at the European level could be illustrated by the 2011


ruling delivered by the ECJ in the case of Oliver Brüstle v Greenpeace eV. In brief, Brüstle sought patent specification in respect of a pioneering method of medical treatment, which consisted of transplanting neural precursor cells directly into the nervous system. The patent was intended to facilitate production of an unlimited number of such cells that were planned to be retrieved from artificially generated human embryos at the blastocyst stage. The German Federal Supreme Court (Bundesgerichtshof) sought a preliminary ruling from the ECJ in order to determine whether granting the patent would be authorised in the light of European law.

According to the applicant, in the absence of a binding definition on the grounds of EU law, the term ‘embryo’ was to be understood as an entity that comes into an existence fourteen days after fertilisation. Since the neural precursor cells were to be retrieved at an earlier, blastocyst stage, the treatment was not affecting physical integrity of such embryos.

The ECJ, on the other hand, proposed that, in cases where fertilisation was intended to commence the process of development of a human being, a fertilised ovum was to be regarded as a human embryo ab initio.

The Court further relied on a broad interpretation of article 6(2)(c) of the previously mentioned 2004 Directive, whereby any use of human embryos for industrial or commercial purposes is to be rendered as non-patentable. Hence,

---

190 That is, around five days post-fertilisation.
using embryos *in vitro* for the sole purpose of scientific research was decided to fall into the scope of the provision examined.\(^\text{191}\) In addition, the Court made reference to the 1998 Directive on the legal protection of biotechnological inventions, which disallows granting patents that would be contrary to morality or to the principles of public order.\(^\text{192}\) In addition, although the technique of retrieving stem cells from human embryos *in vitro* might not yet have been popularised in 1998, the Directive discussed had already stipulated that uses of human embryos for non-therapeutic purposes should be excluded from patentability by domestic law of the Member States.\(^\text{193}\)

Ultimately, it was held that a procedure, which consists of removing stem cells from human embryos (at the blastocyst stage) but which leads to subsequent destruction of these embryos, cannot be patented in compliance with the EU law. On that account, Brüstle’s patent was held to be invalid.\(^\text{194}\)

To conclude, we could propose that the scope of EU law pertaining to antenatal prerogatives is limited to scarce provisions of a technical character, aimed at securing adequate, harmonised standards of performance of ART. Furthermore, for reasons similar to those discussed in the preceding section, the prospect of

---


\(^\text{193}\) Ibid para 42.

\(^\text{194}\) For further commentary on the case discussed, see for example: AA Sheikh, ‘The ECJ, the Human Embryo and Patents’ (2011) 17(2) MLJI 62.
achieving harmonised standards of protection of foetal rights under EU law seems, indeed, very unlikely.

2.2 Embryo (Foetus) and National Law

2.2.1 Public versus Private Law

The division between public and private law seems both perfectly logical and age-old, at least from the perspective of continental law.

It deserves to be noted that the above dichotomy was already relied upon in the times of Ancient Rome. As an example, we could cite a passage from Livy’s commentary, describing the Law of the Twelve Tables (Lex Duodecin Tabularum)\(^{195}\) as ‘the source of entire law, both public and private’.\(^{196}\) Furthermore, according to an excerpt from the Justinian Digest, commonly attributed to Ulpian: ‘(p)ublic law is that which respects the establishment of the Roman commonwealth, private that which respects individual interests, some matters being of public and others of private interests’.\(^{197}\)

---

\(^{195}\) Law of the Twelve Tables (c 451 - 450 BC) is estimated to be the earliest codified piece of Roman legislation.

\(^{196}\) See: K Kolańczyk, Prawo Rzymskie (Państwowe Wydawnictwo Naukowe 1973) 22.

More contemporarily, Planiol characterised the division as ‘capital and quite usual’ on the grounds of his most famous 1899 work, entitled *Traité Élémentaire de Droit Civil*.\(^{198}\) While approving Ulpian’s ‘public versus private interest’ criterion, Planiol indicated a complementary benchmark which could be used to classify legal norms under the two, *prima facie*, bipolar branches, and which can be described as the ‘acting as an agent versus acting as a principal’. As he argued, an individual exercising a norm of public law acts by virtue of delegation emanating from the sovereign, whereas the same individual exercising a norm of private law acts in his own name.\(^{199}\)

On that account, it could be proposed that norms of private law regulate relations between autonomous parties. Thanks to this autonomy, a private law relationship will essentially lack the element of imperative submission of one subject to another.\(^{200}\)

In line with the continental doctrine, public law is traditionally subdivided into constitutional, administrative and criminal law. Private law, on the other hand, will encompass broadly defined civil law.\(^{201}\)

---


\(^{199}\) Ibid.


\(^{201}\) Some commentators also acknowledge that commercial (business) law with all its sub-branches (such as, most notably, company law, competition law and intellectual property law) constitutes an integral part of civil law. See, for example: A Wolter, J Ignatowicz and K Stefaniuk, *Prawo Cywilne. Zarys Części Ogólnej* (2nd rev edn, Lexis-Nexis 2001) 23-24. Furthermore, continental commentaries indicate that civil law constitutes a principal, but an integral part of private law, whereas in the common law literature the terms ‘civil law’ and ‘private law’ seem to be used interchangeably. See, for example: the definition of ‘civil law’ in J Law and EA Martin (eds), *Oxford Dictionary of Law* (6th edn, OUP 2006) 92.
In spite of the above cited guidelines, drawing a vivid line between public and private law may, at times, prove a very complicated, if not impossible, task. Firstly, it is because many factual scenarios might be, in fact, simultaneously governed by the norms of both public and private law.\textsuperscript{202} Secondly, in certain areas of law, there will always be a significant degree of overlap between the two branches.\textsuperscript{203} Thirdly, blurring the boundaries may be partially owed to the phenomenon of constitutionalisation of private law, which can now be more frequently observed in diverse jurisdictions worldwide.\textsuperscript{204}

Finally, the degree to which the division between public and private law will be acknowledged, largely depends on legal traditions and practices that are being followed in a given country. According to Wilson, due to the pragmatic attitude prevailing in common law jurisdictions, the dichotomy discussed is likely to be treated in a more relaxed manner.\textsuperscript{205} As he further explains, written sources, such as codes or statutes, play only a secondary role to both judges and legal scholars in the process of defining, applying and developing the law. Hence, we could argue that – as opposed to continental law – common law will place the emphasis on facts and remedies, as opposed to rigid, conceptual divisions.\textsuperscript{206}

\textsuperscript{202} For example, a person who committed a battery can be liable under the principles of both criminal law and the law of civil obligations.

\textsuperscript{203} For example, labour law combines many elements of both public (mainly administrative) and private (mainly contract) law.

\textsuperscript{204} See: MV Onufrio, ‘The Constitutionalization of Contract Law in the Irish, the German and the Italian Systems: Is Horizontal Indirect Effect Like Direct Effect?’ (2007) 7 InDret 1.

\textsuperscript{205} See: G Wilson, ‘Comparative Legal Scholarship’ in M McConville and WH Chui, Research Methods for Law (Edinburgh University Press 2007) 95.

\textsuperscript{206} Ibid.
At the same time, while examining the scope of prerogatives attributable to an embryo (foetus), we could, *prima facie*, claim that the division between public and private law seems to be relatively tangible under law of numerous jurisdictions. It is because, essentially, different aspects of such protection are being realised in each of the domains examined; and different attitudes (remedies) are relied upon in order to fulfil these tasks.

### 2.2.2 Embryo (Foetus) and Public Law

While tackling foetal rights from the public law perspective, attention should be drawn, in the first place, to the provisions of domestic criminal laws. Here, the laws' main mission consists of penalising cases of unlawful interference with the bodily integrity of an embryo (foetus). Hence, the author finds it necessary to consider regulation of pregnancy terminations, as of 1 May 2018, as well as criminal sanctions envisaged in cases of foeticide and third party foetal assault.\(^{207}\)

#### 2.2.2.1 Abortion

We may initially note that, for many past centuries, criminal law of numerous European jurisdictions equated abortion with homicide. Furthermore, in line with the predominant Christian philosophy, which was discussed in the previous

---

\(^{207}\) Due to space constraints, the author is not going to examine whether an embryo (foetus) could be treated as another person for the purpose of applying the self-defence doctrine. As should be briefly explained, in the present context, a person could escape criminal liability, if it was accepted that he applied defensive (deadly) force with the aim of saving the life *in utero*. Here, a classic example would be assaulting or killing a gynaecologist, who was on a verge of performing an abortion. For an interesting discussion on the issue, see, for example: S Christie, ‘Crimes Against the Foetus: The Rights and Wrongs of Protecting the Unborn’ (2006) 12(2) MLJI 65, 69-72.
chapter, the crime was – also for a very long time – penalised in accordance with the animation (ensoulment) criterion.

As for historic law of continental Europe, reference should be made, most notably, to the provisions of the German Particular Code 1507\textsuperscript{208} and to its more comprehensive successor, i.e. the Criminal Code 1532 (\textit{Carolina}), whose article 133 envisaged a death penalty for both the abortionists and the would-be mothers.

In France, on the other hand, imposing criminal liability in the situations examined remained within the sphere of discretion customarily enjoyed by the judicial authorities. In principle, a woman who had terminated her pregnancy, could incur a death penalty only in case where her foetus had already been animated (ensouled).

The tendency to punish procurement of late abortions in a particularly harsh manner continued throughout the eighteenth-century. As an example, we could point to provisions of the Austrian Criminal Code 1768 (\textit{Theresiana}), whereby the crime discussed was liable to a death penalty, preceded by tortures. Similarly, the punishment could be, nonetheless, exceptionally mitigated, if the termination had been performed during earlier weeks of the pregnancy.\textsuperscript{209}

\footnotesize
\textsuperscript{208} Also known as the Schwarzenberg's Code or \textit{Bambergensis}.
\textsuperscript{209} See: Nawrot (n 2) 106-108.
Due to the intellectual movement of Enlightenment, which dominated Europe throughout the eighteenth century, the ensoulment criterion eventually became irrelevant to the issue of criminal liability for performing (or undergoing) an abortion. As a result, criminal law regulating the subject matter in continental jurisdictions gradually became more relaxed.\(^{210}\)

For instance, in the Criminal Code 1786 (\textit{Leopoldina}), which remained in force in the Habsburgs' Italian territories, procuring (or undergoing) a pregnancy termination was still treated as a crime but, instead of the death penalty, it incurred imprisonment (including life imprisonment) or exile. Moreover, the following the Habsburgian Criminal Code 1787 – which is better known under the name \textit{Josephina} – provided that the penalty of imprisonment, combined with forced labour, could not exceed five years.

Finally, the French Criminal Code 1791, enacted by the Constituent Assembly during the Revolution, envisaged imprisonment of an abortionist but did not impose criminal liability on the would-be mother who had availed of the termination.\(^{211}\) In 1939 the law relaxed again, as the Code was altered to permit an abortion that would save the pregnant woman's life. Further and ultimate liberalisation of the French abortion law was achieved by the Pregnancy Termination Act 1975,\(^{212}\) commonly referred to as Veil Law (\textit{La Loi Veil})

\(^{210}\) As should be recalled, the movement is also popularly linked to codification of civil law, first written constitutions and developments in the area of human rights in numerous European countries.
\(^{211}\) Nawrot (n 2) 106-108.
\(^{212}\) \textit{Loi n° 75-17 du 17 janvier 1975 relative à l'interruption volontaire de la grossesse}, Official Journal of the Republic of France of 18 January 1975, 739.
With reference to common law and mixed jurisdictions, it should be explained that the law of England and Wales initially regarded abortion of a quickened foetus solely as a misdemeanour. However, under the Lord Ellenborough's Act 1803, it subsequently became a severely punishable felony. The latter's legislative successor, the Offences Against the Person Act 1837, still disallowed performance of terminations at any (even a very early) stage of a pregnancy. The ban was upheld by sections 58 and 59 of the statute's following 1861 version. It should be acknowledged that the abovementioned provisions technically remain in force up to the present day in the jurisdiction examined.

In practice, however, the law on abortion became significantly relaxed after the enactment of the Abortion Act 1967, which became binding law in England, Wales and Scotland. The exception was initially defined in a very liberal manner and, in consequence, termination performed during the first weeks of a pregnancy was almost always regarded as lawful. Nonetheless, the law subsequently became more restrictive after the statute examined was amended by section 37 of the Human Fertilisation and Embryology Act 1990.

As for the currently binding law on abortion in both continental and common law European countries, it will suffice to say that the solutions adopted vary between

---

213 Moving inside the womb.
214 Offences Against the Person Act 1837 (c 100).
215 Abortion Act 1967 (c 87).
216 In Northern Ireland performance of abortions is still regulated under sections 58 and 59 of Offences against the Person Act 1861 and sections 25 and 26 of Criminal Justice Act (Northern Ireland) 1945 (c 15).
217 Human Fertilisation and Embryology Act 1990 (c 37); hereinafter the HFEA 1990.
very strict (e.g. Ireland), rather strict (e.g. Poland), rather lenient (e.g. Germany, France and the United Kingdom) and very lenient (e.g. the Netherlands).

In Ireland, in line with provisions of the Protection of Life During Pregnancy Act 2013, termination of a pregnancy can only be lawfully performed in order to prevent an existing risk of maternal death, which is incurred in the pregnancy.\footnote{As should be noted, the issue of protection of antenatal rights under Irish constitutional law (i.e. under Article 40.3.3° of the Irish Constitution) will be thoroughly discussed in Part 2, devoted to the Law of Torts.} The risk discussed will more frequently accompany a medical condition; however, under certain circumstances an abortion can also be authorised in cases of maternal suicidal ideation, directly linked to continuation of the pregnancy.\footnote{Protection of Life During Pregnancy Act 2013 (No 35 of 2013), s 9. However, in line with the recently published catalogue of governmental policies, in case where the forthcoming referendum on the 8th Amendment is passed in May 2018, the cited statute would be repealed in full. See: Policy Paper on Regulation of Termination of Pregnancy of 8 March 2018 <http://health.gov.ie/wp-content/uploads/2018/03/Policy-paper-approved-by-Government-8-March-2018.pdf> accessed 22 March 2018.}

As far as Polish law is concerned, the Act on Family Planning, Protection of the Human Foetus and Conditions for Abortion Admissibility 1993\footnote{Act of 7 January 1993 on Family Planning, Protection of the Human Foetus and the Conditions for Abortion Admissibility, Official Journal of the Republic of Poland, No 1993.17.78; hereinafter Family Planning Act 1993.} generally disallows performance of abortions save in three enumerated scenarios, namely: threat to maternal life (health) due to the pregnancy; significant risk that the foetus is severely and irreversibly impaired or that the resulting child will be suffering from an incurable, life-threatening condition and justified suspicion that the pregnancy resulted from a criminal offence.\footnote{Family Planning Act 1993, art 4a §1.}
In France, the Law Concerning Pregnancy Termination and Contraception 2001\textsuperscript{222} authorised legal abortions on demand up to the twelfth week of a pregnancy. Such authorisation remains in force up to the present day, as can be evidenced with recourse to provisions of the Code of Public Health.\textsuperscript{223} Terminations of more advanced gestations are conditionally permitted in cases of an existing risk to maternal life (health) or poor foetal prognosis (grave impairment).\textsuperscript{224} As should be added, the 2015 amendment of the statute discussed repealed the previously existing seven-day ‘cooling-off’ period before the first request for an abortion expressed by a pregnant woman and her final, written statement to that effect.

Similarly, in Germany abortion on demand during the first trimester of gestation is not punishable, provided that adequate counselling had been offered to the pregnant woman prior to the procedure. It can also be authorised in the circumstances described in both the Polish and French statutes.\textsuperscript{225}

As for England, Wales and Scotland, the Abortion Act 1967 stipulates that a pregnancy, which did not exceed the twenty-fourth week, can be legally terminated in case of an established risk of injury to the physical (or mental) health of a pregnant woman\textsuperscript{226} or to any existing children of her family. Finally,

\begin{footnotesize}
\textsuperscript{224} Ibid arts L2213-1 – L2213-3.
\textsuperscript{226} Or when termination is aimed at preventing the above described injury (injuries).
\end{footnotesize}
an abortion can also be offered to the woman in the presence of substantial risk that the resulting child may suffer from severe physical (or mental) abnormalities.\(^{227}\)

Finally, in the Netherlands, pursuant to the Law on the Termination of Pregnancy 1981 in its current form,\(^{228}\) an abortion can be legally performed on the woman’s demand up to the twenty-first week of the pregnancy.

### 2.2.2.2 Foetal Assault and Foeticide

Similarly to the case of legal framework of abortion, also the regulation concerning foetal assault and foeticide varies from jurisdiction to jurisdiction. The criminal law of some countries, such as Poland, does not expressly envisage any sanctions for foeticide. Similarly, in France foeticide was excluded from a catalogue of criminal offences by virtue of a judicial decision of the *Cour de Cassation*.\(^{229}\)

On the other hand, in line with article 157a §1 of the Polish Criminal Code 1997,\(^{230}\) causing an injury or health disturbance to an embryo (foetus) incurs imprisonment of up to two years. According to the following paragraph, a medical

---

\(^{227}\) Abortion Act 1967 (c 87), s 1(1).


practitioner will escape criminal liability in the scenario examined, as long as it can be established that he had acted in a medical emergency, while aiming to preserve the life (or health) of either the pregnant woman, her foetus or both of them.

As for common law countries, attention should be drawn to the 1990 ruling delivered in the case of *R v Tait*\(^\text{231}\) by the Criminal Division of English Court of Appeal. As was then decided, an embryo (foetus) was not to be considered as a person for the purpose of section 16 of the previously mentioned Offences Against the Person Act 1861. On that account, the Court ultimately decided that a threat to kill a child *in utero* did not *per se* constitute a criminal offence.

In the present context, we should also point to the Court’s subsequent decision issued in the case of *Attorney General’s Reference (Number 3 of 1994)*\(^\text{232}\). There, B stabbed M in the face, back and abdomen during a domestic dispute. At the time of the accident M was around twenty-two weeks pregnant with their child and, as a result, she went into labour seventeen days later. The resulting child, S, was born severely premature and subsequently died of pulmonary complications at the age of four months.

In the absence of direct evidence of either murder or manslaughter, B – upon the judge’s instruction – was acquitted by the jury at trial; however, while relying on

\(^{231}\) *R v Tait* [1990] 1 QB 290.

section 36 of the Criminal Justice Act 1972, the Attorney General subsequently referred the matter to the Court of Appeal. The Court reversed the decision in respect of murder, which was followed by the defendant’s appeal to the House of Lords. As the latter ultimately concluded, assaulting a pregnant woman, which led to premature labour causally linked to the subsequent death of the resulting child, constitutes an instance of manslaughter but not of murder.

Moreover, the law of England and Wales still recognises an offence of ‘child destruction’ – i.e. ending the life of an embryo (foetus) – which was introduced by section 1(1) of the Infant Life (Preservation) Act 1929. Similarly, in Ireland destruction of ‘unborn human life’ has been expressly defined as a criminal act by section 22 of the Protection of Life During Pregnancy Act 2013.

We could note that criminal liability for foeticide has also been regulated under the American state law. The majority of states have, to date, adopted corresponding statutes, which criminalise actions against the foetus, while regarding them as either homicide or foeticide. However, formal thresholds allowing for imposition of criminal liability in the scenarios examined are not uniform, with some states adhering to the point of conception, while others – to the point of quickening or foetal viability.

---

233 Criminal Justice Act 1972 (c 71).
235 Infant Life (Preservation) Act 1929 (c 34).
On the other hand, in some states – including, for instance, Arkansas – an embryo (foetus) was excluded from the scope of criminal law definition of a ‘person’, following the Supreme Court ruling. An opposing line of reasoning was, nonetheless, followed by the Supreme Court of South Carolina in its 1984 decision delivered in the case of *State v Horne*. There, a husband committed an assault on his heavily pregnant wife, which contributed to intrauterine death of the full-term foetus. As the Court underlined, such conduct was to be treated in the same manner as homicide. An analogous outcome was reached some thirteen years later in the case of *Whitner v State of Carolina*, where foetal death was due to maternal excess consumption of illicit drugs. With recourse to *Horne*, the Court equated a viable foetus with a victim of child abuse and, consequently, the would-be mother was found guilty of homicide.

### 2.2.2.3 Crimes Pertaining to Performance of ART

As should be further observed, in the aftermath of more recent medical advancements, the majority of jurisdictions have also opted for regulating criminal liability for improper treatment of embryos generated *in vitro*.

For example, under the provisions of the previously cited HFEA 1990, regulating the use of ART in the United Kingdom, storing or using such embryos

---

237 See: *Arkansas Department of Human Services v Collier* [2003] 95 SW 3d 772, where the State’s Supreme Court decided that an embryo (foetus) did not fall within the scope of the definitions of ‘victim’ and ‘juvenile’. See also: Christie (n 207) 66-67.

238 *State v Horne* [1984] 282 SC 444, 319 SE 2d 703; hereinafter *Horne*.


240 In conjunction with its 2008 amendment; hereinafter referred to as the HFEA 2008 (c 22).
either after appearance of the primitive streak\textsuperscript{241} or in other circumstances prohibited under the statute\textsuperscript{242} incur a fine and (or) imprisonment of a maximum of ten years. The Act also criminalises genetic manipulations performed on the already created embryo.\textsuperscript{243}

In line with article 511-17 of the French Criminal Code 1992,\textsuperscript{244} supplying human embryos \textit{in vitro} in return for any form of payment incurs imprisonment for up to seven years and a fine amounting up to €100,000. The same penalty has been envisaged in cases where the embryos were used for the purpose of illegal scientific experimentation\textsuperscript{245} and for human cloning for either commercial, industrial, therapeutic or research purposes.\textsuperscript{246}

As for Polish law, the Treating Infertility Act 2015\textsuperscript{247} criminalised, \textit{inter alia}, retrieval of gametes from deceased persons for the purpose of ART or creation of hybrids and chimeras.\textsuperscript{248}

On the other hand, the most restrictive statute regulating assisted procreation, i.e. the German Embryo Protection Act 1990\textsuperscript{249} – apart from the previously

\textsuperscript{241} HFEA 1990, s 3(3)(a).
\textsuperscript{242} HFEA 1990, s 3(3)(c).
\textsuperscript{243} HFEA 1990, s 3(3)(d).
\textsuperscript{245} See: F.Crim.C., arts 511-16 and 511-17 in conjunction with Code of Public Health, art L152-8(3).
\textsuperscript{246} See: F.Crim.C., arts 511-17 and 511-18 in conjunction with Code of Public Health, arts L2151-1 – L2151-5.
\textsuperscript{248} See: Treating Infertility Act 2015; arts 18(2) and 25(2).
enumerated cases – envisages criminal sanctions (imprisonment or fine) also for creating surplus embryos for the purpose of IVF250 or for transferring embryos in vitro to the uterus of a surrogate mother.251

2.2.3 Embryo (Foetus) and Private Law - Central Research Question

As can be concluded from the preceding section, public law, in its entirety, protects the right to life and the right to physical integrity of an embryo – both in vitro and in vivo – and a foetus. The former right, however, cannot be regarded as an absolute one, since the laws of a vast majority of jurisdictions allow for termination of pregnancies, at least in cases of an existing threat to maternal life. We could also argue that the scope of antenatal protection offered by the norms of public law becomes broader as the pregnancy progresses, particularly if looking from the perspective of abortion regulations.

In addition, it could be, prima facie, observed that in jurisdictions where the right to perform a legal abortion is limited to exceptional scenarios, the notion of foetal rights is most likely to be associated or even equated with foetal right to life. In consequence, also the academic discourse pertaining to the position of an embryo (foetus) under Irish law is predominantly devoted to issues inherent in regulation of pregnancy terminations under domestic law.

250 In line with section 1(4) of the Act, the maximum number of embryos that can be used during an individual transfer to the uterus should not exceed three.  
251 Embryo Protection Act 1990, s 1(7).
At the same time, in opposition to the – still overwhelming – abortion debate, protecting foetal prerogatives in a broadly understood domain of private law does not, in this author’s view, receive adequate academic attention; scarce reference is being made, for instance, to potential remedies available in cases of negligently performed antenatal interventions, undetermined filiation or succession assumed by a posthumous child.

Therefore, the aim of this thesis is to examine foetal status under Irish private law in comparison with the law of other selected jurisdictions, with the view of expanding the discourse about antenatal rights onto an already existing but still somehow unbeaten path. The analysis may, in turn, allow us to confirm the validity of one of the three more general hypotheses formulated below.

1. Embryo (foetus) constitutes an integral part of the maternal organism (*pars viscerum matris*) and, hence, it cannot be regarded as a person under private law. In other words, the law solely protects the rights and interests of a ‘future’ natural person.

2. Embryo (foetus) can acquire concrete, enumerated rights, which, however, only become exercisable at the moment when the resulting child is born alive.

3. Embryo (foetus) enjoys legal personality (capacity) on the grounds of private law, either general or conditional, i.e. intrinsic to the born-alive rule.
The author will attempt to achieve the objectives discussed, while relying on a number of selected tools and methods that will be described in the following, third chapter.

Finally, it should be reiterated that the present thesis sets out the law of all the jurisdictions examined, as the author understands it, as of 1 May 2018.
CHAPTER 3
Organisation of the Research

1. Methodology

As was previously explained, the aim of this thesis is to analyse the rights enjoyed by an embryo (foetus) in the domain of private law. In order to attain this objective, the author has adopted primarily a doctrinal approach, while adhering to a comparative method of legal analysis.

The term ‘doctrinal’ derives from a Latin word *doctrina*, meaning: instruction, knowledge or learning. In the context of legal research, the method essentially boils down to determining what the law is and involves critical examination of the law, which is based on identification, analysis and synthesis of legal norms that are applicable in a given context. However, as Wilson observes, doctrinal analysis of legal norms typically includes also an empirical element. Namely, the doctrine is tested empirically to establish how it has been received in practice, how efficient it has been and what kind of obstacles have been encountered during its application. He further argues that the abovementioned obstacles might not necessarily be of legal or technical character, due to the fact that social or economic factors – interacting with the law – ought to be offered equal consideration.

253 Ibid.
254 Wilson (n 205) 87.
Following Wilson’s line of reasoning, it should be explained from the outset that the thesis is not solely meant to identify the catalogue of legal norms applicable in the context examined. The author further attempts to identify the existing theories behind recognition of certain foetal rights and to match them with the law analysed. Furthermore, the doctrinal approach applied throughout the thesis is paired with the socio-legal one; i.e. the author also considers practicability of the legal norms examined, while assessing potential purposes, which these norms could serve. The final part of the thesis presents the optimal – in the author’s view – theory behind foetal rights and foetal personality, together with suggestions for potential reforms in the area. Again, emphasis has been placed on the practical side of these possible amendments.

Consequently, instead of being regarded as a purely abstract phenomenon, the study of law serves as a ‘means of dealing with major problems facing individuals and society’, while highlighting the links that exist between the law and the real life.255 In this way, it is hoped that the thesis will not only present the author’s legal viewpoint on the issue examined, but it will also allow her to place it in a broader socio-legal context.

As for the comparative method of legal analysis, its most frequently cited objective is to provide inspiration for the national law that can take the form of guidelines for future legal developments. In addition, in cases where more than one legal family is represented, the analysis will consist in offering ‘a common

255 Ibid 91.
solution to the commonly shared problem’.\textsuperscript{256} According to Samuel, comparison involves two stages. It is initially performed on a micro scale, i.e. by comparing two objects without comparing two legal systems and, subsequently – on a macro scale, when the object of comparison is placed within the home legal culture and also within the legal culture of the ‘other’.\textsuperscript{257}

All these observations influenced the catalogue of example jurisdictions selected for the purpose of the comparison. Apart from the most frequently applied historic (and, to certain degree, also geographical) criterion, i.e. a legal family represented, the author also considered social, cultural and religious attitudes towards the issue of foetal rights and foetal status, which would be most characteristic for each of the countries examined. With reference to national law, the author looked at statutory regulation of assisted reproductive techniques, regimes of tortious liability for antenatal injuries, existence of antenatal prerogatives in other areas of law and, particularly, in other areas of private law, and, finally, the lawmakers’ approach towards recognition of foetal personality (capacity).

Unsurprisingly, Ireland and Irish law constitute a focus of this thesis. Accordingly, it would seem to be both correct and logical to compare Irish law with the law of other common law jurisdictions. However, due to considerable similarities between Irish and Polish attitudes to the issue of foetal rights, particularly in its

\textsuperscript{256} Wilson (n 205) 88.
\textsuperscript{257} G Samuel, ‘Comparative Law and its Methodology’ in Watkins and Burton (n 252) 103.
social, cultural and religious context, the author decided to draw equal attention to the law of the two abovementioned countries.

At the same time, the analysis would be incomplete or, at times, even impossible without including references to the law of important secondary jurisdictions. From the continental perspective, since Polish private law largely derives from German and French law, the author looked at the caselaw and statutory solutions adopted in the area examined in Germany and France. For the same reasons, the analysis of Irish law was supplemented by passages concerning the law of England and Wales and, at times, also of the law of Scotland or Northern Ireland. Finally, although the analysis focuses predominantly on Europe, the author has provided some examples of cases and statutes outlining the attitudes towards foetal prerogatives adopted on the grounds of American and Australian law (both state and federal) and of the provincial law of Canada.

It could be argued that, thanks to the three-ingredient methodology, this research gains potential of stretching the boundaries of a more classic comparison between common law and continental law. At the same time, the author remains aware of certain limitations that are likely to accompany her analysis. Most notably, while providing the previously mentioned inspiration for national law, a comparatist must bear in mind that foreign laws are not to be regarded merely as potential ‘carbon paper’, but as a resultant product of a given country’s history, traditions and culture (including religion). Therefore, the majority of foreign

\[258\] At times reference to Italian and Czech law is also made.
solutions cannot be simply transplanted to the Irish legal system; nonetheless, they can serve as ‘road marks’ or signifiers of how these solutions have been working in practice in other jurisdictions.

Hence, the aim of this thesis should be finally clarified as describing the position of an embryo (foetus) on the grounds of Irish private law, in comparison with private law of other example jurisdictions, particularly, with Polish law.

2. Structure of the Thesis

Inclusive of the ‘Introduction’, the body of the thesis consists of five principal segments, referred to as parts. All the parts have been divided into chapters and further split into sections and sub-sections.

Each part begins with a preface describing its structure and rationale and ends with preliminary conclusions. The introductory chapter of all the parts analyses historic law on the prenatal prerogatives examined, in order to place them in a more general and global context. Considering that contemporary private law of continental countries has been heavily inspired by Roman law, its examination was not only appropriate, but also essential. The subsequent chapters discuss the past and currently binding solutions adopted in a given area of private law. First, the author draws her attention to Poland and the accompanying continental jurisdictions, subsequently turning to the common law countries. The main body of each of the parts ends with analysis of the Irish position.
Accordingly, the subsequent, second part, entitled: ‘Embryo (Foetus) and the Law of Torts’ analyses the right to receive compensation for antenatal injuries. It is followed by the third part - ‘Embryo (Foetus) and Family Law’, focusing on prenatal rights and responsibilities exercised by both the expectant parents and by persons acting in loco parentis. The fourth part, entitled: ‘Embryo (Foetus) and the Law of Succession’ discusses the capacity of an embryo (foetus) to become an heir or a legatee. The fifth and final part, entitled ‘Concluding Observations’, summarises main features of legal protection enjoyed by an embryo (foetus) on the grounds of Irish private law in comparison with the law of other example jurisdictions. It begins with remarks de lege lata, i.e. regarding the law currently in force. After addressing the issue of foetal personality (capacity), the author ends the thesis with some observations de lege ferenda, i.e. regarding future legal developments in the area examined.

Furthermore, as will be observed, the part devoted to the position of an embryo (foetus) on the grounds of the law of torts is much longer and broader in its scope than the parts embracing other, corresponding areas of private law. Such disproportion could be, prima facie, considered as unjustified. At the same time, the outstanding length and breadth of the second part can be explained twofold.

Firstly, the right to receive compensation for antenatal injuries is most likely to be the focus of litigation. Secondly, it is also significantly more complex than the related prenatal prerogatives. The remaining parts of the thesis are, however, of equal importance, since they form necessary components of a conceptual whole,
while allowing the author to formulate views on the more general issue of the foetal status.

3. Terminology

Some closing remarks are due regarding specific terms and formulations appearing in the thesis.

3.1 Embryo (Foetus)

First of all, the author finds it necessary to describe what is meant by ‘embryo’ and ‘foetus’, before saying anything about the scope of legal protection currently offered to them.

The two terms have been adopted on the grounds of medical sciences and are primarily linked to the stages of an early human life, i.e. embryonic, foetal and neonatal periods, further followed by infancy and childhood.259

The term ‘embryo’ has been derived from a Greek word *émbroun*, clustered from the preposition *en* (‘in’) and the verb *brúein* or *bryein* (‘to be full, to swell’). It delineates a growing human organism from the moment of conception until the moment of emergence and maturation of its internal organs, which, according to

---

259 It should be pointed out that medical sciences also recognise the so-called pre-embryonic period, lasting for approximately two (three) weeks from the moment of conception, during which the developing human is referred to as a ‘zygote’. See, for example: MJ Seller, ‘The Chronology of Human Development’ in Dunstan and Seller (n 1) 19 or Nawrot (n 2) 114.
some sources, takes place during the eighth week of gestation or, according to other sources, during the tenth week of gestation. The term ‘foetus’, on the other hand, originates from the same spelt Latin word meaning ‘offspring’ and represents a human being from the end of the eighth week of gestation (or the beginning of the ninth week of gestation) up until the moment of its birth, which has already been defined.

The terms associated with independent, extraterine stages of a human life should be given equal consideration. The first of them, ‘neonate’, derives from the Latin word neonatus, consisting of the adjective neo (‘new’) and the perfect active participle of the verb nascor (‘to be born’). A neonate, or a newborn, as it is more frequently referred to, describes a human being who is younger than four weeks, whereas the term ‘infant’ has been reserved for humans, who reached the age of four weeks but who are younger than two years. However, some scientists regard development of an ability to walk as a more appropriate threshold marking the end of the infancy period. Finally, the phase of childhood, in the course of which a human young is being referred to as a ‘child’, begins at the age of two (or, alternatively, at the age when the child gains an

---


262 See: definition of a ‘foetus’ in Stedman (n 260) 711.

263 See: definition of a ‘foetus’ in Dorland (n 260) 698. See also: T Smęczyński, ‘Nasciturus w świetle Ustawodawstwa o Przerwaniu Ciąży’ (1993) 1 Studia Prawnicze 73, 75.

264 According to other sources, the foetal period lasts from the end of the tenth week of gestation until the moment of birth. See, for example: Norwitz and Schorge (n 261) 73.

265 See: the definitions of a ‘neonate’ and ‘neonatal’ in Dorland (n 260) 947 and Stedman (n 260) 1288.

ability to walk) and lasts until the start of puberty, usually taking place between the age of eleven and fourteen.267

Seemingly, medical definitions of the terms ‘embryo’ and ‘foetus’ cannot be described as uniform. The inconsistencies observed result largely from the fact that the beginning of human gestational age can be estimated with the use of two separate criterions. The former, applied on the grounds of embryology, is the actual day on which conception took place. The latter, applied on the grounds of gynaecology and obstetrics, is the first day of the pregnant woman’s last menstrual period.268 Nonetheless, these terms are commonly applied in the scientific domain, which confirms that development of all human beings, during both intra- and extrauterine phases of their lives, remains a gradual, albeit a continuous process. Accordingly, one could conclude that, at least from a scientific (medical) point of view, talking about a ‘conceived’ or ‘unborn’ child would seem neither correct, nor logical.269 As Jackson argues, a similar observation applies to the expressions: ‘mother’ or ‘pregnant mother’, used to describe a pregnant woman, since, technically and medically, one only becomes a mother after giving birth.270

267 Ibid.
268 Seller (n 259) 21.
269 Nota bene, it is interesting to mention that the word ‘child’ in the modern English language derives from a Gothic word kilthei (followed by cild, adapted by Old English), which can be translated as ‘uterus’. See: A Catherine, ‘L’assimilation de l’Embyon à l’Enfant? Les Indices Civilistes de Personnification de l’Embryon’ (2006) 5 CRDF 79, 80.
270 See: E Jackson, Medical Law: Text, Cases and Materials (OUP 2006) 587. This author ordinarily uses the term ‘pregnant woman’ in this context; however, the expressions: ‘prospective (future) mother’ and ‘prospective (future) father’ also seem appropriate.
At the same time, it is a truism that expressions ‘unborn child’ and ‘unborn baby’ (or, simply, a ‘child’ or ‘baby’) are preferred over ‘embryo’ and ‘foetus’ in ordinary parlance. Needless to say, it would be rather bizarre for a pregnant woman to use scientific nomenclature while addressing her expected offspring. According to Enright, during pregnancy most women develop ‘a bond of affection and affiliation’ with their future children.\textsuperscript{271} The bond corresponds with the idea of love and culminates in the pregnant woman’s assumption of responsibility for her child to be. Enright argues that this state seems to be higher and more valuable than the mere physical containment of the foetus that the woman carries.\textsuperscript{272} Moreover, the colloquial expressions are used by medical practitioners themselves, especially during conversations with their pregnant patients, whom they commonly address as ‘mothers’. In simple terms, it is perfectly understandable that in everyday speech one will intuitively mean an embryo (foetus) but will rather speak about a ‘baby’ or a ‘child’ or, as observed McCluskey LJ in \textit{Hamilton v Fife Health Board}, about ‘him’ or ‘her’.\textsuperscript{273}

Yet, while examining how the product of conception is being referred to in the juristic jargon of the countries examined, one is confronted with a medley of scientific and conversational terms, often regarded as synonyms. As far as statutory law is concerned, the Polish legislature, for example, has favoured the terms: ‘conceived child’ (dziecko poczęte) and ‘conceived but unborn child’

\textsuperscript{272} Ibid.
(dziecko poczęte lecz nienarodzone), both appearing in the provisions of the Civil and Family Codes. In addition, in the statutes which are relevant to Polish criminal law, both terms function alongside the corresponding notions of a ‘foetus’ and a ‘pregnant woman’. Finally, the Children's Ombudsman Act 2000, focusing on the rights of a child, provides in its article 2(1) that a ‘child’ is to be defined as ‘every human being from the moment of conception until the moment of attaining majority’.

With regard to French statutory law, it is interesting to mention, for instance, some of the provisions of the second part of the previously cited Code of Public Health, entitled: 'The Health of the Family, the Mother and the Child’ (along with the amending Acts), which apply in numerous factual scenarios involving a human life before birth. As could be observed, the excerpts regulating medical assistance in procreation and preimplantation (prenatal) diagnoses include both scientific as well as conversational terms. On the one hand, the Code talks about an ‘embryo (foetus)’ and an ‘embryo in vitro’, on the other hand, it refers to

---

274 See: P.C.C; art 927 §2 and the abrogated §2 of art 8.
275 See: Polish Family Code 1964 (Official Journal of the Republic of Poland No 1964.9.59 with subsequent amendments (hereinafter P.F.C.); arts 75 §1, 78 and 182. The term ‘conceived child’ also appears, for instance, in s 43(1) of the California Civil Code.
276 Cf, for example: arts 152 §2 and §3 P.Crim C. and arts 2(1)(1), 4a(1)(2) and 4a(2) of the Family Planning Act 1993.
278 However, in the remaining example jurisdictions the statutes pertaining to protection of children's rights define a 'child' as a person under the age of 18, without further clarifying whether an embryo (foetus) also falls within the scope of the definition. See, for example: definitions of a 'child' in: s 65(1) of Children Act 2004 (c 31) in force on the territory of England, Wales, Scotland and Northern Ireland; s 3(1) of Children Act 2001 (No 24 of 2001) and s 2(1) of Ombudsman for Children Act 2002 (no 22), both in force in Ireland. The French statute, Ombudsman for Children Act 2000 (Law no 2000-196 of 6 March 2000), does not explain who a child is. Nonetheless, we could assume that the term 'minor child' (enfant mineur), used by the legislator is consistent with the term mineur, defined by article 388 of the French Civil Code and, thus, it is to be understood as an individual of either sex who has not reached the age of 18.
279 See, for example: Code of Public Health 1953; arts L2131-1, L-2141-6 or L-2141-10.
280 See, for example: Ibid arts L2131-4, L2131-4(2) or L-2141-10.
an ‘unborn child’ \( (\text{enfant à naître}) \). The latter term, accompanied with ‘pregnant woman’ \( (\text{femme enceinte}) \), is also used exclusively in the section devoted to pregnancy termination.

As for the United Kingdom, the term ‘unborn child’ can be encountered, for example, in section 2 of the Congenital Disabilities (Civil Liability) Act 1976. At the same time, the wording of the original HFEA 1990 and HFEA 2008, relies predominantly on the term ‘embryo’. Here, the term is to be interpreted in a particularly broad manner, as references to an ‘embryo’ have been decided to equally include references to: ‘an egg that is in the process of fertilisation or is undergoing any other process capable of resulting in an embryo’. At the same time, on a number of occasions both Acts refer to ‘a child who is being carried (by a woman)’, that is assumingly understood as a foetus. On the grounds of criminal law, the Abortion Act 1967 adheres to the terms ‘foetus’ and ‘pregnant woman’, whereas the provisions of the Infant Life (Preservation) Act 1929 and the corresponding section 25 of the Criminal Justice Act (Northern Ireland) 1945, both criminalising ‘child destruction’, mention a ‘child capable of being born alive’ at the time of committing the offence, more than likely to be understood as a ‘viable foetus’.

---

281 See, for example: Ibid arts L-2141-6 and L-2141-10.
282 See, for example: Ibid arts L2212-1 and L2213-1.
285 Ibid ss 33(1); 34(1); 47; 57(1) and 57(2).
286 Abortion Act 1967, s 5(2).
287 Ibid ss 1(1)(a),(b) and (c); 1(2); 1(4); 3(1)(b) and 4(2).
288 Infant Life (Preservation) Act 1929, s 1(1).
The erratic terminology characterises also the language of the few Irish statutes and statutory instruments that would be relevant in the present context. Accordingly, section 58 of the Civil Liability Act 1961\textsuperscript{289} refers to an ‘unborn child’, whereas the Protection of Life During Pregnancy Act 2013 has introduced a novel term of ‘unborn human life’, paired with the notion of ‘pregnant woman’. Unlike the private law provision, section 2(1) of the 2013 Act defines the adjective ‘unborn’ as relating to the phase commencing after implantation in the womb and finishing on complete emergence of the ‘life’ from a female body. On the contrary, a sole set of statutory instruments pertaining to performance of ART in Ireland, mentions ‘embryo misidentification (mix-up)’.\textsuperscript{290}

Moreover, also from the point of view of judicial practice, when referring to legal protection of life before birth, judges tend to apply both the scientific and conversational terms at their own discretion. The same pattern has been followed by numerous academics, who in their books, scholarly articles, glosses, case studies, etc. often mention ‘embryos’ and ‘foetuses’ alongside with ‘unborn’ and ‘prenatal children’, without justifying whether and how the above terms fit within the scenarios discussed. Finally, even more confusion has been added by some authors of legal dictionaries, who apply the terms ‘child’ and ‘foetus’ in an interchangeable manner.\textsuperscript{291}

\textsuperscript{289} Civil Liability Act 1961 (No 41 of 1961).
\textsuperscript{291} See, for example: definition of a ‘child’ in Garner (n 260) 254.
The language used to describe a human being before birth on the grounds of domestic statutory laws has been criticised by a number of commentators. As has been argued, not only does the legislatures’ choice demonstrate hesitance and lack of objectivity on their part, but it also clearly proves that the law is becoming helpless in the face of progressive medical advancements. Still, perhaps, this variety of terms and definitions applied in the discussed context should not come as a surprise?

First of all, from a purely etymological perspective, the conversational terms could be, indeed, interpreted twofold. On the one hand, a ‘conceived’ or an ‘unborn’ child might be regarded as ‘a child to be’ or, in other words, as an entity that will come into an existence at the moment of its birth. On the other hand, to ‘expect a child’ might be equally understood as ‘to carry an entity that is already regarded as a child’. This observation also applies, for instance, to the term ‘a child resulting from the implantation of the embryo’ (or ‘a resulting child’, as it is referred to in short) which appears in the text of the previously mentioned United Kingdom’s legislation pertaining to ART. Secondly, law as a branch of knowledge, derives from two broader disciplines, i.e. humanities and social sciences. Accordingly, the body of law could be seen as a collection of norms enacted, applied and amended by the humans. In theory, these norms are intended to serve in the best interest of those humans, regardless of whether they are addressed to an individual being or to a larger group of beings, such as a

292 See, for example: Nawrot (n 2) 9; J Haberko, Cywilnoprawna Ochrona Dziecka Poczętego a Stosowanie Procedur Medycznych (Wolters Kluwer, 2011) 18.
293 Nawrot (n 2) 9.
294 Catherine (n 269) 79-80.
family, community, society, etc. If so, the language used by those who enact the law, but also by those who apply, amend and comment on the law in force, is naturally bound to be more ‘humane’, as compared with the scientific jargon. Thus, use of conversational terms, such as ‘unborn child’, in the juristic jargon should be, perhaps, regarded as highly appropriate. Thirdly, unlike the medical jargon, the language of law does not have to acknowledge the distinction between individual phases of human antenatal development, except for a number of specific scenarios.296

On the contrary, one could argue that the ‘non-scientific’ terms used in the wording of judgments and statutes are often bizarre, ambiguous and, thus, can prove to be problematic. A perfect example of the term of this kind can be found in the previously mentioned Article 40.3.3° of Bunreacht Na hÉireann, which acknowledges the right to life of the ‘unborn’, equal to the right to life of the ‘mother’. As has already been explained, potential relevance of Article 40.3.3° to the issues tackled by this research will be examined in a greater detail in the subsequent part of the thesis. At this point it deserves to be noted that the term ‘unborn’, described by Kingston and colleagues as a ‘neologism of uncertain ambit’,297 has been generating controversies since the time of its introduction. Despite suggestions made by various advisory bodies, such as, most notably, the Constitution Review Group, it has never been awarded a formal definition.298 In

296 For example, one will be always talking about an embryo (or, in fact, also a pre-embryo) in the context of assisted reproductive techniques, whereas a foetus will be an obvious choice in the context of prenatal surgical interventions and birth injuries.
addition, the use of ordinary parlance in this context may at certain times convey some emotional load or refer to the drafters’ (judges’) beliefs or supported philosophical or moral stance, which might be rendered as inappropriate, if the law was to maintain its secular character.

In passing, the author considered adhering to the Latin term ‘nasciturus’ for the purposes of her research. The term, which derives from the verb nascor and translates as ‘the one whose birth is expected’, is best known as a part of the nasciturus pro iam nato habetur maxim, analysed more thoroughly in the final part of this work. It is also being used as a synonym of another Latin term - qui in utero est (the one who is in utero). 299 At the same time, it is more narrow in its scope than the term ‘conceptus’, describing ‘all products of conception’, i.e. the embryo (foetus), but also the placenta and membranes at any stage between the moments of conception and birth. 300 Both terms – ‘conceptus’ and ‘nasciturus’ – popularly used by continental commentators and judges, seem more apt in comparison with the ‘unborn’ or ‘conceived child’. However, they are not normally acknowledged in the juristic jargon of the common law countries, Ireland included, and, for the above reason, they will not be applied.

To sum up, for the purpose of this thesis the term ‘embryo (foetus)’ is intended to represent a developing human organism from the moment of conception until

---

accessed 8 December 2017. See also, for example: D Madden, ‘Article 40.3.3° and Assisted Human Reproduction in Ireland’ in J Schweppe (ed) The Unborn Child, Article 40.3.3° and Abortion in Ireland: Twenty Five Years of Protection? (The Liffey Press 2008) 309.


300 Seller (n 259) 19.
the moment of birth. Other terms, such as: 'conceived', 'unborn' or 'prenatal' child, 'unborn human life' and 'unborn' have not been used, save in cases where sources of borrowed information have been either cited verbatim or paraphrased.

It should be also explained that the author's intention to apply the scientific terms does not reveal any of her moral or religious views, but it is motivated by the previously described objective of ensuring that the research maintains truly legal and impartial character.

3.2 Tort Law

Secondly, for the sake of brevity, the terms: 'tort', 'the law of torts' and 'tortious liability' will be used while discussing the law of all the jurisdictions examined, irrespective of whether they belong to the system of common law or to the legal system of Continental Europe. Application of the terms: 'delict', 'the law of delicts' and 'delictual liability' would seem more apt, when referring to the law of continental countries, as these could serve to illustrate fundamental differences between the two systems discussed.\(^{301}\) However, as Magnus deducted, even if the exact meaning of certain notions and terms differs from jurisdiction to jurisdiction, they are, in essence, the same conceptual stones.\(^ {302}\) Accordingly, the

---

\(^{301}\) The terms 'delict' and 'delictual liability' translate as delikt (odpowiedzialność deliktowa) on the grounds of Polish law or délít (liabilité delictuelle) – on the grounds of French law. Etymologically, the word 'tort' represents a wrong in conversational French; however the term 'tort' is unknown to the French legal jargon. In addition, the terms 'tort' and 'delict' are not to be treated as equivalent because '(m)any obligations which in England are considered as arising from torts will be treated in the law of Continental Europe as arising from contracts'. See: RK Kuratowski, 'Torts in Private International Law' (1947) 1(2) ILQ 172, 172.

use of words: ‘tort’, ‘torts’ and ‘tortious’ in the context of continental law seems to be an established practice followed by numerous academic commentators, comparatists included.\textsuperscript{303} In any event, the term ‘tort’ is to be associated with allocation of liability for losses,\textsuperscript{304} whereas the liability discussed is to be understood as liability of unilateral character, resulting from commission of a wrongful act (omission), when the party responsible becomes obliged to redress the damage caused to another party.\textsuperscript{305}

\textbf{3.3 Civil Law}

Thirdly, as is commonly known, the expression ‘civil’ can also be interpreted in two ways. First, it is meant to characterise the legal system, contrasted with the system of common law and represented by jurisdictions, whose law derives largely from the Roman heritage. Second, it is used as a synonym of ‘private’, when referring to the body of law opposed to the body of public law. In order to avoid any potential confusion, the adjective ‘continental’ has been used in the former context.


\textsuperscript{304}See WVH Rogers, \textit{Winfield and Jolowicz on Tort} (18th edn, Sweet & Maxwell 2010) 2.

Finally, all translations from Polish and French into English are the author’s own, unless the translator has been acknowledged in a footnote.
Conclusions

In summary, the author agrees that religious and philosophical deliberations about beginning of a new human life can be described as notoriously complex.\textsuperscript{306} As Dworkin rightly observes, assessing the life’s value – both before and after birth – is intrinsic to the human nature. However, while most humans will consider the gift of life as an inviolable one, they will not be unanimous on the conceptual level; the individual perception of what that idea means will radiate throughout their entire lives.\textsuperscript{307}

From a legal perspective, similarly to the case of Roman law, the fact of being born alive (or alive and viable) implies significant consequences under the law of all the jurisdictions examined. Formal definitions of ‘live-birth’ and ‘stillbirth’ can be nowadays found in diverse legal sources, nonetheless, their individual elements vary from country to country.

At the same time, the law pertaining to human life during its prenatal phase cannot, in its entirety, be described as particularly uniform or transparent. When looking from the international law perspective, none of the conventions, or any other sources drawn under the auspices of international (European) bodies or institutions, explicitly determine the scope of foetal rights or explain the notion of foetal status. Instead, the relevant law consists of general, open-ended guidelines that explain how an embryo (foetus), but particularly an embryo in

\textsuperscript{306} Christie (n 207) 74.
\textsuperscript{307} Dworkin (n 82) 28.
vitro, should be treated and what activities it can be subjected to.\textsuperscript{308} According to Smyczyński, while considering the varying degrees of protection awarded to unborn human life at the national level, it would be virtually impossible to impose any harmonised solutions – however strict or liberal – on the Member States (Contracting Parties).\textsuperscript{309}

When looking from the national perspective, it can be observed that – despite the fact that the position of an (embryo) foetus under the norms of public law is, \textit{prima facie}, more easily determinable, if compared with the parallel position under the norms of private law – the more general question of the foetal status under law of each of the jurisdictions examined is not a straightforward one to answer. In addition, the already unclear sketch outlining the law on prenatal prerogatives is likely to be further blurred, if we consider the universally non-uniform, erratic or even somehow bizarre language.

And into the abovementioned abyss, filled with ethical, legal and terminological inconsistencies, falls the author of the present thesis.

\textsuperscript{308} As the European Court of Justice stated in its previously cited 2007 ruling, ‘(...) there is no European consensus on the scientific and legal definition of the beginning of life’. See: Tysi\c{a}c \textit{v} Poland \textit{(n 152)} ECHR 219, para 74.

PART 2
EMBRYO (FOETUS) AND THE LAW OF TORTS
Preface

This part describes and analyses the position of an embryo (foetus) on the grounds of the law of torts of the selected, example jurisdictions. As could be anticipated, the analysis centres on the right to receive compensation for antenatal injuries from a person (persons), who have been found liable for their infliction under the domestic law of civil obligations.

The part consists of four chapters and has the following structure. The first chapter outlines the historic evolution of the term ‘antenatal injuries’, while referring to the relevant legislation, caselaw and customs of various countries and communities remaining beyond the continental versus common law division.

Since it is unattainable to assess all the occasions where tortious liability for antenatal injuries could be engaged, the following three chapters describe three corresponding scenarios where these injuries are most likely to occur. Accordingly, the author discusses liability for antenatal injuries caused by: parental conduct, road traffic accidents and, finally, by certain instances of medical negligence. It should be recalled that the comparative method is not aimed only at presenting the relevant solutions adopted in each individual jurisdiction. It is primarily applied with the view of identifying the characteristics confirming, on the one hand, universality and, on the other hand, uniqueness of the Irish approach.
With reference to each of the scenarios, the premises of tortious liability for one’s own act with an element of fault are invoked in the first place;\(^1\) however, potential application of special regimes of the liability in some of the instances is also considered. Furthermore, the author draws her attention to some of the exonerative (exculpatory) circumstances, which can serve in the tortfeasor’s defence. The part finishes with a concluding section describing common problems with establishing tortious liability in all the scenarios discussed. The author also draws some initial hypotheses concerning foetal personality (capacity) which are subsequently elaborated in the final part of the thesis.

Before tackling the matter on its merits, it should be acknowledged that the term ‘antenatal injury’ is nowadays defined in a significantly broad manner. As will be further demonstrated, progressive extension of its scope is owed, most notably, to the previously mentioned rapid development in the field of medical sciences, as a result of which unborn human life has become a more vulnerable object of hitherto unrecognised but potentially harmful activities. In addition, from a more general perspective, a large proportion of medical negligence claims, attracting substantively high sums of compensation, pertains to antenatal injuries caused by inadequate gynaecological (obstetric) care received by the claimants’ mothers during pregnancy and during labour.\(^2\) Many of such cases are well-known to the public opinion thanks to regular media coverage.\(^3\) For these reasons, the right to

---

1 Namely: the damage, the breach of an existing legal duty (referred to as the duty of care under common law) and the causal nexus between the two.
3 In Ireland, for example, considerable publicity was awarded to the 2013 High Court case of four-year-old Sarah McFeely, who suffers from dyskinetic cerebral palsy. The illness was allegedly caused due to excessive administration of syntocinon to her mother during labour, followed by a failure to recognise hyperstimulation. The girl, who sued HSE through her mother, received €1.3 million compensation by means of an interim settlement.
receive compensation for antenatal injuries resulting from a broadly understood medical error will remain a focus of this part of the thesis.

Finally, as should be recalled at the outset, the law of torts belongs to a larger category of civil obligations, also universally represented by contracts and – in common law – by restitution, dealing with remedies which are provided in cases of unjustified enrichment. Hence, discussion on foetal prerogatives under


4 It should be noted that some equitable obligations, such as those concerned with trusts, are also traditionally classed as a component of the category examined. See: E Quill, Torts in Ireland (3rd edn, Gill & Macmillan 2009) 8-9.
contract law should be, *prima facie,* also included in this part of the analysis. At the same time, unlike the impressive volume of legal sources and legal commentary concerning damages for antenatal harm under the law of torts, only a small number of statutory provisions and cases touch upon foetal position under the law of contract.

The main reason behind the above scarcity of sources is the fact that an embryo (foetus) cannot, itself, become a party to a civil contract under the law of any of the jurisdictions examined. Hence, contractual liability *vis-à-vis* a child, who was injured *in utero,* for instance, due to negligent medical treatment of his mother provided by a self-employed physician within the scope of his private practice, would have to be excluded *de jure.*

At the same time, one should note that in a number of continental countries an embryo (foetus) can be indicated as a beneficiary of certain, enumerated *pacta in favorem tertii.*

First of all, ‘one who is only conceived’ (*chi è soltanto conceptio*) can become a donee by virtue of article 769 of the Italian Civil Code. Furthermore, article 784 stipulates that the ‘gift’ can also be secured in favour of the children of a specified person living at the time when the agreement is concluded, even if they have not been yet conceived. Moreover, as for Polish contract law, pursuant to the Supreme Court’s guidelines, a ‘conceived child’ can be indicated as a beneficiary.

---

5 Obviously, the physician would be still liable in contract *vis-à-vis* the mother.

of an accident insurance agreement. Additionally, in 1971 the Supreme Administrative Court confirmed that it can also benefit of a donation agreement ‘concluded with the aim of protecting its future interests’.

Finally, under French law an embryo (foetus) can be made a beneficiary of a *donatio mortis causa*. However, as this stipulation falls rather within the scope of the law of succession, it will be further analysed in the fourth part of the thesis.

---

CHAPTER 1
The Notion of Antenatal Injuries

1. Compensation for Loss of an Heir

Since the ancient times the law has envisaged pecuniary remedies for harming a child before its birth. Principles pertaining to the liability for foeticide caused by a third party unlawful interference can be found in the oldest preserved legal sources such as, most notably: the Babylonian Code of Hammurabi (c 1790 BC), the Code of the Nesilim, representing the law of the Hittite Empire (c 1650-1500 BC), and the Code of the Assura (c 1075 BC). According to each of the codes, anyone who harmed a pregnant woman causing death of her foetus was liable in damages. In some of the scenarios the ancient Assyrian law provided for a

---

9 §209 of the Code of Hammurabi: ‘If a man strike the daughter of a man and brings about a miscarriage, he shall pay ten shekels of silver for her miscarriage’. §210: ‘If that woman dies, they shall put his daughter to death’. The further subsections, envisaging only pecuniary compensation, applied in cases where the miscarriage had been brought about to ‘a daughter of a common man’ (ss 211-212) and ‘a maidservant of a man’ (ss 213-214). The English translation of the Code of Hammurabi can be found, for instance, in DD Luckenbill (trs), ‘The Code of Hammurabi’ in JMP Smith, The Origin and History of Hebrew Law (University of Chicago Press 1960) 181.

10 §17 of the Code of the Nesilim: ‘If anyone cause a free woman to miscarry, if it be the tenth month, he shall give ten half-shekels of silver, if it be the fifth month, he shall give five half-shekels of silver’. See: Code of Nesilim <www.fordham.edu/halsall/ancient/1650nesilim.asp> accessed 15 July 2012.

11 Art I.21 of the Code of the Assura: ‘If a man strike the daughter of a man and cause her to drop what is in her, they shall prosecute him, they shall convict him, two talents and thirty manas of lead shall he pay, fifty blows they shall inflict on him, one month shall he toil’. Art I.50: ‘If a man strike the wife of a man, in her first stage of pregnancy, and cause her to drop that which is in her, it is a crime; two talents of lead he shall pay’. Art I.51: ‘If a man strike a harlot and cause her to drop that which is in her, blows for blows they shall lay upon him; he shall make restitution for a life’. See: Code of the Assura <www.fordham.edu/halsall/ancient/1075assyriancode.asp> accessed 15 July 2012.
corporal punishment and one-month forced labour for the benefit of the king.\textsuperscript{12} On the other hand, the most restrictive Code of Hammurabi, in compliance with \textit{lex talionis},\textsuperscript{13} ordered putting the perpetrator’s own daughter to death, in case where the victim had died along with the foetus. At the same time, it is evident that severity of the punishment in each instance depended on the social status of the pregnant woman and on the stage of the pregnancy at which such harm was inflicted to her.

A corresponding stipulation can be found in the Old Testament, where in Exodus 21:22-25 we read: ‘(i)f men strive, and hurt a woman with child, so that her fruit depart from her, and yet no mischief follow: he shall be surely punished, according as the woman’s husband will lay upon him; and he shall pay as the judges determine. And if any mischief follow, then thou shalt give life for life, eye for eye, tooth for tooth, hand for hand, foot for foot, burning for burning, wound for wound, stripe for stripe’.\textsuperscript{14} Rather unsurprisingly, the said ‘mischief’ does not represent the injury inflicted to the foetus but, similarly to the case of the three previously mentioned codes, it rather represents the injury inflicted to the pregnant woman which resulted in a subsequent miscarriage or premature


\textsuperscript{13} \textit{Lex talionis} was an ancient principle of criminal law, whereby criminals were to receive precisely those injuries and damages they had inflicted upon their victims as a form of punishment. It is commonly referred to as the ‘eye-for-an-eye’ principle. See, for example: definition of ‘talion’ in \textit{Encyclopaedia Britannica} <http://www.britannica.com/EBchecked/topic/581485/talion> accessed 13 June 2013.

labour. The social status of the victim seems to have remained irrelevant from the perspective of Hebraic law.

The provisions discussed, most notably the excerpts from the Code of Hammurabi, are sometimes cited in preliminary sections of commentaries examining antenatal injuries in the context of the law of torts. Nonetheless, it is obvious that pecuniary remedies for foeticide, available under law of ancient civilisations do not have much in common with pecuniary remedies for antenatal harm, available in the majority of jurisdictions under contemporary law of torts.

One should remember that law regulating family relations in the ancient societies was overwhelmingly based on the system of patriarchy. As a result, all children, including also those in utero, remained strictly subordinated to their fathers. Moreover, in some jurisdictions concerned they were treated as objects under property law. Naturally, women, once married, became subordinated to their husbands and could not exercise any parental authority over their children, save in exceptional circumstances.

For the reasons discussed, those remedies were aimed neither at protecting the human life in its prenatal form, nor at compensating the pain and suffering of the prospective parents experienced as a result of the wrongful death of their foetus. As Nawrot and Reiman rightly argue, their purpose was rather to protect the

---

16 Nawrot (n 12) 24.
17 See for example EF Albertsworth (n 15) 465 or J Schweppe, ‘Revisiting Article 40.3.3°. Part One: Third-Party Foetal Assault’ (2005) 4 IJFL 19, 22.
18 For instance, fathers were entitled to hand their children to creditors as a form of settling an outstanding debt. See: Nawrot (n 12) 19.
rights and interests attributable to *pater familias*, while awarding him damages for the loss of a potential heir. In addition, the severe punishment for fatally injuring a pregnant woman, envisaged by §209 of the Code of Hammurabi, could be justified by the fact that her death deprived the head of the family of an opportunity to raise any of her other children (and potential heirs) in his future life.

2. Compensation for Wrongful Death of a Foetus

Another action commonly associated with the notion of antenatal injuries is a compensatory claim for the so-called ‘wrongful death’ of a foetus, i.e. death resulting from a fatal accident caused by the torfeasor's act or omission. As will be demonstrated, this action, *prima facie*, resembles the previously discussed claim for the ‘loss of an heir’, but in reality it is based on a virtually different rationale.

As far as common law is concerned, it is worth noting that historic law of England and Wales, while adhering to the then binding principle of patriarchy of family relations, awarded compensation to the *pater familias* for injuries inflicted to his dependants. According to Malone, the damages in question were initially quantified with reference to the economic value of household services provided by the claimant's injured wife and children. In the seventeenth century the

---


20 However, if the family father, himself, suffered an injury resulting from a wrongful act, his dependants were not entitled to any form of compensation. See: WS Malone, ‘The Genesis of Wrongful Death’ (1965) 17(6) Stanford Law Review 1043, 1053.
quantum was decided to include also the value of marital consortium.\textsuperscript{21} At the same time, in compliance with the actio personalis moritur cum persona principle,\textsuperscript{22} the death of a family member resulting from a tortious act was not regarded as an injurious event.\textsuperscript{23}

The English courts had still observed the rule in the beginning of the nineteenth century, as can be illustrated by 1808 Nisi Prius decision issued in the case of Baker v Bolton,\textsuperscript{24} containing Lord Ellenborough's well-known statement: '(.i)n a civil court, the death of a human being could not be complained of as an injury (...).'\textsuperscript{25} Nevertheless, the progressing industrial developments, which largely increased incidence of fatal accidents in everyday life, ultimately gave a path to recognition of the so-called wrongful death claims. The first corresponding statute, referred to as the Fatal Accidents Act or, more popularly, as Lord Campbell's Act, was enacted in 1846.\textsuperscript{26} The claim discussed has survived in England and Wales until the present day and is currently available under Lord Campbell's Act's currently binding successor, i.e. the Fatal Accidents Act 1976.

At the same time, it should be observed that the mere expression ‘wrongful death’ is more frequently encountered in the American or Australian legal literature, whereas in Europe the claims discussed are popularly referred to as ‘fatal accidents’ (‘fatal injuries’) claims. The main head of damages in those cases is

\textsuperscript{21} Malone (n 20) 1052.
\textsuperscript{22} Translated as: ‘a tort action dies along with the person’.
\textsuperscript{24} Baker v Bolton [1808] 1 Camp 493, 170 ER 1033 (Nisi Prius).
\textsuperscript{25} Ibid (Lord Ellenborough CJ).
\textsuperscript{26} One should note that the Act applied solely on the territory of England and Wales. In Scotland the courts had already allowed for damages in the situations discussed.
pecuniary loss suffered by the claimant from the time of his loved one's death, which typically consists of funeral expenses as well as the value of the breadwinner's financial support and his personal services, if they are capable of monetary assessment. The designated circle of relatives may also demand compensation for non-pecuniary loss (i.e. mental distress) experienced as a result of bereavement. It is also important to mention that in any event the claimant acts on behalf of the deceased person but in his own interest.27

Can damages for ‘wrongful death’ be claimed on behalf of a stillborn child under any statute or under the principles of common law? The English doctrine has nearly unanimously excluded such a possibility.28 It is because the quality of being born alive is indispensably linked to any cause of action in tort, regardless of whether the compensatory claim is instituted by the plaintiff himself or, like in the case of a wrongful death claim, on behalf of the ‘would-be plaintiff’. The ‘born alive’ condition has also been articulated expressis verbis in section 4(2)(a) of the Congenital Disabilities (Civil Liability) Act 1976, which – to recall – remains the core statute regulating actions arising from birth in England, Wales and Northern Ireland.29 Obviously, the ‘born alive’ condition further impinges on availability of ‘wrongful death’ claims in accordance with the provisions of the Fatal Accidents Act 1976.30

---

27 See, for example: J Cooke, Law of Tort (9th edn, Pearson 2009) 524-528; Quill (n 4) 537-539.
29 Section 4(2)(a) reads: ‘In this Act – “born” means born alive (the moment of a child’s birth being when it first has a life separate from its mother) and “birth” has a corresponding meaning’.
30 Whitfield (n 28) 850.
On the grounds of common law, prevalence of the 'born alive' condition is usually explained with reference to the duty of care theory. As Whitfield argues, there is no cause of action for foetal wrongful death as there can be no actionable breach of duty to those born dead.\(^{31}\) If the child is stillborn, because he never lived, he possesses no legal rights.\(^{32}\)

On a comparative note, however, compensatory claims for ‘wrongful death’ of the foetus have been allowed under law of the majority of American states.\(^{33}\) Availability of the cause of action in such cases depends on the provisions of the relevant Wrongful Death Act.\(^{34}\) A corresponding stipulation can be found in section 369(2) of the Second Restatement of the Law of Torts.\(^{35}\)

As far as continental Europe is concerned, neither an action for wrongful death, in general, nor an action for wrongful death of the foetus, in particular, have been recognised in any of the jurisdictions examined. Firstly, rejection of wrongful death

---

\(^{31}\) Ibid.

\(^{32}\) On that account, Whitfield remains 'surprised' by some of the observations made obiter by Dillon LJ in *Burton v Islington Health Authority and De Martell v Merton and Sutton Health Authority* [1993] QB 204, 232. As the learned judge proposed: 'I doubt very much whether there are any claims now outstanding which are not statute barred, in respect of children stillborn before 22 July 1976 or any children born before that date, who are locked in litigation with their mothers over whether the mother tasted alcohol or followed a diet other than recommended by the current phase of medical opinion during pregnancy'. See also: Whitfield (n 28) 850.

\(^{33}\) According to Cotter, as of 2012 the cause of action for a wrongful foetal death was allowed in forty-two states and disallowed in six states; whereas in the two remaining states no authority so far addressed existence of the cause of action in the situations discussed. Nonetheless, the laws of twenty-nine states, where the claim was recognised, accepted an additional condition of foetal viability. At the same time, the laws of two states (Mississippi and Georgia) provided that the stillborn foetus must have been 'quick', i.e. its movements were to be subjectively perceptible by the pregnant woman. See: D Cotter, 'Fetal Death by Wrongful Act: Expanding Wrongful Death Actions to the Unborn' (2012) 55 Virginia Legislative Issue Brief 1, 12.


\(^{35}\) 'If the child is not born alive, there is no liability unless the applicable wrongful death statute so provides'. See: American Law Institute, *Restatement of the Law, Second, Torts 2d: As Adopted and Promulgated* (American Law Institute Publishers 1965).
death claims is intrinsically linked to the continental concept of legal capacity, defined as passive, potential ability to become a subject of rights and duties attributable to a natural person under civil law.\(^{36}\) It has commonly been accepted that legal capacity of a human being runs from the moment of live-birth until the moment of death.\(^{37}\) Hence, no claim can be lodged on behalf of a deceased person in any event, even if it is, in fact, intended to compensate for losses suffered by another party. Secondly, exclusion of claims for wrongful foetal death can be justified by the mere construction of liability for antenatal injuries, which, under the law of all the continental countries concerned, has unanimously been founded on the ‘born alive’ rule.\(^{38}\) Thirdly, in some jurisdictions, including France, civil claims in cases of antenatal death have been expressly excluded by a specialised statute.\(^{39}\)

At the same time, it should be firmly underlined that unavailability of wrongful foetal death claims does not preclude the parents (particularly the mother) from seeking damages for their own personal or psychiatric injury or for the pain and

\(^{36}\) Legal capacity should not, however, be treated as a synonym of legal personality, the former being a broader and more general concept. Both notions of legal capacity and legal personality will be further discussed in the concluding part of this thesis.


\(^{38}\) The current legislative framework regarding compensation for antenatal harm in the continental countries will be further elaborated in the subsequent chapter.

suffering resulting from a miscarriage (stillbirth), while acting on their own behalf.  

From the common law perspective, English commentators frequently point to the 1986 ruling delivered in the case of Bagley v North Hertfordshire Health Authority. Here, the medical staff failed to perform a vital, antenatal blood check which would allow them to detect an existing Rhesus-incompatibility. In consequence, the pregnant patient was deprived of an opportunity to undergo an earlier induction and her child was later delivered stillborn. Simon Brown J decided that he was unable to award statutory damages for bereavement under section 1A of the Fatal Accidents Act 1976, since the ‘born alive’ premise had not been satisfied in the above factual scenario. He, nonetheless, proposed that the child's mother could be compensated for non-pecuniary harm, further defined as ‘the loss of the satisfaction of bringing her pregnancy, confinement and labour to a successful, indeed joyous conclusion’. In addition, seemingly under the same head of damages, he was also willing to offer redress for disrupted family plans,

---

42 Whitfield (n 28) 848. Whitfield reports that the above line of reasoning was also followed by Rose J in Grieve v Salford Health Authority [1991] 2 Med LR 295; hereinafter Grieve. At the same time, awarding compensation for the ‘loss of satisfaction’ (also referred to as ‘dashed hopes’) was subsequently rejected by Ognall J in Kerby v Redbridge Health Authority [1993] 4 Med LR 180; hereinafter Kerby. It should be explained that, unlike in Grieve, in the Kerby case a child died shortly after birth, as a result of negligent obstetrical care. The learned judge argued that the term discussed represented common emotions of grief, sorrow and distress accompanying the death of a loved one, which are not, by definition, capable of being redressed under English law.
i.e. for the loss of enjoyment experienced, while raising a healthy child, who – due to the defendant’s negligence – never came into being.\footnote{Whitfield (n 28) 849. In this context, it is also appropriate to refer to the earlier case of \textit{Kralj v McGrath} [1986] 1 All ER 54, where gravely negligent administration of the plaintiff's labour was followed by death of one of her twins at the age of two months. The woman claimed that the shock suffered due to the tragic events aggravated her grief, causing further deterioration of her own condition. Woolf J explained that although, indeed, grief was not capable of being compensated \textit{per se} under English law, the plaintiff was entitled to aggravated damages for her own personal injury, due to the fact that her intense, negative emotions experienced after the incident impeded on the recovery process.}

As for English law, if the bereaved parents are treated as secondary victims,\footnote{That is, the sole witnesses of the injury inflicted to their child, as opposed to primary victims, being direct participants of the incident.} they can, assumingly, also bring a claim for damages for a psychiatric injury (‘nervous shock’), as long as their personal circumstances satisfy the criteria established in the landmark House of Lords ruling, delivered in the 1992 case of \textit{Alock v Chief Constable of South Yorkshire}.\footnote{\textit{Alock and Others v Chief Constable of South Yorkshire} [1992] 1 AC 310 (HL); hereinafter \textit{Alock}. To recall, the \textit{Alock} case concerned tragic 1989 events that took place during a football match at Sheffield’s Hillsborough football stadium. There, negligent directions given by South Yorkshire Police, who had been responsible for crowd control, led to a fatal crush which claimed the lives of ninety-six spectators and left several hundred of the others injured. A number of compensatory claims was brought by the victims’ relatives, who claimed to have suffered psychiatric harm in the aftermath of the horrific incident. In its 1992 judgment, the House of Lords acknowledged the previously mentioned distinction between a primary and a secondary victim and determined premises to be considered in cases where the latter seeks redress for his non-pecuniary loss.} As in all other scenarios involving the parent – child relationship, the first Alock condition, i.e. existence of a close tie of love and affection between the primary and the secondary victim, will be assumed \textit{de jure} also in the cases examined. Furthermore, the second condition of proximity in time and space will be equally easy to establish, particularly where the compensatory claim was brought by a woman who had a natural
Finally, in line with the third condition, the plaintiff will need to establish that she (he) suffered ‘shock’ as a result of the traumatic occurrence.\(^{47}\)

In Ireland the right to receive compensation for wrongful death is governed by section 48 of the Civil Liability Act 1961. The cited provision has to be read and applied in conjunction with section 58 of the same statute, whereby: ‘(f)or the avoidance of doubt it is hereby declared that the law relating to wrongs shall apply to an unborn child for his protection in like manner as if the child were born, \textit{provided the child is subsequently born alive}.\(^{48}\) Therefore, the binding Irish legislation seemingly disallows the claim discussed.

At the same time, while taking into consideration the wording of Article 40.3.3° of \textit{Bunreacht Na hÉireann},\(^{49}\) Schweppe has suggested that its application in the tort law context could potentially give rise to a ‘constitutional tort’.\(^{50}\) In support

\(^{46}\) Accordingly, it will be harder to establish it in a case where the claim was brought by a mother, who remained under general anaesthesia, while her child was being delivered via a Caesarean section.

\(^{47}\) As Ackner LJ famously explained: ‘“(s)hock”, in the context of this cause of action, involves the sudden appreciation by sight or sound of a horrifying event, which violently agitates the mind. It has yet to include psychiatric illness caused by the accumulation over a period of time of more gradual assaults on the nervous system’. See: \textit{Alock (n 45) para 5 (Ackner LJ)}. For further judicial interpretation of the ‘nervous shock’ premise under English law, see, for instance: \textit{Sion v Hampstead Health Authority [1994] 5 Med LR 170 or Tredget and Tredget v Bexley Health Authority [1994] 5 Med LR 178}. Due to the fact that this thesis focuses on foetal rights and prerogatives, further developments in the broad area of liability for ‘nervous shock’ will not be discussed in greater detail. Some of the associated issues will, nonetheless, be acknowledged in the chapter’s last section devoted, \textit{inter alia}, to the liability for the ‘loss of a breadwinner’.

\(^{48}\) Civil Liability Act 1961 (No 41 of 1961), s 58 (emphasis added).

\(^{49}\) The first paragraph of Article 40.3.3° of \textit{Bunreacht Na hÉireann} reads: ‘(t)he State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right’.

\(^{50}\) Schweppe (n 17) 26. However, McMahon and Binchy have suggested that the term ‘constitutional tort’ is not an appropriate one, since it is preferable to describe the infringement discussed as a ‘wrongful interference with a constitutional right’. See: W Binchy, \textit{Meskell, The Constitution and Tort Law} (2011) 33 DULJ 339; BME McMahon and W Binchy, \textit{Law of Torts} (4th edn, Bloomsbury 2013) 19. Broader evaluation of the relationship between tortious liability and a breach of one’s constitutional right would be equally excessive, considering the aim and
of her views the referred commentator relied on a broader interpretation of the foetal right to life, which has been recommended by several Irish scholars and judges.\textsuperscript{51} She also invoked the Supreme Court’s 1973 ruling in the case of Meskell \textit{v} CIE,\textsuperscript{52} which established the principle of liability in damages for unlawful interference with one’s constitutional right.\textsuperscript{53} To put it in the words of Walsh J: ‘(...) if a person has suffered damage by virtue of a breach of a constitutional right or the infringement of a constitutional right, that person is entitled to seek redress against the person or persons who have infringed that right’.\textsuperscript{54} The reasoning from \textit{Meskell} was relied upon in a number of subsequent judgments delivered in the cases of \textit{Cotter v Ahern}\textsuperscript{55} or \textit{Kearney v Minister for Justice}.\textsuperscript{56} As should be noted, the Constitution does not include any specific clause addressing the remedies that could be relied upon by the plaintiff in a case of a breach of his constitutional rights. However, as some Irish commentators have suggested, ‘breach of a constitutional right’ should be still classified as a separate tort in Irish framework of this research. It should be, however, briefly mentioned that the Irish position significantly differs from the position adopted in other common law and continental jurisdictions, where a ‘constitutional tort’ is understood essentially as a wrongful act (omission) committed by a servant of the State in the course of exercising public authority. This, in turn, may support a proposition that Irish law adheres to the doctrine of direct horizontal effect of constitutional rights, whereby an individual can invoke his constitutional prerogative in a case against another individual, and not solely against the State. See also: MV Onufrio, ‘The Constitutionalization of Contract Law in the Irish, the German and the Italian Systems: Is Horizontal Indirect Effect like Direct Effect?’ (2007) 7 InDret 1, 3-4. \textsuperscript{51} Schweppe (n 17) 19. Interpretation of Article 40.3.3° and its potential links to tortious liability for antenatal injuries under Irish law will be broadly analysed in the subsequent section. \textsuperscript{52} \textit{Meskell v CIE} [1973] IR 121; hereinafter \textit{Meskell}. \textsuperscript{53} For the discussion of caselaw related to the concept of ‘constitutional tort’, see, generally: G Hogan and G Whyte, \textit{JM Kelly, The Irish Constitution} (4th edn, Tottel Publishing 2003) 1311-1313, McMahon and Binchy (n 50) 19-50. \textsuperscript{54} \textit{Meskell} (n 52) 133 (Walsh J). For further discussion on the issue of liability for breach of one’s constitutional right, see for example: McMahon and Binchy (n 50) 19-50. \textsuperscript{55} \textit{Cotter v Ahern} [1976] ILRM 248. \textsuperscript{56} \textit{Kearney v Minister for Justice} [1986] IR 116 [1987] ILRM 52.
law. The injured plaintiff could, therefore, rely on ‘the ordinary range of actions and orders’ that would be available to him in a particular factual scenario.\(^{57}\)

In order to be able to base the action directly on the provisions of the Constitution, the plaintiff will have to establish that the common law and statutory remedies available in a case where his personal right has been violated are either non-existent or inadequate.\(^{58}\) To put it in the words of Henchy J in *Hanrahan v Merck Sharp & Dohme*,\(^{59}\) the existing tort must be ‘ineffective to protect the plaintiff’s constitutional right’.\(^{60}\) On that account, if the plaintiff can defend or vindicate his right under either common law or statute, the court will abstain from any intervention.\(^{61}\) As could be argued, application of *Meskell* in the context of Article 40.3.3° would allow the courts to fill in an existing loophole as there is currently no cause of action for a fatal accident claim in a case where the death of an embryo (foetus) resulted from a wrongful act (omission).

On the other hand, however, if the ‘constitutional tort’ was to be established in the present context the court could be faced with difficulties concerning causation and a possibility of double recovery.\(^{62}\) More importantly, however, attention should be drawn to the relevance of the ‘born alive’ principle, governing the Irish law of tort. Firstly, the ‘born alive rule’, which originates from the


\(^{58}\) See, for example: Costello J’s remarks in *W v Ireland (No 2)* [1997] 2 IR 141, 164 (Costello J) or Barrington J’s remarks in *McDonnell v Ireland* [1998] 1 IR 134, 147-148 (Barrington J).

\(^{59}\) *Hanrahan v Merck Sharp & Dohme* [1988] ILRM 629; hereinafter *Hanrahan*.

\(^{60}\) Ibid 636 (Henchy J).

\(^{61}\) See: *Kelly v Minister for Agriculture, Food and Forestry* (High Court, 1 May 2001).

\(^{62}\) Since, as has already been acknowledged, the parents (more likely, the mother) will have their own action for compensation of non-pecuniary loss resulting from a miscarriage (stillbirth).
common law and which has been expressly articulated in section 58 of the Civil Liability Act 1961, could be seen as an apparent product of legitimate exercise of parliamentary discretion. Namely, it provides clearer and more precise parameters of the ambiguous Article 40.3.3°. Incidentally, it may be noted that the domestic courts did, in the past, show their deference to the Oireachtas, for instance, in cases pertaining to the constitutionality of provisions governing limitation of actions.63 Secondly, attention should also be drawn to the Supreme Court’s appreciation of the general principles governing the law of torts in Ireland, expressed, for example, in its 1997 judgment delivered in the case of Sweeney v Duggan.64 As Binchy reports, it is apparent that the Court was not compelled ‘to subject traditional negligence principles to a re-assessment in accordance with the constitutional framework of rights-protection’.65 Thirdly,

63 See, for example: Tuohy v Courtney [1994] 3 IR 1, 47. The facts of the case were the following. The plaintiff bought a house in 1978. He believed that he was acquiring a freehold interest in the property, which was solely subject to a ground rent. Later, he learnt that he had, in fact, acquired a leasehold interest. The plaintiff alleged negligence on the part of his solicitor, who had represented him in the course of concluding the contract of sale. However, the defendant pleaded that the statute of limitations had expired, since the summons was not issued until 1987. At first instance, the court decided to interpret section 11 of the Statute of Limitations 1957 in a strict manner and, thus, the plaintiff’s claim was rendered statute-barred. In response, the plaintiff claimed that the lack of discoverability test in the section examined violated his ownership and personal rights protected by the Constitution. The Supreme Court ultimately rejected a proposal, whereby the apparent severity of the section examined could be subject to constitutional challenge. Most importantly, it was held that the legislature’s task was to balance rights and duties safeguarded by the provisions of Bunreacht Na hÉireann. On the other hand, the judiciary, when faced with an action for unconstitutionality, was not in a position to impose any views concerning the scope and the character of such rights and duties. The above line of reasoning was subsequently followed by the Supreme Court in Murphy v McInerney Construction Ltd [2008] IEHC 323. See also: Quill (n 4) 498.

64 Sweeney v Duggan [1991] 2 IR 274 [1997] 2 ILRM 211. This case, on the other hand, concerned an occupational accident in a quarry. The injured employee could not receive full compensation from the employer company, as the latter had not been effectively insured. He later decided to sue the company’s effective owner, i.e. the manager of the quarry, while relying on Article 40.3.2° of Bunreacht Na hÉireann. Namely, he alleged that there had been a failure to protect his right to bodily integrity. Barron J rejected his claim after founding no assistance from any of the constitutional provisions pertaining to personal rights. The cited judge simply concluded that the plaintiff’s claim was to be analysed with recourse to the law of negligence. See: Binchy (n 50) 348.

65 See: Binchy (n 50) 344.
statutes are *ex lege* presumed to be compliant with the Constitution.\textsuperscript{66} Fourthly, the aim of the ‘born alive rule’ is to guarantee stability and transparency of civil relations between private parties. Finally, we could point to the Supreme Court’s caselaw favouring narrow interpretation of Article 40.3.3°, in particular, to its most recent judgment delivered in the case of *M (Immigration - Rights of Unborn) v Minister for Justice and Equality & Others*,\textsuperscript{67} which will be further discussed in the forthcoming section.

As a counterargument, one could observe that, in any event, a constitutional provision will supersede a statutory one in compliance with the *lex superior derogat legi inferiori* principle. Therefore, we could argue that although Article 40.3.3° of *Bunreacht hÉireann* protects foetal right to life, the protection – under the currently binding Irish law – is not fully adequate, in a sense that the precise wording of section 58 of the Civil Liability Act 1961 will estop the plaintiff from relying on a civil law remedy in case where the child was stillborn. On that account, the court would, more than likely, recognise the existence of a constitutional tort in the present context. Such recognition, in the author’s opinion, would not mean that ‘the tort is redundant in the presence of the Constitution’,\textsuperscript{68} but rather that the State would provide a remedy to vindicate the plaintiff’s personal rights in a case where the tort will fail to fulfill this task.

\textsuperscript{66} See, for example: Hanna J’s statement in *Pigs Marketing Board v Donnelly* [1939] IR 413, 417, whether: ‘(...) a law passed by the Oireachtas (...) is presumed to be constitutional unless and until the contrary is clearly established’.


\textsuperscript{68} See: TAM Cooney and T Kerr, ‘Constitutional Aspects of Irish Tort Law’ (1981) 3 DULJ 1, 2. See also: Heuston (n 57) 222.
In any event, further analysis of the issue discussed falls outside the scope of this thesis and, therefore, it will not be continued. It is because the right to receive compensation for foetal death belongs, in fact, to another persons’ (i.e. the parents’) patrimony. On that account, these claims can be hardly regarded as claims for antenatal injuries, if the term is interpreted in line with the objectives behind this research.

The same observation concerns the so-called ‘wrongful conception’ (‘wrongful pregnancy’) claims and ‘wrongful birth’ claims. As should be explained, ‘wrongful conception’ (‘wrongful pregnancy’) claim is a claim brought by a parent (parents) against a defendant, whose negligence resulted in conceiving a child that they had not planned. ‘Wrongful birth’, on the other hand, is a claim brought by a parent (parents) of a child born with a congenital defect against a defendant, whose negligence effectively deprived them of an opportunity to legally terminate the pregnancy. However, the above two claims should not be confused with a ‘wrongful life’ claim that is brought by (or on behalf of) a child who alleges that but for the defendant’s negligence he would have never been born and live a life that is not worth living. Accordingly, admissibility of ‘wrongful life’ claims will be analysed in the final section of this chapter.

---

To conclude, in all the above scenarios the parents allege that they have been harmed by the fact that the child was either conceived (born), the fact that it was born with a defect or the fact that it was stillborn. This research, on the other hand, considers an ‘antenatal injury’ exclusively as diminution of the child’s, and only the child’s, patrimony. At the same time, it remains irrelevant that the vast majority of compensatory claims are being brought on behalf of the injured children, most frequently by their parents.


3.1 Ireland and Other Common Law Jurisdictions

Acknowledging a child’s right to receive compensation for antenatal harm in cases where the child is born alive seems like a natural direction in which the law of most jurisdictions would gradually evolve. Surprisingly, however, compensatory claims for antenatal injuries were not allowed by the courts or domestic statutes until well into the twentieth century. Commentators have consistently pointed to a number of reasons explaining this attitude.

3.1.1 Initial Restrictions: Walker v Great Northern Railway Co. of Ireland

As far as common law countries are concerned, the courts' initial unwillingness to acknowledge the child’s right to receive compensation for antenatal harm may have been connected with a previously binding rule of tort law, whereby privity of contract was a necessary condition of the duty of care. Such reasoning is best
illustrated by the 1891 Irish case of *Walker v Great Northern Railway Co. of Ireland*,\(^70\) where a pregnant train passenger was involved in an accident caused by negligence of the railway company’s employees. As a result of the event her daughter was later born with permanent defects. While examining the claim for damages brought on behalf of the disabled child, the court concentrated on whether a contingent contractual bond, which could give rise to liability in damages, existed. Having decided that the plaintiff did not have a cause of action in contract from the defendant’s conduct, it was concluded, firstly, that the agreement existed solely between the railway company and the plaintiff’s mother, and, secondly, that no consideration was received by the defendant in respect of the additional ‘passenger’. O’Brien CJ also underlined that a pregnant woman, not a railway company, was the common carrier of the foetus. Nonetheless, as the ‘privity of contract fallacy’ doctrine was departed from in subsequent judgments, such as, most notably, *Donoghue v Stevenson*,\(^71\) the reasoning from *Walker* could no longer be seen as relevant.\(^72\)

On the one hand, it seems likely that the refusal to entertain the plaintiff’s claim in the instant case was to some degree dictated by the views of the then binding doctrine. One the other hand, it seems equally likely that treating the claim exclusively from the perspective of contract law allowed the court, firstly, to escape difficulties of hypothetical causation and, secondly, to avoid addressing the issue of foetal personality under common law. At the same time, the judges,

---

\(^70\) *Walker v Great Northern Railway Co. of Ireland* [1891] 28 LR, IR 69; hereinafter *Walker*.

\(^71\) *Donoghue v Stevenson* [1932] AC 562 (HL Sc).

\(^72\) Whitfield (n 28) 795 and Healy (n 2) 382.
while appreciating possible emergence of these hurdles,\textsuperscript{73} seemed intrigued by the idea of recognising prenatal interests under the law of torts and proposed that it could be ‘further elaborated’.\textsuperscript{74}

In passing, even before \textit{Walker} was decided, initial reluctance towards remedying antenatal harm had already been expressed by some of the American courts. Most notably, one should point to the seminal 1884 judgment delivered in the case of \textit{Dietrich v Inhabitants of Northampton} by the Supreme Court of Massachusetts.\textsuperscript{75} Here, a five months pregnant woman tripped on a defect in one of Northampton’s highways and – as a result of a subsequent fall – suffered a miscarriage. Her child, ‘although not directly injured (...) was too little advanced in foetal life to survive its premature birth’ and died within less than an hour.\textsuperscript{76} Having pointed to serious uncertainties over causation and remoteness in the case examined, Holmes J also stated that a foetus could not, at the time when the injury occurred, be regarded as an independent person, but rather as a part of the maternal organism. According to the learned judge, lack of independent existence, prevented a child harmed \textit{in utero} from standing as a plaintiff in civil litigation.\textsuperscript{77} The case was, accordingly, dismissed.\textsuperscript{78}

\textsuperscript{73} Most notably, O’Brien CJ stated that: ‘(t)here are instances in the law where rules of right are founded upon the inherent and inevitable difficulty or impossibility of proof. And it is easy to see what a boundless sea of speculation in evidence this new idea would launch us’. See: \textit{Walker} 81–82 (O’Brien CJ).

\textsuperscript{74} Albertsworth (n 15) 464.

\textsuperscript{75} \textit{Dietrich v Inhabitants of Northampton} [1884] 138 Mass 14.

\textsuperscript{76} Ibid 15 (Holmes J).

\textsuperscript{77} Ibid 17 (Holmes J).

\textsuperscript{78} The potential causation difficulties were reiterated in a number of subsequent American judgments, such as, for example: \textit{Magnolia Coca Cola Bottling Co. v Jordan} [1935] 124 Tex 347, 78 SW 2d 944.
3.1.2 Gradual Developments: Caselaw and Legislation

3.1.2.1 England and Wales

In England *Walker* was expressly departed from in 1992 in the judgment issued in joint cases of *Burton v Islington Health Authority* and *De Martell v Merton and Sutton Health Authority*. Both plaintiffs, Tina Burton and Christopher De Martell, alleged that they had been born with severe physical abnormalities as a result of negligent medical treatment received by their mothers during the pregnancy in the former case, and during the pregnancy and labour in the latter. In both cases the courts were faced with the same question: whether a child, who was born alive but who suffers from disabilities causally linked to the defendant’s negligence, can seek compensation if the negligent conduct took place when the child was still in his mother’s womb.

At first instance, both trial judges decided in favour of the plaintiffs. In *Burton v Islington Health Authority* Potts J appreciated that the defendant authority might potentially owe a duty of care to the foetus but the cause of action is incomplete until the child is born alive. Similarly, in *De Martell v Merton and Sutton Health Authority* Phillips J found that, since at common law one becomes

---

79 *Burton v Islington Health Authority and De Martell v Merton and Sutton Health Authority* [1992] 3 All ER 832; hereinafter *Burton and De Martell*.
80 According to Jones, the theory, whereby the duty of care was owed to an embryo (foetus) had already been developing under the law of England and Wales when the ruling discussed was delivered. For instance, the above point was conceded for the defendant’s counsel in the Court of Appeal’s 1982 ruling issued in the case of *McKay v Essex AHA* [1982] 1 QB 1166, which will be further discussed in the subsequent section of this chapter. See: Jones (n 28) 145.
81 *Burton v Islington Health Authority* [1991] 1 QB 638.
82 *De Martell v Merton and Sutton Health Authority* [1992] 3 All ER 820.
a natural person at the moment of birth, the child, once born alive, acquires the right to receive compensation for damage caused by the defendant’s lack of skill and care.

It should be noted that both trial judges were clearly inspired by the 1972 Australian case of *Watt v Rama*. The facts of the case were the following. The plaintiff had suffered from brain damage and epilepsy. It was established that her condition was linked to a road traffic accident caused by the defendant’s negligent driving at a time when she was still *in utero*. Potts J relied on Winneke CJ’s judgment, stating that there is a continuous duty of care to the foetus and then to the child; however the breach of that duty only takes place at the time of birth. Phillips J, on the other hand, seemed to have been more influenced by Gillard J’s reasoning. He found that the duty was ‘born’ with the child and it was only at the time of birth when the cause of action in negligence came into an existence. Subsequently, in the Court of Appeal’s judgment in *Burton and De Martell*, Dillon LJ commented on the references to *Watt v Rama*. He noted that, although the trial judges expressed diverse opinions based on Winneke CJ’s and Gillard J’s deliberations, these differences were not significant.

On appeal by the two defendant health authorities, the Court of Appeal started the analysis by ascertaining that a foetus, while a foetus, does not possess independent legal personality in English law, as was previously found in several

---

83 *Watt v Rama* [1972] VR 353.
84 *Burton v Islington Health Authority* (n 79) 230 (Dillon LJ).
reported judgments, including the previously cited Paton v British Pregnancy Advisory Service Trustees and Another\(^{85}\) as well as Re F (In Utero)\(^{86}\) or C v S.\(^{87}\)

At the same time, having derived no assistance from the contract-orientated Walker, Balcombe and Dillon LJJ referred instead to the corresponding judicial developments that had been taking place over the years in other common law countries, including Canada\(^{88}\) and Australia.\(^{89}\) However, most notably, the Court focused on the seminal 1933 appeal decision in the case of Montreal Tramways v Léveillé,\(^{90}\) issued under Civil Law of Quebec by the Canadian Supreme Court.

The case concerned a child born with clubfeet who claimed compensation from a tramcar company, alleging that her defect resulted from an accident caused by the company’s subordinate’s negligence, while she was still in her mother’s womb.

Acknowledging the claimant’s right of action, Lamont J observed that not to do so would compel the child ‘(…) without any fault on its part, to go through life carrying the seal of another’s fault and bearing a very heavy burden of infirmity

\(^{85}\) Paton v British Pregnancy Advisory Service Trustees and Another [1979] QB 276.
\(^{86}\) Re F (In Utero) [1988] Fam 122.
\(^{88}\) See: Duval v Seguin [1972] 26 DLR (3d) 418. In this case the plaintiff, Ann Duval, was born with physical deformities and lifelong mental disability as a result of a road traffic accident which occurred on a highway in eastern Ontario. At the time of the crash Ann was still in utero. While awarding the damages, Fraser J established that the defendant owed a duty of care to the plaintiff, since it was foreseeable that some users of the highway were pregnant women, whose foetuses were likely to be harmed in a potential car crash. The fact that the wrong had been committed before the plaintiff’s birth could not be deemed as defence to the negligent driver’s liability in tort. See: Duval v Seguin 433 (Fraser)).
\(^{89}\) Watt v Rama (n 83).
\(^{90}\) Montreal Tramways v Léveillé [1933] 4 DLR 337; hereinafter Montreal Tramways.
and inconvenience without any compensation therefor'. While explaining the rationale behind his decision, the learned judge made reference to the ‘nasciturus rule’ of medieval law and its application in property and criminal law cases. He observed that, since the action in tort was in the child’s interest, the child was analogously considered to be born at the time when the injurious act took place. Cannon J, on the other hand, made a successful attempt to overcome the previously described ‘foetal personality dilemma’ by acknowledging that the plaintiff did, in fact, suffer her injuries at the time of her birth, i.e. when the right became actionable. In response to the previously cited counterarguments, he also stated that thanks to the scientific progress the causation difficulties could no longer be regarded as an obstacle to recognising the plaintiff’s claim.

It is worth noting that the above discussed line of reasoning was subsequently relied upon by some of the American courts. In particular, the 1947 ruling of the District Court for the District of Columbia in the case of Bonbrest v Kotz - largely inspired by the Montreal Tramways – is deemed as a starting point for redressing prenatal injuries under American tort law.

However, according to some commentators, the point discussed should be rather associated with Boggs J’s dissenting opinion, delivered nearly fifty years before Bonbrest in the Illinois case of Allaire v St Luke’s Hospital. In brief, Allaire...
concerned a hospital elevator accident involving a heavily pregnant patient. Due to the injuries sustained by his mother, the plaintiff was subsequently born with a deformed leg. The Court of Illinois rejected the claim, while arguing that – at the time when the accident occurred – the plaintiff had not yet been a person and, thus, he could not bring a negligence action against the defendant clinic at his own account. For the above reason, the court further equated redressing the plaintiff’s damage in the scenario examined with engaging into a ‘legal fiction’. In disagreement, Boggs J proposed a ‘viability criterion’, whereby a child could be compensated for prenatal harm as long as, firstly, he had already been capable of living \textit{ex utero} at the time when the injurious event took place and, secondly, he was subsequently born alive.\footnote{\textit{Allaire} (n 96) 641 (Boggs J).}

It should be noted that the criterion examined was acknowledged in some of the subsequent judgments, including \textit{Lipps v Milwaukee Electric Ry. & Light Co.},\footnote{\textit{Lipps v Milwaukee Electric Ry. & Light Co} [1916] 164 Wis 272, 159 NW 916.} \textit{Williams v Marion Rapid Transit Inc}\footnote{\textit{Williams v Marion Rapid Transit Inc} [1949] 87 NE 2d 334. There, a pregnant woman fell from the steps of a bus due to the defendant operator’s negligence. As a result, her child – who had already been viable at the time of the incident – was later born with disabilities.} and \textit{Amann v Faidy},\footnote{\textit{Amann v Faidy} [1953] 415 Ill 422, 114 NE 2d 412.} which overruled \textit{Allaire}.\footnote{For more thorough analysis of historic American caselaw pertaining to prenatal injuries, see, for example: Albertsworth (n 15) 466-467; M Nesterowicz, ‘Odpowiedzialność Cywilna według \textit{Common Law} za Szkody Wyrządzone Nasciturusowi przed i po Jego Poczęciu’ (1983) 8 Państwo i Prawo 85, 87.} In that way, Boggs J’s dissenting opinion eventually became the binding law of Illinois.\footnote{See: \textit{Rainey et al v Horn} [1954] 72 So 2d 434, 221 Miss 269, 279 (Gillespie J).} Finally, one could also point to the more general principle inserted in section 869 of the Second Restatement of the Law of Torts, whereby
anyone who has harmed an embryo (foetus) bears liability in tort for the resulting damage.\(^{103}\)

Returning to the law of England and Wales, we could argue that the Quebecoise approach was also largely relied upon in *Burton and De Martell*. Most notably, while dismissing the appeal brought by the two defendant health authorities, the court concluded that a child can, under common law, demand damages for injuries caused by negligence of another party, sustained at the time when he was still *in utero*. Furthermore, Dillon LJ acknowledged the previously mentioned ‘nasciturus rule’, remaining in operation in continental law jurisdictions.\(^{104}\) He noted that, due to significant developments that had taken place since the *Montreal Tramways* ruling, there was no longer need to adhere to the maxim.\(^{105}\)

At the same time, while following Cannon J’s line of reasoning, the learned judge observed that, since in law and logic no damage could have been caused to the plaintiff before he began his independent existence, the right to claim damages for antenatal harm only becomes actionable at the moment of the child’s birth, i.e. at the time when the child becomes a person and inherits his damaged body. In addition, recognition of prenatal interests was found to be only possible provided that the child was born alive.\(^{106}\)

\(^{103}\) American Law Institute (n 35) s 869. The liability in question can be imposed as long as the child was born alive.

\(^{104}\) *Burton and De Martell* (n 79) 838 (Dillon LJ).

\(^{105}\) Ibid 839 (Dillon LJ).

\(^{106}\) Ibid 841 (Dillon LJ). A similar proposal, whereby the duty of care only arises at the time of birth, was acknowledged by both Winneke CJ and Gillard J in *Watt v Rama*. 
The decision of the English Court of Appeal was also followed by judges of its Scottish counterpart in the case of *Hamilton v Fife Health Board*. There, a child died at the age of three days and his mother suffered serious gynaecological complications as a result of a negligently performed forceps delivery. The parents sued the Health Board for compensation for loss of the child’s society. Initially, the Lord Ordinary (Prosser) decided that, pursuant to section 1(1) of the then binding Damages (Scotland) Act 1976, compensable personal injuries could only be sustained by a person. He further held that, since the deceased boy was not a person at the time when he was harmed, his parents’ action was irrelevant. However, Prosser LJ’s opinion was subsequently reversed by the judges of the Extra Division, comprising McCluskey, Caplan and Wylie LJ. Allowing a reclaiming motion, their Lordships reiterated that the liability in tort can be established as long as *damnum* concurs with *injuria*. In a prenatal injury scenario the above concurrence takes place only when the child is born alive and acquires the right of redress vis-à-vis the party, who was responsible for his loss.

To complete the analysis of *Burton and De Martell*, the author should, however, explain that prior to the two cases being decided, the English legislature had already introduced statutory provisions superseding the common law to allow for imposition of tortious liability in cases of established antenatal harm. Its

---

108 Damages (Scotland) Act 1976 (c 13), repealed by Damages (Scotland) Act 2011, asp 7.
110 Ibid.
enactment was preceded by the English Law Commission recommendations, included in its 1974 Report.\textsuperscript{111}

It is frequently submitted that introduction of the statute became a necessity in the light of the ‘thalidomide tragedy’, which resulted in over ten thousand children worldwide being born with severe deformities.\textsuperscript{112} Thalidomide (alpha-phthalimido-glutarimide) was first developed in mid-1950s’ in West Germany and for several years it was popularly prescribed to pregnant women as an antiemetic for morning sickness. However, separate studies conducted by Lenz and Knapp\textsuperscript{113} as well as McBride\textsuperscript{114} revealed that children, whose mothers ingested the medication particularly during the first trimester of pregnancy, developed a myriad of characteristic skeletal limb abnormalities, including severe shortening or partial absence of one or more limbs (phocomelia) and complete absence of the limbs (amelia).\textsuperscript{115} In addition, a number of children exhibited aural and facial anomalies when prenatal exposure to thalidomide took place between the third and the sixth week after conception. As could be assumed, the drug has been since classified amongst the most potent teratogens and its prescription to pregnant women continues to be strongly discouraged.

\begin{thebibliography}{99}
\item\textsuperscript{111} Law Commission of England, \textit{Report on Injuries to Unborn Children} (Law Com No 60, Cmnd 5709, 1974).
\item\textsuperscript{112} See, for example: SM McLean, 'Ante-Natal Injuries' in SM McLean (ed), \textit{Legal Issues in Medicine} (Gower 1981) 150.
\item\textsuperscript{114} See WB McBride, 'Thalidomide and Congenital Abnormalities' (1961) Lancet 2 1358.
\item\textsuperscript{115} See: KL Moore and TVN Persaud, \textit{Before We Are Born: Essentials of Embryology and Birth Defects} (6th edn, Saunders 2003) 128 and 134.
\end{thebibliography}
It should be observed that an alleged causal link between the described pathologies and the maternal ingestion of thalidomide had already been reported in the 1969 case of *S v Distillers Co. (Biochemicals) Ltd.*\(^{116}\) The case did not, however, establish the cause of action, since the parties eventually reached a settlement, whereby the defendant producer was to pay the victims £20 million worth of damages. A further £5 million was to be furnished by the British Government from an especially established fund.\(^{117}\)

The provisional 1972 statute, known as Dangerous Drugs and Disabled Children Bill, which finally furnished victims of prenatal harm with a cause of action, eventually entered into force in 1976 under the name Congenital Disabilities (Civil Liability) Act.\(^{118}\) At the time of writing the present thesis, the Act remains in operation in the territory of England, Wales and Northern Ireland.\(^{119}\)

As should be now noted, section 4(5) of the Act explains why the Court of Appeal was compelled to decide the *Burton* and *De Martell* cases under the principles of common law. Namely, the provision limits application of the statute discussed exclusively ‘(…) in respect of births after (but not before) its passing (…)’. At the same time, both Tina Burton and Christopher De Martell were born before 1976.\(^{120}\)

---

\(^{116}\) *S v Distillers Co. (Biochemicals) Ltd* [1969] 3 All ER 1142 [1970] 1 WLR 114.

\(^{117}\) See: Nesterowicz (n 69) 91.

\(^{118}\) c 28; hereinafter, Congenital Disabilities Act 1976.

\(^{119}\) In Scotland, civil liability for antenatal injuries is being established on the basis of the existing rules of common law. See, for example: Nesterowicz (n 69) 91.

\(^{120}\) See also: *Burton and De Martell* (n 79) 843 (Dillon LJ).
Apart from the general Congenital Disabilities Act, one should mention some other statutes regulating tortious liability for prenatal harm in more specific contexts. These are, most notably, the previously mentioned Human Fertilisation and Embryology Acts 1990 and 2008,\textsuperscript{121} pertaining to civil liability resulting from improper use of assisted reproductive techniques.

Finally, section 6(3) of the Consumer Protection Act 1987\textsuperscript{122} extends tortious liability for antenatal harm to cases where it was caused by a defective product.\textsuperscript{123}

### 3.1.2.2 Ireland

In Ireland, tortious liability for antenatal injuries has been regulated by means of a single, general statutory provision, i.e. the previously cited section 58 of the Civil Liability Act 1961, which overruled the 1891 judgment delivered in the case of *Walker*.\textsuperscript{124} Hence, as could be observed, liability for antenatal harm on the grounds of Irish law of torts had been recognised much earlier than in the other common law jurisdictions.

As the section stipulates, ‘(f)or the avoidance of doubt it is hereby declared that the law relating to wrongs shall apply to an unborn child for his protection in like manner as if the child were born, provided the child is subsequently born alive’.

\textsuperscript{121} Hereinafter, respectively, the HFEA 1990 and the HFEA 2008.
\textsuperscript{122} Consumer Protection Act 1987 (c 43).
\textsuperscript{123} Specific provisions of all the above cited statutes, which correspond with the individual scenarios of antenatal harm, will be further discussed in this part’s subsequent chapters.
Considering its wording, we may, therefore, propose that under the domestic law of torts, an embryo (foetus) is placed in the same position as a child already born. As a result, a child will be able to receive compensation for an injury caused by another party's act or omission which occurred at the time when the child was still in utero.

Furthermore, the wording of the clause examined does not suggest that tortious liability for antenatal harm has to be necessarily based on the defendant’s fault. Therefore, the provisions governing liability based on risk are also potentially applicable. However, the only obvious association with the abovementioned regime would be the provisions governing strict liability for damage caused by a defective product on the grounds of the Liability for Defective Product Act 1991. In the present context the established negative consequences for the embryo (foetus) would have to be linked to the use of products (such as medications), devices or materials whose safety was not such as persons generally are entitled to expect.

In addition, it is clear that, similarly to the case of other jurisdictions examined, relying on section 58 will only be possible as long as the resulting child was subsequently born alive. As McMahon and Binchy advise, from an Irish perspective, it is not essential for the child to be viable, as ‘postnatal birth of even momentary duration will suffice’.125

---

125 See: McMahon and Binchy (n 57) 425.
As will be further acknowledged, the above cited provision has not been discussed extensively in the accompanying caselaw which concerns antenatal injuries and which will be acknowledged in the forthcoming chapters. For now, it will suffice to say that, seemingly, cases on liability for prenatal occurrences in this jurisdiction proceed on the courts’ implicit acceptance that the action in tort is permitted because of the explicit reference to the ‘nasciturus maxim’ appearing in the wording of section 58 of the Civil Liability Act 1961. On the other hand, as was previously observed, allowing a fatal injuries action to parents of a stillborn child, outside the context of constitutional law, seems to be, prima facie, excluded due to the precise wording of the section. To recall, an actionable injury against the deceased is necessary for a ‘wrongful death’ claim governed under section 48(1) of the statute examined.\textsuperscript{126} In other words, the defendant’s act (omission) would have to have constituted a tort vis-à-vis the deceased person, in case where he (she) had survived. In the present scenario, the fact of stillbirth – and, accordingly, non-fulfilment of the born-alive rule – makes it impossible to establish that a tort was committed.\textsuperscript{127}

At the same time, a group of Irish commentators, who support a broader and more comprehensive interpretation of Article 40.3.3° of Bunreacht Na hÉireann, argue that the proviso may be applicable outside the more traditional context of abortion prohibition.\textsuperscript{128} In support of this proposal, they refer, inter alia, to the

\textsuperscript{126} S 48(1) reads: ‘Where the death of a person is caused by the wrongful act of another such as would have entitled the party injured, but for his death, to maintain an action and recover damages in respect thereof, the person who would have been so liable shall be liable to an action for damages for the benefit of the dependants of the deceased’.

\textsuperscript{127} For an opposite view, see, for example: McMahon and Binchy (n 57) 425-426.

\textsuperscript{128} See, for example: Schweppe (n 17) 19; W Binchy, ‘Article 40.3.3° of the Constitution: Respecting the Dignity and Equal Worth of Human Beings’ in: J Schweppe (ed), The Unborn Child, Article 40.3.3° and Abortion in Ireland: Twenty-Five Years of Protection? (Liffey Press
protective, non-prohibitive language of the article’s first paragraph, which does not refer to abortion *per se*.\textsuperscript{129}

In addition, looking from the historic perspective, the more general approach to Article 40.3.3° could be deducted from Walsh J’s statement included in the Supreme Court’s 1980 judgment delivered in the case of *G v An Bord Uchtála*,\textsuperscript{130} which pre-dated introduction of the constitutional provision. According to the learned judge: ‘(t)he right to life necessarily implies the right to be born, the right to preserve and defend (and have preserved and defended) that life (...)’.\textsuperscript{131}

Following the above line of reasoning could lead to an initial conclusion, whereby Article 40.3.3° serves as a ‘blanket formula’ of criminal and tortious liability for prenatal harm or, as the case may be, even as a source of most – if not all – prerogatives vested in an embryo (foetus) by the domestic law. From a more general perspective, legal doctrine allows for a broadened interpretation of rights and liberties.\textsuperscript{132} To test the appropriateness of such with reference to the proviso examined, the author will – in the first place – consider its wording. In case where no satisfactory conclusions are reached at the linguistic level, she will rely on three auxiliary methods of legal interpretation, i.e. historic, functional and comparative.

\textsuperscript{129} Schweppe (n 17) 19.
\textsuperscript{130} *G v An Bord Uchtála* [1980] IR 32.
\textsuperscript{131} Ibid 69 (Walsh J).
\textsuperscript{132} See, for example: L Morawski, *Wstęp do Prawoznawstwa* (9th edn, Dom Organizatora 2008) 140.
Textual Interpretation of Article 40.3.3°

According to a Roman maxim, *interpretation cessat in claris*, which can be translated as ‘interpretation stops in the face of clarity’. In other words, one should attempt to establish the meaning of a legal norm solely when uncertainties arise. At the same time, the above cited formula does not seem to characterise Article 40.3.3°, whose ambiguous and imprecise wording had already been criticised even before the provision was signed into law. Moreover, it has been provoking contentious debates until the present day. The controversies concern, in the first place, a peculiar and rather unfortunate term of ‘unborn’, which was already acknowledged in the introductory part of this thesis. The ‘unborn’ is further accompanied by equally problematic and undefined expressions, i.e. ‘with due regard’ and ‘as far as practicable’.

From the plain language meaning perspective, the first paragraph of Article 40.3.3° does not, *prima facie*, seem to pertain to any antenatal rights associated within the domain of private law. It is because most of the English language dictionaries define ‘life’ as ‘the state of being alive as a human being’ or as synonyms of ‘existence’ or ‘survival’. Therefore, it is very unlikely that an

---

133 Vagueness of the language of the intended Article 40.3.3° was acknowledged shortly before its enactment in 1983 by the then Taoiseach - Garret FitzGerald. Supporting the Attorney General’s opinion, the Taoiseach contended that: ‘the words used are ambiguous and unclear and could even have the opposite effect to what we all seek’. See: ‘Taoiseach Warns on Wording’, *The Irish Times* (Dublin, 6 September 1983) 6.


ordinary English speaker would be willing to accept that the ‘right to life of the unborn’\textsuperscript{136} contains in its scope, for instance, the right to posthumously inherit an estate, to become a beneficiary of a third-party contract concluded before one’s birth or even to receive compensation for antenatal harm. It is, therefore, apparent that the wording of the provision, as it is understood in ordinary parlance, does not justify awarding it any broader, more general interpretation.

On that account, textual interpretation of Article 40.3.3\textdegree{} does not seem to strongly support the hypothesis, whereby the clause discussed could serve as a ‘blanket formula’ in all the factual scenarios where prenatal prerogatives are at stake. In order to assess Article 40.3.3\textdegree{} in the particular tort law context, the author finds it now appropriate to further juxtapose its language with the language of section 58 of the Civil Liability Act 1961.

It appears that the ‘wrongs’ acknowledged by the latter provision consist primarily of inflicting an injury to the health of an embryo (foetus) either in a direct or an indirect manner. Hence, as can be deduced, section 58 of the Act pertains to ‘health’, in the sense of providing a civil remedy to a resulting child in any case where the bodily integrity of that child \textit{qua} embryo (foetus) had been altered by another party (parties). From the plain language perspective, ‘health’ has been defined as ‘attainment and maintenance of the highest state of mental and bodily vigour of which any given individual is capable’.\textsuperscript{137} Since ‘life’ and

\textsuperscript{136} While assuming that an ‘unborn’ is to be understood as an ‘embryo (foetus)’.

‘health’ are not synonyms, the direct linguistic link between the two analysed provisions cannot be established.

At the same time, sole reliance on textual interpretation of the terms ‘life’ and ‘health’, while analysing the potential relationship between ‘the right to life’ and ‘the right to recover for diminished health’ – particularly from the medical law perspective – might lead to undesired, if not unjust, results. Here, some useful guidance may be drawn from judicial interpretation of the right to life of the pregnant woman. If the right to life of the ‘unborn’ and the right to life of the ‘mother’ are equal, as suggests the wording of Article 40.3.3°, then it can be surmised that the scope of the right to life enjoyed by the ‘mother’ would have to be understood in the same manner as the scope of the right to life enjoyed by the ‘unborn’.

In England and Wales the issue discussed was primarily assessed in the 1938 case of *R v Bourne*, concerning legality of an abortion that was performed by a prominent gynaecologist on a teenage girl, who had fallen pregnant as a result of a gang rape. MacNaghten J instructed the jury that they were entitled to take the view, whereby a doctor operates for the purpose of preserving the life of the mother as long as he believes ‘on reasonable grounds and with adequate knowledge, that the probable consequence of the continuance of the pregnancy would be to make the woman a physical or mental wreck’. Hence, the learned judge could not distinguish between a threat to the life of the pregnant girl

---

138 *R v Bourne* [1938] 3 All ER 615 [1939] 1 KB 687; hereinafter *Bourne*.
139 At the time abortion was prohibited under *Offences Against the Person Act 1861*.
140 *R v Bourne* [1938] 3 All ER 615, 619 (MacNaghten J).
(woman) and a threat to her health since, as he underlined, the two concepts were intertwined and largely dependent upon each other. It should be observed that the above line of interpretation was also followed some thirty years later in the Australian case of *R v Davidson*, where Mehennitt J acknowledged that a serious threat to physical (mental) health of the pregnant woman was to be treated in the same manner as a threat to her life and, hence, its presence justified terminating the pregnancy. Accordingly, it could be carefully accepted that there exists an implicit link between the notions of ‘life’ and ‘health’, as long as the right to life is understood to be encompassing also the right to maintain certain quality of that life, which is not to be diminished by another party’s wrongful interference.

Two problems may, nonetheless, arise in the Irish context. Firstly, both *Bourne* and *Davidson* cannot be treated as binding precedents under the law of this jurisdiction. Secondly, the approach adhered to in the two cases discussed is not likely to be followed by the Irish courts. In support of the above proposal, let us return to the previously cited, landmark 1992 judgment delivered by the Irish Supreme Court in the case of *Attorney General v X*, which, nota bene, was based on a factual scenario very similar to the one in *Bourne*. There, Finlay CJ stated that termination of pregnancy in Ireland was to be regarded as permissible ‘(i)f it is...
established as a matter of probability that there is a real and substantial risk to the life, *as distinct from the health*, of the mother’, which can be only avoided by means of such termination.\textsuperscript{144} Accordingly, as some commentators observe, the above cited test ‘concentrates on the continued physical existence of the pregnant woman, while discounting other factors, such as her mental or emotional “well-being”’.\textsuperscript{145}

To sum up, textual interpretation of Article 40.3.3° of *Bunreacht Na hÉireann* does not seem to reveal any substantial link between the provision and the law of torts. Recourse to relevant caselaw does not resolve the doubts, either, particularly if we consider Finlay CJ’s strict interpretation of the ‘right to life’ proposed in *Attorney General v X*.

**Historic and Functional Interpretation of Article 40.3.3°**

While considering another popular Roman maxim, whereby *animus hominis est anima scripti* (‘intention is the soul of an instrument’), it may be now useful to examine the original *ratio legis* behind Article 40.3.3°. Accordingly, this section of the analysis will attempt to explain what both the drafters of the (still unaltered) provision and the Irish citizens anticipated to achieve thanks to its enactment.

As is commonly known, the provision discussed came into existence by virtue of the Eighth Amendment of the Constitution Act 1983, previously approved by

\textsuperscript{144} Ibid 53 (Finlay CJ); emphasis added.

\textsuperscript{145} Drislane (n 141) 37.
means of a popular referendum. Hence, we could argue that it ultimately was
the nation’s will to place the explicit ‘right to life of the unborn’ among other
fundamental constitutional prerogatives.

As numerous scholars underline, the Eight Amendment of the Constitution was
not aimed at criminalising pregnancy terminations. It is because the above
matter had already been regulated prior to the referendum by the previously
acknowledged Offences Against the Person Act 1861. The cited English statute,
which had become the law of the then dependant Irish territory, prohibited
‘unlawful procurement of miscarriages’ both for oneself and for another person
through drugs, ‘other noxious things’ or mechanical means as well as ‘assisting
in the procurement of such’. The above prohibition was subsequently
reinforced by section 10 of the Health (Family Planning) Act 1979, putting a ban
on enumerated activities of an economic nature that involved the use of
abortifacients.

Acknowledgment of foetal right to life at the constitutional level was, in fact,
prompted by conservative pressure groups, who, in the early 1980’s became

146 The referendum took place on 7 September 1983 and the Act was signed one month later, on
7 October.
147 Despite the political element, which had undoubtedly influenced the 1983 referendum
campaign.
148 See, for example: D Tomkin and P Hanafin, Irish Medical Law (Round Hall, 1995) 182;
Constitution Review Group (n 134) 273; J Casey, Constitutional Law in Ireland (3rd edn, Sweet &
Maxwell 2000) 433; S Mills, Clinical Practice and the Law (2nd edn, Tottel 2007) 287; S
Donnelly, ‘A, B and C v Ireland: Will the European Court of Human Rights Address Ireland’s
149 Offences Against the Person Act 1861, s 58.
150 Offences Against the Person Act 1861, s 59.
151 Namely: sale, importation into the State, manufacture, advertising or display of
abortifacients. See: Health (Family Planning) Act 1979 (No 20 of 1979), s 10(c).
seriously concerned about ‘the tide of liberalism’ that had emerged a decade earlier as a novel trend in the Irish society.152 Furthermore, arguments in support of the amendment began to appear in the aftermath of the 1974 Supreme Court’s ruling in the case of McGee v Attorney General,153 where the law restricting availability of contraceptives was decided to be incompatible with the plaintiff’s unenumerated right to marital privacy, implicitly protected under Articles 40.3.1° and 41 of Bunreacht Na hÉireann.

At the same time, it should be recalled that only a year earlier the US Supreme Court had delivered a landmark judgment in the case of Roe v Wade,154 confirming that the right to privacy also encompassed the pregnant woman’s right to decide whether or not to avail of an abortion. While keeping the outcome of McGee in mind, the pro-amendment supporters became concerned that, in the absence of a relevant constitutional clause, termination of pregnancy in Ireland would be subsequently introduced ‘through the back door’, i.e. by means of a statute repealing the 1861 Act or by means of a judicial decision extending the interpretation of the right to privacy with recourse to Roe v Wade.

Finally, while considering the obligations stemming from Ireland’s membership in the (then) European Economic Community and in the Council of Europe, proponents of the Eight Amendment hoped that it would counteract potential future relaxation of the strict Irish abortion law which, as they feared, was likely

---

152 Tomkin and Hanafin (n 148) 182.
153 McGee v Attorney General [1974] IR 284. The case concerned a married woman, who attempted to export contraceptive jelly from the United Kingdom after being advised by her doctor that a further, fifth pregnancy could constitute a risk to her life.
to be recommended or necessitated by either EC law or the European Court of Human Rights (ECtHR).

*Nota bene*, it could be observed that some Irish commentators deemed the above concerns as highly unreasonable. Sherlock, for instance, argues that ‘the likelihood of the concept of privacy as set out in *McGee* leading to a right to abortion was very small, indeed’.

She further refers to arguments submitted by Griffin and Walsh JJ in *McGee* and to other judgments concerning the right to privacy delivered prior to the Eighth Amendment, such as, for example, the already cited *G v An Bord Uchtála* and *Norris v Attorney General*. In conclusion, the cited scholar observes that, firstly, the right to privacy was never regarded as an absolute one and, secondly, in case of a conflict of the two rights examined, an Irish court would most likely give priority to the right to life of an embryo (foetus).

Furthermore, Sherlock suggests that the fear of potential reforms required under European and international law was truly unfounded. As was previously noted in the Introduction, the ECtHR declared in a number of its judgments that the contracting parties enjoyed a wide margin of appreciation, while deciding on issues of sensitive nature, such as legality of abortion. Thus, the ECtHR was never in a position to imperiously decide on how the issue should be resolved under the law of any member jurisdiction. As far as European law is concerned, Article

155 Sherlock (n 141) 14.
156 *Norris v Attorney General* [1984] IR 36.
157 Sherlock (n 141) 17-18. On the margin, it should be noted that even now, more than 30 years later, European law has still not evolved a decisive competence in the area examined (similarly to the other areas of social policy).
40.3.3° could, prima facie, be still found inferior to the norms of the (then) European Community law.\textsuperscript{158} It is because, in case of a clash between a provision of national law – regardless of its hierarchy – and a provision of the (then) European Community law, the latter would have prevailed.\textsuperscript{159}

Excerpts from media coverage of the 1983 referendum may also cast some light on the original goals that Article 40.3.3° was intended to accomplish. Numerous contributions, which can be traced in archived Irish daily newspapers and TV recordings, clearly suggest that the issue of abortion remained at the heart of the public debate during the period discussed. In fact, abortion was (and still remains) a leading if not an exclusive topic, most commonly associated with the Eighth Amendment. On the language side, it is also interesting to point out that the referendum was commonly being dubbed ‘the abortion referendum’,\textsuperscript{160} whereas the constitutional proviso that subsequently became Article 40.3.3° was being referred to as the ‘anti-abortion amendment’.\textsuperscript{161}

\textsuperscript{158} Ibid 20.
\textsuperscript{159} The position of Article 40.3.3° vis-à-vis European law was subsequently strengthened by the Solemn Declaration to the Protocol 17 to the Treaty on European Union 1992, popularly referred to as ‘Maastricht Protocol’, whereby: ‘Nothing in the Treaties or in the Treaty establishing the European Atomic Energy Community, or in the Treaties or Acts modifying or supplementing those Treaties, shall affect the application in Ireland of Article 40.3.3 of the Constitution of Ireland’. However, in the light of the ‘travel’ and ‘information’ amendments, the overall effectiveness of the Maastricht Protocol has been questioned by some commentators. See, for example: Constitution Review Group (n 134) 273.
\textsuperscript{160} See, for example: W Clingan, ‘Referendum Within Next 10 Weeks’ The Irish Times (Dublin, 18 January 1983) 6; M Finlan, ‘Referendum Should Be Dropped – Young FG’ The Irish Times (Dublin, 14 February 1983) 7; D Coghlan, ‘Cluskey Becomes Third Minister to Reject Amendment’ The Irish Times (Dublin, 15 February 1983); J Jones, ‘37% Against Holding Abortion Referendum’ The Irish Times (Dublin, 17 February 1983) 7; ‘Father Seeks Court Order to Block Abortion Referendum’, The Irish Times (Dublin, 8 June 1983) 11.
\textsuperscript{161} See, for example: O O’Leary, ‘Amendment Text “Open to Change”’ The Irish Times (Dublin, 10 February 1983) 1.
Furthermore, the public (criminal) law centred rationale behind Article 40.3.3° has been, since, expressly invoked in caselaw of the Irish Supreme Court. Two examples, namely, the 2002 judgment issued in the case of *Baby Oladapo and Others v Minister for Justice and Others*[^162] and the 2009 judgment issued in the case of *Roche v Roche*[^163] may help the author to illustrate the narrow functional interpretation of the provision discussed.

In the former case a Nigerian national, Iyabode Abimbola Oladapo, sought refugee status in Ireland due to alleged threats made to her life by followers of an unknown religious cult, known as the ‘Ogboni Fraternity’. As her application was held ‘manifestly unfounded’, a deportation order – subsequently challenged by Ms Oladapo – was issued by the immigration authorities.

During the appeal proceedings before the High Court, the then pregnant applicant argued that due to substantial differences between the Irish and Nigerian standards of maternity care, her deportation would result in denying her foetus the right to life which the State was obliged to protect and vindicate, pursuant to Article 40.3.3° of *Bunreacht Na hÉireann*. While dismissing Ms Oladapo’s appeal, Smyth J stressed that her case was unrelated to the issues of either abortion or foetal right to life.


[^163]: *Roche v Roche* [2010] IESC 10; hereinafter *Roche*. 
His findings were later deemed as ‘entirely correct’ by Keane CJ, who in his final judgment relied, *inter alia*, on the line of interpretation of Article 40.3.3° previously followed in *Attorney General v X*. As the learned judge argued, the opening passage of the proviso discussed was to prevent further liberalisation of the abortion law in Ireland, either by means of a statute or a judicial decision. Since in the applicants’ case neither the State, nor any of its organs intended to terminate Ms Oladapo’s pregnancy, Keane CJ concluded that the maternity care standard argument was irrelevant to the case decided.

The latter case concerned the constitutional status of three cryopreserved, surplus embryos, which were generated *in vitro* with the use of gametes retrieved from Mary and Thomas Roche. After the spouses had separated, Ms Roche planned to take legal control over their embryos in order to achieve another pregnancy against the wishes of her estranged husband. At the High Court level she unsuccessfully argued that Article 40.3.3° vested the frozen embryos with the right to life and, hence, their implantation and further development was to be facilitated by the State. McGovern J – similarly to Keane CJ – agreed that the purpose of the Eighth Amendment was to maintain prohibition of abortion, initially secured by the previously cited provisions of Offences Against the Person Act 1861. Relying on the historic interpretation of Article 40.3.3°, he further added that: ‘(...) (t)o infer that it was in the mind of the people that ‘unborn’ included embryos outside the womb or embryos *in vitro* would be to completely ignore the circumstances in which the amendment (...) arose’.\(^{164}\) In the end the

---

\(^{164}\) *MR v TR and Others* [2006] IEHC 359, 388 (McGovern J).
Supreme Court upheld the High Court’s decision, acknowledging that an artificially generated, cryopreserved embryo does not fall within the scope of the definition of ‘unborn’, appearing in Article 40.3.3°.

Furthermore, one should also bear in mind the Thirteenth and the Fourteenth Amendments of Bunreacht Na hÉireann, which were signed into law on 23 December 1992 and by virtue of which the original wording of Article 40.3.3° was extended by two further paragraphs. The added passages acknowledged, respectively, the freedom to travel to another country in order to obtain an abortion 165 and the freedom to obtain information about availability of abortions outside of Ireland. 166 Accordingly, we could propose that the amendments discussed attempted to clarify the scope of application of Article 40.3.3° in the aftermath of both Attorney General v X and the preceding caselaw related to the ‘travel’ and ‘information’ rights. 167

On that account, if we assess the second and third paragraphs of the currently binding Article 40.3.3° in conjunction with the original first paragraph, we could conclude that the provision examined as a whole pertains exclusively to the issue of abortion, despite the fact that words, such as ‘abortion’ or ‘termination of pregnancy’ do not, indeed, appear anywhere in its wording.

---

165 ‘This subsection shall not limit freedom to travel between the State and another state’.
166 ‘This subsection shall not limit freedom to obtain or make available, in the State, subject to such conditions as may be laid down by law, information relating to services lawfully available in another state’.
Finally, as a form of postscript to the conclusion previously formed, the author finds it necessary to refer to the most recent judgment delivered by the Supreme Court on 7 March 2018 in the case of *M (Immigration - Rights of Unborn) v Minister for Justice and Equality & Others*.\(^ {168}\) In brief, the case concerned a 2007 deportation order that was issued by immigration authorities in respect of a Nigerian asylum seeker. The man, referred to as I.R.M., did, however, remain in the State illegally for a number of subsequent years; he also began a relationship with an Irish citizen (S.J.R.), who became pregnant with their child in late 2014. In 2015 I.R.M. and S.J.R. sought revocation of the deportation order from the Minister of Justice and Equality, while maintaining that the fact of their child's imminent birth – at the time when the appeal proceedings were being held – should have been taken into consideration.

In the light of the couple's circumstances, the High Court was compelled to clarify the scope of antenatal prerogatives which were enjoyed by a child *in utero* and which were to be considered by the Minister in cases, where an application to revoke a deportation order, regulated under section 3(11) of the Immigration Act 1999, was made in respect of the child's prospective father.\(^ {169}\)

Humphreys J proposed that – in the scenarios examined – the Minister would be obliged to contemplate the ‘current and prospective situation’ of the potential

---

\(^{168}\) See: *M (Immigration - Rights of Unborn) v Minister for Justice and Equality & Others* [2018] IESC 14


\(^{169}\) *IRM and Others v Minister for Justice and Equality and Others (No 2)* [2016] IEHC 478; hereinafter *IRM v Minister for Justice and Equality*. 

153
deportee, including also the prospective post-birth situation of his, yet unborn, child. At the same time, the scope of corresponding rights enjoyed by an embryo (foetus) under both statute and Bunreacht Na hÉireann should be understood broadly, i.e. beyond the right to be born.

The Supreme Court upheld Humphrey J’s general conclusion, whereby the Minister was required to consider the rights that the potential deportee’s resulting child would acquire at the moment of her birth. On the other hand, the Court opted for a stricter interpretation of the scope of prenatal prerogatives in the present context. As was underlined, the common law and statutory provisions – thoroughly analysed in the lengthy judgment – all recognised and protected foetal rights and interests. At the same time, all members of the adjudicating panel unanimously accepted that ‘neither the common law cases and statutory provisions, nor the pre and post Eighth Amendment cases relied on (...)’confirm the High Court’s proposal, whereby an embryo (foetus) possesses any inherent constitutionally protected rights other than the right to life, expressly stipulated by Article 40.3.3°.

To conclude, the original rationale behind the Eighth Amendment was seemingly unrelated to the law of torts. It is because the purpose of the 1983 referendum

---

170 Ibid para 102 (ii) (Humphreys J).
171 As the learned judge proposed, ‘(t)he unborn child enjoys significant rights and legal position at common law, by statute and under the Constitution, going well beyond the right to life alone. Many of these rights are actually effective rather than merely prospective’. See: IRM v Minister for Justice and Equality (n 169) para 101 (vi) (Humphreys J).
172 M v Minister for Justice and Equality (n 168) para 10.62.
173 The judgment was delivered by: Clarke CJ, O’Donnell J, McKechnie J, MacMenamin J, Dunne J, O’Malley J and Finlay Geoghegan J.
174 M v Minister for Justice and Equality (n 168) para 13.3 (v).
was to award a special constitutional status to the already binding criminal law prohibition. Additionally, the historic interpretation suggests that the right to life of the ‘unborn’ was, at the time of enactment of Article 40.3.3°, commonly understood by academics, legal practitioners and also by the general public175 as the right enjoyed by an embryo *in vivo* (foetus) to continue its existence in the womb until the moment of birth and beyond, without a threat that the existence would be ended by means of a pregnancy termination.176

To sum up, in the author’s view, the substantive law on tortious liability for antenatal injuries under Irish law consists of section 58 of the Civil Liability Act 1961 and of the corresponding caselaw.

---


176 At the same time, the right to preserve foetal health has been acknowledged *expressis verbis* in a number of American cases, such as, for example *Hoener v Bertinato* [1961] 171 A 2d 140, 67 NJ Super 517. There, it was decided that a foetus enjoyed both the right to life and the right to health, and it deserved legal protection even before reaching the stage of viability. In addition, attention should be drawn to the case of *Jefferson v Griffin Spalding County Hospital Authority* [1981] 274 SE 2d 457, where a foetus was decided to fall under the definition of a ‘deprived child’, i.e. a child who had not received proper parental care concerning the matter of his physical health.
3.2. Poland and Other Continental Law Jurisdictions

3.2.1 Poland

The right to demand redress for antenatal injuries was for the first time articulated *expressis verbis* in article 446¹ of the Polish Civil Code 1964,¹⁷⁷ whereby ‘(a)fter its birth a child can claim compensation for any prenatal damage it has suffered’.¹⁷⁸ The provision was one of the several amendments inserted into the Code by virtue of the previously cited Act of 7 January 1993 on Family Planning, Protection of the Human Foetus and the Conditions for Abortion Admissibility, commonly referred to as the Family Planning Act 1993.

It could be, nonetheless, argued that the 1993 amendment only served to authorise long-term judicial practice, since compensation for harm sustained before one’s birth had already been awarded by Polish courts prior to enactment of P.C.C.¹⁷⁹ For example, in the judgment delivered on 8 January 1965 the Polish Supreme Court introduced a general clause, whereby a child could seek compensation for damage resulting from injuries to his body (health), despite the fact that the wrong had been committed before that child was born and had been directed at his (then pregnant) mother.¹⁸⁰ Furthermore, in another judgment of

---

¹⁷⁷ Civil Code 1964 (*Kodeks cywilny*), Official Journal of the Republic of Poland No 1964.16.93 with subsequent amendments; hereinafter P.C.C. Please, note that amended provisions of Polish codes and statutes are typically marked with superscripted numbers.


¹⁷⁹ Judgment of the Polish Supreme Court of 8 October 1952, C756/51 [1953] 5 NP 70. See also: Judgment of the Polish Supreme Court of 4 April 1966, II PR 139/66 [1966] 9 OSNCP 158 with A Wolter’s gloss.

3 May 1967 the Supreme Court decided that the position of a child who was injured in utero under the law of torts could not be worse than the position of a child who was injured in the course of labour or soon afterwards.\textsuperscript{181}

### 3.2.1. Germany and France

In Germany and France\textsuperscript{182} the child’s right to demand compensation for antenatal injuries was acknowledged by the courts by means of a broadened interpretation of the already existing general provisions of the law of torts.

As far as Germany is concerned, the right discussed emerged from §823-1 B.G.B., being a general clause providing legal protection to victims of all tortious acts and omissions.\textsuperscript{183} In the judgment delivered on 13 January 1972\textsuperscript{184} the Supreme Federal Court of Justice (Bundesgerichtshof) approved the view previously expressed by the Court of Appeal, whereby an embryo (foetus) is to be regarded as ‘another person’ for the purpose of §823-1. In the case discussed, a child was born disabled as a result of injuries suffered by his mother during a car accident, which had occurred at the time when she was six months pregnant. The Bundesgerichtshof acknowledged the direct character of the injuries inflicted to the plaintiff, while he was still en ventre sa mère, explaining that at the time of birth the consequences of the wrongful act become apparent and 'the object of

---

\textsuperscript{181} Judgment of the Polish Supreme Court of 3 May 1967, II PR 120/67 [1967] 10 OSNCP 189.


\textsuperscript{183} §823-1 BGB: ‘A person who, intentionally or negligently, unlawfully injures the life, body, health, freedom, property or another right of another person is liable to make compensation to the other party for the damage arising from this’.

the liability first reaches its existence’. Therefore, we could argue that an injury inflicted on an embryo (foetus) becomes an injury to the health of a physical person at the moment of its birth, for which the wrongdoer will be responsible under the provision discussed.

4. Classification of Antenatal Injuries

After discussing the previous and current legal framework of tortious liability for antenatal injuries, it is now appropriate to classify them under more general headings.

As was already observed in the preface, the notion of antenatal injury (disability, prejudice) has been universally awarded a very broad meaning under the currently binding law of torts of both continental and common law jurisdictions.

With reference to the law of England, Wales and Northern Ireland, attention should be drawn in the first place to the comprehensive definition of the term ‘disability’, adopted for the purpose of the Congenital Disabilities Act 1976. Namely, section 4(1) describes it as: ‘any deformity, disease or abnormality, including predisposition (whether or not susceptible of immediate prognosis) to physical or mental defect in the future’. On the other hand, although neither section 58 of the Civil Liability Act 1961, nor article 446¹ P.C.C. include any formal

---

definition of the term examined; both the terms ‘wrongs to the unborn child’ and ‘prenatal damage’ have been interpreted broadly by the domestic courts.¹⁸⁶

In an attempt to distinguish major categories of antenatal harm, we may pose, in particular, the three following questions:

1) When was the antenatal injury inflicted?

2) Who committed the wrongful act (omission) and who was its intended addressee?

3) What type of resulting prejudice was suffered by the embryo (foetus)?

On that account, it should be observed that the injury suffered by the plaintiff before his birth in any factual scenario may belong to more than one of the categories proposed.

4.1 When Was the Antenatal Injury Inflicted?

The period of time during which an event impeding foetal development may occur, starts at the moment of conception and ends at the moment of birth. However, as will be evidenced in the subsequent chapters, parental exposure to harm resulting in congenital impairments in the resulting offspring could have already taken place many years before the plaintiff was conceived.¹⁸⁷

¹⁸⁶ The same observation applies to judicial interpretation of the term by French and German courts.
¹⁸⁷ The ability to receive compensation for damage resulting from preconception events will be further evaluated in the third chapter.
Furthermore, the deleterious effect that the defendant’s act (omission) had on the plaintiff’s health can be diagnosed at some time before the plaintiff was born, at the time of his birth, but also in his later life.

4.2 Who Committed the Wrongful Act (Omission) and Who Was Its Direct Addressee?

A child can be harmed before birth either by his own parents or by other parties. As was already suggested, in a vast proportion of the cases examined, the injury will be inflicted by members of the medical personnel.

On the other hand, while looking from the perspective of the prejudiced party, the wrongful act (omission) will be, first of all, directed at the pregnant woman, while impairing intrauterine development of the embryo (foetus) par ricochet. These will be, for instance, factual scenarios where the woman was assaulted or where she suffered a non-fatal accident. Secondly, the harm can be inflicted to the embryo (foetus) in a more direct manner. To provide a corresponding example we could recall the already cited 1965 judgment, delivered by the Polish Supreme Court.\textsuperscript{188} In this case, the plaintiff was born with cleft jaw and palate, following an attempted pregnancy termination. The defects were linked to the fact that the operating physician had failed to diagnose the patient’s twin pregnancy and went on to abort only one of the foetuses, while unintentionally injuring the other. The resulting child – i.e. the plaintiff – was subsequently born alive. Other relevant

\textsuperscript{188} See: Judgment of the Polish Supreme Court of 8 January 1965 (n 180).
scenarios may include a negligently performed foetal surgery or genetic manipulations, which affected an embryo in vitro. On that account, it should also be observed that, in all the instances discussed, the wrongdoer can act either with or without intent to cause bodily harm to the embryo (foetus).189

4.3 What Type of Harm Was Inflicted?

The injury inflicted to an embryo (foetus) will primarily consist of actual bodily harm or disturbance of health and (or) proper development. The damage can be caused by numerous, diverse factors, such as, most notably, mechanical and environmental ones.

It should be explained that specific types of injuries that can be sustained by an embryo (foetus) in each of the three example scenarios will be presented at the beginning of the corresponding, subsequent chapters. At this point, however, attention should be drawn to two particular forms of antenatal harm that cannot be categorised with the use of any of the above cited criteria. The first one is an injury lying at the heart of the previously mentioned wrongful life claim. The second one is an injury popularly referred to as ‘loss of a breadwinner’.

---

189 With reference to the last-mentioned type of antenatal harm, Pattinson argues that ‘negligent use of genetic information and technologies’ will belong to a separate, sui generis category of the so-called ‘genomic torts’. See: Pattinson (n 28) 335-336.
4.3.1 Awarding Compensation for Wrongful Life

It should be noted that the term ‘wrongful life’ initially appeared in the 1963 American ruling delivered by the Appellate Court of Illinois in the case of Zepeda v Zepeda.\textsuperscript{190} There, the plaintiff – a healthy child born out of the wedlock – sought compensation from his father for the alleged disadvantages resulting from its illegitimate status. The claim was implicitly rejected.\textsuperscript{191}

As for the currently binding law, although, in essence, the term discussed still describes a claim brought by a child, who seeks redress for 'being conceived or born with allegedly unsatisfactory traits or prospects',\textsuperscript{192} ‘wrongful life’ is commonly associated with cases where the child, suffering from grave congenital defects, claims that he would not exist and, hence, would not be compelled to live a life not worth living but for the defendant's negligence.\textsuperscript{193}

On that account, the claim examined will always be instituted against a medical practitioner (practitioners), who either:

\begin{footnotes}
\item [190] Zepeda v Zepeda [1963] 190 NE 2d 849; hereinafter Zepeda.
\item [191] As should be briefly explained, the Court, however, agreed that the defendant’s conduct constituted a tort, while, rather bizarrely, proposing that the plaintiff’s ‘(…) adulterine birth has placed him under a permanent disability’. Rejection of the plaintiff’s claim stemmed from the Court's reluctance towards recognition of a new type of tort, referred to as ‘wrongful life’. See: Zepeda (n 190), paras [25] and [28]. One may note that the same outcome was reached in the subsequent, similar case of Williams v State of New York [1966] 18 NY 2d 481.
\item [193] See, for example: M Safjan, ‘Odpowiedzialność za Wadliwą Diagnozę Prenatalną w Świetle Orzeczeństa USA’ (1985) 10(476) Państwo i Prawo 99, 100; Pattinson (n 28) 310; Jackson (n 28) 718; JK Mason, RA McCall Smith and GT Laurie, Law and Medical Ethics (7th edn, OUP 2006) 189. To recall, ‘wrongful life’ should not, however, be confused with ‘wrongful birth’ and ‘wrongful conception’ claims, where the parents of a child born with a defect or born as a result of failed sterilisation (contraception) method seek compensation for burdens resulting from the child’s upbringing and, in case of ‘wrongful birth’ for their own pain and suffering linked to the child’s disability.
\end{footnotes}
a) provided the prospective parents with inadequate information on the risk of passing on a genetic illness to their future offspring;\textsuperscript{194}

b) negligently performed antenatal examination (diagnosis) which led the prospective parents to a false conclusion that the embryo (foetus) develops normally;

c) following PGD,\textsuperscript{195} wrongly selected an embryo \textit{in vitro} carrying a specific genetic mutation (mutations) for the purpose of implantation in the uterus.

Needless to say, wrongful life claims are regarded as particularly controversial. Most notably, in the cases examined the court will be compelled to decide whether being born and continuing to live with a congenital defect can, \textit{per se}, be regarded as injurious.

Assumingly, the decision-makers who adhere to the ‘sanctity of life’ doctrine will reject the claim, while stating that any life, even the one full of pain and suffering, should always be regarded as beneficial. Others, however, will argue that life can be either good, i.e. fortunate and joyful, or wrongful, i.e. unfortunate and woeful. At the same time, if the plaintiff’s claim is allowed, the court will implicitly state that the plaintiff would have been in a better position, if he had never been born.\textsuperscript{196}

\textsuperscript{194} For instance, as a result of negligently performed (interpreted) genetic testing.

\textsuperscript{195} Preimplantation Genetic Diagnosis.

\textsuperscript{196} See: JK Mason, \textit{Law and Medical Ethics} (Butterworths 1994) 144.
Regardless of the ethical judgment of wrongful life claims, in any event, it would be very difficult to demonstrate that the defendant’s conduct fulfils any of the premises of the tort of negligence.\textsuperscript{197}

Firstly, while acknowledging that damage always represents some kind of diminution, one could not possibly argue that the plaintiff was deprived of something that he had previously enjoyed.

Secondly, it would be equally problematic to indicate which of the plaintiff’s rights was violated by the defendant’s act (omission). Some commentators point to ‘the right to be born healthy and to have a happy childhood’\textsuperscript{198} or to ‘the right of the child’s parents to opt on the child’s behalf for its non-existence, in circumstances where properly informed parents could reasonably have done so’.\textsuperscript{199} In the author’s view, the above cited rights do not seem to be relevant to the wrongful life scenarios. The only prerogative that the plaintiff could invoke in the present context would be his hypothetical ‘right to never have been born’, which had been allegedly violated by the defendant’s lack of skill or care. At the same time, it is dubious that such a solution would be approved by judicial organs, whose universal aim is to safeguard the value of human life rather than to depreciate it.

\textsuperscript{197} Or premises of civil liability based on fault, if looking from the continental law perspective.
Thirdly, existence of a causal nexus between the defendant’s conduct and the plaintiff’s injury is not straightforward, either. As was observed by the Supreme Court of Ohio in its 1980 wrongful life case of Hester v Dwivedi, the only injury causally related to the appellees’ breach of duty was the deprivation of the chance to make a fully informed decision whether to continue the pregnancy. That decision, according to Moyer CJ, could have been made solely by the plaintiff’s mother.

However, assumingly, the principal reason behind rejection of wrongful life claims lays in the impossibility to calculate the quantum. As should be recalled, the court calculates the amount of damages by relying on the restitutio in integrum principle. Hence, the awarded compensation should put the plaintiff in the position where he would have been, had the wrongful act (omission) not been committed. At the same time, since the plaintiff in the scenario examined claims that he should have never been born, his pre-injury state would have to be defined as non-existence. Accordingly, in order to comply with restitutio, the court would have to compare the value of plaintiff’s impaired life with a virtually abstract state in which he would have been, had he not existed.

The majority of courts have so far rendered wrongful life claims unsubstantiated precisely for that reason. The examples include the Supreme Court of New Jersey

---


201 Hester v Dwivedi (n 200) (Moyer CJ).

202 Ibid.

203 See, for example: JL Diamond, Understanding Torts (Matthew Bender 1996) 168.
ruling in the case of *Gleitman v Cosgrove*.204 There, the plaintiff was born deaf, blind and mentally impaired, as a result of maternal infection with rubella virus in her early pregnancy.205 While rejecting the claim, Proctor J stated that the plaintiff '(...) would have us measure the difference between his life (...) against the utter void of non-existence, but it is impossible to make such a determination'.206

Nonetheless, a different, remedy-focused approach was adhered to, for instance, by the Californian Court of Appeal in its 1980 ruling delivered in the case of *Curlender v Bio-Science Laboratories*,207 where a child, who had instituted a wrongful life claim, was awarded compensation for her life with a grave, hereditary condition. There, a married couple, Phillis and Hyam Curlender, underwent genetic testing to establish, whether they carried a recessive gene responsible for Tay-Sachs disease. At the time they both consciously decided that – in case of a positive result – they would not attempt to procreate. Due to negligence on the part of the laboratory staff, the tests produced a falsely negative outcome. The couple decided to go ahead with the pregnancy and were further


205 As should be explained, rubella virus (also referred to as German Measles or Three-Day Measles virus) has been described as particularly teratogenic in cases where maternal primary infection took place during the first trimester of pregnancy, when it is likely to cause congenital rubella syndrome in the developing embryo (foetus). The anomalies composing the syndrome are severe and typically include microcephaly, cardiac defects, cataracts and deafness. They can be accompanied by less frequently occurring pathologies, such as neural tube defects, growth retardation or intellectual disabilities. See, for example: K Ostrowski, *Embriologia Człowieka. Podręcznik dla Studentów Medycyny* (3rd revised edn, Państwowy Zakład Wydawnictw Lekarskich 1988) 180; A Ornoy and J Arnon, 'Clinical Teratology' in: 'Fetal Medicine (Special Issue)' (1993) 159 West J Med 382, 387; Moore and Persaud (n 15) 128 and 135.

206 *Gleitman v Cosgrove* (n 204) (Proctor J).

advised not to avail of amniocentesis. Unfortunately, it turned out that the resulting child, Shauna, was subsequently diagnosed with Tay-Sachs.

The Court did, in the first place, acknowledge the unquantifiability of damages in wrongful life cases. At the same time, an emphasis was placed on the general principle of remediating losses caused by another party's unlawful act (omission), articulated in section 3281 of the California Civil Code. While adopting a purely ‘pragmatic approach’ to wrongful life claims, the Court refused to deliberate upon the value of the plaintiff's impaired life. It simply concentrated on the material aspect of the case, i.e. the fact that the child – who was born alive and suffers – should be offered some form of pecuniary relief in order to ameliorate her difficult condition. On that account, Shauna was compensated for both pecuniary and non-pecuniary loss (pain and suffering) resulting from her life with the illness.208

The line of argumentation proposed by the Californian Court of Appeal did not, however, stand the test of time. In its 1982 ruling in the landmark case of Turpin v Sortini,209 the State Supreme Court rejected a wrongful life claim brought by a child, Joy, who was suffering from hearing loss. Her parents had not been properly advised that the impairment, which had also affected Joy's elder sister – Hope, could be owed to genetic factors. In support of its decision, the Court relied

208 See: Curlender (n 207) para IV [3] (Jefferson PJ). It should also be noted that before the Curlender judgment was delivered, damages for wrongful life had been also awarded by the New York Court of Appeal in the case of Park v Chessin [1977] 60 AD 2d 80. Nonetheless, a year later the same court reversed the ruling in the case of Becker v Schwartz [1978] 46 NY 2d 401, which ultimately confirmed unavailability of wrongful life claims under the state law of New York.

209 Turpin v Sortini [1982] 643 P 2d 954 (Sup Ct Cal); hereinafter Turpin.
on the ‘incalculable nature’\textsuperscript{210} of both the burdens and the benefits, experienced by Joy after she was born due to the defendant’s negligence.\textsuperscript{211}

As for the law of England and Wales, one should point, in the first place, to the 1982 Court of Appeal’s judgment, delivered in the case of \textit{McKay v Essex AHA}.\textsuperscript{212} 

The facts of the case were the following. Ms McKay had been exposed to the rubella virus during the first trimester of her pregnancy. However, she was not properly informed about the fact due to several administrative errors and following birth, her child was diagnosed with congenital rubella syndrome. Before the court, the impaired plaintiff argued that, due to the healthcare staff’s negligence, her mother had been unable terminate the pregnancy on medical grounds.

The Court of Appeal rejected the plaintiff’s claim, while relying on two major arguments. Firstly, it was found to be contrary to public policy. Ackner LJ referred to the previously mentioned sanctity of human life, while arguing that compensating wrongful life would implicitly impose an obligation on medical practitioners to advise termination in any case of diagnosed foetal pathology.\textsuperscript{213} Secondly, the Court acknowledged the difficulties with calculating quantum with recourse to the \textit{restitutio in integrum} principle. Comparing the plaintiff’s

\textsuperscript{210} Ibid 964 (Kaus J).
\textsuperscript{211} \textit{Turpin} was followed, for instance, by Washington Supreme Court in \textit{Haberson v Parke-Davis Inc} [1983] 656 P 2d 483. In addition, in a number of states wrongful life claims have been explicitly prohibited by means of a relevant statutory provision. See, for example: Pennsylvania Consolidated Statutes 2012, c 83, s 8305(b).
\textsuperscript{212} \textit{McKay v Essex AHA} [1982] 1 QB 1166; hereinafter \textit{McKay}.
\textsuperscript{213} \textit{McKay} (n 212) 1188 (Ackner LJ).
condition at the time of the proceedings with the state of not having been born at all, proved an impossible task for the Court of Appeal.214

With reference to statute law, the Congenital Disabilities Act 1976 assumingly disallows the cause of action in wrongful life cases. However, considering the wording of section 1(2)(b) of the Act, the above prohibition is not stated *expressis verbis*.215 Explicit, strong discouragement towards the claims in question was, on the other hand, articulated in the Law Commission 1974 Report on Injuries to Unborn Children, which preceded enactment of the 1976 Act. The Commission pointed to the previously cited difficulties with measuring damage in wrongful life scenarios. It was also feared that recognition of the claim under statutory law of England, Wales and Northern Ireland would encourage medical staff to practice ‘defensive medicine’.216 Accordingly, as Whitfield argues, ‘it was therefore the clear intention of the legislature that the Congenital Disabilities (Civil Liability) Act 1976 should allow no such cause of action’.217 An identical conclusion was reached by Stephenson and Ackner LJJ in *McKay*.218

---

214 Ibid 1181-1182 (Stephenson LJ); 1189 (Ackner LJ); 1192-1193 (Griffiths LJ). In support of the above argument, Ackner and Stephenson LJJ additionally relied on *Cataford v Moreau* [1978] 114 DLR (3d) 585, which was delivered by the Supreme Court of Quebec in a wrongful conception case.


217 Whitfield (n 28) 821.

Finally, with reference to Ireland, since the currently binding domestic law prohibits abortion on the grounds of foetal impairment, actions for wrongful life would not be available *de jure* in any event.\(^{219}\)

As for the continental jurisdictions, it should be noted that a wrongful life claim was initially recognised by the French Supreme Court (*Cour de Cassation*), most notably, in a well-known 2000 case, popularly being referred to as *l’affaire Perruche*.\(^{220}\) Similarly to the plaintiff in *McKay*, Nicholas Perruche was born with congenital rubella syndrome as a consequence of maternal infection with the virus at the early stages of gestation. Also similarly to Ms McKay, Ms Perruche had been wrongly given the all clear by her physician, who, apart from having ignored her symptoms, relied on falsely negative results of a negligently performed blood examination. The French Supreme Court decided that errors committed by both the physician and the laboratory had prevented Mrs Perruche from exercising her choice to end her pregnancy with the aim of avoiding the birth of a disabled child.

---

\(^{219}\) See, for example: GW Hogan, JM Whyte and JM Kelly, *The Irish Constitution* (4th edn, Tottel 2006) 1523; McMahon and Binchy (n 50) 1237.

\(^{220}\) Judgment of the French Supreme Court of 17 November 2000, Assemblée Plénière [2000] JCP II 10438; hereinafter referred to as *Perruche*. As Nesterowicz notes, prior to *Perruche*, the French Supreme Court had already admitted wrongful life claims in at least two reported rulings, which were delivered, respectively, on 16 July 1991 [1991] Bull Civ 248 and on 26 March 1996 [1997] D 135. In the former case, the defendant physician failed to administer rubella antibody testing, while knowing that the plaintiff’s mother was trying to conceive. The woman – who had not been immune to rubella virus – contracted the illness in her early pregnancy and, as a result, the plaintiff was born severely disabled. In the latter case, the compensatory claims were brought jointly by two impaired infant plaintiffs. The first child was also born with congenital rubella syndrome, whereas the second child – similarly to his father – suffered from a serious condition, which had been wrongly labelled as non-hereditary by the defendant physician. On the other hand, the cited commentator also points to the judgment issued by the Bordeaux Court of Appeal on 26 January 1995 [1995] IV JCP 1568. There, the court rejected a wrongful life claim, while relying on the fact that there was no recognisable, objective right either to be or not to be born. See: Nesterowicz (n 69) 33-35.
On that account, Nicholas was awarded compensation for the loss resulting from his grave condition.\textsuperscript{221}

The decision was heavily criticised by legal scholars, ethicists and, particularly, by medical practitioners,\textsuperscript{222} amid concerns that the latter would refuse performing antenatal check-ups due to fear of a ‘flood of lawsuits’. In response, two years later the previously cited \textit{Loi n° 2002-303} was passed by the French Parliament. The statute, which became known as ‘Anti-Perruche’ or ‘Kouchner Act’, banned children suffering from congenital conditions from seeking damages for the mere fact of having been born.\textsuperscript{223} At the same time, it was decided that the costs of maintenance of those children were to be borne by the State. Thus, \textit{Loi n° 2002-303} was followed by creation of ONIAM (\textit{Office national d'indemnisation des accidents médicaux}), being a national body authorised to compensate losses suffered by victims of medical malpractice in cases where such resulted in particularly grave disabilities.\textsuperscript{224}

\textsuperscript{221} It should be noted that Mrs Perruche also received compensation for her own loss, which was awarded under the wrongful birth heading.


\textsuperscript{223} \textit{Loi n° 2002-303}, art 1: \textit{Nul ne peut se prévaloir d’un préjudice du seul fait de sa naissance}. It should be noted that the cited provision was re-enacted by article 2 of \textit{Loi n° 2005-102 du 11 février 2005}. Currently, exclusion of wrongful life claims is expressed in article L114-5 of the Code of Social Aid and Families 1956.

\textsuperscript{224} However, as Feuillet explains, by virtue of the ECtHR’s rulings delivered, most notably, in the case of \textit{Maurice v France} [2005] ECHR 683, the Kouchner Act was found to be inapplicable to civil proceedings that had already begun before its passing. While justifying its decisions, the ECtHR argued that the parents of a disabled child had a legitimate expectation to receive full compensation for his condition, which would have been awarded in line with Perruche. The abovementioned expectation was to be treated as ‘a debt or property interest which was retroactively infringed upon by the Kouchner Act’. In addition, both the \textit{Cour de Cassation} and the \textit{Conseil d'État} later decided that the Act applied in cases where a child was born after its entry into force (i.e. on or after 7 March 2002). See: Judgment of the \textit{Conseil d'État} of 19 February 2003 [2003] Rec Lebon 41; Judgment of the French Supreme Court of 8 July 2008 [2008] I Bull Civ 796. See also: Feuillet (n 222) 147-148.
In Germany, a seminal wrongful life claim was rejected in 1983 by the Supreme Federal Court of Justice. There, a child was also born with congenital rubella syndrome following undiagnosed maternal infection in early pregnancy. The Court awarded compensation to the parents for their own loss under the wrongful birth heading, while, at the same time, denying compensation for wrongful life to the disabled plaintiff. It was argued that the defendant physician, who had failed to diagnose the illness, was not responsible vis-à-vis the plaintiff for the fact that an abortion had not been performed. As the Court observed, otherwise, he would have been authorised to decide how much a human life was worth. It was stressed that the value in question was ‘a legally protected interest of the highest order (…), which no other party may estimate’. Similar arguments, supporting rejection of the claims discussed were recapitulated by the Court in its subsequent caselaw.

As far as Poland is concerned, no court ruling in a wrongful life case has yet been reported. Interestingly, the 1965 Supreme Court ruling delivered in the case of a child, who had survived a negligently performed abortion, but was later born with orofacial abnormalities, was not – even hypothetically – considered as a wrongful life scenario in any of the accompanying commentaries. Here, an emphasis was placed on the fact that the defendant had injured the plaintiff in utero, whereas the fact that the plaintiff was born alive merely as a result of the defendant’s negligence was somehow disregarded.

---

226 McMahon and Binchy (n 50) 1236.
In comparison, one should cite the 1992 Canadian judgment delivered by the British Columbia Court of Appeal in the case of *Cherry v Borsman*, which was based on a nearly identical factual scenario. Having established the defendant’s liability for the plaintiff’s antenatal harm, the court formulated a general principle, whereby a physician, who failed to meet his duty vis-à-vis the pregnant woman to perform an abortion with adequate skill and care, owed a duty of care towards an embryo (foetus) not to harm it as a result of this intervention. It was also proposed that the primordial duty to perform an efficient surgical termination was owed solely to the pregnant woman and not to the injured plaintiff. On that account, the latter was not able to seek redress for wrongful life.

At the same time, as Whitfield observes, had the defendant physician in the *Cherry* case been more diligent, the plaintiff would have never been born and would not have suffered from his defect. Hence, the action ‘was really only for wrongful life’. According to this author, even if Whitfield’s stance was to be supported, both continental and common law courts are still unlikely to classify injuries resulting from a negligently performed abortion as a case of wrongful life. Firstly, it is because, here, the plaintiff’s injuries are in fact contributable to the defendant’s own actions and not solely to the previously mentioned ‘external factor’, such as a pathogen or a chromosomal aberration. Secondly, from the pragmatic point of view, considering the previously described controversies.

---

228 *Cherry (Guardian ad litem) v Borsman* [1992] 99 DLR 4th 487 (BCCA); hereinafter *Cherry*.
229 Ibid para 62 (Hutcheon, Hollinrake and Rowles JJ).  
230 Whitfield (n 28) 821.  
231 Ibid.
surrounding the claims in question, the court will be more likely to grant a remedy to the plaintiff, if his injuries are not classified as wrongful life. Furthermore, according to some Polish commentators, despite the fact that wrongful life claims and antenatal injury claims are, \textit{prima facie}, similar, they belong to two distinct categories.\footnote{See, for example: M Safjan in: K Pietrzykowski (ed) \textit{Kodeks Cywilny Tom I Komentarz do Art. 1-449} (4th edn, CH Beck 2005) 1304 and Safjan (n 193) 106.} The above stance was approved by other continental scholars, who argue that the only link between the plaintiff’s position and the defendant’s conduct is the fact that due to the latter’s negligence, the former was born alive instead of having been aborted.\footnote{Feuillet (n 222) 142. See also: M Martin-Casals and J Solé Feliu, ‘Comparative Report’ in Martin-Casals (n 40) 278.} As is consequently argued, article 446\footnote{Jaworek (n 69) 59.} P.C.C. should not be regarded as giving rise to tortious liability for wrongful life when the damage suffered by the plaintiff merely consists in his birth.\footnote{Jackson (n 28) 718.}

As for the opposing views, Jackson, for example, suggests that due to progressive developments in modern perinatology, the alleged boundary between the two claims discussed is, in fact, likely to disappear. Namely, as it gradually becomes easier to diagnose and treat diverse congenital pathologies \textit{in utero}, it is also more likely that the affected embryo (foetus) will – upon receiving adequate medical treatment – successively develop into a healthy child.\footnote{Jackson (n 28) 718.}

To sum up, in most continental and common law jurisdictions, a wrongful life claim would, most likely, be rejected. According to this author, the resentment
towards the claim in question might not necessarily result from the previously described quantum and causation difficulties but from the mere fact that awarding damages for not having one's prenatal life terminated seems both immoral and reprehensible per definitionem.

4.3.2 Awarding Compensation for the Loss of a Breadwinner

An antenatal injury consisting of the death of a breadwinner will occur in cases, where a person, who would have ordinarily been obliged to maintain and support the plaintiff, died as a result of a wrongful act (omission), while the latter was in utero.

Hence, it can be assumed that the term 'breadwinner' will most often stand for the plaintiff’s expectant father. As opposed to a typical antenatal injury scenario, physical health and wellbeing of a child claiming damages for the loss of his breadwinner will not, per se, be affected. Here, the damage suffered by the plaintiff can be described as loss of his father’s financial support and, hypothetically, also as his injured feelings experienced as a result of the father’s death.

Accordingly, the author will assess the loss of a breadwinner from a two-head perspective, while referring, firstly, to the element of pecuniary loss (i.e. lack of

---

236 As for Polish law, the term discussed has been interpreted to equally include the expectant grandparents and other persons indicated by the courts. See: P Mackus, ‘Odpowiedzialność za Szkodę Wyrządzoną Nasciturusowi’ in: E Skowrońska-Bocian (ed), Prace z Prawa Cywilnego (CH Beck 2010) 396-397.
or diminished maintenance) and secondly – to the element of non-pecuniary loss (i.e. pain and suffering following death of a loved one).

4.3.2.1 Pecuniary Loss

As far as Polish law is concerned, article 162 of the Code of Civil Obligations 1933, which preceded P.C.C., had stipulated that dependents of a person, who died as a result of a fatal accident can demand an annuity as long as they were factually supported by him (her). On that account, an annuity in case of the father’s wrongful death could not initially be brought by posthumous children.

The narrow approach was subsequently rejected in a number of rulings delivered by the Polish Supreme Court due to being incompliant with ‘the spirit of the domestic family law’. One should also refer to the previously cited 1952 judgment, whereby a child, who had already been conceived at the time of the father’s death and who would have been otherwise dependent on him, was to be treated in an analogous manner to a child who had been born in the father’s lifetime.

With regard to the currently binding regulation, some commentators have argued that annuity claims brought by posthumous children in the situations examined...
will be based on the broadly interpreted article 446 §2 P.C.C., instead of the previously cited article 446¹ P.C.C.²³⁹

Pursuant to the former provision, a person, in respect of whom the deceased had a statutory duty of maintenance, may demand an annuity from the person obliged to redress the damage. Additionally, the same type of financial support may be claimed by other persons, who were related to the deceased and whom he voluntarily and permanently maintained, if – in the light of the circumstances of the case – provision of such is necessitated by the principles of social intercourse.

In general terms, the amount of annuities is assessed in compliance with the claimant’s increased needs, while considering, in particular, hypothesised earnings and financial means of the deceased which would have been available to the claimant for the duration of the former’s duty to support. More specifically, when determining the amount of annuities claimed by a posthumous child, the court will apply the same criteria as those applicable in a case where a child, seeking redress for the loss of his breadwinner, was at a pre-school age at the time of the father’s death.²⁴⁰

It is interesting to mention that the above presented tort law approach is consistent with parallel developments in the area of the Polish labour law. For instance, in its 1987 resolution the Supreme Court expressly stated that a posthumous child enjoyed the right to claim compensation for damage resulting

---
²³⁹ See: Safjan (n 232) 1302.
²⁴⁰ See: Judgment of the Polish Supreme Court of 4 April 1966 (n 179).
from the death of his father caused by an employment injury or an occupational illness. The judges were of the opinion that putting a posthumous child in a less favourable position in comparison with a child born during his father’s lifetime was to be regarded as unjustifiable. Finally, compensatory claims are also available on the grounds of the Act Concerning Social Insurance from Work Accidents and Occupational Illnesses 2002.

As for French law, in line with the more general principle, the child will seemingly be able to receive compensation for the pecuniary loss resulting from the father’s wrongful death, which, here, is likely to be treated as a form of indirect damage (préjudice par ricochet).

With reference to the law of England and Wales, the child’s compensatory claim for the father’s wrongful death became, in principle, available under the previously mentioned Fatal Injuries Act 1846. Also in line with the presently binding statute, i.e. the Fatal Accidents Act 1976, any child of the deceased that formerly was – or, assumingly, would have been – his dependent, can bring an action for pecuniary loss against the wrongdoer.


It should be acknowledged that in the above cited 1987 resolution the court departed from its previous view, whereby a posthumous child could not claim damages for the loss of his breadwinner due to the fact that it did not possess legal capacity at the time of the injury. See: Resolution of the Seven Judges of the Supreme Court of 28 January 1987 (unreported).


Fatal Accidents Act 1846, s II.

Fatal Accidents Act 1976, s 1(3)(e).

In Scotland the so-called dependency claims are allowed under the provisions of Damages (Scotland) Act 2011. Similarly to the case of England and Wales, they can be brought by members of the victim’s immediate family, including also his children. See: Damages (Scotland) Act 2011, s 4(3)(a) in conjunction with s 14(1)(b).
Furthermore, in the present context, one should refer, particularly, to the 1871 ruling delivered by the High Court of Admiralty in the case of *The George and Richard*.247 There, a posthumous child of an on-board carpenter, who had been a fatal victim of a ship sinking accident, demanded redress for the father’s wrongful death. The court decided that the claimant was to be classified as a dependent for the purpose of bringing an action under the statute discussed.

Subsequently, in *Williams v Ocean Coal Ltd.*,248 the court relied on the previously cited ‘nasciturus maxim’ in order to establish a posthumous child’s dependency status. As a result, the child, whose father had died as a result of an occupational incident, was entitled to damages under the Workmen’s Compensation Act 1897.

As for the American caselaw, it is appropriate to follow with a similar 1912 ruling delivered by the Supreme Court of Oklahoma in the case of *Hordon v St Louis and San Francisco Railway Co.*,249 where it was stated that a child, who remained *in utero* at the time of his father’s wrongful death, but who was later born alive, was also considered to be already existing at the time when the wrong was committed. As the court further underlined, a posthumous child was to be treated as any other beneficiary from the point of view of statute law, and, thus, he could demand redress for pecuniary loss suffered in consequence of the death of his father.250


248 *Williams v Ocean Coal Ltd* [1907] 2 KB 422.

249 *Hordon v St Louis and San Francisco Railway Co.* [1912] 37 Okl 256, 128 Pac 727, cited by Page Keeton (n 34) 368.

250 Page Keeton (n 34) 368.
Finally, in accordance with a general rule of the Irish law of torts, a child, as a dependent, can demand compensation for damage resulting from the wrongful death of his father under the previously acknowledged section 48(1) of the Civil Liability Act 1961. As for the head of pecuniary loss, pursuant to section 49 of the Act, he will be able to seek redress for his ‘injury’, which, similarly to the case of Polish and English law, is understood as deprivation of the parent’s financial assistance.\(^{251}\) If considering the wording of the – also previously cited - section 58 of the statute examined, it can be well speculated that the right to receive compensation for the wrongful death of the breadwinner will be equally vested in a posthumous child.

### 4.3.2.2 Non-Pecuniary Loss

As should be observed at the outset, a posthumous child of a man, who died as a result of a wrong committed by another party, could not have developed any emotional bond with his father. Thus, in the aftermath of the death, the child could not have experienced any negative emotions, typically accompanying grief. It is, however, theoretically possible that the pain and suffering may have been encountered at some later stage of the child’s life, most notably, on the occasion of learning about the circumstances of the breadwinner’s fatal accident.

In line with a general principle adopted by the majority of the jurisdictions examined, non-pecuniary loss resulting from wrongful death of a loved one is,
prima facie, not compensable, unless it can be established that it constitutes an injury to the plaintiff's own health.

With reference to continental law, such is, for instance, the current position of German law of torts, where damages for emotional disturbances are not being awarded in any event, save in cases of an established ‘nervous shock’.252

Furthermore, according to the previously binding Supreme Court guidelines, grief, per se, was not recoverable under Polish law, either, unless it implied ‘severe mental trauma’.253 It should be, however, explained, that these instructions had, for many years, been circumvented in judicial practice, since ordinary courts tended to award a customary sum of solatium to the deceased’s closest relatives, while relying on a broad interpretation of the previously cited article 446 P.C.C.254 The above custom eventually became a legal norm by virtue of the fourth paragraph, added to the provision examined by virtue of the statute’s 2008 amendment.

In addition, préjudice d’affection suffered by individuals, who had shared an affectionate relationship with a victim of a fatal incident, will be fully recoverable under French law. In the present context, it should be also acknowledged that – in line with the principle of full compensation – a claim brought by the victim’s child cannot be rejected due to the fact that minors do not experience grief in the

254 Mackus (n 236) 398.
same way as adults; for that reason, French courts make no distinction to the age of the plaintiff seeking redress for non-pecuniary loss.255

As was already explained in the previous section of this chapter, non-pecuniary loss, not meeting conditions established in the relevant caselaw, remains unrecoverable under the common law of England and Wales256 and common law of Ireland.

As for statutory remedies, in England and Wales a posthumous child will not be seemingly entitled to a fixed sum of bereavement damages, stipulated by section 1A of the Fatal Accidents Act 1976, since those can only be claimed by the spouse (civil partner) of the deceased and, conditionally, also by his parents.257

Under Irish statute law, grief resulting from wrongful death of a loved one can be compensated by means of a fixed sum of solatium, which is collectively awarded to the dependents of the deceased, pursuant to sections 48 and 49(1)(a) of the Civil Liability Act 1961.258

255 Francoz-Terminal (n 40) 115.
256 As was summarised by Denning LJ in the landmark case of Hinz v Berry [1970] 2 QB 40: ‘(i)n English law no damages are awarded for grief or sorrow caused by a person's death (...). Damages are, however, recoverable for nervous shock, or, to put it in medical terms, for any recognisable psychiatric illness caused by the breach of duty by the defendant'.
257 By means of comparison we may note that, under provisions of the previously mentioned equivalent Scottish statute, members of the deceased’s immediate family (including children) can seek damages for broadly understood non-pecuniary harm, most notably, for the experienced grief and sorrow but also for the loss of society and guidance that would have been provided by the deceased. See: Damages (Scotland) Act 2011, ss 4(1)(a) and 4(3)(b).
258 The total amount, which can be recovered under the head examined by all the dependents of the deceased currently amounts to £35,000, as is acknowledged in Liability Act 1961 (Section 49) Order 2014.
In summary, considering the practicalities of the scenario examined, it is unlikely that a posthumous child could – in any event – bring an action for psychiatric harm resulting from the father’s wrongful death. Seemingly, the more appropriate approach would be awarding a sum of solatium for ‘the loss of the father’s society and guidance’, as, perhaps, opposed to grief in its proper sense. It should be underlined that, in the scenarios examined, the two last mentioned types of loss will be suffered by the posthumous child \textit{ab initio}. With reference to Poland, France and Ireland, due to the more general language of the corresponding statutory norms, the courts would need to decide, whether the loss of society (guidance) falls into the scope of definition of the respective terms: non-pecuniary harm, \textit{préjudice d’affection} or, finally, mental distress.

\footnote{Most notably, lack of proximity.}
CHAPTER 2

Liability for Antenatal Injuries Resulting from Parental Conduct

This chapter assesses liability for antenatal harm incurred by the plaintiff’s parent (parents). Considering the physical coexistence of the pregnant woman and the embryo (foetus) and the fact that the former exercises the largest degree of control over the latter’s wellbeing, an emphasis will be placed on maternal liability. However, since expectant (or even potential) fathers are also capable of affecting physical integrity and health of their future offspring, the author will also examine some aspects of paternal liability in this context.

With regard to maternal liability, the medico-legal literature frequently refers to the so-called ‘maternal-foetal conflict’, occurring when the pregnant woman refuses consent to third party intervention\(^{260}\) aimed at protecting life or health of her foetus. Hypothetical existence of the conflict\(^{261}\) raises questions on how to maintain balance between foetal rights and maternal liberties, such as the woman’s own right to life, to preserve bodily integrity or to make personal lifestyle choices, pertaining to professional career, pastime activities, diet, sexual relations, religion, etc.

\(^{260}\) Usually an invasive medical procedure or treatment.

\(^{261}\) Some commentators argue that ‘maternal-foetal conflict’ does not, in fact, exist. As they explain, an embryo (foetus) constitutes an integral part of the body of the pregnant woman until the moment of birth; thus, one cannot remain in conflict with one’s own body part. See, for example: J Losco and M Shublak, ‘Paternal-Fetal Conflict: An Examination of Paternal Responsibilities to the Fetus’ (1994) 13(1) Politics and the Life Sciences 63, 63.
As the thesis focuses on private law, the author will not assess the ‘maternal-foetal conflict’ from the right to abortion perspective, despite the fact that the latter is sometimes regarded as a derivative of the pregnant woman’s right of self-autonomy.

At the same time, we should consider whether the State, acting as *parens partiae*, can compel a pregnant woman to undergo a forced medical treatment in order to protect foetal health. The chapter only briefly touches upon this issue, as both principles and boundaries of such intervention are more thoroughly discussed in the subsequent part of the thesis, devoted to family law.

For the purpose of the present part of the analysis, it will be assumed that the child was born alive. Thus, maternal (paternal) liability for antenatal harm will be assessed in a retrospective manner. In other words, the author will examine, whether the plaintiff’s mother (father) can be found liable for damage inflicted to her (his) child before that child was born or even conceived. In this context, attention will also be drawn to the rationale behind maternal immunity from suit under the law of torts of some of the jurisdictions examined.

In addition, for the purpose of the present part – and the forthcoming part of the thesis relevant to family law – it will be assumed that the pregnant woman is an adult capable of expressing valid consent and that she has not been incapacitated.

262 We will assume that the risk materialised and the child was born injured.
Hence, situations where the woman cannot consent to medical treatment – for example, due to being in a coma or being brain dead – will not be discussed.

Finally, in this chapter the author will omit remarks concerning liability for antenatal harm resulting from the plaintiff’s mother’s (father’s) negligent driving, as this scenario will be further assessed in the following, third chapter.

1. Maternal Liability for Antenatal Injuries

1.1 The Damage

A woman can harm her expected offspring by numerous, diverse acts (omissions) that can be committed as early as at the time of conception,\(^{263}\) throughout the pregnancy or as late as at the final stages of labour. Since it would be unattainable to present all the instances of potentially deleterious maternal behaviour, the author will focus on those most frequently cited in the medical literature.

We should mention, in the first place, teratogenic maternal conditions\(^{264}\) (e.g. insulin-dependent diabetes mellitus\(^ {265}\) or exposure to chronic, severe stress\(^ {266}\)) as well as anatomic features (e.g. deformities of the pelvic area) that can potentially lead to foetal impairments, if medical advice is not sought.

\(^{263}\) Or even earlier than conception took place.
\(^{264}\) The term ‘teratogen’, derived from the Greek word τέρας (a monster) can be defined as any substance, agent or process that induces formation of developmental abnormalities in an embryo (foetus). See: Oxford Medical Dictionary (4th edn, OUP 2007) 706.
\(^{265}\) Moore and Persaud (n 115) 137.
However, most frequently a pregnant woman will harm her foetus by ingesting teratogens. Out of the broad range of harmful substances, the author will focus on stimulants, in particular, on alcohol, tobacco and illicit drugs, as those seem to generate the biggest amount of controversy.

It had been long suspected that consumption of alcoholic beverages during the pregnancy could generate congenital abnormalities. Some commentators even proposed that such a possibility had already been investigated in ancient times. With reference to the Ancient Near East, an excerpt from the Old Testament’s Book of Judges, referring to the story of Samson, is popularly cited in this context. Here, an angel visits Samson’s future mother to inform her that she will conceive and bear a son and advises her not to drink wine or other ‘strong drink’.

Abel, however, seems to question the biblical Hebrews’ rudimentary awareness of alcohol’s teratogenic potential. To support his stance, he argues that the above excerpt is incomplete and, hence, taken entirely out of its context. It is because in the following passage the angel also instructs the woman that her son

---


269 Abel (n 267) 3.

270 Ibid.
will become a Nazarite, dedicated to the God ‘from the womb until the day of his death’. While relying on the text of the preceding Book of Numbers, the cited author acknowledges abstinence from wine as one of the fundamental restrictions imposed on all followers of the Nazarite cult. Since Samson was regarded as a Nazarite from the moment of conception, Abel speculates that the angel’s advice symbolises observance of the Biblical law of Nazariteship, rather than the Hebrews’ concern about foetal well-being in utero.

As far as Ancient Greece and Rome are concerned, recourse is often made to the comment attributed to Aristotle that appears in Burton’s Anatomy of Melancholy: ‘(…) foolish, drunken, or hair-brain women, most part bring forth children like unto themselves, morosos et languidos’. Moreover, some commentators also point to a purported Carthaginian custom, whereby newlywed couples were ordered to abstain from drinking wine on their wedding night to ensure that their future offspring would be free of congenital defects.

Similarly, no historic data has yet confirmed that the risks associated with prenatal alcohol exposure had been known to Ancient Greeks or Romans. First of all, as Abel points out in another piece of his commentary, the cited Aristotle’s

272 Numbers, 6:2-3: ‘(…) When either man or woman shall separate themselves to vow a vow of a Nazarite, to separate themselves unto the Lord. He shall separate himself from wine and strong drink, and shall drink no vinegar of wine, or vinegar of strong drink, neither shall he drink any liquor of grapes, nor eat moist grapes, or dried’. The English translation according to KJV Bible <http://www.kingjamesbibleonline.org/Numbers-Chapter-6/> accessed 3 July 2013.
274 EL Abel, ‘Was the Fetal Alcohol Syndrome Recognized by the Greeks and Romans?’ (1999) 34(6) Alcohol and Alcoholism 868, 870.
comments were, in fact, Burton’s own words.\textsuperscript{275} Similarly, no evidence suggests that the custom in question was actually practiced in Carthage. On the other hand, the recommended abstinence could be explained with recourse to the, then popular, belief, whereby indisposition caused by alcohol abuse could affect the husband’s (as opposed to the wife’s) fertility. A less fertile man, as was further assumed, would be prone to conceive more daughters. At the same time, it should be recalled that, in line with the Ancient Greek culture and philosophy, a female child was less desired than a male one. Hence, it was simply believed that chances of having a child of the socially privileged gender increased in cases where the custom was being observed.\textsuperscript{276}

Setting the ancient ambiguities aside, a causal link between maternal alcohol abuse and foetal impairment was initially observed by Sullivan in 1899. The cited researcher, who worked as a deputy medical officer in the Liverpool prison, noted that incidence of stillbirth and infant mortality was higher amongst children, who were born to alcoholic inmates.\textsuperscript{277} However, it was not until the early 1970's when the issue of maternal alcohol abuse was ultimately awarded more adequate scrutiny in clinical research.\textsuperscript{278} In their landmark 1973 article Jones and Smith

\textsuperscript{275} Ibid 869.
\textsuperscript{276} Ibid 870.
\textsuperscript{277} See, for example: R Greenbaum and G Koren, ‘Fetal Alcohol Spectrum Disorder – New Diagnostic Initiatives’ (2002) 73 Paediatrics Child Health 139, 139.
discussed the findings of paediatric examination of eleven children born to chronic alcoholics. They identified a recurrent pattern of birth abnormalities, potentially linked to prenatal alcohol exposure, which, for the first time, was referred to as 'Foetal Alcohol Syndrome' (FAS). Since then, numerous studies unanimously confirmed alcohol to be teratogenic, while assessing incidence and phenotype of FAS as well as methods of its prevention and treatment. It is now evident that children diagnosed with the full form of FAS exhibit severe disturbances of a developmental and functional nature, such as intrauterine and (or) postnatal growth impairment, mental retardation and various neurocognitive deficits. These disturbances are typically accompanied by unique, abnormal morphologic features.

Furthermore, thanks to continuing progress in the field of neurosciences, the full phenotype of FAS is no longer regarded as a sole clinical entity encompassing the most serious pathologies related to prenatal alcohol exposure. The syndrome discussed now belongs to a broader category of Foetal Alcohol Spectrum Disorder(s) (FASD), representing the entirety of diverse physical and intellectual deficiencies that the exposure is most likely to trigger.

---

279 See: KL Jones and DW Smith, 'Recognition of Fetal Alcohol Syndrome in Early Infancy' (1973) 2 The Lancet 999. The observations were preceded by a study and continued in two subsequent works: KL Jones, DW Smith, CN Ulleland and AP Streissguth, 'Pattern of Malformation in Offspring of Chronic Alcoholic Mothers (1973) 1 The Lancet 1267. See also: Jones and Streissguth (n 278) 373.


281 The examples include hyperactivity, impulsivity, difficulties with planning and mental organisation, visuospatial problems and difficulties with understanding consequences of their own behaviour. See: Mukherjee et al (n 278) 375.

282 The authors usually point to distinct craniofacial features, such as short palpebral fissures, smooth philtrum and thin vermilion border of an upper lip. See: Mukherjee et al (n 278) 375; Jones and Streissguth (n 278) 377. Other characteristics, such as a low nasal bridge, are described as 'associated with the syndrome'. See: Moore and Persaud (n 115) 132.

283 Mukherjee et al (n 278) 375; Jones and Streissguth (n 278) 377.
Finally, it should be explained that incidence and severity of congenital defects will depend on a variety of factors, such as, most notably, the pregnant woman’s genetic constitution, her individual metabolism or nutritional status. However, it can be suspected that the scale of impairment suffered by the embryo (foetus) will depend mostly on maternal drinking habits and drinking patterns, while assuming that the more alcohol is ingested throughout gestation, the greater the risk that the resulting child’s health will be gravely and irreversibly affected.

Despite continuing research, there is still no universal consensus as to the exact amount of alcohol that can be safely consumed by prospective mothers. Accordingly, national health policy guidelines in many countries, including Ireland, urge pregnant women and those trying to conceive to completely abstain from drinking alcoholic beverages.

With regard to nicotine, its teratogenicity is owed to the fact that the substance impairs uterine blood flow, while restricting transplacental passage of oxygen and nutrients to the developing embryo (foetus). In consequence, smoking during pregnancy is regarded as a common cause of chronic foetal hypoxia, associated with Intrauterine Growth Retardation (IUGR), premature deliveries and low birth weight.

---

284 One should note that FAS was initially associated with chronic maternal alcoholism, common for members of high-risk populations. However, further research confirmed that the condition can also be caused by moderate alcohol consumption throughout pregnancy. See: Mukherjee et al (n 278) 375-376.

weight, being a chief predictor of perinatal death.\textsuperscript{286} Moreover, many researchers have acknowledged a causal link between maternal smoking and the increased risk of occurrence of congenital orofacial clefts.\textsuperscript{287}

However, out of all the stimulants concerned, illegal drugs seem to have the strongest potential of affecting foetal health. Most notably, maternal exposure to cocaine and heroin is likely to cause prematurity, IUGR, cerebral haemorrhage as well as a range of Central Nervous System and urogenital defects.\textsuperscript{288} Prenatal exposure to LSD\textsuperscript{289} has been, on the other hand, associated with limb malformations and frequent neural pathologies.\textsuperscript{290} Furthermore, some commentators have linked maternal use of recreational drugs, such as marijuana, to increased incidence of neuroblastoma in the resulting offspring.\textsuperscript{291} Finally, newborns delivered by drug addicts can exhibit withdrawal symptoms and require detox treatment during the first weeks of their lives.

Apart from abusing stimulants, a pregnant woman can contribute to foetal injuries by refusing to act in compliance with universally approved standards of care, concerning her health, lifestyle or by following certain religious practices.

\begin{footnotesize}
\begin{enumerate}
\item Ornoy and Arnon (n 205) 385; Moore and Persaud (n 115) 131.
\item Ornoy and Arnon (n 205) 386; Moore and Persaud (n 115) 131.
\item Lysergic Acid Diethylamide.
\item Moore and Persaud (n 115) 135.
\item See, for example: EC Bluhm et al, ‘Maternal Use of Recreational Drugs and Neuroblastoma in Offspring: A Report from the Children’s Oncology Group (United States)’ (2006) 17(5) Cancer Causes and Control 663. However, to fully confirm validity of the links discussed, the cited researchers acknowledged the need to perform more research in the area.
\end{enumerate}
\end{footnotesize}
To provide a few examples, maternal malnutrition may result in IUGR or lead to premature labour. In addition, folic acid deficiency before and after conception has been universally linked to higher incidence of neural tube defects in the resulting offspring. Furthermore, we could point to rare cases where a pregnant woman inflicts harm to herself, while affecting the foetus (e.g. through self-mutilation or an attempted suicide) or where she unsuccessfully attempts to provoke a miscarriage. Finally, as was previously noted, the injuries in question can result from the woman’s refusal to undergo certain medical procedures, which are aimed at preserving either her own health (life) or the health (life) of her foetus. These could be, for instance, injuries following a refused blood transfusion, rhesus disease following refused administration of Anti-D (Rho) Immunoglobulin or damage caused in the course of a complicated natural delivery, which was performed in lieu of a refused Caesarean section.

Accordingly, we could conclude that maternal decisions to act (or refrain from acting) in a way harming an embryo (foetus) can be both unconscious and involuntary, conscious but involuntary or both conscious and voluntary. In the last mentioned scenario, the pregnant woman will be fully aware that her personal choices are likely to result in putting the health of the foetus in jeopardy.

292 Ornoy and Arnon (n 205) 387.
293 For instance, by a Jehovah’s witness.
294 For example, they can be owed to lack of knowledge or awareness.
295 For example, they can be owed to poverty or restricted access to healthcare services.
1.2 Maternal Liability for Antenatal Injuries in Ireland and Other Common Law Jurisdictions

Under statutory law of England, Wales and Northern Ireland, in line with section 1(1) of the Congenital Disabilities Act 1976, a child cannot bring a civil suit for antenatal injuries against his mother.\textsuperscript{296}

At the same time, it is not straightforward whether the principle of maternal immunity from suit would also apply under the rules of common law, i.e. in cases where the plaintiff, seeking redress for harm sustained \textit{in utero}, was born before 22 July 1976.\textsuperscript{297} In absence of any reported relevant caselaw, we could point to the previously cited Dillon J’s observation, made in the \textit{Burton and De Martell} judgment, whereby a child could, in fact, demand redress from his mother, if the claim was made outside provisions of the 1976 statute.\textsuperscript{298} However, due to the ambiguity of the statement in question, we will conclude that the matter remains to be resolved by the courts, although a case is unlikely to arise due to the passage of time.

Exclusion of maternal liability under the statute examined has been supported with recourse to four frequently cited arguments. Firstly, it has been proposed that pregnant women are to be treated as independent individuals. Concerns over potential litigation could, on the other hand, affect the sphere of their self-

\textsuperscript{296} It should be explained that the exemption was previously recommended by the English Law Commission in its 1973 report, concerning the statute discussed.
\textsuperscript{297} See: K Oliphant, ‘Children as Victims under the Law of England and Wales’ in Martin-Casals (n 40) 88.
\textsuperscript{298} See: \textit{Burton and De Martell} [1993] QB 204, 232 (Dillon J).
autonomy. Secondly, as prospective mothers are now typically provided with plenty of support and professional advice on standards of safe behaviour during pregnancy, establishing negligence in the scenarios examined could prove to be a very difficult task. Thirdly, there have been fears that a claim instituted by the child against his mother could become the father’s ‘weapon’ in case of a judicial dispute between the spouses (partners). Finally, the claims are likely to have a negative effect on the relationship between the defendant mother and her child.

At the same time, some commentators have argued against the blanket formula of maternal immunity and, in response to the above cited woes and concerns, they suggested a number of ‘step-less’ solutions. As Pattinson observes, constraints imposed on maternal behaviour could be deemed as compatible with personal freedoms, as long as they remained within reasonable limits. In addition, instituting an action against the mother in the course of a pending matrimonial dispute could be explicitly disallowed by statute. Furthermore, it has been observed that a child-mother relationship can be, at times, already broken down

---

299 Most notably, in respect of their professional life (e.g. health and safety regulations) and wellbeing (e.g. healthy diet, supplements, vaccinations, avoidance of stimulants and stress).
301 See, for example: B Greene, Understanding Medical Law (Cavendish Publishing, 2004) 147-148; Pattinson (n 28) 317-318.
302 Pattinson (n 28) 318-319. The cited commentator equally argues that lack of an available remedy under the Congenital Disabilities Act 1976 in the scenarios examined could be potentially challenged with recourse to Article 6 of ECHR 1950, which, in England and Wales, has been given effect under Human Rights Act 1998. In such a case, a potential complainant could receive a declaration of incompatibility under section 4(2) of the Act, enabling the government to address the issue in compliance with the subsequent section 10. However, it should also be mentioned that the government is not legally obliged to act. See: Pattinson (n 28) 314.
before a compensatory claim against the mother is even contemplated (e.g. in cases where the child was placed for adoption).

The exclusion discussed seemingly goes in line with the so-called ‘non-interventionist’ approach towards the pregnant woman-foetus relationship, prevailing under the law of England and Wales, which can be best illustrated with reference to the caselaw concerning forced Caesarean sections.303

Historically, however, the law of the jurisdiction leaned towards limitation of the pregnant woman’s right to self-autonomy, as we could deduce from the 1992 judgment delivered by England’s High Court of Justice (Family Division) in the case of Re S.304 There, pregnant S, was admitted to hospital in established labour and with ruptured membranes. A foetal transverse position with an elbow projecting through the cervix was diagnosed on examination, but the patient, a ‘born-again Christian’, did not consent to the required Caesarean section, while invoking religious grounds. The court exercised its inherent jurisdiction to decide that the section could be lawfully performed against the patient’s will, as it best served in the interest of both the woman and her foetus.305


The line of reasoning in *Re S* was departed from a few years later in two landmark rulings delivered by the Court of Appeal, firstly, in the case of *Re MB* and, secondly, in the case of *St George’s Healthcare NHS Trust v S*. In the latter case, the patient, also referred to as S, did not consent to an emergency Caesarean section, despite being diagnosed with severe pre-eclampsia. She was subsequently detained at the hospital and had the operation carried out with recourse to section 2 of Mental Health Act 1983.

In the former case, pregnant MB, whose foetus was also in a breech position, initially had consented to the section, but later refused to having anaesthetic drugs administered via an injection or an IV catheter, due to an irrational fear resulting from her alleged ‘needle phobia’. After forced intravenous anaesthesia had been judicially authorised, the patient, nonetheless, voluntarily agreed to all the interventions inherent in a surgical delivery and went on to give birth to a healthy infant. With reference to S, it was decided that, as she had been competent to consent to medical treatment, both her detention and the court-ordered C-section were unlawful. MB’s appeal, on the other hand, was rejected as she was found to be temporarily incompetent due to her ‘impaired mental functioning’.

In both the cited rulings the Court of Appeal acknowledged that, although an embryo (foetus) is not rendered by the law as a non-entity, the pregnant woman’s right to maintain control over her body outweighs any of the potential foetal

---

306 *Re MB* [1997] EWCA Civ 3093 (26 March 1997); hereinafter *Re MB*.
307 *St George’s Healthcare NHS Trust v S and R v Collins and Others, ex parte S* [1998] 3 All ER 673; hereinafter *St George’s Healthcare NHS Trust v S*.
308 *St George’s Healthcare NHS Trust v S* (n 307) 674 (Butler-Sloss and Walker LJJ).
309 *Re MB* (n 306) para 30 (Butler-Sloss LJ).
rights and interests up to the moment of birth. Therefore, it can be concluded that a competent pregnant woman could not be forced to have a medical intervention of any kind performed against her will; even if the refusal was to be viewed as irrational and morally repugnant, or if it implied serious consequences for maternal and (or) foetal wellbeing.

With reference to Irish law, maternal immunity from suit (in any event) has not been established under either the principles of common law or of the Civil Liability Act 1961.

1.3 Maternal Liability for Antenatal Injuries in Poland and Other Continental Law Jurisdictions

As far as liability for antenatal injuries under currently binding Polish law is concerned, the child's mother will be treated in the same manner as any other potential tortfeasor. It should be noted that a temporary departure from the principle took place in 1997 on the grounds of the statute amending the Family Planning Act 1993. In accordance with its provisions, article 446 P.C.C. was complemented by an additional passage, whereby the child could not demand redress for such injuries from his mother.

---

310 Ibid para 60 (Butler-Sloss LJ).
311 Ibid para 30 (Butler-Sloss LJ). It should be noted that an analogous position was adopted by the British Medical Association. See: V English et al, *Medical Ethics Today: the BMA’s Handbook of Ethics and Law* (2nd edn, BMJ Books, 2004) 228. As Brazier puts it, imposing intervention on pregnant women through court orders 'would do far more harm than good to the principles and practice of obstetric care'. See: Brazier (n 300) 258.
312 Dziecko nie może dochodzić tych roszczeń w stosunku do matki.
The above cited passage was, nonetheless, repealed approximately twelve months later after it had been declared unconstitutional by the Polish Constitutional Tribunal on the grounds that it had violated fundamental principles of democracy and equality before the law.\textsuperscript{313}

As for their primary argument, the majority of the Tribunal's judges believed that maternal immunity from suit restricted the scope of protection offered to an embryo (foetus) under domestic private law.\textsuperscript{314} In addition, it was observed that, quite ironically, pregnant women were to be regarded as the most natural warrants of foetal prerogatives. Moreover, the judges deemed the disputed provision as discriminatory, since it clearly placed the child's mother in a privileged position vis-à-vis all the other potential wrongdoers, including the child's remaining relatives or medical practitioners.\textsuperscript{315} Finally, the legislature was criticised for the lack of accountability. As the judges observed, liability in tort could already be imposed on the – otherwise immune – mother in a case where the child was injured due to her negligence shortly after being born.\textsuperscript{316}

In absence of any straightforward statutory exclusions, we could propose that the mother will also be potentially liable for prenatal harm under both French and German law, as long as her fault can be demonstrated.\textsuperscript{317}


\textsuperscript{314} Judgment of the Polish Constitutional Tribunal of 28 May 1996 (n 313) para 4.5.

\textsuperscript{315} Ibid.

\textsuperscript{316} Ibid.

\textsuperscript{317} See: Francoz-Terminal et al (n 40) 119; G Wagner, ‘Children as Victims under French law’ in Martin-Casals (n 40) 141 et seq.
As for the potential boundaries of the liability, Francoz-Terminal and colleagues speculate that, as for France, there is currently nothing to prevent a child from suing his mother for all types of prenatal injuries, including also those resulting from her inappropriate health (lifestyle) behaviours. The cited commentators further refer to an unprecedented court decision issued in a case of a woman, who lost custody of her child due to her excessive smoking habits. They suggest that a similar line of reasoning could be followed in a corresponding, hitherto unreported, tort law ruling.\(^{318}\)

Imposing liability on the mother in the last-mentioned scenario has, on the other hand, been highly disputed in Germany. As scholars supporting maternal immunity from suit have argued, pregnancy belongs to the sphere of a woman’s right to privacy, safeguarded under the Federal Constitution. Hence, the scope of maternal duty to provide adequate care to the developing embryo (foetus) should not be assessed in the same manner as the scope of a corresponding duty imposed on any other party (parties).

Their opponents, at the same time, have observed that even the most fundamental personal prerogatives never have an absolute character. In addition, we may note that maternal liability for harm inflicted to the child while \textit{in utero} is – under provisions of B.G.B. – already limited to intentional or reckless acts.\(^{319}\) In respect of the previously mentioned boundaries, Wagner concludes that the rights enjoyed by the pregnant woman and those enjoyed by the embryo (foetus)

\(^{318}\) Francoz-Terminal et al (n 40) 120.

\(^{319}\) B.G.B., §1664-1.
have to be balanced in order to protect the latter and, by the same token, to allow the former to live a lifestyle which is ‘not subjected to exaggerated exigencies’.\textsuperscript{320}

While appreciating that the pregnant woman’s right of self-autonomy should be respected by the lawmaker to the highest possible extent, this author would argue against the solution adopted under the Congenital Disabilities Act 1976. Most notably, if looking from the plaintiff’s perspective, blanket exclusion of maternal liability for prenatal harm runs afoul of the full compensation principle, in addition to being particularly harsh in the – still occurring – cases of maternal intentional conduct (gross negligence).

As a counterargument, one could observe that in a vast majority of the cases discussed, the damages will, paradoxically, be deducted from parental patrimony, which serves to the purpose of maintaining the plaintiff.\textsuperscript{321} Therefore, reparation of antenatal harm, which was inflicted to the plaintiff by his mother may only seem as apparent.\textsuperscript{322} At the same time, it can be proposed that mere availability of a claim against the mother may already serve in the interest of justice, while acting as a deterring factor. In addition, the above paradox will not occur in cases, where the plaintiff, who had been injured \textit{in utero}, was later placed in care, was being raised by another relative or when he had already been financially

\textsuperscript{320} See: Wagner (n 317) 141-142.

\textsuperscript{321} To put it simply, the plaintiff would not be able to receive more financial assistance than the one already in place.

\textsuperscript{322} See, for example: NJ McBride and R Bagshaw, \textit{Tort Law} (Pearson 2005) 183 and Jackson (n 28) 719.
independent from his mother at the time when the compensatory claim was instituted.\textsuperscript{323}

1.4 Liability for Damage Caused by Maternal Refusal of a Foetal Surgery

After assessing general principles of maternal liability for harm inflicted to an embryo (foetus), the author will now attempt to apply them in a more concrete (and quite novel) scenario, which is related to the previously described maternal-foetal conflict.

Namely, due to ongoing scientific advancements, the clash between maternal and foetal interests may have extended beyond the more popular clichés of a pregnant smoker (alcoholic, drug addict) refusing to quit her addiction or of a parturient patient unwilling to undergo a Caesarean section. Therefore, it is now appropriate to consider, for instance, whether the mother would be answerable to her child, in a case where she refused to consent to a surgical intervention, aimed at treating the child's congenital illness while \textit{in utero}.\textsuperscript{324} Before turning to the mother's liability in the present context, let us look at some of the practicalities involved in performance of the interventions discussed.

\textsuperscript{323} This will also be the case where the mother's behaviour is covered by an insurance policy. Apart from the most obvious example of compulsory motor vehicle insurance, which is further discussed in the subsequent chapter, there may be other situations where an insurance agreement will come into operation, e.g. a home insurance policy may cover torts in certain instances.

\textsuperscript{324} England, Wales and Northern Ireland will, naturally, be excluded from this section of the analysis, as the mother (in the present context) will be immune from suit.
Medical literature describes three surgical techniques that are commonly used to treat various foetal defects. Each of them carries diverse degrees of maternal and foetal risk and is characterised by different success rates.\textsuperscript{325}

The first and most invasive form of the procedure is the so-called ‘open foetal surgery’, in the course of which a pregnant woman’s abdomen and uterus are open and the surgery is performed on a partially exposed foetus. The technique has been used, for instance: to correct malformations of foetal urinary tracts, to remove congenital tumours of foetal sacral area, to repair neurological defects, such as myelomeningocele, or to treat pulmonary sequestration.

The second form, referred to as ‘EXIT’ (Ex Utero Intrapartum Treatment) procedure, can be treated as a subcategory of an open foetal surgery and described as an ‘extended’ form of a Caesarean section. EXIT is usually carried out in cases of diagnosed life-threatening obstructions of foetal airways caused, for example, by congenital laryngeal atresia or large tumours located in the foetal mouth, neck and lungs. The technique consists of performing a uterine incision to deliver the foetus’s head only with the rest of its body remaining inside the womb, attached by an umbilical cord to the maternal circulation. After the obstruction is removed, the surgeon performs a complete delivery.

Finally, the third form of foetal treatment, available since the early 1990’s, is the so-called ‘fetoscopic surgery’, combining both endoscopic and sonographic techniques. It allows the operator to access the fetoplacental unit with the use of very small instruments and, hence, it requires minimal surgical invasion into the body of the foetus and that of the pregnant woman. This type of intervention has been found to be particularly beneficial while treating congenital diaphragmatic hernia or ‘twin-to-twin transfusion syndrome’ (TTTS), a rare condition affecting monochorionic twins\(^{326}\) which occurs in cases of unbalanced blood supply.

Performance of prenatal operations is still considered to be risky for both the pregnant woman and her foetus\(^{327}\). Potential hazards, which are most likely to occur during open foetal surgeries, may include amniotic fluid leakage, premature rupture of membranes, preterm labour, foetal distress as well as future negative reproductive consequences for the mother. As some researchers suggest, the outcomes of treating certain congenital illnesses are still characterised by relatively low rates of success, as can be illustrated by more numerous instances of the resulting foetal (infant) death\(^{328}\).

With reference to Poland, none of the clinical guidelines or statutory provisions have yet addressed the issue of pregnant patient’s consent to a foetal surgery. At the same time, commentators remain in agreement that the court could not compel a physician to perform the surgery on a competent pregnant woman and

\(^{326}\) TTTS may affect twins sharing the same placenta.

\(^{327}\) Cunningham (n 325) 305.

\(^{328}\) This can be illustrated, for example, by the results of research concerning experiences with foetal valvuloplasty. See: Deprest et al (n 325) 446.
her foetus against the former’s will, as such treatment would not be authorised under any of the statutes. However, as in any other instance of a conflict between maternal and foetal health interests, the physician would be obliged to seek advice from a relevant specialist or to summon a consultation meeting, pursuant to article 37 of the Medical Doctors and Dentists Act 1996.329

At the same time, developments in foetal therapy, paired with popularisation of medical imaging techniques, may imply a conclusion, whereby a foetus should no longer be regarded as pars viscerum matris, but as a rightful patient,330 enjoying its own right to prenatal care.331

As some Polish commentators have proposed de lege ferenda, the concept of ‘foetal patienthood’ should be further reflected in a statutory declaration, aimed at limiting the pregnant patient’s decision-making powers in all cases, where the disputed prenatal intervention is aimed at benefitting the foetus without affecting maternal health.332 If enacted by the Parliament, the declaration would vest the court with the right to render the patient’s refusal as ineffective. In such a scenario, the physician could proceed without her consent, in accordance with the procedure envisaged by article 34(7) of the previously mentioned 1996 Act.333

333 Ibid 406-407 and 441.
Refusal of antenatal medical care would only be justifiable in cases of an established, substantial risk of maternal death or deterioration of maternal health, incurred in the treatment. In addition, the risk would be assessed in the light of the current medical knowledge, outside the sphere of subjective fears and emotions that can be potentially encountered by the gravid patient. Accordingly, in the course of such assessment, the court would have to rely on a hypothetical model of a ‘reasonable pregnant woman’.

This solution would also be, *prima facie*, optimal from the pragmatic point of view. Namely, we could argue that maternal refusal of medical intervention prevents a physician from repairing the resulting child’s injuries at the time when the child is still *in utero*. Hence, it would seem more rational to overcome the (already estimable) effects of the refusal by limiting maternal freedom of choice, than to incur losses that will be both more difficult and more expensive to repair after the child’s birth.

However, as Mackus argues, even in absence of the declaration in question, maternal refusal to consent to a foetal surgery may still turn out to be a sufficient basis for a compensatory claim under article 446\(^1\) P.C.C. Most notably, he refers to the previously discussed 1996 ruling delivered by the Polish Constitutional Tribunal, acknowledging legal protection of intrauterine human life under both public and private law. While giving priority to the last-mentioned value, Mackus concludes that the mother will bear liability for all forms of damage suffered by the resulting child, as long as she contributed to it by acting inappropriately.
during the pregnancy, even if the inappropriate conduct could be equally perceived as exercising her own personal freedoms.\textsuperscript{334}

Unsurprisingly, the ‘constitutional law argument’ has also been acknowledged by a number of Irish scholars, suggesting that, in the light of Article 40.3.3\textdegree\ of \textit{Bunreacht Na hÉireann} (still in force at the time covered by the thesis), foetal right to life would supersede the pregnant woman’s right to self-autonomy in cases, where the pregnancy does not pose threat, risk or danger to her own life.\textsuperscript{335}

According to Hogan and Whyte, the constitutional prerogative could, however, be relied upon by a competent pregnant woman in order to refuse consent to treatment aimed at saving her own life. If that is the case, then we may well assume that the State could not, in fact, compel the woman to undergo medical intervention in order ‘to vindicate the right to life of her foetus’.\textsuperscript{336} At the same time, in absence of a statutory definition of ‘due regard’, its future interpretation in the present context would be left to the judiciary.\textsuperscript{337}

\textsuperscript{334} Mackus (n 236) 422-423.
\textsuperscript{335} See: Tomkin and Hanafin (n 148) 45; AA Sheikh and DA Cusack, ‘Maternal Brain Death, Pregnancy and the Foetus: The Medico-Legal Implications’ 7(2) MIJI (2001); Casey (n 137) 75; GW Hogan, JM Whyte and JM Kelly, \textit{The Irish Constitution} (4th edn, Tottel 2006) 1522 et seq; Quill (n 4) 213.
\textsuperscript{336} Hogan and Whyte (n 335) 1523.
\textsuperscript{337} As section 7.7.1 of HSE’s 2014 ‘National Consent Policy’ provides: 
’(t)he consent of a pregnant woman is required for all health and social care interventions. However, because of the constitutional provision on the right to life of the ‘unborn’, there is significant legal uncertainty regarding the extent of a pregnant woman’s right to refuse treatment in circumstances in which the refusal would put the life of a viable foetus at serious risk. In such circumstances, legal advice should be sought as to whether an application to the High Court would be necessary’. 
See: Health Service Executive, ‘National Consent Policy’ 2014  
Leaving the constitutional prerogatives aside, this author believes that, in any of the jurisdictions examined, a court-ordered foetal surgery would be a very unlikely scenario. Similarly, the mother, who refused to consent to medical intervention during her pregnancy, would not be answerable to the child born with a congenital illness that could have been treated in utero. Two facts have to be considered, in particular: first, foetal surgeries involve significant interference with maternal bodily integrity and they pose substantial risk to maternal health; second, their performance has not yet become a well-established, clinical practice.\(^\text{338}\) In addition, although the factual scenario may, theoretically, fulfil the premises of damage and causation, it would be very hard to accept that the mother was at fault, i.e. that her conduct was unlawful.\(^\text{339}\)

To summarise the observations concerning maternal liability for foetal harm, this author does not support the UK’s statutory solution, whereby the mother should be immune from suit in any event where her conduct contributed to foetal harm. As was evidenced in the preceding passages, the liability discussed poses particular difficulties for all those enacting, interpreting and applying the law in force. On the one hand, the pregnant woman exercises the largest degree of control over her embryo (foetus), while also exercising her own right to autonomy, including the right to refuse any form of medical intervention. On the other hand, however, the foetus will be, seemingly, treated as a patient on the

\(^{338}\) Despite the fact that the first foetal surgery took place nearly three decades ago, they are still described as being in the research and development phase. See: James (n 330) 1580.

\(^{339}\) For the opposing views, see, for example: KA Knopoff, 'Can a Pregnant Woman Morally Refuse Fetal Surgery?' (1991) 79(2) CLR 499, 509-510. From an American perspective, a pregnant woman could be, prima facie, obliged to undergo a foetal surgery in consequence of waiving her right to perform an abortion during the first trimester of the pregnancy.
grounds of medical law and, hence, the potential risks and benefits flowing from the intervention thereof will need to be considered in an equally careful manner. As a result, the author supports a compromise solution – i.e. an explicit statutory clause, whereby maternal liability for antenatal harm would be restricted to intentional acts and gross negligence – similar to the previously cited doctrinal interpretation of section §1664-1 B.G.B.\textsuperscript{340} Accordingly, the mother would not be liable in tort in cases where she had simply disregarded medical advice, provided by her doctor or midwife.\textsuperscript{341}

Additionally, the author does not believe that recognition of the ‘foetal patienthood’ on the grounds of healthcare law could potentially hinder the circumscription of the scope of maternal liability for antenatal harm. From the tort law perspective, such recognition simply reinforces an argument, whereby a duty of care is owed to the foetus by medical practitioners. Accordingly, appreciating the existence of a doctor–patient relationship in the present context will make it harder for the defendant to argue against the duty of care and, in consequence, also against its breach. At the same time, the relationship, itself would not impose any equivalent duty on the pregnant woman. Furthermore, acknowledgment of the ‘foetal patienthood’ may, \textit{prima facie}, strengthen the prospective parents’ authority to make decisions concerning

\textsuperscript{340}To recall, the discussion concerning the statutory solution adopted in Germany was included in the preceding section.

\textsuperscript{341}The author supports restricting the scope of tortious liability also in respect of the maternal wrongful acts (omissions) that had preceded conception. Here, as we may speculate, it would be even more problematic to impose liability on the mother due to the issues concerning proximity and, more importantly, causation. Hence, it could be argued that mere ignorance of medical advice concerning the woman’s potential, future reproduction (i.e. ingesting folic acid or avoiding exposure to harmful substances) should not give rise to liability in tort. We may also note that the issue of liability from preconception event, as seen from a clinical perspective, will be thoroughly analysed in the third chapter.
surgical interventions directly involving their expected offspring. The last-mentioned proposal will be further discussed in the third part of the thesis, devoted to family law.

As for Ireland, no domestic statute pertaining to provision of healthcare contains a direct reference to the care provided to the ‘unborn patient’. On the other hand, an obligation to protect foetal right to life and to exercise care during medical interventions involving the foetus can be found in some of the important clinical guidelines addressed to members of the medical personnel. As an example, we could invoke, for instance, the 2010 ‘Guidelines on the Protection of the Unborn Child during Diagnostic Medical Exposures, issued by the Radiological Protection Institute of Ireland, 2014 Guidance Document for Health Professionals concerning Implementation of the Protection of Life During Pregnancy Act 2013 issued by the Department of Health or in paragraph 48.1 of the 2016 Guide to Professional Conduct and Ethics (8th edition) issued by the Medical Council. Finally, recognition of foetal patienthood may be additionally confirmed by an established practice of assigning a legal representative of an embryo (foetus) during the proceedings before the Irish courts.

---

342 See: Broughton (n 128) 78.
346 For instance in the previously mentioned case of Miss D (2007) the Attorney General instructed a senior counsel to represent separately the interests of D’s foetus. See: ‘AG Instructs
Finally, we could speculate that maternal liability for harm caused as a result of a pregnancy termination – also an attempted pregnancy termination – would have to be equally excluded. Therefore, one should acknowledge the importance of public (criminal) law principles addressing the issue examined. As a model solution we could point to article article 157a §3 of the Polish Criminal Code 1997, whereby a woman who performs an abortion (both lawful nad unlawful) does not bear criminal liability to any corresponding bodily harm suffered by the embryo (foetus).347

2. Paternal Liability for Antenatal Harm

2.1 The Damage

As was previously demonstrated, in the vast majority of scenarios involving parental liability for antenatal harm, the mother of the injured child will be the author of the wrongful act (omission). However, it should be observed that in many cases the father’s conduct may have an equally deleterious effect on the health of the expected offspring.

The cases discussed could be further divided into two separate categories. The first category encompasses occurrences that are external to the health of the prospective (expectant) father. In other words, they are not causally linked to any of his underlying medical conditions. Accordingly, these would be, *inter alia*, all the cases where the father – while acting either intentionally or negligently – inflicted mechanical injuries to the pregnant woman, which directly affected the developing embryo (foetus). Some corresponding examples may include instances of domestic violence or road traffic accidents, which involved both the expectant parents, but which were caused due to the father’s lack of skill and (or) care.

The second category will, on the other hand, encompass those cases where the prospective (expectant) father contributed to the injury suffered by the resulting child by reasons related to his own health. Medical research now confirms that male reproductive organs can be negatively influenced by various agents, identified as both mutagens and teratogens. The resulting abnormalities may, in turn, influence the condition of the affected men’s future children.

As for mutagenic factors, pre-conceptional exposure to irradiation has been linked to the increased risk of leukaemia and non-Hodgkin’s lymphoma in children of male workers of the nuclear industry.348

---

As for teratogenic factors, children of men who had had occupational contact with benzene prior to reproduction, were more likely to be born prematurely and to suffer the related complications.\(^{349}\) In addition, pre-conceptional exposure to Agent Orange has been associated by some researchers with excess risk of developing spina bifida.\(^{350}\)

Furthermore, as many infectious agents can act as teratogens, we could argue that a potential (prospective) father can contribute to his child's congenital defects by infecting his spouse (partner), for instance, with viruses or bacteria causing sexually transmitted diseases, such as HIV, HSV-2 or Treponema pallidum.\(^{351}\) Finally, some researchers have established a link between congenital defects and passive exposure to nicotine in cases where non-smoking pregnant women shared a household with their smoking spouses (partners).\(^{352}\)

In summary, the prospective father’s negligence – here, understood as lack of care – can consist of either disregarding medical advice concerning family planning or passing on an infectious disease to his spouse (partner) before or during the pregnancy.

\(^{349}\) See, for example: C Xing et al, 'Benzene Exposure Near the U.S. Permissible Limit Is Associated with Sperm Aneuploidy' (2010) 118(6) Environmental Health Perspectives 833.


\(^{351}\) The effects of untreated infectious diseases will be further discussed in the fourth chapter of this part, devoted to liability for antenatal harm caused by medical errors.

\(^{352}\) Losco and Schublak (n 261) 67.
2.2 Paternal Liability for Antenatal Injuries under the Law of the
Jurisdictions Examined

As can be summarised, the father’s liability for inflicting harm to his child before birth has not been specifically addressed by statute law of the majority of the jurisdictions examined. On that account, in such cases he will be neither immune from suit, nor treated differently to any other wrongdoer.

Seemingly, the only statutory provision regulating paternal liability in the above context is section 1(4) of the Congenital Disabilities Act 1976, applicable in cases, where prenatal harm resulted from a preconception occurrence. In line with the provision, the defendant will not be answerable to the plaintiff under the statute, if both the prospective parents had been aware of such an occurrence\textsuperscript{353} and also of the fact that it carried an increased risk of conceiving a child with a congenital defect. Nonetheless, the defence – in the above scenario – will not be available to the child’s father, if the risk factor had been known to him, but had not been known to the child’s mother.

As was observed by some commentators, the father may, nonetheless, still escape liability in the last-mentioned scenario, if the cited exclusion is interpreted in a more careful manner. Namely, let us suppose that D, the plaintiff’s father, had been fully aware of the risk of passing on a grave hereditary illness onto P, the plaintiff, before the latter was conceived. Then, even if P inherited the defective

\textsuperscript{353} Such as, for example: genetic mutation, underlying parental condition or previous exposure to harmful substances.
gene, it would be hard to establish that his father was the author of prenatal harm that could have been otherwise avoided. Here, D’s ‘recklessness’ merely resulted in conceiving P, who would have not existed, but for his father’s decision to procreate. This circumstance can, on the other hand, be described as being reminiscent of a wrongful life claim which is disallowed under the 1976 statute.\textsuperscript{354}

In conclusion, it will be almost always possible for the child to sue his father for compensation for antenatal injuries. In cases where the pregnant wife (partner) suffered her own harm, the man will be liable vis-à-vis both the mother and the child.

3. Parental Liability in the Context of Assisted Reproduction

Finally, in the light of the scientific developments it is necessary to briefly outline potential parental liability in the context of antenatal injuries that are causally linked to performance of ART. Due to space constraints, an emphasis will be placed on cases, where the pregnancy was carried by a surrogate, who contributed to foetal harm\textsuperscript{355} and where the resulting child's congenital defect was owed to defective gametes, which were provided by a donor for the purpose of AID or IVF.

\textsuperscript{354} See: Brazier (n 300) 244-245.

\textsuperscript{355} But who was not the resulting child’s genetic mother.
As for the case of the surrogate’s liability, it should be observed that – in any scenario where the harm was inflicted in utero – the law of all the jurisdictions examined seems to assume biological coexistence of the gravida and the embryo (foetus). Hence, in the present context, the surrogate will most likely be regarded as the ‘mother’. Complications may, however, arise in cases where the damage will be causally linked to a factor attributable to the child’s genetic mother, such as a gene mutation caused by the previously examined various preconception occurrences. Most notably, with reference to the law of England, Wales and Northern Ireland, it is not clear which of the two women (that can both be referred to as ‘mothers’) could escape liability from suit in line with section 2 of the Congenital Disabilities Act 1976.

As this author would argue, here, maternal immunity from suit would be, prima facie, enjoyed by the surrogate due to the fact that, in the light of the currently binding filiation law, she will be deemed as the resulting child’s legal mother. However, it could be equally assumed that the genetic mother of the child born to the surrogate\(^{356}\) could still escape liability in tort in case where that child’s injury resulted from a preconception occurrence, as long as the compensatory claim was classified by the court under the banner of ‘wrongful life’.

On the other hand, it should be observed that the problem of surrogate’s potential liability in tort would not – at least in legal theory – arise under German law, where surrogacy arrangements remain a prohibited practice, pursuant to

\(^{356}\) i.e. the gamete provider.
provisions of the Embryo Protection Act 1990.\footnote{See: Embryo Protection Act, s 1(1)(7).} As for Poland and Ireland, while considering, first, that the mother is not immune from suit under the statute and, second, that surrogacy has not been authorised \textit{expressis verbis} in a binding piece of legislation, the matter examined would have to be further interpreted and resolved by the court.

As far as potential tortious liability of sperm donors is concerned, in some jurisdictions, including France, the donors’ immunity from suit has been secured by an explicit statutory provision. As article 311-19 F.C.C. provides: ‘(n)o action in tort may lie against a donor’.\footnote{The principle was introduced by Ordinance No 2005-759 of 4 July 2005 concerning Filiation Law Reform.} In other jurisdictions, e.g. Poland and Ireland, the still binding\footnote{Treating Infertility Act 2015, Official Journal of the Republic of Poland No 2015.1087, art 37(5).} and still observed in practice principle of donor anonymity in the context of ART would make it impossible, \textit{de jure et de facto}, to institute a claim against an individual who voluntarily provided samples of his semen for the purpose of assisted conception. On the other hand, in the United Kingdom\footnote{See: Human Fertilisation and Embryology Authority (Disclosure of Donor Information) Regulations 2004, SI No 1511/2004.} and Germany,\footnote{See: Judgment of the German Supreme Federal Court of 28 January 2015 (XII ZR 201/13).} where anonymity of donors is no longer secured by the relevant law, the above possibility could not be, \textit{prima facie}, excluded.\footnote{See also: Davies (n 215) 243-244.}
CHAPTER 3
Liability for Antenatal Injuries Resulting from a Road Traffic Accident

1. The Damage

In a vast majority of factual scenarios where prenatal harm was a consequence of a road traffic accident, the pregnant woman will be the primarily and the more directly injured individual. The risk of suffering damage in these circumstances could be described as relatively high, if we consider the fact that the gravida will not always be the affected driver, but also a passenger or a pedestrian. It can be expected that a vast majority of congenital defects, which are causally linked to the accidents in question, are owed to significant mechanical pressure that is being applied to the woman’s abdominal area at the time of the event. Therefore, according to the medical research, detrimental effects for the developing foetus tend to be the greatest during the final trimester of gestation, i.e. at the time when the protective barriers secured by the maternal organism are naturally the lowest.

363 However, it can be assumed that, in some scenarios, severe stress can also contribute to antenatal injuries (e.g. in cases where it led to premature labour).
364 For instance, according to the rather disturbing Polish statistics, road traffic accidents are a leading category of non-fatal accidents (54%) involving pregnant women. Mackus (n 236) 392.
2. Liability for Antenatal Harm Resulting from a Road Traffic Accident under Common Law

The statutory law of England, Wales and Northern Ireland specifically addresses a factual scenario, where a pregnant woman drove a motor vehicle and where her lack of care (skill) subsequently contributed to a road traffic collision. In line with section 2 of the Congenital Disabilities Act 1976, a child, who suffered injuries in utero in the above circumstances can seek damages from the negligent mother-driver, as long as she had known that she was pregnant at the time the vehicle was being used. This sole exception from the statutory principle of maternal immunity from suit is linked to the corresponding principles of the domestic law of insurance, whereby all motor vehicle users will be parties of a compulsory insurance contract. To authorise imposition of liability in tort on the plaintiff’s mother, the statute equates the ‘passenger’ en ventre sa mère with another road traffic participant. On that account, the pregnant woman’s duty to provide care and safety, while in control of a motor vehicle, encompasses also the embryo (foetus) that she carries.

With reference to Australia, existence of maternal duty of care vis-à-vis the embryo (foetus) was confirmed by the New South Wales Court of Appeal in its 1991 ruling, delivered in the case of Lynch v Lynch and Another. Accordingly, a

---

365 Or should have reasonably known.
366 Congenital Disabilities Act 1976, s 1(1) in conjunction with s 2.
367 Road Traffic Act 1988 (c 52), s 143.
368 On the other hand, in line with some of the American state laws, the child’s mother will be liable for damage suffered by the child qua embryo (foetus) as a result of her negligent driving, but only up to the limit of her liability insurance. See: Oliphant (n 297) 88.
girl, who had been involved in a car accident and sustained serious neurological injuries while in utero, succeeded in a negligence claim against her mother, the driver of the vehicle. As should be noted, the Appellate Court was reluctant to follow a broader, more universal interpretation of the duty that was previously suggested at the trial level. Possibly, in an attempt to avoid demarcating boundaries of maternal autonomy, Clarke JA restricted the ruling to tort scenarios involving road traffic collisions.\textsuperscript{370}

A virtually different outcome was, on the other hand, reached by the Supreme Court of Canada in its 1999 decision in the case of Dobson v Dobson.\textsuperscript{371} There, a pregnant woman was driving a car during a snowstorm, when a collision, allegedly owed to lack of her own skill and care, occurred. In the aftermath of the event, her son had to be delivered via an emergency Caesarean section. He was later diagnosed with cerebral palsy, which contributed to his permanent physical and mental disability.

As Cory J initially observed, a vast majority of pregnant women protect the health and life of their expected offspring; even if such protection is achieved at the expense of their own physical (and/or emotional) wellbeing.\textsuperscript{372} However, while giving regard to the right to maintain control over one’s own body, and the – previously acknowledged – argument, whereby suing one’s parent for prenatal negligence could lead to disruption of family life, the majority of judges refrained

\textsuperscript{370} Similarly to the case of other jurisdictions, compensating road traffic victims under the negligent driver’s policy had already been regulated under the State’s Motor Vehicles (Third Party Insurance) Act 1942. See: Lynch (n 369) 415 and 420 (Clarke JA).

\textsuperscript{371} Dobson v Dobson (Litigation Guardian) [1999] 2 SCR 753; hereinafter Dobson.

\textsuperscript{372} Ibid para 24 (Cory J).
from confirming that a pregnant woman owes a duty of care to her embryo (foetus) in any set of factual circumstances, while delegating such a task to the legislature.\footnote{373}

With reference to Ireland, there is no specific statutory provisions regulating liability for antenatal injuries sustained as a result of a road traffic collision; thus, it can be speculated that section 58 of the Civil Liability Act 1961 – accompanied by relevant provisions of the Road Traffic Act 2016\footnote{374} – will constitute a general basis of the plaintiff’s claim under Irish law.

3. Liability for Antenatal Harm Resulting from a Road Traffic Accident under Continental Law

In Poland, similarly to Ireland, the scenarios examined will be generally encompassed by the corresponding blanket formula, i.e. article 446\textsuperscript{1} P.C.C. Indicating the relevant regime of tortious liability in the present context may, however, prove a more complicated task. It is because the cited provision must be applied in conjunction with the Code’s preceding article 436 §1, whereby an independent possessor\footnote{375} of ‘a mechanical means of transport propelled by

\footnotesize{\textsuperscript{373} According to McInnes, the outcome of Dobson cannot be regarded as ‘particularly surprising’, considering Canada’s liberal law on pregnancy termination and previous caselaw, acknowledging maternal autonomy, such as Winnipeg Child and Family Services (Northwest Area) v RDG [1997] 3 SCR 925. See: M McInnes, ‘Case Comment. Pre-natal Injuries in the Supreme Court of Canada’ (2000) 116 LQR 26.}

\footnotesize{\textsuperscript{374} Road Traffic Act 2016 (No 21 of 2016). In particular, one should bear in mind the Act’s section 4(1) which regulates vehicle insurer obligations.}

\footnotesize{\textsuperscript{375} Usually, the independent possessor will be equated with the owner. However, the term must be understood broadly, to include all persons who exercise authority (control) over the possessed thing in the same manner as owners (e.g. a lessee of the vehicle or even a person who stole it).}
natural forces'\textsuperscript{376} bears strict liability for damage resulting from its operation.\textsuperscript{377} Assumingly, by excluding the premise of the possessor’s fault, the Polish lawmaker acted in the interest of potential victims of road traffic collisions. As should be, nonetheless, explained, pursuant to the following §2, in any case where the plaintiff was being ‘carried gratuitously’ at the time of the collision,\textsuperscript{378} the possessor’s liability will be governed under the ‘general principles’ of the liability in tort, which means that his fault will need to be demonstrated.\textsuperscript{379}

In line with some of the commentaries accompanying the Code, a person is being carried gratuitously, if, firstly, he does not bear any costs incurred in his transportation and, secondly, the provider of transport acts in his interest.\textsuperscript{380} At the same time, it has not been clarified, whether the same definition should apply \textit{mutatis mutandis} to an embryo (foetus), in any case where the road traffic collision affected a pregnant woman.

\textsuperscript{376} Here, a motor vehicle.

\textsuperscript{377} The Polish solution was clearly inspired by German law, where the possessor (\textit{Halter}) of a motor vehicle is strictly liable for damage resulting from its use in line with §7 of Road Traffic Act 1909 (\textit{StVG}). In France, on the other hand, the possessor of a motor vehicle will be regarded as its ‘guardian’ (\textit{gardien}) and, hence, his liability will be governed under section 1 of art 1384 F.C.C. The guardian’s liability under French law is also imposed without the element of fault. The plaintiff will solely have to prove that the defendant ‘guarded’ the motor vehicle – i.e. he enjoyed effective and independent power of use, direction and control over it – and that the prejudice resulted from coming into contact with the guarded vehicle, while it remained in movement. See, for example: Viney (n 244) 250.

\textsuperscript{378} For instance, the plaintiff’s mother was a passenger of a car driven by a friend or a neighbour; or – in a less likely scenario – she was a hitchhiker picked up from the road by the defendant.

\textsuperscript{379} According to the commentators, the rationale behind introducing the above exception stemmed from the principle of fairness. As the law assumes, a person carried gratuitously implicitly accepts the risk of damage incurred in the informal agreement. It should also be underlined that only the independent possessor of the car that carried the plaintiff gratuitously will escape the regime of strict liability; the principle will not apply to other participants of the road traffic. See, for example: Safjan in Pietrzykowski (n 232) 1303; Mackus (n 236) 393.

\textsuperscript{380} Ibid.
Arguably, the negative answer could lead to creation of an unwelcome dualism, whereby – in the same factual scenario – the defendant’s liability in tort vis-à-vis the resulting child would be based on risk, whereas his liability vis-à-vis the child’s mother would be based on fault. At the same time, situations where two separate regimes of liability apply to an identical set of factual circumstances are not unknown to the law.\textsuperscript{381} On the other hand, in order to defend the view, whereby the child was, in fact, carried gratuitously while \textit{in utero}, we could propose that the risk incurred in the spontaneously arranged transport was, at the time, accepted by his mother, while acting in his interest and on his behalf. Nonetheless, since risky maternal behaviour does not, \textit{prima facie}, serve the foetal interest, the last-mentioned argument could be rendered as irrelevant by the court.\textsuperscript{382}

\textsuperscript{381} Under both Polish and German law, if the independent possessor (\textit{Halter}) was also the driver of the motor vehicle, he may additionally be liable under the general rules of P.C.C. and B.G.B. In such scenarios, ‘(...) plaintiffs can plead claims under both fault-based and risk-based liability regimes in the same case; each claim is treated independently so that both forms of liability can coexist’. See: H Koch, ‘The Law of Torts’ in J Zekoll and M Reimann, \textit{Introduction to German Law} (2nd edn, Kluwer International 2005) 205.

\textsuperscript{382} Mackus argues that, due to the interpretational ambiguities, the relationship between articles 436 §2 and 466\textsuperscript{1} P.C.C. needs to be revisited by the Polish legislature. See: Mackus (n 236) 393.
CHAPTER 4

Liability for Antenatal Injuries Resulting from a Medical Error

As was previously alluded to, although pregnancy and childbirth are, *prima facie*, regarded as natural aspects of human physiology, their management still remains subject to substantial supervision by medical practitioners. Hence, the potential scope of liability for medical errors which resulted in harming an embryo (foetus) will be particularly broad and, at times, also difficult to determine.

We could speculate at the outset that a vast majority of compensatory claims arising in the present context will be brought under the regime of tortious liability with an element of fault. With reference to methods of regulation, Poland and France opted for blanket formulas of personal liability included in their domestic civil codes.\(^{383}\) These clauses govern liability for all hypothetical wrongful acts (omissions) that can be attributed to a human.\(^{384}\) In other continental countries, e.g. in Germany, a number of more semi-general norms, regulating the grounds of the liability in question are used in lieu of the blanket formulas.\(^{385}\)

---

\(^{383}\) See: art 415 P.C.C., whereby: ‘(w)hoever, by his fault, causes injury to another shall be liable to redress it’. The Polish clause is nearly identical to art 1382-1 F.C.C. in its original wording *(Tout fait quelconque de l’homme, qui cause à autrui un dommage, oblige celui par la faute duquel il est arrivé, à le réparer)*.


\(^{385}\) In the medical malpractice cases, the plaintiff will commonly rely on §823-1 B.G.B., whereby a person who unlawfully, negligently or deliberately violated another’s personal right (*Rechtsgüter*), such as life, physical integrity or health, is liable to compensate the damage arising from his actions. If the wrongful act (omission) constitutes a statutory duty (*Schutzgesetz*) and the element of fault has been established, the plaintiff may rely on §2 of the above cited provision. See: C Wendehorst, ‘Liability for and Insurability of Biomedical Research Involving Human Subjects under German law. Tort Law Aspects’ in J Dute, MG Faure and H
In common law jurisdictions an affected child will – more than likely – opt for bringing a legal action based on the tort of negligence. Accordingly, as in any other negligence case, the plaintiff will be required to establish that the defendant owed him the duty of care, which was breached due to his conduct. In addition the alleged injury (damage, loss) must be both recoverable in law and causally linked to the breach of the duty committed by the defendant.

As for relevance of torts actionable per se, most notably of trespass (battery), these, in the clinical context, will typically be committed in cases where a patient received medical treatment despite errors during the consent process; i.e. where he did not consent to the intervention or had been ill-informed. On that account, bringing a legal action based on trespass (battery) by a child harmed in utero does not seem a likely scenario.

It is also important to stress that the catalogue of potential defendants in the scenarios examined – regardless of the jurisdiction – will not be limited to gynaecologists, obstetricians or midwives but will also include sonographers, family doctors, pharmacists or manufacturers (suppliers) of pharmaceutics and other devices used in the course of antenatal or perinatal medical care. Finally, as

Koziol (eds), Liability for and Insurability of Biomedical Research Involving Human Subjects in a Comparative Perspective, Tort and Insurance Law Series, vol 7 (Springer 2004) 194.

386 Although the common law system does not recognise blanket clauses of tortious liability, negligence – as the most dominant tort – can be treated as a general ground of tortious liability for one’s own act. See: Lewaszkiewicz-Petrykowska (n 384) 219 and 241.

387 See, for example: Re a Ward of Court (withholding medical treatment) (No 2) [1996] 2 IR 79, 156 (Denham J).

388 In addition, as Tomkin and Hanafin argue, ‘battery has connotations of undesirable or antisocial behaviour, and is increasingly being replaced by negligence as the proper form of action where a doctor is the defendant’. See: Tomkin and Hanafin (n 148) 70.
was previously explained, many aspects of the liability for antenatal injuries resulting from medical malpractice will be governed under specialised statutes. Since presenting all the instances, where the liability in question would arise would not be attainable, the author will limit this section of the analysis to particular examples of injurious occurrences that took place: before conception, before implantation of an embryo *in vitro* in the uterus and before birth. For the sake of clarity, we will also assume that the defendant is a physician, who either provided antenatal medical care to the plaintiff’s mother or performed ART – in case where the plaintiff suffered harm before birth but *ex utero*.

### 1. Liability for Antenatal Injuries Resulting from Pre-Conception Occurrences

#### 1.1. The Damage

A preconception injury can be defined as an occurrence, which did not affect either the pregnant woman or the embryo (foetus) *per se*, but which was a necessary link in the chain of events leading to birth of an affected (in many cases – disabled) child. In other words, we could argue that the occurrence discussed influenced the prospective parents’ ability to conceive a healthy child.

As examples, we could cite, *inter alia*, negligent management of the plaintiff’s mother’s previous pregnancies and (or) labours, insufficient pre-pregnancy counselling or any other form of inadequate medical care that had affected the
plaintiff’s mother’s ability to experience an uncomplicated pregnancy or the mother’s (but also the father’s) ability to produce unaffected gametes.

1.2 Recognition of Compensatory Claims

As for Poland, to date, a judgment admitting damages for an established preconception injury has not been yet reported. Some commentators have, nonetheless, questioned mere availability of the claim discussed under domestic law of torts. Most notably, it has been proposed that extending the scope of the defendant’s liability to pre-pregnancy occurrences seems a step too far and could potentially open the floodgates to new suits.389

According to other scholars, adhering to the principle of justice and fairness would require a broad interpretation of article 4461 P.P.C. Arguably, patients who suffer from particular conditions (e.g. venereal diseases or rhesus incompatibility) or undergo specific forms of treatment (e.g. chemotherapy or radiotherapy) should be duly informed of their diminished capacity to conceive a healthy child. Hence, inadequate counselling would be seen as an unlawful contravention of an established standard of care.390 As Safjan observes, unlawfulness of the conduct and ‘pure’ infliction of the injury do not have to be


390 See: E Wojtaszek, ‘Odpowiedzialność Cywilna z Tytułu Szkód Wyrządzonych Dziecku Przed Jego Poczęciem’ (1990) 10-12 Nowe Prawo 91, 97. However, the decision to reproduce despite the existing risks, which was made by properly informed prospective parents, will not be tantamount to unlawfulness, even in case where the resulting child was born with a defect linked to an underlying parental condition. See: Ibid 98.
parallel in time. Hence, the fact that the plaintiff’s harm originated from an
occurrence which predated his conception cannot, per se, exclude the defendant
physician’s liability in tort.\footnote{See: Safjan (n 331) 121-122; Safjan (n 232) 1303.}
Furthermore, as Wojtaszek points out, awarding
preconception damages broadens the scope of protection enjoyed by an embryo
(foetus) under Polish private law.\footnote{Wojtaszek (n 390) 94.}

Other commentators adhere to the more cautious approach, while assuming that
a claim for preconception injuries would have to be rejected, if the court relied
exclusively on the language of article 446\footnote{In line with the provision, a child can receive compensation for harm sustained before birth
and not before conception.} P.P.C.\footnote{A Cisek in E Gniewek (ed), Kodeks Cywilny. Tom I. Komentarz do art 1-534 (CH Beck 2004)
1141.} It is also feared that, even if a
broader interpretation was to be relied upon, many claims of the kind could be
rejected due to substantive evidential difficulties, which often accompany
preconception occurrences and are likely to hinder the process of establishing
adequate causation.\footnote{The Latin term, used in the continental literature in the context of preconception injuries,
could be translated as ‘the one who is on the way to being conceived’, i.e. a future natural
person.}

Interestingly, it should be noted that such potential obstacles did not, in the past,
prevent the German Supreme Federal Court from establishing tortious liability
for injuries inflicted to a concepiendus.\footnote{In the cited 1953 case, the plaintiff’s
mother had been infected with syphilis prior to her pregnancy. As a result of
}
inadequate treatment, the resulting child was later born with the same condition.\(^\text{396}\)

Arguably, with reference to common law countries, admissibility of compensatory claims for preconception injuries would have to be assessed from the perspective of the established duty of care, as opposed to the established breach of that duty – i.e. the equivalent ‘continental’ premise of unlawfulness. In other words, in the scenarios discussed, the court would be compelled to decide whether, in particular circumstances, the duty of care may encompass human beings not yet in existence.

As should be noted, historically, such claims were admitted, for example, by American appellate courts, at least on three frequently cited occasions. Most notably, we could point to the 1973 ruling delivered by the United States Court of Appeal in the case of \textit{Jorgensen v Meade Johnson Laboratories}.\(^\text{397}\) There, the plaintiffs, Kimberley and Pamela Jorgensen, were twins suffering from Down’s syndrome. As was established, prior to the pregnancy, their mother had been using birth control pills, Oracon, manufactured by the defendant company. The plaintiffs successfully argued that the pills had been responsible for chromosomal aberrations, which were later linked to their condition. The Court followed the same line of reasoning in its subsequent 1978 decision, delivered in the case of \textit{Bergstresser v Mitchell}.\(^\text{398}\) The facts of the case were the following. The plaintiff,
Brian Bergstresser, was born prematurely via an emergency Caesarean section. In the course of the delivery he suffered serious neurological complications and was later diagnosed with brain damage. In the light of the gathered evidence, the plaintiff successfully argued that the complications discussed arose due to the previous, negligent section which had been performed on his mother and which had been responsible for weakening her uterus.\textsuperscript{399}

A similar approach was followed by the Illinois Appellate Court in its 1977 ruling, delivered in the case of \textit{Renslow v Mennonite Hospital}.\textsuperscript{400} There, the plaintiff’s mother, before falling pregnant, had received blood with an incompatible Rhesus factor. In consequence of the error, her daughter, Leah Ann, was later born with a congenital haemolytic disease.\textsuperscript{401}

Assuming, establishing proximity, i.e. an intrinsic element of the duty of care, posed the biggest difficulties in all the three scenarios examined. The courts, however, still ruled in favour of the infant plaintiffs, by adhering to the construction of an ‘extended’ duty of care. Namely, while there was no doubt that – in each of those cases – the defendant’s negligence was inherent to treatment

\textsuperscript{399}At the same time, we could refer to the subsequent ruling delivered by the Appellate Court of New York, whereby the plaintiff, who sustained nearly identical injuries in a very similar set of circumstances as Brian Bergstresser, was denied a cause of action. See: \textit{Albala v City of New York} [1981] 54 NY 2d 269.

\textsuperscript{400} \textit{Renslow v Mennonite Hospital} [1976] 351 NE 2d 870. As should be noted, similar factual circumstances arose in the subsequent case of \textit{Yeager v Bloomington Obstetrics and Gynaecology Inc} [1992] 585 NE 2d 969, where the Supreme Court of Indiana also ruled in favour of the disabled infant plaintiff.

provided to the plaintiffs’ mothers before they conceived, it could have been reasonably anticipated, first, that the women were likely to reproduce\(^402\) and, second, that the lack of adequate care increased the risk of complications during any of their future pregnancies. Hence, relying on the construction discussed allowed the courts to impose liability in tort on the defendants without acknowledging that the duty of care was, in fact, owed to some non-existent, future humans.

It could be argued that the same line of argumentation was relied upon in Australia in the 1992 ruling, delivered by the Court of Appeal of New South Wales in the case of *X and Y v Pal*.\(^403\) There, the plaintiff – like in the previously cited German case – was born with symptoms of congenital syphilis. It was established that her illness resulted from negligent gynaecological care, i.e. lack of screening and inadequate treatment, which had been received by her mother prior to the pregnancy.

As Clarke JA observed, the duty of care will be owed to the *conciipientus* at the time when the wrong was committed, as long as there existed a corresponding relationship between the defendant and ‘the class of persons’ to which the plaintiff, i.e. the future child, belonged. The learned judge further relied on the example of a negligent builder, whose poorly constructed bridge collapses a few years after being open to the public.\(^404\) Per analogy, we could propose that pre-

\(^{402}\) Since all the mothers were of childbearing age at the time when the treatment was being provided.


\(^{404}\) Ibid 205 (Clarke JA).
pregnancy occurrences, affecting maternal health can lead to foetal impairment. The defects can already be detected in utero, but they cannot be compensated for unless and until the child is subsequently born alive.

With reference to statutory law of England, Wales and Northern Ireland, we could argue that preconception injuries resulting from negligent maternal treatment will, prima facie, fall within the scope of section 2(a) of the Congenital Disabilities Act 1976, stipulating liability for occurrences, which affected either of the plaintiff’s parents in his (her) ability ‘to have a normal, healthy child’. However, in line with section 4 of the Act, the author of preconception harm will not be answerable to the infant, if – at the time of its commission – either (both) of the prospective parents knew the risk of conceiving a disabled child. According to the general principle described in the preceding section 3, the duty owed to the child is a derivative one, ergo the child’s action will be dependent on the existence of the duty of care owed to the prospective parent (parents), although it is not essential that the parent (parents) personally suffered any harm.

In Ireland, similarly to Poland, in absence of any specific statutory provision to the effect, availability of the claims examined will largely depend on how the term ‘wrongs’, appearing in section 58 of the Civil Liability Act 1961, would be interpreted by the court. If the term was to be understood in line with the

---

405 And that is the true moment when ‘the faulty bridge collapses’.
406 As the provision further explains, the parent (parents) must have known the particular risk created by the preconception occurrence. It should also be recalled that the cited subsection will not apply in cases where the resulting child’s father, being sued for damages, knew of the risk, whereas the mother did not.
407 Or an established precedent.
previously cited Roche, a concipiendus would, more than likely, be divorced from protection offered to an embryo (foetus) under domestic law of torts. According to Healy, if Roche was to be applied per analogiam to wrongs committed at the time when any corresponding duties of care towards the plaintiff were ‘potential, hypothetical and never definite’, imposing tortious liability onto the defendant would be very hard to justify.\(^4\)

At the same time, even in a case where the court accepted that the defendant’s negligence consisted of creating a risk of harm to the then not-existent but subsequently conceived plaintiff, the latter may still not succeed in securing the damages due to potentially serious causation difficulties, already acknowledged in the preceding section.\(^5\)

2. Liability for Antenatal Injuries Resulting from Pre-Implantation Occurrences

The next, logical step of the analysis would be assessing whether a child can demand compensation for damage caused by pre-implantation occurrences, i.e. acts (omissions) that took place when he had already been conceived but remained outside the maternal organism. Such will be the cases of negligently performed ART, e.g. homologous insemination with the husband’s (partner’s) sperm, heterologous insemination with a donor’s sperm, In Vitro Fertilisation or Preimplantation Genetic Diagnosis (PGD). For reasons of space, the author

---

\(^4\) Healy (n 2) 382-383.
\(^5\) Quill (n 4) 112.
decided to focus on the last-mentioned and, arguably, the most controversial legal procedure associated with assisted reproduction.\footnote{For the discussion on tortious liability for injuries resulting from other procedures associated with ART, such as, for example, IVF by means of intracytoplasmic sperm injection, see: M Browne, ‘Preconception Tort Law in the Era of Assisted Reproduction: Applying a Nexus Test For Duty’ (2001) 69 Fordham L Rev 2555 <http://ir.lawnet.fordham.edu/flr/vol69/iss6/9/> accessed 18 February 2013.}

In brief, PGD is applied in conjunction with \textit{In Vitro} Fertilisation (IVF) and involves an examination of the DNA sequence extracted from a single cell of a human embryo at a very early (i.e. blastomere) stage of its development. The procedure is performed approximately three days after the IVF takes place, when the embryos usually consist of four to eight cells.\footnote{See, for example: J Kapelańska-Pręgowska, ‘Preimplantacyjna Diagnoza Molekularna w Międzynarodowych Standardach Wiązących i Zalecanych’ (2009) 35(11) Prawo i Medycyna 85, 86-87; PR Brezina, DS Brezina and WG Kearns, ‘Preimplantation Genetic Testing’ (2012) 345(7875) BMJ 38, 38.}

Depending on the objective to be achieved by the prospective parents, PGD can take two forms, referred to as \textit{screening out} and \textit{screening in}.\footnote{Kapelańska-Pręgowska (n 411) 86-87.} The aim of the more commonly used \textit{screening out} is to detect serious abnormalities in genes and chromosomes, responsible for a vast number of potentially fatal disorders.\footnote{E.g. Tay-Sachs disease, β thalassaemia, sickle cell anaemia or cystic fibrosis.} The technique might also serve to determine the sex of the examined embryos, in cases where one or both of the prospective parents are at risk of passing on a gender-related condition.\footnote{E.g. Duchenne’s muscular dystrophy, haemophilia, Lesch-Nyhan syndrome (LNS) or fragile X syndrome. See, for example: JDA Delhanty, D Wells and JC Harper, ‘Genetic Diagnosis Before Implantation: Applications of the Technique Are Growing’ (1997) 315(7122) BMJ 828, 828.} The second form of PGD, \textit{screening in}, can be described as a search for the ‘best’ embryo, being the embryo that carries some desired characteristics. It can be availed of by couples in their attempts to
conceive a saviour sibling via HLA-typing – i.e. a child who, at birth, will provide matching stem cells for an older brother or sister, who is already suffering from a condition so grave that he (she) can be only cured by means of a HSC\textsuperscript{415} transplantation.\textsuperscript{416}

The screening process allows us to identify the blastomers that either: carry a defective gene,\textsuperscript{417} remain in a vulnerable position because of their sex or lack the best compatibility to become a future donor for the affected sibling. Since, obviously, those embryos will not be selected for subsequent implantation in the uterus, they may be frozen for an indefinite period of time or destroyed.

For the assessment of tortious liability we could envisage a hypothetical scenario, where an embryo – previously subjected to a blastomere biopsy – was subsequently labelled as ‘unaffected’ and qualified for implantation in the womb. However, the resulting child was born injured or disabled as a result of the procedure. It should be underlined from the outset that, according to the current state of medical knowledge, such a scenario may be, in fact, considered very unlikely.

Although an invasion into the embryo’s body still remains an indispensable element of PGD, one should point out that it takes place at the stage when the

\textsuperscript{415} Hematopoietic Stem Cells, defined as multipotent blood forming cells that are present in bone marrow, peripheral blood and umbilical cord blood.

\textsuperscript{416} Provided that no other existing family member can be a tissue match.

\textsuperscript{417} Provided that: ‘(…) the mutation within the relevant gene is known, the chromosome carrying the gene can be tracked through the family tree, or the specific chromosomal rearrangement has been identified’. See: P Braude and F Flinter, ‘Use and Misuse of Preimplantation Genetic Testing’ (2007) 335 (7623) BMJ 752, 752.
embryonic cells are totipotent, i.e. capable of becoming any cell or tissue of the future foetus.\textsuperscript{418} Therefore, removing one of the cells from an early embryo does not seemingly affect this embryo’s capacity to survive and develop into a normal foetus and, subsequently, into a healthy child.

Furthermore, scientific studies published in 2003 indicate that performing the biopsy in the course of PGD does not increase the occurrence of major malformations in respect of children conceived via PGD combined with IVF as compared with children conceived via ‘traditional’ IVF and as compared with the general population.\textsuperscript{419} Similar conclusions have been recently reported by the Bioethical Committee operating under the auspices of the Polish Academy of Science.\textsuperscript{420}

If the biopsy was performed in a negligent manner, it can be well-speculated that the embryo would most likely not survive PGD and the injured child would have never come into an existence. In any event, since the technique is still regarded as ‘experimental’\textsuperscript{421} and its long-term effects have not been yet fully explored, let us, nonetheless, adhere to a scenario, where a negligently performed biopsy did produce an ‘adverse effect’ that manifested itself sometime after the child was


\textsuperscript{419} However, it was also observed that such children need to participate in the follow up research. See: K Devolder, ‘Preimplantation HLA Typing: Having Children to Save Our Loved Ones’ (2005) 31(10) J Med Ethics 582, 583.

\textsuperscript{420} Siedlecka (n 418).

\textsuperscript{421} B Scannell, ‘Brave New World? The Ethics of Pre-implantation Genetic Diagnosis in Ireland’ (2007) 1 MLJI 27, 30.
born.\textsuperscript{422} We will also assume that the above ‘adverse effect’ constituted diminution classified as damage from the point of view of the law of torts.

As for statutory law of England, Wales and Northern Ireland, tortious liability for all pre-implantation occurrences is explicitly regulated under section 1A of the Congenital Disabilities Act 1976, introduced by the HFEA 1990. The provision extends application of the general clause from section 1 of the Act to cases of antenatal injuries caused in the course of assisted reproduction. The extended section 1 encompasses scenarios where the child’s condition resulted from a negligent process of selection of the embryos or their storage (also storage of gametes). In such cases, the child’s disabilities are to be regarded as damage resulting from the wrongful act of that person and actionable, accordingly, at the suit of the child, provided that he is born alive.

As for the law of the remaining jurisdictions, including Polish and Irish law, we have already established that, as long as a broad interpretation of the general clauses was relied upon, preconception events could potentially give rise to liability in tort. If – in the present scenario – the court also applied reasoning \textit{a minori ad maius}, it would be likely to reach the following conclusion: if tortious liability can arise from an injurious event that had taken place before the plaintiff was conceived, then the case for its imposition is even stronger, if the event took

\footnotesize{\textsuperscript{422} To recall, tortious liability for negligent selection of an affected embryo – which resulted in birth of a disabled child – was discussed in the first chapter’s section devoted to wrongful life.}
place at some stage after conception, regardless of whether or not the plaintiff factually remained in his mother’s womb.\textsuperscript{423}

In addition, as has been underlined by Mason and McCall Smith: ‘(t)ort, criminal and constitutional law all have their own working definition of “person” and the protection to which the foetus is entitled’.\textsuperscript{424} Therefore, in this author’s opinion, there is nothing to prevent the court from recognising a new category of wrongs which could be referred to as ‘preimplantation injuries’.

3. Liability for Antenatal Injuries Resulting from Occurrences during the Pregnancy and Labour

3.1 Damage

3.1.1 Occurrences During the Pregnancy

Needless to say, adequate clinical management of an established pregnancy will be critical to the well-being of an embryo (foetus). Undoubtedly, it would be excessive, if not impossible, to enumerate all hypothetical instances where a medical error inherent to medical treatment of a gravida will result in impairment of her foetus. As for some more general categories, we could

\textsuperscript{423} The uncertainties concerning potential application of s 58 of the Civil Liability Act 1961 in pre-implantation scenarios were also acknowledged in the previously cited High Court’s ruling delivered in Roche. However, McGovern J did not venture much further in his reasoning. As he proposed, ‘[s]uffice it to say that the word “unborn” as set out in the Civil Liability Act does not offer much assistance to my determination of the issues in this case’. See: \textit{MR v TR and Others} [2006] (n 164) para 16 (McGovern J).

\textsuperscript{424} JK Mason, RA McCall Smith and GT Laurie, \textit{Law and Medical Ethics} (6th edn, Butterworths 2002) 159.
distinguish antenatal injuries caused by diagnostic errors, where the underlying maternal or foetal condition had not been properly detected or, in spite of the correct diagnosis, it was left untreated or poorly managed. On that account, the errors which contributed to prenatal harm will be either inherent to the treatment of the pregnant woman or direct to the treatment of her foetus.⁴²⁵

Improper management of an underlying maternal condition will, in the first place, consist of administration of teratogenic substances. Here, we could mention factual scenarios, where, for instance: the physician had not established the fact of pregnancy prior to the treatment, where he was unaware of the fact that the prescribed substance (course of treatment) can impair foetal development, or, where he decided to administer the teratogen despite the existing warning. In this context, it is also important to stress that severity of harm inflicted to the embryo (foetus) will depend on several factors, such as, most notably: the latter’s individual genetic susceptibility, gestational age at the time of treatment and the administered dose of medication, in cases where pharmacological therapy was in place.⁴²⁶

To provide some examples of the established teratogenic medications, we could mention a certain group of antibiotics, most notably – tetracyclines.⁴²⁷ Attention should also be drawn to hormonal drugs, such as diethylstilbestrol (DES). The

---

⁴²⁵ In the last-mentioned case, the diagnostic errors can result from negligent performance of various antenatal procedures (e.g. ultrasound scans, Chorionic Villus Sampling or amniocentesis) or from wrong interpretation of their results.


⁴²⁷ Administration of tetracycline during the third trimester of pregnancy (even in minimal doses) can lead to impairment of foetal bone growth, enamel hypoplasia or permanent yellow staining of the child’s future teeth See, for example: Ornoy and Arnon (n 205) 385; Rubin (n 426) 1504; Moore and Persaud (n 115) 131.
substance, characterised as synthetic, non-steroidal oestrogen, was previously administrated to *gravidas* with the aim of preventing miscarriages and premature labours.\(^{428}\) However, in 1971 Herbst and colleagues described, for the first time, a possible link between maternal ingestion of DES and an increased risk of developing vaginal cancer\(^{429}\) in the resulting female offspring.\(^{430}\)

According to a number of more recent studies, ‘DES daughters’ are also more susceptible to breast cancer at an older age.\(^{431}\) Furthermore, in comparison with members of the general population, both daughters and sons of women, who had been treated with DES during the pregnancy, were more likely to exhibit various anomalies of genital tracts and genital organs.\(^{432}\)

---


\(^{429}\) Clear-cell adenocarcinoma.


\(^{432}\) See, for example: Wingfield (n 428) 1414; Ornoy and Arnon (n 205) 383; Moore and Persaud (n 115) 132. As should be briefly mentioned, compensatory claims instituted by ‘DES daughters’ for injuries resulting from their prenatal exposure to the drug, were previously accepted in a number of American judgments. These are most commonly discussed in the context of causation uncertainties. Namely, in the abovementioned scenarios the plaintiffs were unable to indicate the sole defendant manufacturer that produced the batch (batches) of the drug ingested by their mothers during gestation. In order to be able to establish causation, the plaintiffs successfully argued that all the manufacturers acted in a parallel manner to produce an identical, generically marketed product. They also created the same degree of risk to the public by introducing the unsafe product to the market. While awarding the damages, the courts relied on the so-called ‘market share theory’, whereby the manufacturers of DES should be liable in tort *pro rata* – i.e. in proportion to their share in the drug’s national market. See, for example: Sindell v Abbott Laboratories [1980] 26 Cal 3d 588; Hymowitz v Eli Lilly & Co [1989] 541 NYS 2d 941 (NY, CA); hereinafter *Hymowitz*. For further discussion concerning the *Hymowitz* case, see also: A Bernstein, *Hymowitz v Eli Lilly and Co.: Market of Mothers* in RL Rabin and SD Sugarman, *Tort Stories* (Foundation Press 2003) 151 et seq. As for Europe, compensation for injuries related to the plaintiffs’ prenatal exposure to diethylstilbestrol was awarded, for instance, by the Versailles Court of Appeal (France) in 2004. See: Judgment of the Versailles Court of Appeal of 30 April 2004 [2004] 12 RCA, note C, cited by M Cannarsa et al, ‘France’ in: K Koziol and BC Steininger (eds), *Tort and Insurance Law Yearbook: European Tort Law 2004* (Springer 2004) 293-297.
Other general categories of teratogenic pharmaceuticals include, *inter alia*: anticoagulants (e.g. warfarin),\textsuperscript{433} anticonvulsants (e.g. phenytoin),\textsuperscript{434} barbiturates, β-blockers, salicylates\textsuperscript{435} as well as chemical compounds related to vitamin A (retinol) that are used to treat various skin conditions.\textsuperscript{436}

Furthermore, various foetal pathologies may be caused by high levels of ionising radiation, if such was administered to the pregnant patient.\textsuperscript{437} At the same time, there has been no conclusive evidence that diagnostic levels of radiation can have any negative impact on the developing embryo (foetus).\textsuperscript{438}

On the other hand, foetal well-being could also be hindered in a somehow opposite case, i.e. where no pharmacological therapy (or insufficient pharmacological therapy) had been prescribed to the pregnant woman. This will be, for instance, a scenario, where both maternal (and foetal) organisms had been exposed to teratogenic pathogens, such as certain types of viruses, bacteria or protozoans. To provide some corresponding examples, untreated maternal

\textsuperscript{433} According to research, warfarin ingested during pregnancy can cause haemorrhage in the developing embryo (foetus). See: Rubin (n 426) 1504.

\textsuperscript{434} Exposure to phenytoin *in utero* has been linked to the so-called Foetal Hydantoin Syndrome (FHS), which is associated with various foetal pathologies, such as, most notably: microcephaly, abnormal craniofacial features, limb defects, heart diseases and mental retardation. In addition, the affected individuals remain at higher risk of developing neural tube defects and orofacial clefts. See, for example: Ornoy and Arnon (n 205) 384; Moore and Persaud (n 115) 128 and 133; T Tomson and V Hiilesmaa, ‘Pregnancy Plus: Epilepsy in Pregnancy’ (2007) 335(7623) BMJ 769, 770.

\textsuperscript{435} Rubin (n 426) 1504.

\textsuperscript{436} Retinoids, used in treatment of cystic acne and psoriasis, are believed to be responsible for congenital neural tube defects, cardiovascular defects and cleft palates. If the exposure takes place during the second and third trimesters of the pregnancy, the foetus will also be more likely to develop microcephaly, mental retardation and various ocular anomalies. See, for example: Ornoy and Arnon (n 205) 383-384; Moore and Persaud (n 115) 128 and 133-134; S Weatherhead, SC Robson and NJ Reynolds, ‘Pregnancy Plus: Management of Psoriasis in Pregnancy’ (2007) 334(7605) BMJ 1218, 1219.

\textsuperscript{437} As Moore reports, these may include impairment of the foetal growth and mental retardation, diagnosable in the resulting child. See: Moore and Persaud (n 115) 128 and 136.

\textsuperscript{438} Moore and Persaud (n 115) 136.
infection caused by cytomegalovirus (CMV), herpesviruses, Human Immunodeficiency Virus (HIV) or *treponema pallidum* can be particularly dangerous for the developing embryo (foetus). With reference to parasitic protozoans, we should mention *Toxoplasma gondii*, linked to toxoplasmosis.

3.1.2 Occurrences During the Labour

Medical errors, which occur during all stages of an established labour, may have particularly grave and life-changing consequences for the resulting child. As could be observed from numerous reported cases, many irreversible neurological injuries have been owed to delayed Caesarean sections or forced vaginal deliveries in the presence of foetal distress or other underlying complications. In addition, significant damage of similar character can be owed to negligent management of shoulder dystocia, improper use of obstetrical instruments, such as:

---

439 Maternal infection with CMV during the first trimester of the pregnancy will, more than likely, be fatal for the developing embryo. At the same time, exposure to the virus at later stages of gestation may result in serious foetal deficiencies, such as: IUGR, microcephaly, hydrocephaly and chorioretinitis. See: Ornoy and Arnon (n 205) 387; Moore and Persaud (n 115) 128 and 135.

440 Maternal infection with herpesviruses (i.e. herpes simplex and varicella zoster) can lead to foetal nerve palsies, hydrocephaly, cataracts as well as congenital hypoplasia of limbs, fingers and toes. See: Ornoy and Arnon (n 205) 387; Moore and Persaud (n 115) 128 and 136.

441 According to research, HIV-infected pregnant women, who have not received any antiretroviral treatment, are more likely to give birth to children suffering from microcephaly and other developmental disturbances. See: Moore and Persaud (n 115) 128 and 136.

442 The bacterium can cause congenital syphilis, which has been linked to mental retardation, congenital deafness and hydrocephaly. See: Moore and Persaud (n 115) 128 and 136.

443 Intrauterine infection of an embryo (foetus) with toxoplasmosis can lead, *inter alia*, to microcephaly, hydrocephalus, psychomotor and mental retardation as well as loss of vision and (or) hearing. In addition, these pathologies will be more severe, if the woman becomes infected during the first trimester of pregnancy or if she is immunocompromised (e.g. HIV-positive). See, for example: S-Y Wong and JS Remington, 'Toxoplasmosis in Pregnancy' (1994) 18(6) Clinical Infectious Diseases 853, 854 and 859; Moore and Persaud (n 115) 128; Ornoy and Arnon (n 205) 387.

444 These include, most notably, paraplegia, quadriplegia or cerebral palsy. See: Mackus (n 236) 390.
as forceps or ventouse, negligent management of an induced labour\textsuperscript{445} or – even in cases of more straightforward vaginal deliveries – to the lack of proper monitoring and supervision of the parturient patient by means of obstetrical examinations, scans, Cardiotocography (CTG), etc.

\subsection*{3.2 The Duty of Care and the Element of Fault (Unlawfulness)}

From an Irish perspective, the fact that a physician owes the duty of care to the embryo (foetus) has never been challenged in relevant commentaries or caselaw, starting from the the landmark Supreme Court’s 1989 ruling, delivered in the case of \textit{Dunne v National Maternity Hospital}.\textsuperscript{446} There, the infant plaintiff, William Dunne, sought damages for being born with severe, irreversible brain damage – a cause of his spastic quadriplegic cerebral palsy – developed as a consequence of grossly negligent management of his mother’s labour. Indisputably, the judgment focuses on the element of breach,\textsuperscript{447} while the existence of the duty of care towards the then-unborn plaintiff seems to have been affirmed \textit{per facta concludentia}. In other words, the fact that the plaintiff suffered harm, while he

\begin{itemize}
\item Most notably, excessive administration of oxytocin during an induced delivery can lead to foetal hypoxia, followed by irreversible brain damage.
\item \textit{Dunne v National Maternity Hospital} [1989] ILRM 73; hereinafter \textit{Dunne}.
\item In brief, in line with most fundamental principles of the so-called ‘Dunne test’, a medical practitioner can only be found negligent in diagnosis (treatment) if he committed a failure ‘as no medical practitioner of equal specialist or general status and skill would be guilty of if acting with ordinary care’. In addition, negligence cannot be established if the defendant only deviated from a ‘general and approved practice’, unless such course of action would not be followed by any other medical practitioner of like specialisation or skill, acting with ordinary care required of a person with his qualifications. On the other hand, the defendant will not escape liability, if the followed ‘general and approved practice’ had inherent defects that should have been obvious to ‘any person giving the matter due consideration’. For critical discussion concerning the individual principles of the \textit{Dunne} test, see, for example: C Craven, ‘Medical Negligence and the Dunne Principle: What Do the First and Second Principles Mean?’ (2006) 1(3) Quarterly Review of Tort Law 1.
\end{itemize}
was still *in utero*, was neither challenged, nor even noted, at any point of the Supreme Court’s deliberations.

A similar approach to the duty premise was followed in numerous subsequent ‘cerebral palsy cases’, i.e. *O’Mahony v Bon Secours Hospital*,\(^448\) *Quinn v Mid-Western Health Board*,\(^449\) *Fitzpatrick v National Maternity Hospital*\(^450\) or the more recent High Court’s decision delivered in the case of *Sophie Everard v HSE*,\(^451\) to name but a few.

Perhaps such apparent ignorance on the part of the Irish courts can be explained by the fact that the duty of care owed to the embryo (foetus) *in utero* was, in fact, being regarded as a correlative one. As Healy explains, due to the very unique coexistence of two human beings during the pregnancy and delivery, medical care provided to the foetus is essentially ‘mediated through the care’ provided to the pregnant woman.\(^452\) Hence, the duty of care owed to the embryo (foetus) will, for reasons of foreseeability, be inevitably linked to the duty of care owed to the *gravida*.\(^453\)

Casey, on the other hand, presents an alternative view, whereby a child, who suffered harm while *in utero*, will be owed a ‘contingent retrospective duty of care’ from the physician, who was providing antenatal medical care to his mother.

---

\(^{448}\) *O’Mahony v Bon Secours Hospital* [2001] IESC 62.
\(^{449}\) *Quinn v Mid-Western Health Board* [2005] 4 IR 1.
\(^{450}\) *Fitzpatrick v National Maternity Hospital* [2008] IEHC 62.
\(^{451}\) *Sophie Everard v HSE* [2015] IEHC 592.
\(^{452}\) Healy (n 2) 380.
\(^{453}\) However, according to some commentators, since an embryo (foetus) is not an independent organism, it does not enjoy the right not to be wrongfully harmed. See, for example: C Wellman, *Medical Law and Moral Rights* (Springer 2005) 72-73.
In line with the cited theory, the child (Y) would be suing the physician (X) not as the injured party *per se* but as the injured party’s successor, since Y had not been yet regarded as a physical person at the time when X inflicted the harm to him. As the cited commentator further observes, relying on the fiction allows the court to overcome an ethical dilemma of concurrent duties of care, which accompanies cases of maternal-foetal conflict. At the same time, by accepting that one can ‘inherit’ a right from one’s prenatal self, the court will have to ignore the undisputable biological continuity of prenatal and postnatal phases of human development.454

As for the continental countries, although existence of the duty of care is not a separate premise of liability in tort, medical practitioners will be legally obliged to exercise care also in respect of their unborn patients. In Poland, for example, an analogous responsibility to ‘preserve foetal life and health’ in the course of prenatal interventions has been imposed on all physicians by virtue of a code of professional practice issued by the Supreme Medical Council.455

In all the scenarios examined so far, the defendant will be sued for committing professional misadventure. However, erroneous prenatal diagnosis or treatment does not *per se* constitute the element of fault. First of all, to establish the breach of the duty of care (or, in continental terms, unlawfulness) the plaintiff needs to demonstrate that the defendant’s conduct was incompliant with the established

---

standards of approved clinical\textsuperscript{456} practice, assessed in the light of the relevant statutory provisions (or caselaw) of each of the jurisdictions examined.

Under Polish law, for instance, in order to exercise adequate medical care, a physician must possess current medical knowledge. In addition, he is required to rely on the available methods and measures of prevention, diagnosis and treatment, while acting in accordance with the principles of professional ethics and with due diligence.\textsuperscript{457} Assumingly, the physician will bear personal liability in tort, in cases where antenatal care was provided within the scope of his independent private practice.\textsuperscript{458} Otherwise, the plaintiff will seek redress from the healthcare institution, by which he was employed.\textsuperscript{459}

At times, although the physician’s conduct will be, \textit{prima facie}, non-compliant with the established principles, he will be still able to escape liability in tort.\textsuperscript{460} The element of breach (unlawfulness) may also be impossible to establish \textit{per se}, e.g. in cases, where the plaintiff’s mother suffered from a medical condition that was particularly difficult to diagnose (and/or to control). For instance, maternal toxoplasmosis will often remain undetected, due to the fact of not being normally

\textsuperscript{456} Here, gynaecological and obstetrical.
\textsuperscript{457} Medical Doctors and Dentists Act 1996, art 4. In addition, in line with a more general principle articulated in article 355 §2 P.C.C., the standard of conduct needs to be specified in line with the nature of the debtor’s (here, the defendant’s) profession.
\textsuperscript{458} Since gynaecological (obstetrical) care has been largely privatised, one can expect that compensatory claims for injuries caused by doctors in private clinics will not be uncommon.
\textsuperscript{459} Assumingly, a healthcare institution, such as a hospital or clinic, will bear tortious liability for its own actions and also for actions of its employees.
\textsuperscript{460} As for a statutory example of the defence in antenatal injury cases, reference should be made to section 1(5) of the Congenital Disabilities Act 1976, whereby a physician will not be answerable to the resulting child for any acts or omissions committed within his professional capacity, while providing medical care to the child’s parent, as long as he took ‘reasonable care, having due regard to then received professional opinion’ which was applicable to the particular class of case. However, sole departure from the received opinion does not mean that the physician will automatically be answerable.
associated with any specific symptoms.\textsuperscript{461} Furthermore, congenital malformations are still more likely to be diagnosed in children born to women suffering from diabetes mellitus, even if adequate standards of monitoring and treatment, including all the necessary interventions, are observed and followed throughout the whole period of pregnancy.\textsuperscript{462}

In addition, we should also consider situations where the wrong consisted of failure to use new knowledge or to perform a pioneering procedure, such as, for instance, the previously described operations \textit{in utero}. This author is of the opinion that, considering the still experimental character of these interventions, such apparent omission is not likely to be deemed unlawful. In addition, referral to a foetal surgery is typically made with recourse to the criterion of necessity,\textsuperscript{463} providing that it can only be performed in a case, where no effective postnatal therapy for the given condition and at the given time is available. Hence, correcting certain conditions \textit{in utero} for the mere sake of appearance (e.g. cleft repair), despite its gradual popularisation, has been rendered ethically inappropriate.\textsuperscript{464}

\subsection*{3.3 Causal Nexus}

Similarly to the cases of injuries which resulted from preconception or pre-implantation occurrences, establishing causation in cases of wrongs inherent in

\begin{footnotes}
\item[461] Wong and Remington (n 443) 854.
\item[462] Ornoy and Arnon (n 205) 388.
\item[463] Also referred to as lack of alternative.
\end{footnotes}
treatment during the pregnancy (labour) may prove to be a rather challenging task. The evidential barriers that are likely to be encountered by the plaintiff are owed to a number of factors. Most notably – in spite of the continuous scientific research – the exact mechanisms in which pharmaceuticals, pathogens and other teratogenic agents disrupt foetal development and induce anomalies, have not been yet fully discovered.

In addition, due to ethical considerations, teratogenicity of pharmaceutical products can only be assessed with recourse to retrospective, observational and cautiously interpreted research, as opposed to the commonly used randomised control trials. It is, however, believed that the mechanisms discussed will largely depend on some specific circumstances of each given case, such as: prenatal age at the time of exposure, force of the impact as well as genotype of an embryo (foetus), which can be defined as its ‘genetic construction’. With regard to the last-mentioned factor, it should be further explained that, due to significant genetic diversity, some of the exposed embryos and foetuses will develop congenital pathologies, whereas others will not be affected.

Furthermore, teratogens are known to affect various individual functions of the cell metabolism, while triggering chemical reactions that involve crucial nucleoid acids, proteoglycans or proteins. Hence, they can simultaneously affect a number

465 Wojtaszek (n 390) 100.
466 See, for example: CJ Lewis, Clinical Negligence. A Practical Guide (5th edn, Butterworths 2001) 341; Michałowska (n 389) 1186; Mackus (n 236) 415.
467 Tomson and Hiilesmaa (n 434) 770.
468 For example, more severe congenital pathologies are often diagnosed if the exposure took place between the third and the sixteenth week of the pregnancy, i.e. during the so-called organogenetic period.
469 Moore and Persaud (n 115) 129.
of physiological processes that occur in a parallel manner inside the embryonic (foetal) cells.\textsuperscript{470} On that account, medical researchers estimate that up to sixty percent of all congenital defects diagnosable at birth had been caused by an unknown decisive factor.\textsuperscript{471} 

By way of example, we could mention cases of congenital clubfeet (\textit{talipes equinovarus}), development of which was initially linked to restrained space inside the uterus, resulting, for example, from mechanical injuries directly inflicted to the pregnant woman.\textsuperscript{472} However, further research indicated abnormalities in the region of Chromosome 17 as a more probable, but still not exclusive, cause of the condition examined.\textsuperscript{473} Thus, we could conclude that clubfeet can be owed to both genetic and environmental factors.\textsuperscript{474} 

Serious causation problems are also likely to be encountered in cases where a medical error was committed in the course of an antenatal surgical intervention. As the plaintiff had already been diagnosed with a specific, congenital defect before the defendant intervened, it may be particularly hard to establish, whether the damage – which fully manifested itself after the plaintiff’s birth – resulted

\textsuperscript{470} Ostrowski (n 205) 179; Brazier (n 300) 235; Losco and Shublak (n 261) 65; Haberko (n 332) 223.
\textsuperscript{471} Ornoy and Arnon (n 205) 382.
\textsuperscript{472} As could be deducted, the above line of causal evidence was accepted, for instance, by the Canadian Supreme Court in the previously cited 1933 case of \textit{Montreal Tramways} (n 90).
\textsuperscript{474} Additionally, some sources suggest that the condition more frequently occurs in female foetuses. See: Wynne-Davies (n 473) 446 and 448.
from the defendant’s actions, or would the defect still have existed, had the surgery *in utero* not been performed at all.\(^{475}\)

Establishing a causal nexus between an antenatal injury and an alleged medical error may be further complicated due to the particularly long time frame in which such an error can be committed,\(^{476}\) and due to the fact that antenatal care is usually provided by numerous professionals. Finally, as was already acknowledged, pregnant woman’s own acts and omissions can – to certain degree – also contribute to foetal impairment.\(^{477}\)

Considering all the underlying difficulties, Moore and Persaud conclude that determining the direct, exclusive and certain cause of injuries in the scenarios examined is, *prima facie*, impossible, unless ‘both the causative agent and the type of anomaly are so uncommon that their association in several cases can be judged not to be coincidental’.\(^{478}\)

However, in cases where the remaining premises of tortious liability have been duly satisfied, the courts may use their discretionary power to relax the causation

---


\(^{476}\) As was previously observed, the injurious event can occur as early as before conception and as late as the final stages of labour.

\(^{477}\) Healy (n 2) 379.

\(^{478}\) Moore and Persaud (n 115) 131. On the other hand, according to Page Keeton, in the light of the current state of medical knowledge, such difficulties should be neither greater, nor more frequent in comparison with the remaining cases of damage resulting from an alleged medical error. See: Page Keeton (n 34) 368.
requirements. The above approach undoubtedly serves in the interest of justice, while assuming that stricter interpretation of the law would allow the defendant to escape tortious liability in numerous cases, leaving the – often severely impaired plaintiff – without compensation or long-term annuity.479 In this context, we could point to the 1974 ruling delivered by the Polish Supreme Court, whereby adequate causation will still be established if the plaintiff demonstrates that a given occurrence contributed to his injury, not certainly, but with a high degree of probability.480

On the other hand, a more reluctant attitude towards relaxing causation requirements in antenatal injury scenarios could be best illustrated with recourse to the previously acknowledged 2005 Irish Supreme Court’s judgment, delivered in the case of Quinn v Mid-Western Health Board and Another.481

The facts of the case were the following. The infant plaintiff, Anne-Marie Quinn, was born at full term but was subsequently diagnosed with growth retardation and severe white-matter brain injury, referred to as periventricular leukomalacia (PVL). The plaintiff argued that her injuries were caused by placental insufficiency and, hence, they could have been avoided, had she been delivered earlier. The defendant healthcare professionals admitted that they had breached their duty of care by not properly managing the plaintiff’s mother’s pregnancy and labour. However, it was maintained that the plaintiff’s pathologies were

479 Wojtaszek (n 390) 100.
480 See: Judgment of the Polish Supreme Court of 14 October 1974, II CR 415/74 (unreported). A similar line of reasoning was followed in the Court’s subsequent ruling of 12 January 1977, II CR 671/76 (unreported).
481 Quinn v Mid-Western Health Board and Another (n 449); hereinafter Quinn.
owed to an acute neurological episode that had possibly occurred *in utero* sometime between the twenty-eighth and the thirtieth week of gestation. On that account, they alleged that the plaintiff would still have developed PVL, even in case where her delivery had been expedited.

The trial judge dismissed the plaintiff’s compensatory claim, while accepting that – in the light of the submitted scientific evidence – she failed to establish an existence of a causal nexus between her injuries and the defendant’s conduct,\(^\text{482}\) (most notably, the delayed delivery). The decision was subsequently upheld by the Supreme Court. Kearns J rejected a proposal, whereby Anne-Marie Quinn was able to benefit from more lenient causation requirements, such as those established by the House of Lords in the 2002 English case of *Fairchild v Glenhaven Funeral Services*.\(^\text{483}\) Unlike the plaintiff in *Fairchild*, the plaintiff in *Quinn* could not indicate a single, precise factor that triggered occurrence of the damage.\(^\text{484}\) As some commentators propose, such a careful approach may suggest

\(^{482}\) Most notably, the delayed delivery.

\(^{483}\) See: *Fairchild v Glenhaven Funeral Services Ltd and Others* [2002] 3 All ER 305; hereinafter *Fairchild*. There, the plaintiff, Mr Fairchild, had been exposed to asbestos dust during different periods of his employment and while working for a number of different employers. He subsequently developed malignant mesothelioma. After his death, his wife instituted a negligence claim against the employers, while acting on his behalf. The House of Lords observed that the plaintiff could not have established causation with recourse to the ‘but for test’, since it was virtually impossible to determine which of the employers had been factually responsible for Mr Fairchild’s illness. At the same time, relying on *McGhee v National Coal Board* [1972] 3 All ER 1008, and considering the interest of justice, their Lordships opted for a more relaxed method of demonstrating a causal nexus. Namely, they decided that – in the present case – it was sufficient to determine that the defendant employers’ conduct materially elevated the risk of damage suffered by the plaintiff employee. On that account, the defendants were found to be jointly and severely liable vis-à-vis the plaintiff. At the same time, it was underlined that the abovementioned approach could not be regarded as a universal remedy for any potential claimant, who struggles to establish causation on the balance of probabilities. In line with the *exceptiones non sund extendae* formula, their Lordships concluded that departure from the ‘but for test’ should be treated as an exceptional measure and can only by relied upon in particular circumstances, assessed with recourse to the case-by-case approach.

\(^{484}\) I.e. exposure to cancerogenic asbestos.
that Irish courts may not be willing to ‘follow the broader implications of *Fairchild* in situations where causal uncertainties arise.\(^{485}\)

\(^{485}\) See: Quill (n 4) 450.
Conclusions

In many factual scenarios, the moment when an embryo (foetus) suffers actual damage is preceded by numerous contributory and non-contributory adverse occurrences. Other times, however, a single occurrence, happening hours or minutes before a child’s delivery, will determine whether the child will be born healthy or not.\(^{486}\) In the latter case, the affected infant will be disadvantaged \textit{ab initio} and will be often predestined to a life full of pain and suffering, while remaining at the mercy of his parents or carers.

First of all, despite common law’s initial hostility towards damages for antenatal injuries, which was largely owed to significant conceptual barriers,\(^{487}\) the currently binding law of torts of all the jurisdictions examined admits the compensatory claims on the condition that the plaintiff was born alive.

Secondly, this author would argue that, as long as the damage resulted from a post-conception event, the right to be treated with adequate care will be vested in the embryo (foetus) \textit{qua} embryo (foetus), as opposed to the resulting child. From the medical law perspective, the extended interpretation of the \textit{primum non nocere} maxim could be additionally justified through recourse to the doctrine of ‘foetal patienthood’.\(^{488}\) Arguably, emergence of procedures aimed at remedying congenital defects, but involving \textit{direct} interference with foetal bodily integrity,

\(^{486}\) Healy (n 2) 387.
\(^{487}\) Most notably, to the doctrine of privity of contract.
has given rise to a corresponding duty to preserve adequate standards of care in respect of both the pregnant patients as well as the patients in utero. In addition, the abovementioned doctrine might have thrown new light on the maternal-foetal conflict, also from the point of view of remedying prenatal injuries caused by the pregnant woman’s own acts or omissions. To recall, the unavoidable question concerning boundaries of control exercised by the State over maternal behaviour will be further analysed in the subsequent part of the thesis.

Thirdly, even if the elements of the damage, and (in common law countries) the duty of care towards the plaintiff, might be more easily established, demonstrating the breach of the duty (or the ‘continental’ unlawfulness) will usually be much more problematic.489

On that account, introducing a statutory regime of strict tortious liability or a state compensatory scheme in lieu of the liability discussed, could be, prima facie, seen as a simple, yet ingenious solution, particularly in all those cases, where the plaintiff’s injuries resulted from a medical misadventure.490

---

489 Safjan (n 232) 1302.
490 As should be acknowledged, in some factual scenarios where the plaintiff suffered injuries before birth, he will be able to benefit from the no-fault regime of product liability. To recall, in all the EU Member States the regime in question was introduced by the Council Directive 85/374/EEC of July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for a defective product (OJ L210, 07/08/1985). Hence, if safety of the product was not ‘such as persons generally are entitled to expect’, and the foetal harm was owed to the defect, the resulting child will be, prima facie, entitled to seek damages from the producer. At the same time, a pharmaceutical product cannot, in principle, be rendered defective for the mere fact that it poses risk to foetal wellbeing, as long as the system of adequate warning had been in place.
In brief, strict liability, i.e. liability imposed without the evidence of fault, was originally regarded as a means serving to insure ‘a socially acceptable distribution of accident risks peculiar to modern life’.\textsuperscript{491} Considering the fact that the element of risk is inherent to nearly all medical interventions, the intervening individual (organisation) should, assumingly, be responsible for the resulting harm – regardless of their own fault – in case where such risk materialises.

The need to depart from the premise of fault could be additionally supported with reference to two particularly ‘risky’ types of prenatal interventions, i.e. assisted reproductive techniques (ART) and – the previously acknowledged – operations on the foetus \textit{in utero}.

With reference to the former, we could argue that imposition of strict liability for negligent performance of ART could work as a potential deterrent to illicit experimentation. With reference to the latter, the reported, particular risk factors include: insufficient understanding of some of the foetal conditions, technical barriers and the still pioneering character of some of the surgeries in question.\textsuperscript{492} At the same time, further developments in the area are likely to benefit the society and have been strongly advocated by many medical practitioners.\textsuperscript{493} Access to modern foetal therapy is seen as a ‘promising approach’, particularly with reference to the cases where prenatal complications are still more likely to occur.\textsuperscript{494}

\textsuperscript{491} K Zweigert and H Kötz, \textit{An Introduction to Comparative Law} (3rd edn, Clarendon Press 1998) 650.
\textsuperscript{492} Deprest et al (n 3\textsuperscript{25}) 447; Bullard and Harrison (n 3\textsuperscript{25}) 471.
\textsuperscript{493} Deprest et al (n 3\textsuperscript{25}) 445; Walsh and Adzick (n 3\textsuperscript{25}) 203.
\textsuperscript{494} Milner and Crombleholme (n 3\textsuperscript{25}) 481.
Interestingly, introduction of a no-fault civil liability scheme replacing (accompanying) the current framework of medical negligence litigation, has been already advocated in some of the jurisdictions examined.\(^495\) The reform proposals frequently point to New Zealand’s general compensatory scheme for accident victims, which remains in place since introduction of the 1972 Accident Compensation Act. The scheme discussed encompasses, *inter alia*, all victims of medical misadventure and is funded by taxes, levies imposed on motor vehicles as well as by contributions made by employers and self-employed persons.\(^496\) As for Europe, some elements of liability without fault for a broader category of medical errors were also introduced in Scandinavian countries, most notably, in Sweden.\(^497\)

More importantly, it should be observed that in some jurisdictions these compensatory schemes specifically encompass infants, who were born with severe congenital disabilities in consequence of obstetrical malpractice. In this context, attention could be drawn to the acts of statutory law enacted in late 1980’s by two American states, i.e. Virginia and Florida.\(^498\)

---


\(^496\) Moloney (n 495) 82.

\(^497\) See, for example: Murphy (n 495) 217; Brazier (n 300) 221-225.


As for Ireland, it should be acknowledged that in 2001 the former Minister for Health, Micheál Martin, established an advisory group to examine possible introduction of a no-fault compensation scheme for children born with disabilities resulting from brain damage, most notably, cerebral palsy. However, further work of the group had to be suspended after encountering alleged ‘constitutional difficulties’ that would stem from introducing a scheme of that kind. See: M Wall, ‘Brain Damage Compensation Scheme Setback’ *The Irish Times* (Dublin, 18 April 2006) <https://www.irishtimes.com/news/health/brain-damage-compensation-scheme-setback-1.1039904> accessed 5 February 2018.
At the same time, despite the fact that all the above described schemes were, *prima facie*, aimed at mitigating the hardship caused by negligence on the side of healthcare institutions (healthcare professionals), their implementation encountered significant, practical hurdles. For example, the two last-mentioned Acts have been described by Farell and colleagues as ‘(…) having little impact on improving quality and safety in obstetric practice’.499

Accordingly, this author would argue that elimination of the premise of fault may, in fact, lead to lowering both the standards of medical care and of accountability in the medical sector.500 Hence, also looking from an Irish perspective, the more recommended approach would consist in introducing a revised scheme of medical accountability, aimed at achieving an efficient, transparent procedure of dealing with complaints on professional misconduct, paired with better management of medical protocols and appointment of independent, impartial control bodies supervising the healthcare providers.501

Furthermore, the fault-based scheme of redressing antenatal injuries resulting from medical errors could be further ameliorated, if the injured parties were better assisted by the law when faced with the – still uncommon – significant causation difficulties.502 For example, in cases, where the plaintiff exhibits a

---


500 Furthermore, as Moloney suggests, elimination of fault is likely to undermine ‘the sense of personal responsibility’ of some potential tortfeasors.

501 Moloney (n 495) 83

502 According to Brazier, without relaxation of causation requirements, the statutory instruments, such as the Congenital Disabilities Act 1976, cannot be regarded as fully effective. See: Brazier (n 300) 234-236.
specific myriad of congenital pathologies, which were previously linked to a specific teratogen, establishing causation could boil down to establishing the mere fact of teratogenicity of the given substance (agent, pattern of behaviour), as evidenced by the reputable scientific research.503

Finally, none of the statutes or judgments examined include an expressed formulation whereby an embryo (foetus) possesses legal personality or legal capacity, if considering antenatal rights acquired under domestic law of torts. However, if looking from the child’s perspective, the issue may in fact, appear as virtually irrelevant. Experiencing pain, suffering and inconveniences is not exclusive to those individuals, who suffered injuries as formally recognised physical persons. Hence, further developments of the law in the area should, in this author’s view, focus on remedies (practice), as opposed to concepts (theory).

503 Assumably, the proposed solution may arouse obvious connotations with the previously acknowledged case of Fairchild which – as was also observed – was not relied upon by the Irish Supreme Court. This author would, however, argue that the progressive developments in the area of medical diagnostics may also result in gradual elimination of the evidential barriers, such as those experienced by the plaintiff in Quinn. See: Quinn (n 449).
PART 3

EMBRYO, FOETUS AND FAMILY LAW
**Preface**

This part addresses the position of an embryo (foetus) under family law of the jurisdictions examined.

The text has been divided into two chapters. The first chapter explores legal relationship between the embryo (foetus) and the expectant parents. The author begins the analysis from defining notions of ‘filiation’ and 'legal filiation’, before discussing the current legal framework for establishing motherhood and paternity in Ireland, Poland and other continental and common law countries. Subsequently, she draws a catalogue of parental rights, duties and responsibilities towards a child already born, in an attempt to distinguish a parallel catalogue of rights, duties and responsibilities attributable to the expectant parents before the child’s birth.

The second chapter discusses situations where, in compliance with the principle of child welfare, the State assists or replaces parents with persons and institutions acting on its behalf. As can be assumed, the author focuses on the means of protection applied or potentially applicable to the case of an embryo (foetus).

At the outset, two explanatory remarks are due regarding the scope of this part. Firstly, despite the existing dichotomy between public and private law that has already been acknowledged on numerous occasions, classifying family law as a
branch of private law might be still regarded as inappropriate, particularly from a point of view of the common law scholars.

On the one hand, it could well be argued that the State frequently intervenes into family affairs, for example, through appointment of guardians or curators. In addition, the majority of family law provisions have a non-derogatory character (\textit{ius cogens}) and a vast number of proceedings involving family law matters can be initiated exclusively \textit{ex officio}.\footnote{See, for example: A Wolter, J Ignatowicz and K Stefaniuk, \textit{Prawo Cywilne. Zarys Części Ogólnej} (2nd amended edn, Lexis-Nexis 2001) 20.} Furthermore, some authors have pointed to the intrinsic element of subordination of one person (i.e. a child) to another (i.e. a parent or a guardian), characterising the domain discussed.\footnote{For a more detailed discussion concerning the relationship between private law and family law in continental countries, see, for example: J Ignatowicz and M Nazar, \textit{Prawo Rodzinne} (4th edn, Lexis-Nexis 2012) 44-45.}

In addition, contemporary family law in Ireland and in other European countries can be described as constitutionalised and State policy-orientated.\footnote{See, for example: A Shatter, \textit{Shatter’s Family Law} (4th edn, Butterworths 1997) 93.} Fundamental prerogatives, such as, for example: the right to marry\footnote{See, for example: Constitution of the Republic of Poland 1997, Art 18; Basic Law for the Federal Republic of Germany 1949, Art 6.1; \textit{Bunreacht Na hÉireann} 1937, Art 41.3.1. To recall, the Irish definition of marriage was extended by virtue of the Thirty-fourth Amendment of the Constitution (Marriage Equality) Act 2015 and it now includes marriages formed by homosexual partners.} or the right to rear one’s children in accordance with one’s own convictions,\footnote{See, for example: Constitution of the Republic of Poland 1997, Art 38.1; Basic Law for the Federal Republic of Germany 1949, Art 6.2; \textit{Bunreacht Na hÉireann} 1937, Art 42.1.} have been enshrined in numerous national constitutions. In Ireland, a lot of academic and judicial attention has been devoted to Article 41 of \textit{Bunreacht Na hÉireann}, which acknowledges a special position of a family unit within the Irish State. Limits of
space preclude a more thorough study of caselaw regarding this constitutional provision. It should be, nonetheless, briefly mentioned that a number of important rights pertaining to family life, such as: marital privacy,\(^6\) the right to procreate,\(^7\) the rights of homosexual minorities,\(^8\) or parental rights of unmarried fathers\(^9\) have almost always been acknowledged with reference to Article 41.\(^{10}\)

Interestingly, the connection between the notions of ‘family’ and ‘State’ in this jurisdiction seems to be so strong that crucial ingredients of family law, such as filiation, have been regarded by judges and legal practitioners as belonging to the domain of public law. By way of example, in a more recent Supreme Court judgment, issued in the case of *MR and Another v An t-Ard Chláraitheoir and Others*,\(^{11}\) establishing legal motherhood was treated explicitly as a public law affair.

On the other hand, however, family law should be defined as a domain intended to regulate, in the first place, patrimonial and non-patrimonial relations between private parties, primarily between spouses and civil partners and between parents and their children. The *ratio legis* argument seems to have been given priority in continental countries, where family law is regarded as a part of private

---


\(^7\) For example, *Murray v Ireland* [1991] ILRM 465.

\(^8\) For example, *Norris v The Attorney General* [1984] IR 36. It should be noted that the case was subsequently brought before the European Court of Human Rights that declared that criminalisation of homosexual conduct in Ireland was incompatible with Article 8 of ECHR. See: *Norris v Ireland* [1989] 13 EHRR 186.

\(^9\) For example, *JK v VW* [1990] 2 IR 437.


\(^{11}\) *MR and Another v An t-Ard Chláraitheoir and Others* [2013] IEHC 91 [2014] IESC 60, para 86 (Denham CJ); hereinafter *MR and Another*. This judgment is further analysed in the subsequent section.
law (or its substantive part – i.e. civil law) without any reservations. According to Labrusse-Riou, civil law remains ‘the essential source and foundation’ of family law. As she further explains, family law principles provide a ‘normative framework (...) for the creation, existence and dissolution of family bonds’, which include in its scope notions such as: parental authority, hereditary share and obligation of maintenance.

A view, whereby family law should be treated as a ‘domain of its own kind’ and, thus, cannot be classified as belonging to any larger category, is equally unconvincing. As Wolter rightly points out, it is true to say that family law possesses some unique characteristics; however, that fact does not justify its separation from the domain of private (civil) law. Moreover, the previously described element of subordination is intrinsic to other legal relationships formed in accordance with the principles of broadly understood private law, such as, for example, the relationship between a principal and a contractor and between the parties of certain civil agreements.

Constitutional protection of family rights deserves to be duly acknowledged. In particular, one cannot ignore the ‘central constitutional ethos under which family law is administered’ in this jurisdiction. Nonetheless, if we consider the original

---

14 Labrusse-Riou (n 13) 265.
15 Wolter (n 1) 26.
16 Ignatowicz and Nazar (n 2) 45.
17 Shatter (n 3) 5.
intent of family law provisions along with their subject matter, we could conclude that the domain discussed does not diverge in its content from other areas of private law. Therefore, treating family law as an integral branch of private law seems to this author as a more appropriate approach.

Secondly, from a more narrow perspective, it could be argued that the analysis of foetal rights on the grounds of family law should also include in its scope the issue of court disputes between family members related to pregnancy termination. In Ireland, particularly, the academic literature on the subject of ‘family law’ discusses, for instance, situations where an abortion was performed (or was intended to be performed) against the wishes of the pregnant woman’s spouse (partner), or, in case of pregnant minors, against the wishes of their parents or legal carers.

As Haberko rightly observes, legislatures regard protection of unborn human life as a fundamental principle, which should be acknowledged and respected by domestic law in its entirety. Accordingly, ending this life by means of a medical procedure can only be authorised in exceptional circumstances. Performing an abortion against these principles, which vary from jurisdiction to jurisdiction, will, in principle, incur criminal liability. As the author already observed in the


19 More precisely, these cases concern the so-called ‘right to travel’ – i.e. the right of a pregnant woman to travel to another jurisdiction to avail of a legal abortion. The disputes in this context arise where the abovementioned right was contested by the woman’s family. The examples of the most frequently cited cases include: A and B v Eastern Health Board [1998] 1 IR 464 and Miss D (The Irish Times, 10 May 2007).

preceding part of this thesis, criminal and civil liability might – at times – both come into play in case where a foetus survived the intervention but the resulting child was later born with a defect.

However, while appreciating that the main hypotheses of this thesis are essentially linked to the born alive rule, it has to be concluded that the issues of the right to abortion, together with the corresponding right to travel, do not, in this author’s view, relate to the core of private law, in general, and to the core of family law, in particular. In contrast, exercising the rights of parental (or quasi-parental) care over the embryo (foetus), including the right to consent to foetal therapy, seems to be relevant and will be further analysed in this part.

To sum up, the issue of consenting (dissenting) to pregnancy termination by the pregnant woman’s spouse, partner or other family members falls out of the scope of this work and, therefore, will not be discussed.

In addition, while considering possible repeal of Article 40.3.3° of Bunreacht Na hÉireann in the forthcoming constitutional referendum and its potential, fundamental implications for the highly constitutionalised Irish family law, it should be reiterated that this part of the thesis, similarly to its remaining parts, discusses the law of all the countries examined as of 1 May 2018.
CHAPTER 1

Embryo (Foetus) and the Expectant Parents

1. Who Are ‘Parents’?

The term ‘filiation’, associated with parentage, is ordinarily defined as ‘the fact of being the child of a certain parent (parents)’.

From a broader perspective, it can be awarded at least two if not three separate meanings.

Firstly, it can be considered a synonym of ‘descent’ or ‘derivation’ and understood as a genetic bond existing between a given child and his mother and father – here seen as providers of two gametes which gave beginning to the child’s life.

Secondly, in a legal context, filiation can be described as a relationship, by virtue of which particular individuals, who have fulfilled premises prescribed by the law, are deemed to be the child’s parents. As a consequence, they become depositaries of rights, duties and responsibilities towards each other and towards the child. These rights, duties and responsibilities, determined by the provisions of domestic family law, flow from the abovementioned relationship and are not dependent upon existence of the actual genetic kinship. Thirdly, the literature also acknowledges a notion of social filiation (more often referred to as social parenthood) which consists of ‘performing the caring role for the child’.

---


22 See C Barthon and G Douglas, Law and Parenthood (Butterworths 1995) 47. For a broader discussion concerning the division between genetic, legal and social filiation, see, for example: A Bainham, ‘Parentage, Parenthood and Parental Responsibility: Subtle, Elusive yet...
Assumingly, in a vast majority of cases the genetic filiation will be coupled with its legal and social counterparts, i.e. the man and woman who factually conceived the child will be his legal parents and his de facto carers. At the same time, the law has long accepted situations where genetic, legal and social filiations do not coincide. For instance, that is a case of children being raised by adoptive, foster and step-parents, by various persons or institutions acting in loco parentis or by individuals who either officially declare to be their parents or who are presumed by the law to be their parents, but who are not, in fact, related to them.

2. Who Are 'Legal Parents'?

According to Roman law, a woman who carried the pregnancy and gave birth to a child was considered to be his mother, whereas the child’s father remained, by definition, uncertain. Nonetheless, children born to married women benefited from a presumption, whereby the father was declared by the marriage.

---

23 The author avoids using the expressions ‘biological’ and ‘natural’ filiation. Due to uncertainties resulting from surrogacy agreements, describing parentage as ‘biological’ is no longer precise. In brief, one could argue that in such cases both the surrogate mother as well as the genetic mother could be, in fact, referred to as ‘biological’ or ‘natural’ mothers.  
24 Such as, for instance, the state with regard to children being in its care or the courts with regard to wards of court.  
25 Such as, for instance, unmarried men voluntarily acknowledging their paternity.  
26 Such as, for instance, married men with regard to children born to their wives.  
27 D. 2, 4, 5 (Paulus): pater vero is est, quem nuptiae demonstrant (the father indeed is declared by the marriage). English translation according to: A Watson (ed), The Digest of Justinian vol 1 (University of Pennsylvania Press 1998). The presumption of parentage clearly refers to two fundamental pillars supporting the institution of civil marriage: firstly, the assumed existence of a physical (sexual) bond between the spouses and, secondly, the obligation of marital fidelity which the spouses are expected to observe. Hence, provided that the wife maintained a sexual relationship exclusively with her husband around the time of conception, it will be most probable that the child descended from him. It is important to note that in the past the presumption served not to establish paternity of a given man but rather to confirm that a given
Currently, thanks to DNA analysis it is possible to determine with nearly one hundred percent accuracy if a given child was factually derived from a given individual. Nonetheless, contemporary lawmakers do not require that a man and a woman who officially declare to be the child’s parents were each time in possession of unexceptionable, forensic evidence. Instead, in a vast majority of cases relevant, rebuttable legal presumptions, clearly inspired by the Roman heritage, will apply.

At the same time, one should consider the assisted reproductive techniques (ART) such as, most notably, artificial insemination (with both husband’s and donor’s sperm) and In Vitro Fertilisation. Undoubtedly, these techniques cannot be described as novel; however, their introduction and gradual popularisation in the course of the last three decades has definitely had a significant impact on the existing filiation laws worldwide.

---

269

28 According to medico-legal sources, the first reported artificial insemination with husband’s sperm was performed in England in 1799, whereas donor’s sperm was used for the first time in 1884. The first in vitro fertilisation which resulted in birth of a healthy child, Louise Brown, took place also in England in 1978. See, for example: C Coughlan, B Ledger and B Ola, ‘In-Vitro Fertilization’ (2011) 21(11) Obstetrics, Gynaecology and Reproductive Medicine 303, 303; D Madden, ‘Legal Issues in Artificial Insemination’ (1996) 2(1) MLJI 11, 11 or D Madden, ‘Recent Developments in Assisted Human Reproduction: Legal and Ethical Issues’ (2002) 7(2) MLJI 53, 53.

29 In the United Kingdom the issue of establishing legal filiation of children conceived thanks to ART is regulated by the previously cited Human Fertilisation and Embryology Act 1990 (hereinafter the HFEA 1990). In Germany - it is covered by the Embryo Protection Act 1990 and in France – by the Acts No 94-653 and 94-654, both enacted in 1994. Moreover, some pertinent provisions can be found in the German and French Civil Codes and in other specialised statutes. In Poland the issue is now largely governed by the Treating Infertility Act 2015 in addition to the corresponding articles of the Polish Family Code. In Ireland some relevant provisions have been inserted in the Children and Family Relationships Act 2015 (No 9 of 2015).
Limits of space preclude more thorough analysis of legal filiation in the context of ART.\textsuperscript{30} In brief, if a child was conceived thanks to a technique involving use of gametes retrieved from both the prospective parents, general principles on establishing filiation – presented below – will apply. It is because in the scenarios discussed the domestic laws of all the jurisdictions examined do not distinguish between children conceived via ART and those conceived as a result of sexual cohabitation.\textsuperscript{31} At the same time, similar, albeit not identical, solutions have been adopted in cases where a donor’s genetic material was used to achieve the pregnancy or when the prospective parents entered into a surrogacy arrangement with a third party. These scenarios will be briefly outlined in the following sections.

In addition, for the sake of clarity it will be assumed that assistance in conception has been offered within a professional framework to a heterosexual couple. Therefore, legal relationship between the children in question and homosexual partners of their genetic mothers (fathers) will not be discussed.


\textsuperscript{31} See: D Madden, \textit{Medicine, Ethics and the Law} (Butterworths 2002) 175.
2.1. Establishing Legal Motherhood

With reference to motherhood, the majority of world jurisdictions have adhered to the Roman *mater semper certa est* principle (the mother is always certain), while presuming that the mother ‘is the woman whom the pregnancy points out’ (*mater est quem gestatio demonstrant*). In some continental countries, including Poland, France and Germany this principle has been articulated *expressis verbis* in the domestic family (civil) codes. In common law countries, including England and Wales, the fact of giving birth to a child is viewed as ‘the basis for maternal rights’.

At the same time, it is worth mentioning that article 326 of the French Civil Code regulates a rather unique institution referred to as *accouchement sous X*, which could be translated as ‘secret delivery’ or ‘delivery under the name of X’. Namely, in the aftermath of the delivery, the birth mother can request not to have her identity divulged in any document, including the child’s birth certificate. Hence, motherhood of a child born to ‘X’ cannot be legally established and the child is treated by the law as parentless.

---


33 See: Barthon and Douglas (n 22) 54.
The *mater semper certa est* presumption applies equally in cases of women who conceived thanks to an ART procedure, such as IVF. Here, the gestational mother will always be regarded as the child’s mother, even if the IVF involved the use of eggs of an anonymous donor or whether she acted as a surrogate for another woman.\(^{34}\) Similarly, a woman who simply donated her eggs for the purpose of IVF will not be considered as a legal mother of any child conceived with the use of the procedure discussed.

Interestingly, the Irish position on establishing legal motherhood was altered by the previously mentioned case of *MR and Another*. The case concerned a surrogacy arrangement between a commissioning couple and the wife’s sister (the notice party), who had consented to act as a surrogate. In compliance with the arrangement, the spouses – OR and CR – provided gametes for the purpose of IVF and the resulting embryos were transferred into the surrogate’s uterus. After the twins – MR and DR – were born, the surrogate handed them to the commissioning couple. There was no dispute between the genetic parents and the gestational mother as to who should be vested with custody over the children. OR’s fatherhood could not be challenged, either. The difficulties arose when the genetic parents sought to have the twins’ birth certificates corrected under section 63 of Civil Registration Act 2004. They argued that CR was to be acknowledged as the twins’ legal mother in place of the previously registered surrogate. The letter was accompanied by evidence of the DNA analysis, confirming the applicant’s genetic motherhood. *An t-Ard Chláraitheoir* (the

\(^{34}\) On the margin, the following observation does not concern Germany, where surrogacy remains a forbidden medical practice by virtue of s 1(1)(7) of the previously acknowledged Embryo Protection Act 1990.
Registrar General), while relying on the *mater semper certa est* presumption, refused to alter the original birth certificates.

In the High Court Abbott J ruled in favour of the commissioning couple, stating that due to introduction of IVF, the presumption discussed could no longer be considered as irrebuttable. The learned judge did, nonetheless, acknowledge the historic importance of the presumption and its universal recognition in other European jurisdictions. He concluded that, in the interests of fairness and justice, establishing motherhood under Irish law in the post-IVF situations was to be made on a genetic basis. Therefore, on being proven, the genetic mother – and not the gestational mother – was to be registered as the mother of any child under provisions of Civil Registration Act 2004. It was also stressed that Irish family law (then in force) did not consider surrogacy arrangements as illegal but their performance would be unenforceable before the courts.

In November 2014 the Supreme Court quashed the orders of the High Court, allowing an appeal. In the course of her deliberations Denham CJ reiterated that, from the common law perspective, motherhood appears to be determined by the fact of giving birth and not by a particular rule or maxim.\(^{35}\) The learned judge also observed that there was no stream of reference to the presumption discussed in legal writings.\(^{36}\) In consequence, as she argued, *mater semper certa est* could not be regarded as a principle of common law, in general,\(^{37}\) and of the common law

\(^{35}\) *MR and Another* (n 11) para 80 (Denham CJ).

\(^{36}\) Ibid para 73.

\(^{37}\) Ibid para 77.
in Ireland, in particular.\textsuperscript{38} However, according to Denham CJ, it was not determinative of the case whether the above cited presumption constituted a part of the Irish common law or not, since: ‘(t)he words were a simple recognition of a fact which existed prior to the modern development of assisted human reproduction’.\textsuperscript{39}

In the end it was decided that the existing lacuna in the Irish family law, pertaining to the status of children born as a result of surrogacy arrangements, should not be addressed by the Supreme Court itself, but by the national Parliament by means of a comprehensive piece of legislation.\textsuperscript{40} The statute should also determine, who the mother is for the purpose of the birth registration procedure.\textsuperscript{41}

On that account, at the time of writing this thesis, the Irish position on both establishing motherhood and legality of surrogacy arrangements remains in a state of flux. However, it should be noted that the Children and Family Relationships Act 2015 preserves the \textit{mater semper certa est} presumption by giving the fact of undisputable physiology (mother is the child bearer) precedence over the genetic truth (mother is the gamete provider).\textsuperscript{42} Surrogacy, on the other hand, has not been regulated by the abovementioned statute and remains to be covered by a separate piece of legislation.\textsuperscript{43}

\begin{flushright}
\textsuperscript{38} Ibid para 88. \\
\textsuperscript{39} Ibid para 110. \\
\textsuperscript{40} Ibid para 116. \\
\textsuperscript{41} Ibid para 117. \\
\textsuperscript{42} Children and Family Relationships Act 2015, ss 4 and 5(7). \\
\textsuperscript{43} As should be noted, Assisted Human Reproduction Bill 2017, which was approved by the Government on 3 October 2017, but which is still pending enactment, authorises domestic, gestational and commercial surrogacy. See: Department of Health, 'General Scheme of the
2.2 Establishing Legal Paternity

With reference to paternity, the majority of jurisdictions still rely on the presumption of parentage encapsulated in the previously cited Latin maxim: *pater is est quem nuptiae demonstrant*.44 Accordingly, a child born to a married woman or born within a normal gestation period after the marriage was annulled or terminated by death or divorce45 is presumed to have been fathered by the mother’s husband.46 Most frequently the principle applies *mutatis mutandis* also to the case of judicially separated spouses.47 In Ireland an equivalent rule can be found in section 46 of the Status of Children Act 1987, whereas in the United Kingdom the presumption is being referred to as a principle of common law.48 A child born to an unmarried woman49 cannot rely on any legal presumptions. Paternity of such children is universally established in two ways. Firstly, in continental countries the putative father can voluntarily acknowledge his paternity before a designated administrative officer or before other bodies indicated by the statute.50 Secondly, an unmarried father can request to have his name registered in the child’s birth certificate.51

---

44 See, for example: F.C.C, art 312; B.G.B, §§1592-1593; P.F.C., art 62 §1; I.C.C., art 231.

45 The period during which the presumption of parentage still applies despite termination or annulment of the marriage is usually determined as three hundred days (ten months) in order to cover also unusually long gestations.

46 However, in Germany a child born to a divorcée does not benefit from the presumption discussed in cases where another man acknowledged his paternity.

47 See: F.C.C., art 313; I.C.C., art 232; P.F.C., the second sentence of art 62 §1; Status of Children Act 1987, s 46(2); Children and Family Relationships Act 2015, s 88 amending s 46 of Status of Children Act 1987.


49 Or a woman whose husband had successfully contested his paternity before the court.

50 See: F.C.C., art 316 et seq.; B.G.B., §1594 et seq.; P.F.C., art 73 et seq.

51 See: Births and Deaths Registration Act 1953 (England and Wales), s 10.
In all the components of the United Kingdom such a mention will produce the same effect as the ‘continental’ acknowledgment. In Ireland, on the other hand, the man whose name appears in the birth certificate is presumed to be the child’s legal father; nonetheless, his parental rights have to be subsequently reaffirmed by virtue of a statutory declaration, made together with the child’s mother before a designated organ, or, in case of a dispute, by virtue of a judicial decision. However, section 49 of the Children and Family Relationships Act 2015, amending the Guardianship of Infants Act 1964, now provides that an unmarried father will be treated as the child’s guardian as long as he fulfils certain conditions prescribed by the law – most notably, if he entered into a civil partnership with the child’s mother or cohabited with her for twelve months, including at least three months following the child’s birth.

Secondly, in all the jurisdictions examined the disputed paternity can be established in the course of court proceedings, during which DNA analysis will play a vital, evidential role.

In respect of establishing paternity in the context of ART, it is necessary to examine whether a man, whose wife availed of insemination with donor’s

---

52 See: Children Act 1989 (England and Wales) (c 41), s 4(1)(a), applicable to children born on or after 1 December 2003; Family Law Act (Scotland) 2006, s 23, applicable to children born on or after 4 May 2006 and Family Law Act (Northern Ireland) 2001, s 1(2)(a), applicable to children born before or on 15 April 2002.


54 See: Children and Family Relationships Act 2015, s 49.

55 See: F.C.C., art 317 et seq; B.G.B., §1600 et seq; Act on the Procedure in Family Matters and in Matters of Non-Contentious Jurisdiction 2008 (Germany), §182(1); P.F.C., art 84 et seq; I.C.C., art 269 et seq; Family Law Reform Act 1969 (England and Wales), s 20(1); Status of Children Act 1987 (Ireland), s 10.
sperm\textsuperscript{56} can subsequently seek to contest his paternity before the court by rebutting the presumption of parentage. In Poland, Germany, France and the United Kingdom such claims are expressly prohibited by virtue of the corresponding statutory provisions,\textsuperscript{57} whose entry into force had been preceded and followed by a line of consistent caselaw.\textsuperscript{58}

Therefore, the mother's husband will be regarded as a legal father of his wife's child as long as he had given valid consent to the medical procedure that involved the use of third party's semen. With reference to Ireland, section 11 of the Children and Family Relationships Act 2015 introduced an identical stipulation.

As far as the position of unmarried couples is concerned, if the woman's partner consents to being treated as the father of any child resulting from treatment provided to her, and the treatment in question took place in a licensed clinic, he will be automatically regarded as the child's legal father, even if the genetic material or an embryo (embryos) had been provided by a third party (parties).

\textsuperscript{56} Or after undergoing IVF with the use of the donor's sperm.
\textsuperscript{57} See: F.C.C., art 311-19; B.G.B., §1600-5; P.F.C., art 68; Human Fertilisation and Embryology Act 2008 (hereinafter the HFEA 2008), ss 35 and 38.
\textsuperscript{58} See, for instance: Resolution of the Seven Judges of the Polish Supreme Court of 27 October 1983 [1984] 6 OSNC 86, issued in a case of a married woman who conceived thanks to AID. Her husband had initially agreed to the procedure but later decided to contest his paternity. The court found his demand in breach with the rules of social intercourse and, hence, considered it to be unjustified. The Polish judges were of the opinion that a man who anonymously donates samples of his sperm for the purpose of assisted reproduction does not, in fact, intend to become a father of any children born thanks to the procedure, but he rather leaves his sperm at the disposal of the healthcare agents. Hence, rebutting the presumption of parentage in the case discussed would leave the child with no legal father. Furthermore, in the 1996 English case of \textit{Re CH (Contact: Parentage)}, [1996] 1 FLR 596, a woman who conceived as a result of AID and subsequently divorced her husband, attempted to deny him contact with the child also on the grounds that he was not the genetic father. The court disagreed, stating that, according to the provisions of the HFEA 1990 (then in force), he was to be treated by the law in the same manner as if he was the child's genetic father.
Such is the universal position of the law in the United Kingdom, France\textsuperscript{59} and – in the light of the more recent legislation – also in Poland and in Ireland.\textsuperscript{60}

\textbf{2.3. Legal Consequences of Establishing Filiation}

Assumingly, in a vast majority of jurisdictions the birth (gestational) mother will be treated as the child’s legal mother. We could, therefore, argue that the process of establishing filiation begins with establishing legal motherhood. Establishing motherhood subsequently allows us to determine legal paternity.\textsuperscript{61}

As was previously noted, establishing legal filiation results, in the first place, in creating a legal relationship between a given child and his parents. Universally, the substantial elements of this relationship include: acknowledgment of the child’s personal (civil) status, determined by the personal status of his parent (parents),\textsuperscript{62} and creation of functionally linked parental rights and duties in respect of that child and his patrimony.

It is worth mentioning that establishment of a civil status – linked to establishment of filiation – is particularly important under French law. Namely, article 317 F.C.C. regulates a unique institution of determining filiation \textit{par la possession d’etat} (by possession of an apparent status), i.e. by acknowledging that

\begin{itemize}
\item \textsuperscript{59} F.C.C., art 311-19.
\item \textsuperscript{60} As for Germany, it is not clear whether §1600-5 B.G.B. applies only to the mother’s husband or also to her partner.
\item \textsuperscript{61} See: Ignatowicz and Nazar (n 2) 267.
\item \textsuperscript{62} The child acquires a name and surname, domicile and citizenship.
\end{itemize}
filiation can also stem from personal status, which is *de facto* enjoyed by a given child.

In continental countries the entirety of the previously mentioned parental rights and duties is encompassed by umbrella terms of ‘parental authority’ or ‘parental care’,\(^63\) while in the common law countries these are associated with the notions of ‘guardianship/custody’ or ‘parental responsibility’.\(^64\) The rights and obligations falling within the scope of parental authority (care) – or within the scope of guardianship/custody – usually include: the general obligation of mutual assistance and consideration,\(^65\) the right to administer the child’s estate,\(^66\) the right and responsibility to make decisions concerning vital aspects of the child’s upbringing,\(^67\) the right to legally represent the child,\(^68\) the right to control and direct contact made with the child,\(^69\) and, finally, also the obligation of maintenance.\(^70\)

\(^63\) See, for example: E Holewińska-Łapińska’s definition of ‘parental authority’ in C Kosikowski and E Smoktunowicz (eds), *Wielka Encyklopedia Prawa* (Wydawnictwo Prawo i Praktyka Gospodarcza 2000) 1137; P Gottwald, D Schwab and E Büttner, *Family and Succession Law in Germany* (Kluwer Law International 2001) 76; Labrusse-Riou (n 13) 264; Ignatowicz and Nazar (n 2) 340.

\(^64\) The notion of ‘parental responsibility’, applied on the grounds of family law of England and Wales, is defined by s 3(1) of Children Act 1989 as: ‘all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property’.

\(^65\) As expressed, for example, in §1618a B.G.B.

\(^66\) See, for example: P.F.C., art 100 §1.

\(^67\) Such as: choosing the place of residence, adhering to certain religious practices, deciding on matters such as: education, undergoing medical treatment, obtaining a passport, etc. See, for example: B.G.B., §1631.

\(^68\) Legal representation consists of acting on behalf of the child or giving consent to the child’s own acts. See, for example: P.C.C., art 98 §1; B.G.B., §1629.

\(^69\) See, for example: B.G.B., §1632.

\(^70\) See, for example: P.F.C., art 28 et seq.
While looking from the child’s perspective, it could be argued that, once legal filiation is established, he avails of reciprocal rights vis-à-vis his parents.\textsuperscript{71}

3. Legal Parents of an Embryo (Foetus)

So far we have determined who legal parents are, in addition to outlining the scope of parental rights, duties and responsibilities. It is now necessary to decide, in the first place, whether legal filiation can already be established before the child is born and, secondly, whether such prenatal establishment would result in conferring any parental rights on the expectant parents.

3.1. Establishing Filiation before Birth

3.1.1 Poland and Other Continental Jurisdictions

It could be, \textit{prima facie}, observed that legal relationships of motherhood and paternity begin at the moment of the child’s birth.\textsuperscript{72}

Nonetheless, in Poland and other continental jurisdictions, paternity can be formally established beforehand. Namely, article 75 §1 P.F.C. provides that the previously discussed voluntary declaration of paternity can be made before birth

\begin{footnotesize}
\textsuperscript{71} Such as: the right to be protected by the parents, to be legally represented or maintained by them.
\textsuperscript{72} See: K Pietrzykowski’s definition of ‘motherhood’ in Kosikowski and Smoktunowicz (n 63) 432-433.
\textsuperscript{72} However, Pietrzykowski argues that during the period when article 8 §2 P.C.C. – vesting a ‘conceived but unborn child’ with legal capacity on the grounds of civil law – remained in force (i.e. between 7 January 1993 and 30 August 1996) motherhood in Poland began at the moment of conception.
\end{footnotesize}
of a child, ‘who is already conceived’. An identical stipulation can be found, *inter alia*, in §1594-4 B.G.B., article 316 F.C.C., article 2541.C.C. or §53 Cz.F.C. In all those instances the expectant parents do not dispute paternity, as the pregnant woman must equally consent to the declaration.\(^73\)

Some procedural remarks are due before considering the consequences of this particular form of determining filiation.

First, diverse solutions apply in cases where prenatal acknowledgment of paternity takes place in the course of divorce proceedings between a pregnant woman and her husband. For instance, in Germany the acknowledgment becomes effective not at the time of the child’s birth but at the time of dissolution of the mother’s marriage.\(^74\) On the other hand, according to article 75 §2 P.F.C., the *pater is est quem nuptiae demonstrat* presumption will, in the scenarios examined, be set aside.

Second, also with regard to Poland, it is not clear whether the pregnancy has to be established in the course of medical assessment or documented. The Polish commentators have been divided on the issue. It could be argued that the necessity to provide such evidence would interfere with the woman’s right to privacy and with the principles governing protection of medical records.\(^75\) At the

---

\(^73\) In compliance with art 77 §2 P.F.C., when the pregnant woman is sixteen or older but she lacks full capacity to perform legal acts, such consent can only be submitted before a family court.

\(^74\) See: B.G.B., §1599. See also: Gottwald et al (n 63) 70.

same time, if the child was born after three hundred days from the date on which the putative father had voluntarily acknowledged his paternity, such acknowledgment is rendered ineffective *de jure*.\(^{76}\)

Third, as far as artificially created, yet unimplanted embryos are concerned, attention should be drawn to the new article 75\(^1\) §1 P.F.C., introduced by the Treating Infertility Act 2015.\(^{77}\) It provides that, upon consent expressed by an unmarried woman who is undergoing fertility treatment, her partner can voluntarily declare before the designated organ that he will become a legal father of a child (children) subsequently born thanks to ART. The provision discussed describes the case where the woman concerned availed of AID,\(^{78}\) but it does not refer to the case of AIH. We can, therefore, only speculate whether article 75\(^1\) §1 would apply *mutatis mutandis* also in cases where the declarer remains, himself, the genetic father of the embryos *in vitro*. Alternatively, if we accept that the term ‘conceived but unborn child’ was to be interpreted broadly, we could argue that the general principle from the Code’s preceding article 75 §1 would also be applicable in the scenarios examined.\(^{79}\)

Unsurprisingly, the institution of prenatal acknowledgment of paternity, here treated as an act of willingness to accept parental responsibilities, does not arise

---

\(^{76}\) Pietrzykowski (n 75) 761.


\(^{78}\) Or when she availed of IVF with the use of donated semen.

much controversy. However, in absence of explicit statutory authorisation, it is not equally straightforward, whether paternity of an unmarried man could be established – before the child’s birth – by means of a court order.

To provide a positive answer, we could attempt reasoning *per analogiam*. Accordingly, if an unmarried man can voluntarily acknowledge his paternity with regard to an embryo (foetus), then, similarly, he can seek to have his paternity established before the court.\(^80\) Moreover, we could invoke article 84 §4 P.F.C., whereby judicial proceedings aimed at establishing legal filiation of a given child can continue in the event of that child’s death.\(^81\) Hence, while reasoning *a minori ad maius*, if the procedure discussed can continue after the child’s death, then the case for its availability before the child’s birth is even stronger, should we consider the benefits for the child that will stem from the legal bond existing between him and his father.\(^82\) For example, in consequence of establishing paternity in such scenarios, the court could further oblige the legal father to financially support the pregnant woman, particularly, by sharing the costs of her medical care.

In addition, academic supporters of the solution examined tend to point to the principle of child welfare\(^83\) or to the universally followed judicial practice of interpreting foetal rights in a broad, rather than a narrow, manner.\(^84\) As an

---


\(^81\) The provision discussed applies in case where the child, himself, instituted an action before the court. In the event of his death, the right to establish filiation is vested in his descendants.

\(^82\) Mazurkiewicz (n 80) 149.


\(^84\) Mazurkiewicz (n 80) 151.
example, Haberko cites article 2(1) of the Children’s Ombudsman Act 2000\textsuperscript{85} – previously examined in the introductory part – whereby ‘one is regarded as a child from the moment of conception until the moment of reaching majority’. Hence, as she further argues, an analogously broad judicial interpretation of the term ‘child’ appearing in article 84 P.F.C. could vest the interested party\textsuperscript{86} with the right to establish paternity by the court order before the child’s birth.\textsuperscript{87}

The opponents of the solution argue, first of all, that lack of explicit statutory authorisation of prenatal establishment of paternity before the court was an intention on the part of the Polish lawmaker.\textsuperscript{88} However, even more importantly, reference has been made to potential hazards associated with obtaining necessary evidence for the purpose of the proceedings thereof. As has been established, obtaining a foetal DNA sample – for the purpose of matching it with the putative father’s DNA – increases risks of miscarriage, premature birth or can imply other negative consequences for both the foetus and the pregnant woman.\textsuperscript{89}

\textsuperscript{86} In accordance with articles 84 and 86 P.F.C., the catalogue of persons, who are entitled to institute such an action before the court, is limited to the putative father, the mother, the child (or his descendants) and the prosecutor, if the public interest is at stake.
\textsuperscript{87} Haberko (n 20) 143-145.
\textsuperscript{88} Mazurkiewicz (n 80) 148.
\textsuperscript{89} Haberko (n 20) 143-145.

It should also be noted that in its 1952 Resolution the Polish Supreme Court supported the arguments against prenatal establishment of paternity by means of a court order. See: Resolution of the Polish Supreme Court (Full Civil Chamber) of 6 December 1952 [1953] 2(31) OSN 6.
According to this author, while appreciating, particularly, the last-mentioned circumstance, establishing paternity by means of a court order should not be allowed before the birth of the child that it concerns.

In response to the child welfare argument, it could be pointed out that the principle can still be adhered to in cases where the establishment takes place after the child’s birth. It is because, under Polish law, judgments issued in paternity disputes produce the so-called ex nunc effect – i.e. they confirm existence of parental rights and duties from the moment of conception and not from the moment of birth. On that account, once paternity of a given man in respect of a given child is established, the child’s mother can still demand that the man reimbursed the costs of medical care, previously involved in the pregnancy and delivery.

Either way, by virtue of article 142 P.F.C., the court can still oblige the putative father to make maintenance payments in respect of his pregnant partner. As the above provision applies in cases where paternity has not been formally determined,90 the maintenance order will be imposed on a given man as long as ‘credence can be lent’ to the fact that he is the child’s genetic father.91 In practice, an unmarried woman, who wishes to apply for maintenance during the pregnancy, will be compelled to simultaneously apply for a court order establishing paternity, while assuming that the order in question will only be

90 Here, the paternity is neither presumed by virtue of pater is est quem nuptiae demonstrant maxim, nor it has been voluntarily acknowledged.
91 The maintenance order, issued in accordance with article 142 P.F.C., will remain in operation not only during the pregnancy but also during the first three months of the child’s life.
issued after the child’s birth. Thus, if the original maintenance debtor is subsequently found not to be the child’s father, he will have the right of recourse against the original maintenance creditors – i.e. woman (and child) in respect of whom the payments had been made.

We could argue that prenatal acknowledgment of paternity serves, *prima facie*, to indicate the legal father of an embryo (foetus). Nonetheless, we could equally argue that the *ratio legis* behind articles 75 P.F.C. et seq was not to create parental rights and responsibilities vis-à-vis the latter, but it was rather to facilitate the administrative process of birth registration. It is because, thanks to the institution examined, the personal status of both marital and non-marital children can be now determined (and accordingly registered) *ab initio*. In addition, the provision ensures that a child born to an unmarried woman remains in the same position as a child, who at birth (and only at birth) will automatically benefit from the *pater is est quem nuptiae demonstrant* presumption. To recap, we may carefully propose that prenatal acknowledgment of paternity serves the interest of a future child and that of a future father.

Furthermore, some commentators point to the conditional character of the putative father’s voluntary declaration.\(^2\) Namely, it will produce legal effect only when the child is born within three hundred days from the day on which it was made and only if the child is born alive.

---

\(^2\) See, for example: J Ignatowicz in Pietrzykowski (n 75) 760.
3.1.2 Ireland and Other Common Law (Mixed) Jurisdictions

As was previously explained, common law jurisdictions do not recognise prenatal acknowledgment of paternity. Additionally, in cases where a child is born to an unmarried woman, the father's name can be still revealed in the child's certificate of birth.

Hence, we could argue that in common law countries establishment of motherhood de jure will always take place at the moment of the child's birth, whereas establishment of paternity de jure will take place either at the time of the child's birth, in case of a married father, or at some point after the birth, in case of an unmarried one.

At the same time, it should also be recalled that in order to be able to exercise parental care, both legal mother and father must assume guardianship in respect of their child. On that account, an argument could follow, whereby de facto legal motherhood will, in principle, automatically begin at the moment of the child's birth, whereas de facto legal paternity will begin at the moment when guardianship is assumed by the legal father. Analogously, in the case of a marital child, such assumption will take place ex lege at the time of birth. In the case of a non-marital child, in England, Wales, Scotland and Northern Ireland, a legal father will become the child's guardian by virtue of either a birth certificate or a

---

93 Assuming, of course, that the child was born to the married man's wife.
94 As O'Driscoll puts it: '(h)e is on the birth of his child, an automatic joint guardian and is afforded both constitutional and legislative protection' (emphasis added). See: O'Driscoll (n 53) 18.
court order. On the other hand, to assume guardianship under Irish law, the man indicated in the birth certificate has to remain the mother’s civil partner or cohabitate with her for a prescribed period of time. Alternatively, both parents can make relevant statutory declarations before a designated organ.95

In conclusion, we can speculate that prenatal, voluntary acknowledgment of paternity is not recognised in common law jurisdictions since, in undisputed cases, both filiation de jure (i.e. formal acknowledgment) and de facto (i.e. assumption of guardianship) will be established in the course of registering the child’s civil status, which, needless to say, will not be possible before the child is born. On the other hand, in the continental practice, personal details of an unmarried man, whose paternity had not been previously acknowledged in the manner prescribed by the law, are not recorded in the child’s birth certificate, even if both parents, attending the Registrar’s office, did not dispute paternity and were willing to sign the Register.96

3.2 Rights of the Expectant Parents in Respect of an Embryo (Foetus)

While assuming that filiation cannot be formally established before the child’s birth, or, in case of continental countries, that prenatal establishment of filiation serves merely to determine the civil status of future infants, would the expectant

95 See: Guardianship of Infants Act 1964, s 6B; inserted by virtue of Children and Family Relationships Act 2015, s 49.
parents still be vested with any prerogatives resembling those vested in parents of children already born?

While the majority of parental rights would not, due to their very nature, be exercisable before the child’s birth,\textsuperscript{97} the author will draw particular attention to two of them that could be hypothetically exercised \textit{per analogiam} in respect of an embryo (foetus) and, to certain degree, also in respect of an unimplanted embryo \textit{in vitro}. These are: the right to consent to the child’s medical treatment and the right of custody. Additionally, the former right may be treated as an ingredient of the broader right of the child’s legal representation, universally enjoyed by the parents.

\textbf{3.2.1 Parental Authority (Custody) in Respect of an Embryo (Foetus)}

In general terms, continental law does not offer prospective parents much discretion when it comes to making decisions concerning their expected offspring. These limitations largely stem from the fact that the beginning of the previously examined term of parental authority, encompassing also the two abovementioned rights, has not been defined \textit{expressis verbis}.

For instance, article 92 P.F.C. only vaguely states that a child remains under parental authority until reaching majority. As many commentators argue, such formulation suggests that the authority begins at the moment of birth, and not at

\textsuperscript{97} Such as, for instance, the previously mentioned right to make decisions concerning the child’s place of residence, education, religion, etc.
the moment of conception. However, regarding the father's authority, the moment of establishing legal filiation should, in the light of the observations hitherto made, be seen as a decisive criterion. Thus, his authority will begin at birth as long as the child's parents are married to each other or if the paternity had been voluntarily acknowledged before the child was born. In the remaining cases the authority will be exercisable either from the moment of postnatal, voluntary acknowledgment or from the moment of issuing the court's declaration, accompanying an order establishing the paternity.

It should be mentioned that an analogous solution has been adopted in France, where, in pursuant with article 371-1 F.C.C., parental authority is vested in both parents until the child's majority or emancipation. Similarly, §§1626 and 1627 B.G.B. provide that parental authority, referred to as ‘parental care’ (Elterliche Sorge), is exercised in respect of a minor and in his best interest.

As far as Italian law is concerned, the first sentence of article 320 I.C.C. provides that: ‘(t)he parents jointly, or the parent who exercises authority in an exclusive manner, represent the children born and to be born in all civil acts and administer their property’. The above formulation could, prima facie, suggest that Italian

---


99 Ignaczewski (n 98) 32; Ignatowicz in Pietrzykowski (n 75) 1225.

100 However, in line with §1626a B.G.B, an unmarried father will assume parental care when he submits a relevant declaration in that respect together with the child’s mother or, alternatively, when he either marries the mother or when the care is awarded to him by virtue of a court order.

101 Translation according to: M Beltramo, GE Longo and JH Merryman (trs), The Italian Code and Contemporary Legislation (Oceana 1991), emphasis added.
family law recognises parental authority in its ‘extended’ form. At the same time, it should be borne in mind that article 1 I.C.C. states that the rights enjoyed by the so-called ‘conceived child’ under domestic civil law are subject to the event of birth. Accordingly, one could assume that factual acquisition of the rights by a child en ventre sa mère, on whose behalf the expectant parents act, will be conditional upon his subsequent live-birth.

Moreover, also parental custody or parental responsibility – being the common law equivalents of parental authority (care) – seemingly begin at the moment of birth. As Norrie explicitly points out, until the child is born, neither the pregnant woman, nor her husband (partner) can be regarded as parents in any sense ‘either lay or legal’.102

3.2.2 Parental Right to Consent to Foetal Therapy

As is commonly known, any medical activity engaging physical contact with an examined patient requires his prior consent, expressed in either explicit or implicit manner. In case where the activity discussed involves a minor, such consent will, in principle, be granted by the patient’s parent (parents) or legal guardians.

To recall, in a vast majority of world jurisdictions, women remain under compulsory medical supervision throughout the duration of their pregnancies.

---

102 K McK Norrie, Family Practice and the Law (Aldershot 1991) 77. A similar view, with regard to the father’s rights, was expressed by Greene. See: B Greene, Understanding Medical Law (Cavendish Publishing 2004) 147.
Typically, they avail of routine antenatal examinations and screenings of both invasive and non-invasive character.

Furthermore, as was also already explained in the second part of this thesis, at times a medical intervention will be necessary to preserve the life or health of an embryo (foetus). According to the well-established clinical practice, in such cases the consent will be granted, in the first place, by the pregnant woman.\(^{103}\) When an emergency occurs, and the woman’s consent cannot be obtained, the essential intervention can be still performed in respect of both the ‘patients’ involved.\(^{104}\)

At the same time, since parental authority (custody, responsibility) is not – in the majority of jurisdictions – exercised until the child is born, the legal basis of maternal consent to foetal therapy may not be easily determinable. We could, for instance, argue that the right to consent to foetal therapy could be still encompassed by parental authority or its equivalents, if the latter was to be understood broadly, i.e. if we accepted that its boundaries are not determined solely by the norms of family law.\(^{105}\) Adhering to the abovementioned standpoint would allow us to conclude that parental prerogatives exercised in the situations

\(^{103}\) For the purpose of this section it will be assumed that the pregnant woman is an adult capable of giving informed consent to medical treatment. Hence, additional reservations accompanying the cases of underage or legally incapacitated gravida will not be discussed.

\(^{104}\) See, for example: Medical Doctors and Dentists Act 1996, Official Journal of the Republic of Poland No 1997.28.152, arts 33 and 34(6) (Poland); Code of Public Health 1953, the consolidated version of 1 June 2017 <https://www.legifrance.gouv.fr/affichCode.do;jsessionid=B47234DFB6B872921ECC543B4C477D16.tpda11v_1?cidTexte=LEGITEXT000006072665&dateTexte=20170607> accessed 7 June 2017, art L1111-4 (France). With reference to common law countries, in such scenarios the intervening physician could rely on the so-called ‘doctrine of necessity’. Again, the above cited provisions do not regulate the situation of the pregnant woman expressis verbis but they are analogously applied in the course of an established clinical practice.

\(^{105}\) See, for example: Haberko (n 20) 126-127.
examined in respect of an embryo (foetus) would be, in principle, equated with those exercised in respect of a child already born. The same effect would be achieved if the term ‘parental authority’ was to be awarded its ordinary meaning, but if we applied reasoning *per analogiam*.

In opposition, we could claim that, although the pregnant woman does not enjoy parental authority vis-à-vis her foetus, she will be customarily vested with the right of mere representation, allowing her to exercise factual powers of decision when foetal health or life are at stake. Finally, we could associate the right to consent to the discussed form of intervention with exercising natural (social), as opposed to legal, custody. In such case, the right examined would stem from the undisputed fact of physiological dependence of an embryo (foetus) from the maternal body.

According to this author, a pregnant woman enjoys an implied right of simple, factual representation of her foetus, which could be referred to as a ‘quasi-parental’ prerogative. At the same time, it would be hard to accept that the right in question falls within the scope of parental authority (responsibility, care, etc.).

First of all, it should be observed that none of the jurisdictions examined opted for an explicit formulation to that effect. Secondly, the corresponding original

---

106 However, before the child is born, this is not the exercise of ‘parental rights’. Norrie (n 102) 77. Hence, a pregnant woman, who consents to medical treatment on behalf of her foetus is, in fact, seemingly exercising her own right in respect of her own physical integrity. That could imply a rather controversial conclusion, whereby, at least in the context of consenting to treatment, a foetus is still treated as the part of the maternal organism.

107 Haberko (n 20) 114 and 125.

108 However, in line with the previously cited article 320 I.C.C., we could carefully assume that the above right would be considered as parental right under Italian law.
statutes have not been, to date, amended in order to reflect the previously discussed developments in modern perinatology. Thirdly, if parental authority was to be granted before a child’s birth, it could be, equally, forfeited by virtue of a court order before the child was born. In such cases, a competent, adult pregnant woman could be effectively deprived of the right to consent to an intervention affecting her own physical integrity and posing risks to her own health (life). Finally, as far as non-marital children are concerned, we should consider the fact that prenatal acknowledgment of paternity is not practiced in common law countries, including Ireland. Hence, it would prove rather difficult, if not impossible, to formally indicate the man entitled to exercise parental care in respect of the embryo (foetus), alongside the pregnant woman.109

All in all, the uncertain status of the right to consent to foetal therapy, does not seem to bear much relevance, if looking from the pragmatic point of view. Namely, as long as the consent discussed is expressed by the pregnant woman in a form and manner determined by the statute (caselaw), it will be considered as valid. Otherwise, an obstetrician, who intends to perform a foetal surgery, would be each time compelled to obtain permission from the family court. As was previously explained the boundaries of judicial intervention in cases of medical treatment provided to pregnant women, together with the corresponding statutory provisions and caselaw, will be discussed in the subsequent chapter of this part.

109 For further discussion concerning the rights of the prospective father to consent to foetal therapy see, for example: Haberko (n 20) 307 et seq.
Irrespective of the last-mentioned remark, one could still argue in favour of vesting a pregnant woman with a legal right to represent an embryo (foetus), encompassing the right to make decisions concerning foetal health. As will be demonstrated in the forthcoming section, such explicit formulation would be even more important in cases where conception did not occur in vivo but was achieved by means of ART.

### 3.2.3 Parental Rights in Respect of an Embryo In Vitro

As emerges from the preceding section, both factual and legal protection of the embryo (foetus) is predominantly secured by the pregnant woman and thanks to her body. Therefore, it is logical to expect that the rights of an artificially conceived embryo, remaining outside the sheltering maternal organism, would be awarded even stronger protection on the grounds of family law.

At the same time, while considering regulatory framework of ART in the selected, example jurisdictions together with the accompanying caselaw, one could argue that embryos in vitro are, in principle, treated less favourably in comparison with the already implanted ones. Such inequality seems to characterise the model of regulation approved in both continental and common law countries.\(^{110}\)

\(^{110}\) A similar approach, previously proposed by the Irish Commission on Assisted Human Reproduction, is likely to be adhered to in the forthcoming domestic statute on ART. To recall, the Commission, with exception of one member, advocated that embryos in vitro should not attract legal protection until they are transferred into the womb, at which stage they should be protected in the same manner as embryos conceived in vivo. See: Commission on Assisted Human Reproduction, ‘Report of the Commission on Assisted Human Reproduction 2005’, <http://health.gov.ie/wp-content/uploads/2014/03/Report-of-The-Commission-on-Assisted-Human-Reproduction.pdf> accessed 2 June 2017, Recommendation 16.
Universally, the commissioning parents\textsuperscript{111} are vested with the right to make
dispositions in respect of the unimplanted embryos, which is also referred to as
the ‘embryo custody’. Regarding the content of the right examined, we could,
however, question the relevance of the last-mentioned term in the present
context.

On the one hand, custody, which is commonly associated with day-to-day aspects
of childcare, essentially involves exercising physical control over the child by his
legal parents.\textsuperscript{112} Hence, custody universally consists of directing the child’s
actions, caring for the child’s health and ensuring his safety.\textsuperscript{113} To follow up, we
could observe that the power of disposition in cases of ART precisely boils down
to exercising control over the embryos.

On the other hand, however, despite the fact that none of the legislatures regards
embryos \textit{in vitro} as objects or as marketable commodities, the prerogatives
exercised by the commissioning couple in respect of such embryos bear
resemblance to the prerogatives exercised by an owner in respect of his
patrimony. Namely, patients of fertility clinics commonly authorise creation of

\textsuperscript{111} The term ‘commissioning parent’ is understood by this author as a man or a woman availing
of ART at a licenced fertility clinic, who has consented to becoming a legal parent of any child
that will be born as a result of the use of the techniques in question.

\textsuperscript{112} It should be recalled that under the law of England and Wales the term ‘custody’ is now
embraced by the more general concept of parental responsibility, which was introduced by
virtue of Children Act 1989. Analogously, the French term of \textit{droit de garde parentale} (the right
of parental custody) was removed from F.C.C. in 2002. Currently, the Code uses an expression
\textit{l’autorité parentale}, while describing the entirety of rights attributable to legal parents. See: Act
No 2002-305 of 4 March 2002 concerning Parental Authority, Official Journal of the Republic
of France of 5 March 2002, No 3, 4161.

\textsuperscript{113} See, for example: T Smyczyński, \textit{Prawo Rodzinne i Opiekuńcze} (2nd edn, CH Beck 1999) 153
et seq.
embryos by means of ART, as well as their implantation, storage, donation\textsuperscript{114} and, finally, also destruction. Accordingly, numerous terms associated with property law, such as: ‘use’,\textsuperscript{115} ‘preservation’,\textsuperscript{116} ‘object of research’\textsuperscript{117} ‘donation’\textsuperscript{118} ‘destruction’,\textsuperscript{119} ‘disposal’\textsuperscript{120} or ‘importation’\textsuperscript{121} appear in various statutory provisions regulating ART at the domestic level in Poland, France, Germany and the United Kingdom.

In cases where a commissioning couple avails of ART under private health insurance, the right to make decisions concerning embryos \textit{in vitro} will be pre-established by a contract for provision of medical services, which is normally concluded between the couple and a fertility clinic before the treatment commences.

Furthermore, regardless of the insurance scheme availed of, in all the instances where assisted procreation takes place, the scope of the commissioning couple’s rights and duties vis-à-vis their embryos will be determined by the previously mentioned domestic statutes. Accordingly, in compliance with the liberal model represented by the UK’s HFEA 1990, both the couple and the healthcare provider

\textsuperscript{114} To another commissioning couple or to research bodies.
\textsuperscript{115} See, for example: Treating Infertility Act 2015, art 2(1)(2); numerous provisions of the Code of Public Health 1953; numerous provisions of the HFEA 1990.
\textsuperscript{116} See, for example: Treating Infertility Act 2015, art. 2(1)(15); Code of Public Health 1953, art L2141-6; Embryo Protection Act 1990, s 9(3).
\textsuperscript{117} See, for example: Code of Public Health, art L2141-4.
\textsuperscript{118} See, for example: Treating Infertility Act 2015, art 36(1).
\textsuperscript{119} The term ‘embryo donation’ was also used by the Commission on Assisted Human Reproduction in its 2005 Report. See: Commission on Assisted Human Reproduction (n 110) Recommendation 19. On the other hand, Schedule 3, para 2 of the HFEA 1990 regulates the use in providing treatment services to the person giving consent or that person and another specified person together.
\textsuperscript{120} See, for example: Treating Infertility Act 2015, art 23(3).
\textsuperscript{121} See, for example: Embryo Protection Act 1990, s 2(1); HFEA 1990, ss 14(1)(c) and 17(1)(c).
will enjoy broader discretion during the decision-making process; however, at the expense of protection awarded to the embryos *in vitro*. For instance, the commissioning spouse’s (partner’s) consent for creation and storage of such embryos can be revoked by him (her) at any time.\textsuperscript{122} In such cases, lack of effective consent will result in discontinuation of storage and, consequently, in allowing the unimplanted embryos to perish. Furthermore, in line with the HFEA’s 2009 Regulations,\textsuperscript{123} cryopreserved embryos are, in principle, stored for a period of ten years. It is now, nonetheless, possible to extend the above term, as long as every ten years the clinic obtains a written opinion from a registered medical practitioner that one of the gametal donors, or one of the spouses (partners) availing of ART, already is or is likely to become prematurely infertile.\textsuperscript{124}

In comparison, the ‘compromise’ model of regulation of ART,\textsuperscript{125} which has been adhered to in France and Poland, attempts to safeguard procreative rights of the commissioning couple, while offering stronger protection to the embryos *in vitro*. In addition, similarly to the case of the HFEA 1990 and 2008, certain technical practicalities of assisted reproduction have also been given due regard. For example, according to French law, the commissioning couples, who have consented to cryopreservation and storage of their embryos, are at the same time

\textsuperscript{122} HFEA 1990, Schedule 3, para 4(1).
\textsuperscript{123} Human Fertilisation and Embryology (Statutory Storage Period for Embryos and Gametes) Regulations 2009, SI No 1582 of 2009.
\textsuperscript{124} The amended provisions are applicable to the cases of embryos that were placed in storage on or after 1 October 2009.
\textsuperscript{125} Also referred to as moderately liberal or moderately conservative.
obliged to restate their intention to continue their fertility treatment for each subsequent year of such storage.\textsuperscript{126}

Furthermore, the British and French statutes allow the commissioning couple to donate the surplus embryos to scientific research or to another person (persons) availing of ART.\textsuperscript{127} On the other hand, in line with the more restrictive Polish statute, while it is possible to donate one’s retrieved gametes to research, the already created embryos can be solely donated to an anonymous commissioning couple.\textsuperscript{128} Such a donation is also obligatory in cases where the maximum duration of storage envisaged by the contract, and not exceeding twenty years, has been reached by a given embryo (embryos).\textsuperscript{129}

It is also interesting to note that under French law the last-mentioned form of donation is being referred to as ‘reception (\textit{accueil}) of an embryo’.\textsuperscript{130} In such cases, the transfer of dispositional rights in respect of an embryo \textit{in vitro} to another person (persons) takes place by virtue of a judicial decision, which is made after ensuring that the receivers can cater for the needs of the ‘child to be born’, particularly, in the family, educational and psychological contexts.\textsuperscript{131}

\textsuperscript{126} Code of Public Health 1953, art L2141-4 \textit{l}.
\textsuperscript{127} HFEA 1990, Schedule 3 para 2(1)(c); Code of Public Health 1953, art L2141-5.
\textsuperscript{128} Treating Infertility Act 2015, arts 19 and 36(1).
\textsuperscript{129} Or in case of the death of the commissioning parents. See: Treating Infertility Act 2015, art 21.3.
\textsuperscript{130} Code of Public Health 1953, art L2141-6 \textit{et seq}.
\textsuperscript{131} For the above reason some authors consider the institution of ‘embryo reception’ as a form of quasi-adoption. See, for example: M Gałążka, ‘Prawo Francuskie wobec Embrionu In Vitro’ (2000) 6 Państwo i Prawo 63, 67.
The most conservative model of regulation of ART, represented, for instance by the previously cited German statute, i.e. the Embryo Protection Act 1990, provides very little flexibility for both the commissioning couple and the treatment provider. For instance, the Act forbids creation of more than three embryos for the purpose of each round of IVF. Additionally, intentional use of the embryos in any aim other than achieving a pregnancy is equally unlawful. Finally, since all the created embryos must be transferred into the body of the prospective mother, we can speculate that embryo donation – to whatever person or body – is not an approved practice under German law.

As far as the relevant caselaw is concerned, the court disputes, reported so-far, arose when one of the commissioning spouses (partners) attempted to exercise control over the couple’s surplus, cryopreserved embryos without the other spouse’s (partner’s) consent or after its withdrawal; the court’s task typically boiled down to examining the contractual arrangements related to provision of the fertility treatment, together with the corresponding legislation in force.

With reference to the law of England and Wales, we should return, in particular, to the 2004 judgment issued by the Court of Appeal in the case of Evans v Amicus

---

132 Embryo Protection Act 1990, s 1(1)(4).
133 Embryo Protection Act 1990, s 2(1).
134 A similar, restrictive approach was followed by the Italian legislature, which can be evidenced by the norms of the 2004 ‘Law 40 concerning medically assisted procreation’ (Norme in materia di procreazione medicalmente assistita), Official Journal No 45 of 24 February 2004, which regulates ART on the grounds of domestic law. The ‘Law 40’, regarded as one of the strictest in Europe, has been, nonetheless, subject to several amendments resulting from the caselaw of the Italian Constitutional Tribunal. In particular, the Tribunal declared unconstitutionality of the original bans imposed on transferring maximum three embryos during each IVF cycle (2009), creating surplus embryos (2009) or AID (2014).
To briefly recount the facts of the case, in 2001 Natallie Evans and her partner, Howard Johnston, availed of gamete retrieval and IVF in the aftermath of Ms Evans’ ovarian cancer diagnosis. The embryos – created in vitro – were subsequently cryopreserved with the view of their future implantation. Nearly a year later, as the couple had separated, Mr Johnston decided to withdraw his consent to further storage of their embryos and opted for their destruction.

The Court of Appeal, while considering the strict statutory requirement of both partners’ ‘effective consent’ to embryo storage, rejected Ms Evans’ plea and disallowed appeal to the House of Lords. As all the three judges unanimously affirmed, although the clinic’s decision to discontinue the treatment, which consequently deprived the appellant of a chance to become a genetic mother, interfered with her right to private life, such interference was deemed proportionate. It is because the other commissioning partner enjoys an analogous right not to become a parent. As Arden LJ put it, motherhood could not be forced on Ms Evans and, likewise, fatherhood could not be forced on her ex-partner, particularly, due to the fact that such commitment would ‘probably involve financial responsibility in law for the child as well’.

Finally, from an Irish perspective, it would be impossible to avoid references to the – also previously commented on – 2010 judgment issued by the Supreme Court in the case of Roche v Roche. In the first part of the Roche ruling, based
on a factual scenario resembling Evans, Murray CJ concentrated on the ‘contractual aspect’, i.e. possible existence of an enforceable contractual bond between the spouses. Once established, such a bond could, firstly, give rise to Ms Roche's right to exercise control over the couple's spare, cryopreserved embryos and, secondly, could estop Mr Roche from refusing to give his consent in the circumstances examined. Murray CJ was, nonetheless, satisfied that there had been no agreement, express or implied, as to the use of the embryos and, hence, the principle of estoppel would not apply. Similarly to the justices in Evans, the cited judge did, instead, consider Mr Roche's right not to procreate as a ‘proportionate interference’ with the right to procreate, enjoyed by his ex-wife.

The right to make dispositions with regard to embryos in vitro was also reflected upon by a number of American courts. In this context one should mention, in particular, the frequently cited 1992 judgment, issued by the Tennessee Supreme Court in the case of Davis v Davis, as well as a subsequent, similar case of Kaas v Kaas, which was ruled by the New York Supreme Court in 1998.

The first of the two cases concerned a married couple who, after numerous failed attempts to achieve a pregnancy by means of IVF, decided to get divorced. During the divorce proceedings the spouses remained in dispute only as to one, previously undecided issue, namely: the fate of their seven unused,

---

138 To recall, Ms Roche intended to avail of IVF with the use of the three surplus embryos, contrary to the wishes of her estranged husband.
139 Roche (n 137) para 40 (Murray CJ).
140 Ibid para 39 (Murray CJ).
141 Davis v Davis [1992] 842 SW 2d 588; hereinafter Davis.
cryopreserved embryos, stored at a fertility clinic. Junior Davis preferred to have the embryos destroyed, whereas his wife, Mary Sue, eventually decided to donate them to an anonymous, childless couple. At first instance, the trial court held that a frozen embryo was to be treated as ‘belonging or relating to man’ and, in consequence, the power of disposal was granted to Mrs Davis.

The judgment was subsequently reversed by the Tennessee Court of Appeals on the grounds that both spouses enjoyed equal right to decision-making authority in respect of their embryos; however, Mr Davis’s right to avoid procreation, as a constitutionally acknowledged and protected freedom, prevailed. In its final ruling the Supreme Court decided that an unimplanted human embryo in vitro remains a peculiar entity which can be described as ‘neither a person nor a thing’, but which, at the same time, deserves legal protection due to its potential of becoming a person. In support of the appellate court’s arguments, it was proposed that the State’s interest to protect potential human life does not justify limiting procreative autonomy of prospective parents, whose gametes had been retrieved for the purpose of ART. To that end, Mr Davis’s right not to reproduce was given priority, while the couple’s embryos were ordered to be left at the disposal of the fertility clinic, where, in time, they would be allowed to perish.

The parties of the latter case, Steven and Maureen Kaas, were in a nearly identical situation as Mr and Mrs Davies. However, they had originally stipulated in two separate agreements that, firstly, if they were to divorce, the ‘custody’ of their five frozen embryos remained subject to the court’s discretion, and, secondly, if the
IVF procedure did not result in a pregnancy,\textsuperscript{143} the embryos were to be donated for scientific research. These terms were subsequently challenged by Mrs Kaas, who sought control over the embryos in order to repeat the attempt of implantation.

Initially, the court rendered the spouses’ agreements as insufficiently clear. At the same time, it agreed with Mrs Kaas’s request, while explaining that the husband’s procreative right in cases of IVF was the same as in cases of natural reproduction, i.e. his power of disposal ended at the moment of fertilisation, when the wife became the sole ‘custodian’ of the embryo.

The Supreme Court rejected the above analogy, while holding that fundamental rights governing the relationship between the prospective mother and the embryo (foetus) cannot be invoked before implantation takes place. Moreover, it did not find any alleged inconsistencies in the agreements in question. After approving \textit{Davis}, the judges stressed that joint decisions made by the couples undergoing fertility treatment are both personal and conclusive, i.e. they cannot be subsequently altered by the spouse who has changed his (her) mind in due course. The New York Court of Appeal, while reassessing the case in line with the above stated instructions, ultimately decided that the couple’s embryos would be donated for scientific research.

\footnote{\textsuperscript{143} Or where they were no longer capable of making decisions in respect of their embryos.}
The line of reasoning from *Davis* and *Kaas* was followed in a number of subsequent judgments, such as the decision issued by the Supreme Court of New Jersey in the case of *JB v MB*.\(^{144}\) Here, it was decided that a woman, who no longer wishes to have the surplus embryos implanted in her uterus, enjoys an analogous ‘right not to procreate’ and, thus, she cannot be forced to continue IVF attempts in order to keep the embryos alive.\(^{145}\) It is also interesting to mention the judgment issued by the Washington Appellate Court in the case of *Litowitz v Litowitz*.\(^{146}\) Here, on the other hand, the right of control in respect of the couple’s two frozen embryos was granted to Mr Litowitz, not only because he was the spouse wishing to avoid procreation, but also because he was the exclusive gamete provider, as the couple had used donated ova and hired a surrogate mother for their previous pregnancy.

On the margin, it should be noted that the ‘embryo custody’ disputes prompted many state legislatures to introduce corresponding statutory measures. In consequence, similarly to the case of European countries, couples seeking assistance in conception in the United States are now commonly obliged to provide joint, binding instructions concerning future use of their surplus, cryopreserved embryos in the event of their divorce, death or other circumstances resulting in discontinuation of the fertility treatment.\(^{147}\)

\(^{144}\) *JB v MB* [2001] 783 A 2d 707.

\(^{145}\) For similar arguments, see: *AZ v BZ* [2000] 150, 725 NE 2d 1051.

\(^{146}\) *Litowitz v Litowitz* [2000] 10 P 3d 1086.

Out of the abovementioned statutes, it is vital to mention Title 9 of the Louisiana Revised Statutes 1950, entitled 'Civil Code-Ancillaries'. Uniquely, according to its §123, during the period preceding its implantation in the uterus, an artificially fertilised human ovum is already regarded as a 'juridical person'.\textsuperscript{148} As a result, such embryos are not treated as property of the prospective parents, gametal donors or fertility clinics.\textsuperscript{149} Any individual couple availing of ART under Louisiana law are treated as parents and exercise parental rights in respect of their embryos, as long as their identity has been divulged.\textsuperscript{150} Moreover, the unused embryos cannot be deliberately destroyed,\textsuperscript{151} but are compulsorily handed over for the purpose of subsequent ‘adoptive implantation’. In such cases, the commissioning couple’s parental rights are waved \textit{expressis verbis} and successively transferred onto the prospective, adoptive parents.\textsuperscript{152} Finally, pursuant to §131, all disputes concerning the authority of disposal in the cases examined are to be resolved in the best interests of the individual embryo.\textsuperscript{153}

In conclusion, it could be summarised that the Louisiana model provides a distinct example of a solution, whereby norms of family law, as opposed to the norms of contract law or to \textit{sui generis} quasi-parental, quasi-property rights, are applicable, in both theory and practice, in respect of an embryo \textit{in vitro}.

\textsuperscript{148} Louisiana Revised Statutes 1950, No 9, §123.
\textsuperscript{149} Louisiana Revised Statutes 1950, No 9, §126.
\textsuperscript{150} Louisiana Revised Statutes 1950, No 9, §126.
\textsuperscript{151} Louisiana Revised Statutes 1950, No 9, §129.
\textsuperscript{152} Louisiana Revised Statutes 1950, No 9, §126.
\textsuperscript{153} Louisiana Revised Statutes 1950, No 9, §131.
CHAPTER 2
Embryo (Foetus) and the State’s Agents Acting in Loco Parentis

1. Agents of the State Acting in Loco Parentis

As has been universally accepted worldwide, legal parents remain their children's primary carers. At the same time, the State, while protecting the child welfare principle, enjoys broad powers of control over the parental conduct. The control in question takes two different forms. First, family law in continental jurisdictions envisages appointment of specialised agents, i.e. curators and tutors (also referred to as guardians).\(^{154}\) Second, in common law countries such surveillance can be exercised directly by the courts.

1.1 Roman Genesis of Curatorship

Curatorship derives from the Latin institution of \textit{cura} (\textit{curatio}), broadly understood as ‘care’\(^{155}\) or ‘concern for someone or something’\(^{156}\). It should be explained that during Roman times the term encompassed various arrangements which included an element of one person’s supervision over another person or

\(^{154}\) It should be explained that according to family law of continental countries, a tutor provides comprehensive care for another person, whereas a curator usually provides such care in a more limited scope or in more specific circumstances (e.g. a curator of a deceased or ‘absent’ person). See, for example: Gottwald et al (n 63) 92; E Holewińska-Łapińska’s definition of ‘curatorship’ in Kosikowski and Smoktunowicz (n 63) 403. See also: Ignatowicz and Nazar (n 2) 457.


thing (things), such as, for instance, animals, estates or public works. According to Berger, the term operated in the domain of both public and private law. In respect of the latter, *cura* could be more precisely defined as an institution, whereby the wellbeing and (or) the property of an individual, who was unable to manage his own affairs due to particular trait or hardship, were legally safeguarded by another individual. Berger also points out that the private law variation of *cura*, which had already been acknowledged by the Law of Twelve Tables, resembled to a certain degree the institution of guardianship (*tutela*). The Roman curatorship was normally exercised over minors (*cura minorum*), spendthrifts (*cura prodigi*), mentally disabled (*cura furiosi*) and absent persons (*cura absentis*). Lastly but most importantly, a particular form of curatorship, referred to as *cura ventris*, was introduced to represent the rights and interests of the *nasciturus*, i.e. the ‘one whose birth was expected’.

Interestingly, the word *venter* in plain Latin represents an abdomen or its insides. However, since the Roman jurists treated it as a synonym of the words ‘uterus’ and ‘foetus’ (*qui in ventre est*), the expression *curator ventris* could be equally translated as ‘curator of the womb’ or ‘curator of the foetus’.

158 In Roman public law *cura* embraced the duties of public officials connected with various branches of administration. See: Berger (n 157) 420.
159 The divergences between the scope of rights and obligations delegated to curators as opposed to tutors gradually faded. They disappeared entirely in the postclassical and Justinian times. See: Berger (n 157) 420.
160 The term, understood as ‘the one inside the uterus’, appears, for example, in the text of the Justinian’s Digest, in the excerpts attributed, *inter alia*, to: Marcianus (D. 1, 5, 5, 2), Paulus (D. 5, 4, 3) or Ulpianus (D. 37, 9, 1 et seq).
161 See: Niczyporuk (n 156) 31-33. As will be further demonstrated, nowadays a *curator ventris* can be equally appointed for an unimplanted embryo *in vitro*. Therefore, in this thesis the term *curator ventris* will not be understood narrowly as ‘a curator of the womb’ but broadly, as ‘a curator of an embryo (foetus)’. 

308
During Roman times a *cura ventris*\(^{162}\) protected and represented the full spectrum of rights and interests of his unborn pupil, while safeguarding the interests of the pupil’s family and those of the State. Since the law entrusted the above mission with the family father (*pater familias*), the curator was appointed in the event of the latter’s death. According to Niczyporuk, the appointment took place by virtue of the *pater familias’* testamentary disposition authorised by a magisterial order (*imperium*). In case where no disposition had been made, *imperium* was issued upon request submitted by the pregnant woman or by another interested party.\(^{163}\) If the family father had not indicated any particular person in his last will, the curator was carefully selected by magistrates from amongst the most suitable candidates.\(^{164}\) *Cura ventris* ceased, in principle, at the moment of birth of the child that it concerned.

As can be assumed, appointment of a *cura ventris* served, in the first place, to safeguard rights and interests attributable to the *nasciturus* under the Roman law of succession. Thus, the curator was vested with powers of administration and custody over the inherited assets to which his pupil, once born, would be entitled.\(^{165}\) In addition, the curator – as a rightful ‘proxy’ of the deceased family father – was obliged to maintain and care for the pregnant woman. In particular, he ensured that the woman stayed in good health throughout gestation and enjoyed an appropriate material and social status.\(^{166}\) While remaining in office,

\(^{162}\) Or a *cura ventris bonisque datus*.

\(^{163}\) Such as, for example, a successor or a creditor of the pregnant woman’s deceased husband. See: Niczyporuk (n 156) 161, 163 and 166.

\(^{164}\) Ibid 168-169.

\(^{165}\) Ibid 178. The above tasks were enumerated by Hermogenianus (D. 26, 7, 48).

\(^{166}\) Ibid 183-188.
the curator was subject to magisterial control and incurred civil liability for pecuniary loss which was suffered by his pupil in consequence of his actions – both malicious (e.g. embezzlement of the assets) and negligent (e.g. insufficient administration resulting in destruction or devaluation of the assets).\textsuperscript{167}

In summary, Niczyporuk underlines that, during Roman times, \textit{cura ventris}, together with the corresponding institutions of \textit{inspectio ventris} and \textit{custodia partus},\textsuperscript{168} provided the \textit{nasciturus} with sufficient and broad protection.\textsuperscript{169}

The mere idea, whereby the rights and interests of an embryo (foetus) can be safeguarded by a curator, served as inspiration to some of the continental legislatures, for example, in Poland and Germany. Considering the fundamental differences between Roman family law and contemporary family law, which largely flow from the previously described position of the Roman \textit{pater familias}, the modern \textit{curator ventris} does not, quite obviously, have much in common with his ancient counterpart. These differences will be further elaborated in the subsequent sections.

\subsection*{1.2 Common Law Genesis of Wardship}

Under the law of England, Wales and Ireland a child, whose welfare is at danger of being compromised, can be made a ward of court.

\textsuperscript{167} Ibid 196-201.
\textsuperscript{168} These institutions served to establishing the fact of pregnancy through medical assessment and preventing newborn mix-up once the child was born. See: D. 25, 4, 1, 10 (Ulpianus).
\textsuperscript{169} Niczyporuk (n 156) 211.
A ward of court can be briefly defined as a person who is unable to look after his own affairs and, thus, he, together with his property, deserves to be protected by the judicial organs. The common law commentators frequently point out that the origins of wardship date back to the feudal times, when the Sovereign, acting as *parens partiae*, was obliged to safeguard the rights and interests of the more vulnerable individuals.\(^{170}\) In Ireland, after commencement of the Assisted Decision-Making (Capacity) Act 2015,\(^{171}\) the wardship proceedings are initiated exclusively in cases of minors and are no longer initiated in cases of mentally incapacitated adults.\(^{172}\)

As the literature reports, the original *ratio legis* behind wardship was not to protect the ward’s wellbeing but to safeguard his property rights. However, nowadays it is still possible to become a ward of court even if no property interests are involved. As far as minors are concerned, wardship is aimed, firstly, at protecting them from potential harm resulting from the others’ actions and, secondly, at preventing them from acting unreasonably (e.g. from fleeing the family home).

It could be argued that the court exercising wardship acts truly *in loco parentis*, as its role boils down to deciding what, in any given scenario, lays in the ward’s

---


\(^{171}\) Assisted Decision-Making (Capacity) Act 2015 (No 64 of 2015).

\(^{172}\) The Act repeals the previously binding Lunacy Regulation (Ireland) Act 1871 (c 22), while providing interim arrangements for mentally incapacitated adults, who had become wards of court before its commencement. Those adults, who were not previously made wards of court, can now avail of decision-making supports, i.e. assisted decision-making, co-decision-making and court decision-making in particular cases. The above supports have been introduced by the Act in lieu of wardship.
best interest. As Hamilton CJ pointed out in *Re a Ward of Court*,\(^{173}\) during the abovementioned decision-making process, the court ‘(...) adopts the same attitude as a responsible parent would do in the case of his or her own child.’\(^{174}\)

Once wardship is established, the court is vested with wide powers of control over the ward's life. Most importantly, although the day to day care over the ward is granted to the indicated individual or local authority, the right of the ward’s custody is still vested in the court. Hence, the ward’s carers are obliged to consult the court when making decisions concerning the most important aspects of his life, such as, for example, place of his residence, health, education, maintenance, etc.\(^{175}\)

Universally, control over wardship is exercised by the High Court.\(^{176}\) The proceedings can be initiated by any concerned individual, including family members, foster parents or social workers.\(^{177}\) Finally, wardship ceases when the under-aged minor reaches majority and is discharged by the court.\(^{178}\)

---

\(^{175}\) Nestor (n 170) 434.  
\(^{176}\) The solution applies, for instance, in Ireland, Northern Ireland and in England and Wales.  
\(^{177}\) Shatter (n 3) 599.  
\(^{178}\) Shatter (n 3) 596-597.
2. Agents of an Embryo (Foetus)

It is now necessary to decide to what extent the hitherto examined general provisions regulating the institutions of curatorship and wardship would be applicable in the case of an embryo (foetus).

2.1 Poland and Other Continental Jurisdictions

2.1.1 Curator Ventris under Polish Family Law

According to article 182 P.F.C., a curator can be appointed for ‘a conceived but unborn child’, provided that it is necessary to safeguard the child’s future rights.\(^\text{179}\) From the moment of his appointment, the curator becomes a statutory representative of the embryo (foetus). The curator’s mission comes to an end at the moment of the child’s birth, when his duties are taken over by the child’s legal parents or, exceptionally, by a tutor.\(^\text{180}\)

Some Polish commentators argue that the term ‘conceived but unborn child’ must be understood broadly. In consequence, not only can the curator ventris be designated to represent the rights and interests of a child en ventre sa mère but

\(^{179}\) According to article 599 of the Polish Code of Civil Procedure 1964, Official Journal of the Republic of Poland, No 1964.43.296 (hereinafter P.C.C.P.), a curator ventris is appointed by a competent family court of the territory where the expectant mother has her domicile or habitual residence. The appointment becomes effective at the moment of its pronouncement.

\(^{180}\) In compliance with article 169 (in connection with article 178 §2) P.F.C., the curator’s mission may also come to an end as a result of his dismissal by the competent court. Furthermore, curatorship naturally expires in case of the curator’s death or death of the embryo (foetus).
he can also represent an artificially created embryo during the period preceding its implantation in the uterus.\textsuperscript{181}

In practice, similarly to the case of his Roman counterpart, a \textit{curator ventris} is ordinarily appointed for the purpose of succession proceedings in order to safeguard the right of a posthumous child to become an heir (legatee). Such protection may consist, for instance, of protecting the estate to which the unborn successor is entitled from third party neglectful (malicious) administration. Additionally, in compliance with the rules set out in articles 310 et seq P.C.C.P., the curator will be entitled to preserve evidence for the purpose of future tort law proceedings in case where an antenatal injury occurred.\textsuperscript{182}

Appointment of the curator may also turn out to be necessary in case of a pregnant minor, whose capacity to undertake legal actions is – by virtue of article 15 P.C.C. – limited in its scope. In practice, when no dispute arises, the court will usually delegate the role of a \textit{curator ventris} to one of the pregnant minor’s parents, who, in this context, will act as a representative of his (her) future grandchild.

On the margin, we could point to both advantages and disadvantages of such a customary solution. On the one hand, in the ‘parent-curator’ scenario it might be

\textsuperscript{181}See for example: Czarnik and Gajda (n 79) 106; K Gromek, \textit{Kodeks Rodzinny i Opiekuńczy. Komentarz} (2nd edn, CH Beck 2006) 1518; Haberko (n 20) 100; Haak and Haak-Trzuskawska (n 98) 274. Those who share an opposing view rely largely on historic interpretation of the norms of family law. Hence, they argue that, since IVF had not been known or practised at the time when P.F.C. was enacted, it is unlikely that an embryo \textit{in vitro} was originally regarded as a potential ‘addressee’ of article 182. See: Haberko (n 20) 96.

\textsuperscript{182}See, for example: Lech-Chełmińska and Przybyła (n 75) 373; Ignatowicz in Pietrzykowski (n 75) 1226.
difficult to distinguish between parental rights (duties) – being exercised in respect of the pregnant minor, and the curator’s rights (duties) – being exercised in respect of the embryo (foetus). It is because, here, the decision-making process equally has a bearing on both the ‘children’ concerned. On the other hand, however, appointing an independent individual as a curator ventris will further impede on the already complex relationship existing between the embryo (foetus), the pregnant minor and her parent (parents), in addition to affecting the scope of parental authority, enjoyed by the latter.

_De lege ferenda_, we could propose an alternative statutory solution – supported by both logic and pragmatism – whereby the pregnant minor’s parents would be _de jure_ vested with representation powers in respect of both their daughter and her foetus. In the majority of cases, such an arrangement would ensure that the rights, interests and welfare of all the parties involved are given sufficient consideration. It would also allow the legislature to reduce the amount of the State’s intervention into family affairs to a necessary minimum, as an independent, impartial curator could be appointed solely in a case of a conflict of interests, existing between the parents and their pregnant daughter.

The scope of competences enjoyed by a curator ventris under Polish law is also disputable. Most notably, it is not clear whether the curator can only safeguard the rights of the conceptus regarded merely as a ‘potential’ or ‘future’ natural person, or whether he can factually exercise such rights on behalf of an embryo.

---

183 See: T Sokołowski, ‘Sytuacja Prawna Małoletniej Matki przed Urodzeniem Dziecka’ (1995) 57(3) RPEiS 1, 4-5.
(foetus).\textsuperscript{184} An example which is frequently cited in this context, would be accepting donation on behalf of an unborn recipient.

According to some Polish commentators, including Czarnik, Gajda and Smyczyński, relying on literal interpretation of article 182 P.F.C., which mentions protection of ‘the child’s future rights’, leads to an analogous conclusion, whereby a \textit{curator ventris} cannot acquire or exercise any rights before that child is born.\textsuperscript{185} Others, including Ignatowicz, have adhered to an opposing view, while invoking a broader interpretation of the child welfare principle.\textsuperscript{186}

Finally, in support of the ‘extended’ scope of the curatorial competencies, a number of scholars, represented, for instance, by Nawrot, have gone a step further than Ignatowicz et al. Namely, Nawrot proposes that, once appointed, a \textit{curator ventris} will be entitled – or even obliged – to prevent the pregnant woman and (or) third parties from undertaking activities which could factually or potentially interfere with foetal wellbeing, such as maternal substance abuse, inappropriate lifestyle or performing an invasive medical procedure which is not aimed at preserving maternal life (health), including also procurement of an abortion.\textsuperscript{187} In attempt to justify his views, the cited scholar refers to the original \textit{ratio legis} behind curatoship, i.e. protecting vulnerable individuals from all kinds of threats. He subsequently argues that an analogous mission is vested in a

\textsuperscript{184} Ignatowicz in Pietrzykowski (n 75) 1226.
\textsuperscript{185} See: Czarnik and Gajda (n 79) 106 and T Smyczyński in T Smyczyński (ed), \textit{System Prawa Prawotneg}. \textit{Tom 12 Prawo Rodzinne i Opiekunckie} (CH Beck 2011) 830. A similar view, in respect of receiving donation on behalf of an embryo (foetus) was expressed by Wolter in his Gloss to Judgment of the Polish Supreme Court of 4 April 1966 [1966] 12 NP 1613.
\textsuperscript{186} Ignatowicz in Pietrzykowski (n 75) 1226; Ignatowicz in Ignatowicz and Nazar (n 2) 458-459.
\textsuperscript{187} As was previously explained in the Preface, the curator’s alleged competency to prevent a pregnancy termination is not going to be further discussed.
*curator ventris* – here, regarded as a ‘custodian’ of an embryo (foetus).\(^{188}\)

Different interpretation of article 182 P.F.C., writes Nawrot, would allow us to render protection of family rights under domestic law as ‘purely fictional’.\(^ {189}\)

On the other hand, Haak and Haak-Trzuskawska reached a conclusion similar to Nawrot’s, while reasoning *a minori ad maius*. Accordingly, if future (assumingly, matrimonial) rights of the child are to be protected by a *curator ventris*, than the case of such protection is even stronger in respect of non-matrimonial rights enjoyed by an embryo (foetus) at the time of the curator’s appointment. Hence, the curator would be entitled to protect foetal right to bodily integrity, the right not to be harmed, etc.\(^ {190}\)

This author is inclined to favour a narrower interpretation of the provision examined, firstly, due to the particular linguistic construction (i.e. ‘future rights’) which was used by the Polish legislature. It seems right to assume that the language of legal norms reflects the intentions that accompanied their drafters. If so, it also seems right to assume that certain words and formulations, appearing in the text of P.C.C., were selected in line with the purpose for which a given institution was created.

Secondly, this approach will be even more convincing, if we consider how article 182 P.F.C. is applied in practice by Polish family courts. Namely, in a vast majority

---

\(^{188}\) Nawrot (n 75) 321. For a similar line of argumentation, see for example: H Pietrzak, ‘Curator Ventris dla "Nasciturusa”’ (2011) 15/1-2 (28-29) Studia nad Rodziną 145, 157-158.

\(^{189}\) Nawrot (n 75) 131. Additionally, Nawrot approves the previously cited proposal, whereby the principle of child welfare is equally applicable to an embryo (foetus).

\(^{190}\) Haak and Haak-Trzuskawska (n 98) 275.
of cases, a *curator ventris* will, indeed, secure solely ‘future’ rights of his unborn pupil, i.e. the rights which will not become either exercisable or effective against third parties until and unless that pupil is later born alive. Hence, the curator may not, for example, seek judicial division of inherited assets on behalf of a successor *in utero* or institute civil proceedings against a person who inflicted antenatal harm, while acting on behalf of an unborn injured party.

Furthermore, even more importantly, one of the prospective parents (assumingly, the prospective mother) is ordinarily appointed as the *curator ventris*, if the child’s future rights are at stake.\textsuperscript{191} In cases of parental-foetal conflict the curator may be still appointed from among the prospective parents’ next-of-kin or may be even indicated by the parents, themselves.\textsuperscript{192} The above described customary practice may additionally confirm the hypothesis, whereby parental authority cannot be exercised in respect of an embryo (foetus).

On that account, the most probable *ratio legis* behind the institution of a *curator ventris* was vesting a prospective parent with the right to undertake actions on behalf of his (her) child, which would ensure that, once born, the child would not be placed in a disadvantaged position, for instance, it would not be unjustifiably impoverished or unable to claim damages as a result of evidential deficiencies. In consequence, it seems unlikely that the curator’s role would consist of ensuring appropriate standard of maternal lifestyle or preventing threats to foetal health (life). Firstly, in a vast majority of cases the pregnant woman will, herself, exercise

\textsuperscript{191} See for example: Haak and Haak-Trzuskawska (n 98) 275, Ignatowicz in Pietrzykowski (n 75) 1225 or Lech-Chełmińska and Przybyła (n 75) 373.

\textsuperscript{192} Pietrzak (n 188) 154.
Secondly, it would be hard to legally determine the catalogue of acts which constitute ‘inappropriate standard’. Hence, even if we consider the case where the role discussed was assigned to an impartial relative, would he be able to properly assess the risk and (or) to intervene without having sufficient medical knowledge? The last-mentioned remark will be further reflected upon in the final section of this part.

2.1.2 Curator Ventris under German and Italian Law

It has been reported that the German response to the issue of legal representation of an embryo (foetus), already adopted in the original 1900 version of the B.G.B., served as a model regulation for drafters of the Polish Family Code.\textsuperscript{193} As will be evidenced below, although the Polish statutory solution bears some similarities to the German one, the latter seems to be both more comprehensive and more transparent.

In particular, it has to be noted that the German legislature opted for two separate institutions of family law which can now be relied upon in the situations discussed, i.e. an embryo (foetus) can be represented by either a curator or a tutor.\textsuperscript{194}

\textsuperscript{193} Pietrzak (n 188) 151-152.

\textsuperscript{194} The German word \textit{Vormund}, which was used in the wording of §1774 B.G.B. could be equally translated as ‘a guardian’. Here, as should be recalled, guardianship is understood as an institution of continental family law, derived from the Roman \textit{tutela}.
As for curatorship, the first sentence of §1912 B.G.B. stipulates that a *curator ventris (Der Pfleger für die Leibesfrucht)*\(^{195}\) can be appointed for an ‘unborn child for the safeguarding of its future rights to the extent that these require care’. At the same time, we should recall that, according to the second sentence of the above cited provision, the prospective parents exercise parental care – here, an equivalent of parental authority – in respect of an embryo (foetus) in the same scope and manner as if the child was already born.

As far as guardianship is concerned, in line with §1774 B.G.B., if a child will require to be represented by a tutor upon birth, such a tutor can also be appointed before that child is born. The appointment will not, however, become effective, while the child is still *in utero*.

It could be, therefore, argued that under German law an embryo (foetus) will be primarily represented by the prospective parents, with the State agents playing merely a subsidiary role.

The similar line of reasoning was seemingly followed by the Italian legislature. Namely, in line with article 321 I.C.C., in case where one or both parents, enjoying parental authority, cannot – while acting in the child’s interest – perform an act (acts) remaining beyond the limits of administration ‘in the ordinary course’, the judge can, upon request of persons specified by the statute and after hearing the parents, appoint a curator for the child and authorise him to perform such an act.

\(^{195}\) Literally translated as ‘the foetus’s carer’.
(acts). While considering the previously cited, preceding article 320 I.C.C., whereby the prospective parents represent their expected offspring in all civil acts and administer their property, the appointment seems to be possible before the child's birth.\(^{196}\)

### 2.2 Ireland and Other Common Law (Mixed) Jurisdictions

In common law countries there is no equivalent institution of the continental curator ventris. Accordingly, we should consider, in the first place, the possibility of awarding an embryo (foetus) the status of a ward of court.

The possibility to recourse to wardship in this context has not been yet addressed by any of the Irish judgments. However, some important guidelines can be drawn from the caselaw of England and Wales.

#### 2.2.1 Warding an Embryo (Foetus) under the Law of England and Wales

In the landmark 1988 case of Re F (In Utero),\(^{197}\) which was initially noted in the previous part of this thesis, the English Court of Appeal decided that a foetus cannot be made a ward of court. In the above case a 36-year-old single woman, being a drug addict and a mental illness sufferer, disappeared from her flat at the

---

\(^{196}\) Finally, in this context it is also appropriate to mention the previously cited Louisiana Revised Statutes 1950, No 9, which, in its §126 regulates a particular form of curatorship ventris in respect of an embryo in vitro. According to the cited paragraph, a court of the parish, where such an embryo is located, may, upon motion lodged by the commissioning parents (or other specified individuals), appoint a curator in order to safeguard the embryo’s rights and interests.

\(^{197}\) Re F (In Utero) [1988] Fam 122; hereinafter Re F.
final stage of her second pregnancy. The woman concerned had been leading a nomadic, casual lifestyle since her early twenties and had not previously availed of antenatal care. At the time of her disappearance her elder child had already been looked after by long-term foster parents with the perspective of being adopted. A local authority sought a court order empowering the Tipstaff, assisted by the police, to trace the woman's whereabouts. Once located, she would also be prevented from leaving her domicile and required to attend the hospital for the imminent birth of her child. Lastly, the authority also lodged an ex parte application for leave to issue a summons making the foetus a ward of court.

The authority's approach to the problem, ironically described by Grubb and Pearl as 'ingenious', was rejected by Hollings J at first instance. On appeal, May, Balcombe and Staughton LJJ upheld the judgment discussed, while providing four principal arguments in support of their decision.

Firstly, according to both May and Balcombe LJ, the law of England and Wales introduced wardship in order to protect minors; with reservation that minority begins at birth. Thus, to put it simply, if the minor does not yet exist, there is no ward for the court to protect. Secondly, by following the line of reasoning from judgments such as *Paton v British Pregnancy Advisory Service Trustees and Another* or *C v S*, the learned judges reiterated that under common law an embryo (foetus) does not enjoy legal personality and, hence, it cannot be a subject

---

199 *Re F* (n 197) 138 (May LJ).
200 *Paton v British Pregnancy Advisory Service Trustees* [1979] QB 276.
of wardship proceedings. Thirdly, awarding the embryo (foetus) a status of a ward of court could interfere with the rights and interests of the pregnant woman and, hence, result in an inevitable conflict. To put it in the words of May LJ: ‘(u)ntil the child is actually born there must necessarily be an inherent incompatibility between any projected exercise of wardship jurisdiction and the rights and welfare of the mother’.202

Fourthly and finally, the judges observed that making an embryo (foetus) a ward of court would result in serious practical difficulties in case where the pregnant woman did not, herself, comply with the court’s order. According to May LJ, it would be hard to acknowledge the court’s jurisdiction to issue a committal order in the situations examined.203

For the above stated reasons, children under the law of England and Wales can be made wards of court exclusively after they are born. May LJ established that vesting the courts with jurisdiction to ward an embryo (foetus) lies within the competences exercised by the national Parliament.204

It should be noted that the outcome of Re F was followed by an equal number of both supportive and critical comments. The critics argued, above all, that the law regulating wardship was interpreted too narrowly by the Court of Appeal.205 Furthermore, as was observed, the lack of legal personality of an embryo (foetus)

202 Re F [n 197] 135-136 (May LJ) and 141 (Balcombe LJ).
204 Ibid 139 (May LJ).
under common law remained an irrelevant factor, since the child, despite being the direct beneficiary of protection flowing from wardship, is never a party of the corresponding court proceedings.206

Irrespective of the criticism expressed by those commenting on the case discussed, it could be well argued that the door to making an embryo (foetus) a ward of court has been tightly closed, at least on the territory of England and Wales.207

### 2.2.2 Hypothetical Alternatives to Wardship

Despite the clear exclusion of wardship in the present context, legal scholars have pointed to a number of instances, where prenatal occurrences were, nonetheless, given due consideration by some of the English family courts.

Firstly, as some of the scholars observed, the court can issue a care order in respect of an infant, while relying on the premise of evidenced, improper maternal conduct in the course of the pregnancy. The 1986 judgment, issued by the House of Lords in the case of *D (A Minor) v Berkshire County Council*208 is frequently cited in support of this stance. The facts of the case were the following. A woman with a previous history of drug-addiction was regularly taking narcotics (both orally and intravenously) throughout the entire period of her gestation.

---

206 Grubb and Pearl (n 198) 363.

207 Interestingly, foetuses were successfully made wards of court by a number of American courts in the aim of facilitating forced medical interventions on pregnant women. See, for example: *Jefferson v Griffin Spalding Country Hospital Authority* [1981] 274 SE 2d 457.

208 *D (A Minor) v Berkshire County Council* [1987] 1 All ER 20; hereinafter *D*. 
Seemingly, she had been aware of the fact that her behaviour could be harmful to the developing foetus. Unfortunately, the above risk materialised, i.e. once born, her child was diagnosed with symptoms of drug withdrawal and required intensive medical care.

As a protective measure, an application for a place of safety order was sought by Berkshire County Council under section 1(2)(a) of the then binding Children and Young Persons Act 1969.\(^{209}\) It should be explained that – at the time when D’s case was being proceeded – a care order could be issued in cases of avoidable prevention of the child’s adequate development, avoidable impairment (neglect) of his health, or where the child was being ill-treated. In addition, the abovementioned harm (ill-treatment) could not be merely regarded as a potential threat to the child’s health or well-being, but it must have already been established at the time when the proceedings commenced.

In the light of D’s circumstances, the need for State intervention was not disputed. Hence, the Council had initially succeeded in securing a number of interim care orders, and, in the end, a full care order was granted. The court’s decision, was, nonetheless, challenged by the child's guardian ad litem with the aim to establish whether the premise described in section 1(2)(a) could be still fulfilled in cases where a parent had not yet been able to exercise legal care over his (her) child and the only evidenced harm (ill-treatment) occurred at the time when that child was still in utero.

\(^{209}\) Children and Young Persons Act 1969 (c 54). The cited section was subsequently repealed by section 108(6)(7) of Children Act 1989.
At the Divisional Court, Hollings J declared that the court exceeded its jurisdiction, while issuing a care order in respect of D. He relied on section 70 of the Children and Young Persons Act 1969, defining ‘infant’ as ‘a person under the age of fourteen’. Hence, as he argued, in order to be able to apply section 1(2)(a) of the cited statute, the court was to establish improper parental conduct in relation to a child already born.\textsuperscript{210}

His views were subsequently rejected by the Court of Appeal and, ultimately, also by the House of Lords. In his final judgment, Brandon LJ pointed out, in particular, that both the wording of section 1(2)(a)\textsuperscript{211} as well as observations from the previous, relevant caselaw\textsuperscript{212} supported a conclusion, whereby development, health and treatment of a child were, themselves, continuing concepts. On that account, when considering an application for a care order not only should a family court look at the child’s situation as it was at the time of the proceedings, but also – as it had been beforehand.\textsuperscript{213}

Considering the case examined, it remained beyond doubt that D’s proper development ‘had already been avoidably prevented and her health had already been impaired’ at the time when the care proceedings commenced.\textsuperscript{214} At that time, D – as a six-week-old infant – was also a child in line with the previously

\textsuperscript{210} D (n 208) 25 (Hollings J).
\textsuperscript{211} i.e. the use of present continuous tense (‘is being’).
\textsuperscript{212} He relied, most notably, on the observations made by Bush J and Butler-Sloss J (as she then was) in \textit{M v Westminster City Council}. As the last-mentioned judge underlined: ‘For my part, I find it impossible to find that for the primary condition to be established the child’s proper development can only be considered as being avoidably prevented at the time of the hearing. (…) The present must be relevant in the context of what has happened in the past (…)’. See: \textit{M v Westminster City Council} [1985] FLR 325, 336 (Butler-Sloss J).
\textsuperscript{213} D (n 208) 42 (Brandon LJ).
\textsuperscript{214} Ibid.
cited section 70. In the light of the gathered evidence, it was also indisputable that D’s condition was causally linked to her mother’s actions. The court did not find anything in the Children and Young Persons Act 1969 that would prevent it from considering the prenatal period for the purpose of applying the Act’s section 1(2)(a). Finally, it was argued that a broader interpretation of the provision discussed would best fulfil the aim of child protection in which the cited piece of legislation had originally been enacted.

Brandon LJ’s stance was further supported by Goff LJ, who, nonetheless, placed an emphasis on both the past and the future situation of the child, considered to be placed in care. He stressed, in particular, that mere avoidable impairment of the child’s proper development, which had occurred in the past, was not, itself, sufficient to trigger application of section 1(2)(a), even when the consequences of such an occurrence became fully apparent only after the child was born. According to the cited judge, a care order could be issued on the basis of improper maternal conduct – which, in the light of the gathered evidence, began in the past – only when it was highly probable that such conduct will also persist into the future.215

As Bainham rightly observes, in the scenarios examined the court will assess the situation of the newborn child per se. On the other hand, past maternal behaviour will be used as evidence, while determining the risk of the child’s ill-treatment during the weeks and months to come.216 For that reason, we could well assume

215 Ibid 43-45 (Goff LJ).
that – in the present case – D was placed in care not because her mother had behaved irresponsibly during her pregnancy but because it was highly probable that ‘her addiction would prevent her from being fit to be a parent’. 217 To sum up, when faced with a child welfare issue, the family courts in England and Wales will assess the events preceding the child’s birth solely in conjunction with that child’s prognosticated future.

Nevertheless, while examining some more recent caselaw, we could observe that the last-mentioned prognosis was being acknowledged while the child was still in utero and, hence, the restrictions were already being imposed on the expectant parents. Such an approach could, prima facie, suggest gradual shift towards acknowledgment of foetal prerogatives under the family law of England and Wales.

To provide a corresponding example, we should refer, in particular, to the High Court’s 2009 judgment issued in the case of Bury Metropolitan Borough Council v D. 218 The facts of the case were the following. A local authority applied under inherent jurisdiction for permission not to inform an expectant mother, D, about the content of a care plan, which envisaged that her child, once born, would be immediately removed from her care and, as soon as possible, an Emergency Protection Order would be sought. It is also important to mention that at the time when the Court’s emergency sitting began, the woman in question, who was serving a prison sentence, had already gone into labour.

217 Ibid.
218 Bury Metropolitan Borough Council v D [2009] EWHC 446 (Fam); hereinafter Bury MBC v D.
The woman had been remaining in a mentally unstable, distressed state since her arrival in prison. She was subject to fifteen-minute watch due to an attempted suicide; she had also had a previous record of violent behaviour in respect of her older child, referred to as L, which ultimately resulted in placing L in foster care. In consequence, the local authority became concerned that, on learning the content of the care plan, D would present a risk of serious bodily harm to the child that she then expected.219

The core problem, identified by Munby J, was whether, in spite of obligations imposed under Article 8 of the ECHR 1950, it was lawful for the local authority not to fully include the expectant parents ‘in the birth planning of their future child, as would normally be required’.220 The cited judge began his analysis from assessing the scope of jurisdiction. He excluded a possibility to rely either on wardship or the related welfare institutions that were available under Children Act 1989. At the same time, he acknowledged the court’s jurisdiction to grant anticipatory declaratory relief in the instant case.221 In the end, the local authority’s course of action was decided to be lawful in the light of Article 8, and, accordingly, they were permitted not to divulge the content of the care plan to the woman and to her partner.222 Munby J did, nonetheless, underline that such a

---

219 During her conversation with a social worker she reportedly repeated that ‘her children would be better off dead rather than be in the care of the local authority’. Bury MBC v D (n 218) para 17 (Munby J).
220 Ibid para 5 (Munby J).
221 ‘The fact that the child is as yet unborn means that I cannot exercise jurisdiction under the Children Act 1989; it means that I cannot exercise jurisdiction in wardship. But it does not prevent me (…) exercising jurisdiction under the general law to declare the conduct of the local authority either compliant or (…) non-compliant with Article 8’. Bury MBC v D (n 218) para 12 (Munby J).
222 Ibid para 29 (Munby J).
drastic measure could only be justified by ‘extraordinarily compelling reasons’.\textsuperscript{223} In other words, exclusion of the expectant parents from the birth plan was only possible in highly exceptional and rare situations.\textsuperscript{224}

It should be observed that Munby J’s findings were relied upon in successive judgments, including, for example, the 2014 similar case of \textit{North Somerset Council v LW and Others}.\textsuperscript{225} Here, a local authority was also planning to remove a child at birth without disclosing their intention to a vulnerable expectant mother. The woman concerned suffered from hebephrenic schizophrenia and learning difficulties, linked to her very low IQ. Furthermore, she had previously struggled to follow guidelines offered by the healthcare professionals and social workers, who had been engaged in her case. Due to the serious mental illness, she had been unable to control her emotions, which resulted in recurring episodes of violence and abuse. Finally, as her condition had been deteriorating at the time when the court proceedings commenced, the authority became concerned that she might not be fully aware of going into labour or be unwilling to cooperate with the medical team after its commencement.

In the light of the presented evidence, Keehan J decided that the mother would present a substantial risk of physical harm to herself and even more substantial risk of such harm to her child, had she known that the local authority planned to remove the newborn from her care. He concluded that the premise of highly

\textsuperscript{223} Ibid para 14 (Munby J).
\textsuperscript{224} Ibid para 25 (Munby J).
\textsuperscript{225} \textit{North Somerset Council v LW and Others} [2014] EWHC 1670 (Fam).
unusual circumstances, established by Munby J in *Bury MBC v D*, was duly satisfied in the present case.²²⁶

Returning to our initial assumption, the above presented line of caselaw does not, in this author’s view, represent a shift towards the more comprehensive protection of an embryo (foetus) on the grounds of family law of the jurisdiction examined. Firstly, apropos of *Bury MBC v D*, Munby J was concerned that the mother would be capable of harming her child *at the time of birth*; at no time was the possibility of harming the child *in utero* considered. As he reiterated on a number of occasions, excluding the expectant parents from the care planning process was aimed to ensure ‘the physical safety during *the period immediately following birth* of the as yet unborn child’.²²⁷ We could well speculate that similar reasoning was followed by Keehan J in *North Somerset Council v LW and Others*. Furthermore, it should be observed that – at the time when the authorisation was being granted – both women in question were very close to giving birth; in the former case, the delivery had, in fact, begun. To summarise, we could propose that, in cases concerning lawfulness of certain pre-birth arrangements, the common law court will act in a similar manner to the continental *curator ventris*; i.e. it will protect future rights and interests of a child *in utero*, if, in the presence of exceptional circumstances, these remain at risk of being violated.

As far as Scotland is concerned, the need to propose an alternative to wardship in the present context stems from the fact that the procedure examined has not been

²²⁶ The child in question was subsequently taken into care on the basis of an interim care order. The restriction order, granted by Keehan J, was lifted.
²²⁷ *Bury MBC v D* (n 218) para 25 (Munby J); emphasis added.
recognised by Scottish family law. On that account, Norrie, for instance, considers a possibility of acknowledging the right of prenatal custody *in loco parentis* by means of a judicial decision. However, at this point, we need to recall that, first, custody essentially involves elements of physical care and control exercised over another individual. Second, in case of the relationship between an embryo (foetus) and the pregnant woman, one is confronted with two co-existing human organisms; the former being fully dependant on the latter.

In response, according to Norrie, if the right of custody was to be exercised before the child’s birth, it would have to be identified with the competence to make vital decisions concerning the wellbeing of the embryo (foetus). Furthermore, the cited commentator points to the 1555 Scottish judgment issued by the Court of Session in the case of *Murray v Marshall*, where a prospective father was allowed to make a testamentary disposition, allowing for appointment of a tutor for the purpose of safeguarding the interests of a child *in utero*. The court pointed out that the disposition would be deemed effective as long as the child was ‘lawfully begotten’. At the same time, the judgment did not specify what rights were to be protected and at what stage would the appointment become effective.

Finally, if looking from an American perspective, some commentators have proposed that protection of foetal rights could be better realised through the

---

228 See: Norrie (n 102) 75-77.
229 Ibid.
231 See: P Fraser, *A Treatise on The Law of Scotland, as Applicable to the Personal and Domestic Relations*, vol 2 (T & T Clark, 1846) 77.
judicial institution of a guardian ad litem.\textsuperscript{232} As should be explained, a guardian
ad litem, also referred to as ‘best friend’, is appointed by the court to represent a
child involved in the legal proceedings that touch upon the question of his welfare
(e.g. adoption orders or parental custody disputes).\textsuperscript{233} Accordingly, the guardian
is selected from among individuals with both legal and non-legal background,
who have received extensive training in child welfare advocacy. In the course of
the process, he will fulfil a range of tasks of both technical and procedural nature,
such as, for instance, monitoring the case, accessing the files, attending the
hearings or drawing reports.\textsuperscript{234}

According to Bonner and Sheriff, nearly all the American states have introduced
legislation allowing for nomination of a guardian ad litem for an embryo (foetus)
for the purpose of trust and probate proceedings; whereas some of these statutes
envisage this possibility also in cases of property disputes.\textsuperscript{235} At the same time,
the cited commentators express support for broadening the scope of the
guardian’s judicial competencies in cases requiring prenatal representation. Most
notably, they argue that a guardian ad litem should be commonly appointed by
the court officer\textsuperscript{236} in all instances where foetal interests are at stake due to
improper maternal conduct, such as drug or alcohol abuse.

\textsuperscript{232} See, for example: MH Bonner and JA Sheriff, ‘A Child Needs a Champion: Guardian Ad Litem
Representation for Prenatal Children’ (2013) 19(3) William & Mary Journal of Women and the
Law 511.
\textsuperscript{233} As Bonner and Sheriff report, in the US a guardian ad litem is usually appointed on the court’s
own discretion; however, at times he will be appointed upon the motion made by one of the
parties involved in the proceedings. See: Bonner and Sheriff (n 232) 518.
\textsuperscript{234} Ibid 518.
\textsuperscript{235} Ibid 524-525.
\textsuperscript{236} Upon petition submitted by ‘a concerned citizen’.
As for a model statutory regulation in the area examined, they further refer to Chapter 48 of the Wisconsin Statutes & Annotations, entitled: ‘Children’s Code’ which provides an option of assigning a guardian for ‘any unborn child alleged or found to be in need of protection or service’.\(^\text{237}\) Moreover, in line with the Chapter's §48.193(1)(c), a pregnant woman, who presents a risk of harming her foetus through abusive behaviour, can be taken into custody, if such a measure is necessary for preserving the life \textit{in utero}. Bonner and Sheriff conclude that a comprehensive system of legal representation by guardians \textit{ad litem} ensures optimal protection of the ‘prenatal child’ in case where the pregnant woman is unwilling or unable to exercise care on her own.\(^\text{238}\)

\textbf{2.2.3 The Position of Irish Law}

With reference to Irish family law, in line with the provisions of the Child Care Act 1991,\(^\text{239}\) a care order can be made solely on the birth of a child. Similarly to the case of England and Wales, the court, firstly, can consider prenatal occurrences in the course of the proceedings in question and secondly, it cannot ward a child before it is born.\(^\text{240}\)

With reference to the State’s authorisation to intervene as \textit{parens partiae} in respect of an embryo (foetus), some important guidelines may, in the first place,


\(^{238}\) For opposing views, see, for instance: S Goldberg, ‘Of Gametes and Guardians: The Impropriety of Appointing Guardians \textit{Ad Litem} for Fetuses and Embryos’ (1991) 66 Wash L Rev 503.


flow from two unreported *ex tempore* judgments resulting from emergency hearings, i.e. *SWAHB v K and Another*\(^ {241} \) and *HSE v F*.\(^ {242} \) Both rulings were delivered by the Irish High Court respectively in 2002 and 2010. There, two HIV-positive women at final stages of their pregnancies refused antenatal treatment aimed at reducing the risk of transmitting the virus to their foetuses.

In the former case, the expectant mother initially disagreed to deliver her baby in the indicated Dublin hospital. Finnegan J, the then President of the Irish High Court, informed her that he would impose ‘much more serious orders affecting her personal bodily integrity’ if she refused admission to the hospital.\(^ {243} \) He also announced that, at birth, her child would become a ward of court in order to undergo necessary medical monitoring, testing and retroviral treatment. As the woman concerned eventually agreed to hospital confinement, one can only speculate what such orders could possibly be.\(^ {244} \)

On the other hand, we could, *prima facie*, argue that the Irish High Court went a step further in the latter case. Here, the *gravida*, referred to as F, refused to consent to antiretroviral treatment during her pregnancy due to fears of its...

---

\(^ {241} \) *South Western Area Health Board v K and Another* (unreported, 19 July 2002, High Court).

\(^ {242} \) *Health Service Executive v F* (unreported, 20 November 2010, High Court).

\(^ {243} \) See: M Carolan, ‘HIV Mother to Be Treated to Reduce Risk to Baby’ *The Irish Times* (Dublin, 20 July 2002) 4.

\(^ {244} \) See: G Casey, ‘Pregnant Woman and Unborn Child: Legal Adversaries?’ (2002) 8(2) MLJI 75, 75. Here, reference should also be made to the 2013 case reported by the press, where Waterford Regional Hospital issued an emergency application to proceed with a C-section on a pregnant woman – referred to as A – without her consent. As the Senior Counsel for the hospital stated, the High Court was potentially faced with a task of preserving a balance between the woman’s constitutional right to refuse the intervention and the right to life of her foetus. Since A had eventually consented to the intervention, the Court refrained from making the order in her case. See: J Reilly, ‘Hospital Sought Court Order to Force Mother to Have C-section’ *Irish Independent* (Dublin, 10 March 2013) <https://www.independent.ie/irish-news/courts/hospital-sought-court-order-to-force-mother-to-have-csection-29120379.html> accessed 19 November 2018.
possible side effects. For the same reason, she did not allow for her child’s antiretroviral therapy after his birth. While relying on the significant and superior position of family under Irish law, Birmingham J decided that, once born, F’s child would avail of the treatment discussed against the wishes and concerns expressed by F.\textsuperscript{245}

Although some commentators maintain that the High Court’s order was aimed at safeguarding foetal right to healthcare,\textsuperscript{246} this author observes stronger resemblance to the previously analysed recent English caselaw concerning pre-birth care plans in the presence of exceptional circumstances. Therefore, we could argue that the court did, in fact, safeguard the interests of F’s future child in an unusual and urgent situation, i.e. where a pregnant woman suffering from serious, contagious illness refused to treat her child, both \textit{in} and \textit{ex utero}. Seemingly, at no point was Birmingham J willing to enforce the retroviral treatment on the – still pregnant – F.

A number of Irish scholars have argued that, if the law was to be interpreted broadly, some of the procedures that are, \textit{prima facie}, inapplicable in respect of an embryo (foetus), could be, nonetheless, relied upon in the present context. Nestor, for example, proposes that the High Court could still exercise its jurisdiction before the child’s birth, despite the current practice of not making an embryo (foetus) a ward of court. As he further states, the more flexible approach


\textsuperscript{246} Ibid 76.
can be derived from the fact that wardship is ‘not creation of a statute but (...) a very flexible institution, capable of developing to meet the changing needs of society’.247

Schweppe, on the other hand, discusses a possibility of issuing a care order aimed at protection of an embryo (foetus) in cases of hazardous maternal behaviour. While relying on a broader interpretation of Article 40.3.3° of Bunreacht Na hÉireann, she explains that such an order would have to be treated as a measure reserved for rare, exceptional circumstances, such as, most notably, cases of pregnant alcoholics or drug-addicts, who refuse medical assistance. The above solution, writes Schweppe, would ultimately serve in the interest of both the foetus and the addicted woman, since, if ordered to undergo rehabilitation during the pregnancy, the latter ‘would stand a better chance of maintaining custody of the child at birth’.248

As could be observed, here, the right to life of ‘the unborn’, protected by Article 40.3.3°, is possibly regarded as the primary source of two inherent prerogatives: first, the more general right of legal representation of an embryo (foetus) by the State acting as parens partiae and, second, the right of judicial intervention in cases where foetal wellbeing is at stake.

This author is, nonetheless, of the opinion that, similarly to the previously discussed case of the law of torts, Article 40.3.3° cannot be regarded as a solid

247 Nestor (n 170) 433.
248 Schweppe (n 240) 22.
foundation of foetal rights on the grounds of Irish family law. As far as the first-mentioned prerogative is concerned, if we accept that foetal right to life entails the right to represent an embryo (foetus), we need to conclude that an embryo in vitro, will not, in the aftermath of Roche, enjoy any right of such representation. With regard to the last-mentioned prerogative, if Article 40.3.3° authorises the State's intervention aimed at safeguarding foetal right to life, it will only be triggered in cases where the maternal (third party) conduct is so grave that it is likely to result in a miscarriage or stillbirth. On that account, the Article in question would not be of much assistance in any other scenarios, where such a premise is not fulfilled; for example, in cases of disputes concerning maternal consent to non-risky medical treatment or control over surplus, cryopreserved embryos in vitro.

Finally, attention should be drawn to the more recent 2016 ex tempore judgment, delivered by the Irish High Court in the case of Health Service Executive v B.249 There, surprisingly, it was decided that a competent pregnant woman could not be forced to undergo an elective Caesarean section against her wishes despite the fact that the refusal increased the risk of injury and death to both the woman, herself, and to the foetus that she carried.

In his judgment, Twomey J took an approach described by some commentators as ‘novel and surprising’.250 Namely, he did not focus on the caselaw related to

---

249 Health Service Executive v B & Another [2016] IEHC 605.
application of Article 40.3.3° in the context of refusal to medical treatment.\textsuperscript{251} Instead, he relied on the caselaw related to the parents’ authority to make decisions concerning welfare of their children. Most notably, he invoked the landmark 2001 Supreme Court’s ruling in the case of \textit{North Western Health Board v HW and CW}.\textsuperscript{252} There, it was held that the Health Board could not force parents to consent to their newborn child’s metabolic disorder screening, commonly referred to as the ‘PKU test’, and that parental autonomy to make decisions concerning the children should, in principle, be free from the State’s intervention \textit{in loco parentis}.

While reasoning \textit{per analogiam}, the cited judge subsequently stated that the ‘(…) right of the Courts to intervene in a parent’s decision in relation to an unborn

\textsuperscript{251} On the other hand, different approach was followed by the Irish High Court in \textit{PP v Health Service Executive} [2014] IEHC 622. The plaintiff in the case was the father of a 26-year-old woman (NP), who was declared brain stem dead. Her death was caused by cystic lesions that led to acute hydrocephalus followed by compression of the brain stem. As NP was fourteen weeks pregnant at the time when the declaration was made and the foetal heartbeat was still present, the medical staff decided to maintain maternal somatic support, including mechanical ventilation and artificial nutrition, in attempt to preserve foetal viability. The continuation of life support was deemed a necessary measure in the light of Article 40.3.3° and in the absence of the corresponding legal guidelines. However, NP’s family regarded the prolonged treatment as unlawful and unethical. The medical evidence clearly indicated that, due to the early stage of NP’s gestation and other complications, the foetus had no real prospect of being born alive. The Court, having accepted that the provision examined acknowledges foetal right to life, drew considerable attention to the expressions: ‘defend and vindicate the life’ and ‘as far as practicable’. In conclusion, it was acknowledged that the State’s interest to preserve the right to life was not an absolute one. In exceptional instances, discontinuation of the patient’s somatic support might prevent unnecessary and prolonged pain and suffering. Analogously, while considering irreversibility of NP’s condition and the impact that it had already had on her pregnancy, the court decided that withdrawal of ongoing maternal treatment served in the best interests of the foetus. At the same time, had NP’s brain death occurred at later stages of her gestation, giving the foetus a better prospect of being born alive, the maternal treatment would have been continued. In respect of statutory law, some additional guidelines concerning advance refusal to treatment by a pregnant woman, who lacks capacity to consent, can be found in ss 86(6)(a) and (b) of the Assisted Decision-Making Capacity Act 2015. For the discussion concerning practical application of the Act, see, for example: M Donnelly, ‘The Assisted Decision-Making (Capacity) Act 2015: Implications for Healthcare Decision-Making’ 22(2) MLJI 65.

\textsuperscript{252} \textit{North Western Health Board v HW and CW} [2001] 3 IR 622; hereinafter \textit{HW and CW}. 
child could not be any greater than the Court’s right to intervene in relation to born children’. 253 Hence, the court treated Ms B’s foetus in the same manner as a child already born in order to test whether the circumstances of the case were ‘so exceptional...as to justify actions which would otherwise be a breach of Ms B’s constitutional rights’. 254 He further concluded that, following *HW and CW* – i.e. accepting narrow interpretation of the State’s right to contest parental decisions in respect of their children – Ms B could not be compelled to ‘have her uterus opened against her will’. 255

We could, *prima facie*, argue that, while considering the outcome of *B*, i.e. allowing for analogous application of *HW and CW* to prenatal situations, the Irish attitude towards forced medical procedures on pregnant women is slowly changing from the interventionist approach to the non-interventionist one.

However, it should be noted that Twomey J also carefully considered the degree of risk to the life and health of the foetus in the cited case, while relying on the evidence provided by the medical experts. He was aware of the fact that Ms B could still go on to have a natural delivery, even if the risk of complications was significant. On the other hand, could we speculate that in the presence of higher degree of risk to foetal life, Ms B would, in fact, be forced to undergo the Caesarean section against her wishes? 256 On that account, Twomey J’s reasoning and,

---

*Health Service Executive v B & Another* (n 249) para 15 (Twomey J).

*Health Service Executive v B & Another* (n 249) para 18 (Twomey J).

Ibid para 18 (Twomey J). In comparison, the premise of ‘exceptional circumstances’ was seemingly fulfilled, for instance, in the 2011 case of Temple Street v D and Another [2011] IEHC 1, where the High Court authorised a blood transfusion performed on a three-month old infant despite the lack of parental consent. See: K Wade, *Caesarean Section Refusal in the Irish Courts: Health Service Executive v B* (2017) 25(3) Medical Law Review 494, 499.

*Mills and Mullingan* (n 250) 133.
particularly, his lack of clearer demarcation of the scope of *gravida*'s right to refuse treatment in cases where foetal life is at stake – most notably, in the light of Irish constitutional law – has been criticised by some commentators.\(^{257}\) It remains to be seen whether a similar approach would be followed in the subsequent caselaw.

\(^{257}\) See, for example: Wade (n 255) 504.
Conclusions

The protection enjoyed by an embryo (foetus) on the grounds of family law is, *prima facie*, predominantly realised by the prospective legal parents. As could be deduced from this part of the analysis, individual antenatal prerogatives in the domain examined are not universally enumerated *expressis verbis*. Instead, they either fall into the scope of a broader category (for example, the right to be cared for) or they mirror reciprocal duties imposed on the prospective parents (for example, the right to be represented).

Additionally, in a number of continental jurisdictions, rights, which can be acquired before their beneficiary’s birth but which become exercisable only after he is born, may be secured by a *curator ventris*. At the same time, in the majority of common law countries, including Ireland, there is currently no family law institution that could be equated with the continental curator. This author will argue that, at the time of writing this thesis, neither wardship, nor care orders would be applicable under Irish law in respect of an embryo (foetus).

Also, quite ironically, although the evidence of maternal conduct can be retrospectively relied upon in order to protect the interests of a newborn child, the same child cannot be made a ward of court while *in utero*.

In general, the bundle of parental rights and duties, despite nearly identical composition, is being described by diverse terms, varying from jurisdiction to jurisdiction.

---

258 Schweppe (n 240) 19-20.
jurisdiction. Hence, codes and statutes in continental and common law countries mention parental authority, care, responsibility or, finally, guardianship. Furthermore, particularly, as far as Poland and Ireland are concerned, in absence of a clear statutory disposition concerning the scope of parental rights in respect of an embryo (foetus),\textsuperscript{259} it can be well speculated that the rights and duties falling within the scope of parental authority (guardianship) will only materialise at the moment of the child’s birth.\textsuperscript{260}

Hence, we could argue that, in respect of a foetus or an embryo \textit{in vivo}, a pregnant woman and, at times, also her husband (partner) will normally exercise quasi-parental prerogatives which boil down to making decisions concerning antenatal medical care. In Poland, one of the prospective parents can also fulfil the role of a \textit{curator ventris}, once the above mission has been formally assigned to him (her) by a competent family court.

On the other hand, the right of disposal exercised by a commissioning couple in respect of an embryo \textit{in vitro} – during the period preceding its implantation in the uterus – cannot be seemingly described as parental or even as quasi-parental. At the same time, although the abovementioned prerogatives clearly resemble those exercised by owners on the grounds of property law, this author is not willing to identify them with property rights \textit{sensu stricto}. It is because such

\textsuperscript{259} Such as the previously cited relevant provisions of B.G.B. and I.C.C.
\textsuperscript{260} As Balcombe LJ observed, while rejecting the possibility of warding an embryo (foetus): ‘(...) the legal custody or upbringing of a minor is not in question when the subject of the proposed proceedings is an unborn child’. See: \textit{Re F} (n 197) 143 (Balcombe LJ). In addition, it is interesting to mention that in the previously commented Irish case of \textit{HSE v F} the expectant father of F’s child was refused from submitting an affidavit to the court as an interested non-party to the proceedings. See: Broughton (n 245) 79.
classification would inevitably lead to a highly questionable conclusion, whereby embryos in vitro can be regarded as things.

On this account, it would be far more logical to accept that an embryo in vitro falls into a sui generis category of entities, which can be placed somewhere in between the category of res and the category of personae and which was acknowledged by the Tennessee Supreme Court in the previously cited Davis case.261

Accepting the last-mentioned stance could, at first blush, result in different treatment of an embryo in vitro, as opposed to an embryo in vivo. In other words, depending on its location, a human embryo would be sometimes treated as an entity sui generis and, at other times, it would not be treated in that manner.262 We may, nonetheless, observe that such differences in treatment may be justified due to the very nature of ART. Namely, in the course of IVF the artificially created embryos are involved in a range of activities, including selection, implantation, storage, etc., that are performed and supervised by members of the medical personnel. Needless to say, in case of an embryo in vivo the processes of selection, transfer to the uterus, preservation and, indeed, contingent destruction are carried out solely by and at the discretion of the maternal organism.263

261 See: Davis v Davis [1992] 842 SW 2d 588. It should be mentioned that the above proposal was also approved by a number of Polish commentators, including the former President of the Polish Constitutional Tribunal, Marek Safjan. See: M Safjan, 'O Metodach Rozwiązywania Dylematów Bioetyki' (1992) 5(555) Państwo i Prawo 51, 51 et seq. See also: J Óstojska, 'O Problemie Podmiotowości Prawnej Embriionu In Vitro' (2012) 46(14) Prawo i Medycyna 84, 91.
262 Haberko (n 20) 98.
263 According to the current state of research, the rate of natural embryo loss in cases of unassisted conception can be placed somewhere between 50 and 75%. See, for example: GE Jarvis, 'Early Embryo Mortality in Natural Human Reproduction: What the Data Say' <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5443340/> accessed 16 June 2017.
Hence, we could argue that legal protection of embryos *in vitro* primarily consists in vesting the mechanisms of consent and control in the prospective parents. In addition, the law universally ensures that the embryos are not exploited, genetically modified or treated in an instrumental manner.

While comparing, particularly, the law of Poland and Ireland, it could be, *prima facie*, proposed that the protection offered to an embryo *in vitro* could be additionally straightened thanks to the institution of a *curator ventris*. However, such a proposal will more than likely have to be rejected in the light of some important remarks, mentioned below.

First of all, as was previously suggested, in line with the current wording of article 182 P.F.C., only future rights of an embryo (foetus), once at stake, are being safeguarded. In consequence, the curator fulfils a merely technical role. The legislature has not to date determined the catalogue of legal actions that the curator is or is not authorised to perform on behalf of his unborn pupil.

Furthermore, quite paradoxically, a *curator ventris* is solely appointed in more exceptional situations, for example: where an antenatal injury occurred or where opening of the succession took place at the time when one of the potential beneficiaries was *in utero*. Still, in the more common cases of straightforward and uncomplicated pregnancies – where the curator is not appointed – the embryo (foetus) will remain in a far more vulnerable position, since the expectant (commissioning) parents, not yet vested with parental authority, are not, in a legal sense, its guardians or representatives.
In passing, reference could also be made to a procedural lacuna, which will appear when we attempt to apply the previously cited article 599 P.C.C.P., governing local jurisdiction, to the case of an embryo *in vitro*. Namely, the provision does not explain which family court would be competent to appoint a *curator ventris*, if ‘the conceived child’ was separated from the ‘mother’. Both the court of location of the fertility clinic[^264] as well as the court of the commissioning mother’s domicile seem to fulfil the ‘pregnant woman’s domicile’ criterion[^265].

With reference to Ireland, the need for legislative framework regulating assisted reproduction could not be emphasised enough, if looking from the very perspective of family law. The already unclear Irish position on ART is further blurred by Article 40.3.3° of *Bunreacht na hÉireann*, which is now to be interpreted in the light of *Roche*. An explicit provision, furnishing the ‘unborn’ with protection at the constitutional level, juxtaposed with no recognised protection in case where the ‘unborn’ remains outside the maternal body, strikes not only as an example of grave ineffectiveness, but, as this author will dare to argue, of peculiar legislative hypocrisy on the part of the Irish lawmaker.

To conclude, quite ironically for family law – being the branch most often associated with ‘child welfare’ or ‘children’s rights’ – before the child is born, the majority of legislatures will still, in the domain examined, secure future rights of a future natural person. The above observation may additionally weaken our

[^264]: Where the embryos are being stored.
[^265]: See Czarnik and Gajda (n 79) 106 and 113. For an opposing view, see, for instance: Haak and Haak-Trzuskawska (n 98) 276.
leading hypothesis, assuming recognition of legal personality (capacity) of an embryo (foetus) in the sphere of private law.

As for Europe, it is, nonetheless, important to point once again to the example of the German statutory regulation in this area, which combines restrictions on the grounds of the Embryo Protection Act 1990, aimed at offering maximum protection to an embryo in vitro, with broader, more general parental prerogatives in respect of an embryo (foetus) on the grounds of B.G.B. Although the above approach may undoubtedly be perceived as hard-line, its logic and consistency remain beyond question.

To follow this line of reasoning, we could further propose that in countries adhering to the compromise model of regulation on ART (such as Poland), the prospective (commissioning) parents should consequently enjoy the right of legal representation of an embryo (foetus), which, however, should not be regarded as an equivalent of parental authority (care, responsibility). In case of an embryo in vivo or a foetus, the above right should be de jure vested in a pregnant woman and her husband, or, in case of an unmarried couple, in a man who voluntarily acknowledged his paternity.266

In case of an embryo in vitro, regardless of whether such an embryo was conceived with or without the assistance of an anonymous donor (donors), the power of legal representation should be vested in the woman who consented to

266 We can also propose that in case where the man had not acknowledged his paternity, the pregnant woman would be the sole legal representative of an embryo (foetus).
carry the resulting pregnancy to term and to her husband (partner), as long as he also consented to the use of ART. In this way, anonymous donors (of either sperm or ova) would not be regarded as commissioning parents.

On the margin, it should be explained that, since surrogacy remains an unregulated practice on the grounds of Polish and Irish family law, the legislature would need to specify, who enjoys the right of legal representation in case of the surrogate’s involvement. Here, the difficulty will stem from the fact that an embryo (foetus) could, be, *prima facie*, represented by both the surrogate mother, who consents to carrying the pregnancy to term and by the commissioning mother, who accepts her parental responsibility vis-à-vis the resulting child (children).

Assuming, in the scenario examined the right of legal representation would be, nevertheless, vested in the surrogate mother. Firstly, it is because, in the aftermath of successful implantation in her uterus, the surrogate will begin to exercise exclusive physical control over the commissioning couple’s embryo and, subsequently, their foetus. Hence, looking from the perspective of antenatal medical care, it would prove impossible to deprive the surrogate of the right to consent to interventions affecting her bodily integrity. Secondly and most importantly, it should be recalled that, in the light of the *mater is est quem gestatio*

\[\text{In the last-mentioned case it would need to be additionally specified whether the consent to fertility treatment with its intended consequences, i.e. becoming a legal father of a resulting child (children) was to be equated with voluntary acknowledgment of paternity.}\]

\[\text{On the other hand, could we possibly argue that – before the implantation takes place – the right discussed will be vested in the woman who accepted parental responsibility for the future child (children)?}\]
demonstrant presumption, the surrogate will always be regarded as the child’s legal mother under Polish family law.

Extending the scope of parental rights or courts’ jurisdiction in respect of an embryo (foetus) would undoubtedly serve in the latter's interest, particularly in the case of an embryo in vitro. At the same time, we should appreciate that the amendments proposed – be it more flexibility while relying on wardship, care orders, guardians ad litem or curator ventris – will furnish the State with stronger prerogatives of control in respect of pregnant women. Accordingly, in order to prevent potential abuse of State powers in that context, prenatal interventions should be governed by principles of subsidiarity and proportionality.

First, it could be argued that in a vast majority of cases, the pregnant woman, supported by her husband (partner), will be the best curator of her womb or, to adopt the common law terminology, the most competent court for the unborn ‘ward’ that she carries. Thus, the State interference in the scenarios discussed should, in the name of the welfare of both the pregnant woman and her foetus, be always regarded as the last resort. Hence, as far as Poland is concerned, this author suggests that a curator ventris should be appointed only in exceptional circumstances to include, for instance, death of the prospective father or inconsolable dispute between the prospective parents or between a pregnant minor and her own parents.

Second, if we accept the proposal, whereby judicial institutions, such as wardship, could be further reformed in Ireland in order to be relied upon in the case of an
embryo (foetus), we could argue that State intervention should be regarded as justified exclusively in cases, where the pregnant woman’s conduct truly and seriously endangers the wellbeing of her foetus. These could be, for example, the cases of women chronically abusing alcohol or drugs or women with severe mental disturbances, who persistently refuse medical assistance.

At the same time, the boundary between lawful and justified, as opposed to unlawful or preposterous intervention, is, indeed, very fragile. As a way of example, we could refer to scientific studies indicating that consumption of large amounts of caffeine during pregnancy has been associated with higher risk of low birth weight in future offspring. In consequence, pregnant women in numerous countries worldwide are commonly advised to refrain from consuming more than four hundred mg of caffeine per day. Could we then argue that exposure to caffeine in pregnancy impedes on the wellbeing of an embryo (foetus)? And, in case of a positive answer, should drinking tea and coffee in excess amounts be sufficient to justify involvement of State-controlled agencies? In conclusion, not only should the intervening persons (bodies) be equipped with appropriate medical knowledge on the issues of pregnancy and childbirth, but they also need to apply the ‘common sense attitude’ in any individual situation.


Last but not least, the State should ensure maximum efficiency of educational programmes and information campaigns addressed to expectant (future) parents, which are usually run under the auspices of public health services. Reliable and unbiased information about safe and unsafe behaviours during pregnancy, reflecting current medical knowledge, needs to be more widely available from healthcare practitioners, social workers and officers representing all pre-intervention agencies.
PART 4
EMBRYO, FOETUS AND THE LAW OF SUCCESSION
This part discusses the capacity of an embryo (foetus) to become an heir. In other words, the author examines situations where a child, entitled to inheritance, still remained *en ventre sa mère* at the time of the testator’s (intestate person’s) death.

In comparison with the other prenatal prerogatives, the succession rights of an embryo (foetus) seem to be the least disputed ones and, therefore, they have not to this date received significant attention in legal commentaries. At the same time, the rights discussed can undoubtedly be described as primordial. They are universally acknowledged in both historic and contemporary legal sources of all the jurisdictions examined. In fact, they are the most frequently cited rights in the context of determining the position of an embryo (foetus) on the grounds of private law. Finally, they can be also regarded as foundations of the previously cited maxim: *nasciturus pro iam nato habetur, quotiens de commodis eius agitur*.

Furthermore, it should be observed that the original but still up to date *ratio legis* behind allowing a child to become an heir (or a beneficiary of a testamentary gift) in the situations examined is related to the paramount property right, remaining at the heart of succession law, i.e. ownership. The owner traditionally enjoys the right to administer and dispose of his patrimony, including also the right to designate a person (persons), who will succeed in ownership on the owner’s death. Accordingly, it could be argued that the law respects the testator’s intention to ensure equal distribution of the legacy between his heirs and prevents the child born after the testator’s death from remaining in an
unprivileged position *vis-à-vis* the other successors.¹ To sum up, as ownership constitutes the core of property law, the succession and property law together constitute the core of private law.

For all the above reasons, including a part on succession rights of an embryo (foetus) in this thesis seems both relevant and appropriate.

The text of this part has been divided into four chapters. The first chapter outlines historic origins of the succession rights attributed to an embryo (foetus), while focusing on Roman private law. In the second chapter the author discusses these rights from the continental perspective. Similarly to the previous parts of the analysis, the focus has been on Polish law of succession; however, references to French, German and Italian law have also been made. Analogous analysis – this time concerning the common law countries (mixed jurisdictions) – is continued in the third chapter. It embraces, most notably, the succession law of Ireland, England and Wales and Scotland. In the fourth, final chapter the author presents the law relevant to succession rights that may be enjoyed by the resulting child in cases, where an embryo was conceived (implanted) after the death of a genetic parent, i.e. the gamete provider. The chapter finishes with conclusions summarising the position of an embryo (foetus) on the grounds of succession law in Ireland and in the other jurisdictions examined.

As for explanatory remarks, it should be noted that the analysis pertains equally to testate and intestate succession. The author also considers the right of an embryo (foetus) to become a beneficiary of a gift under a will (a legatee or a devisee).
CHAPTER 1

Succession Rights of an Embryo (Foetus) in Roman Law

1. The Notion of *Postumi*

As was previously suggested, foetal prerogatives in the domain of the law of succession were already acknowledged and observed during the Roman times. The rights discussed are commonly associated with the Latin term *postumus* (or the more frequently appearing plural form of the noun – *postumi*), being a predecessor of the English term: ‘posthumous child’, which traditionally describes a child born subsequent to the death of his father.²

It should be, however, explained that the term *postumus* under Roman law of succession was understood in a much broader manner. Namely, the Romans primarily distinguished between the so-called *postumi sui* – i.e. individuals who would have remained under the decedent’s paternal authority (*patria potestas*), had they been born in his lifetime – and *postumi alieni* (also referred to as *postumi extranei*), i.e. individuals who would not have remained under the authority of *pater familias* in the scenario discussed. For instance, conceived but yet unborn

---

descendants of the testator's emancipated son traditionally belonged to the last-mentioned category of postumi.³

Interestingly, under the archaic Roman law a postumus was supposedly treated as an unascertained person (persona incerta)⁴ and, thus, he could not be appointed as an heir or even as a legatee.⁵ However, some scholars suggest that succession rights of an embryo (foetus) were already being acknowledged and commented on during the times of pre-classical Roman law, with regard to both testate and intestate succession.⁶

2. *Postumi* as Heirs under the Rules of Roman Testate Succession

The first mentions of succession rights attributed to postumi (initially only to postumi sui) appear in the sources drawn in the first century BC. Niczyporuk, for instance, invokes a satire attributed to MT Warron, entitled ‘Testamentum’.⁷ In his satire Warron comments on a testamentary clause, whereby a testator’s child born during a ten-month period following his death was to be automatically disinherited.⁸ Regardless of Warron’s own views on the issue, Niczyporuk further

---

⁴ A persona incerta could be defined as an individual, whose personality was ‘not precisely determined in the mind of the testator’. See: RW Lee, *The Elements of Roman Law with a Translation of the Institutes of Justinian* (4th edn, Sweet & Maxwell 1956) 206.
⁶ Niczyporuk (n 3) 110 and 152.
⁷ It should be explained that the original version of the satire had not lasted until contemporary times. Warron's deliberations were, however, invoked by Aulus Gellius in his famous work entitled ‘Attic Nights’ (*Noctes Atticae*). See: Niczyporuk (n 3) 110.
⁸ It is evident that, according to Warron, the abovementioned ten-month period represented the maximum duration of pregnancy in humans, which was envisaged by the Romans at the time.
observes that if the *postumi* were capable of being disinherited, then they must have enjoyed a primary right to be called to succession in a testament.

As private law evolved during the classical period, more Roman jurists became interested in the issue of succession rights attributed to *postumi*. Gaius, for instance, in the Second Commentary of his famous ‘Institutes’ argues that in order for a last will (*testamentum*) to be considered valid, according to the principles of *ius civile*, the testator should either nominate the *postumi* as his rightful heirs or he should disinherit them. In the subsequent Third Commentary it is further acknowledged that posthumous children should be treated as ‘proper heirs’ (*sui heredes*), as long as they would have remained under the authority of the family father, had they been born in his lifetime. Moreover, in the First Commentary Gaius formulates a more general presumption, whereby posthumous children are regarded (by the law) as already born.

The prerogatives examined were seemingly broadened and reinforced also during the post-classical period of Roman law, as can be ascertained from analysis of some excerpts of Justinian’s Digest. In particular, statements attributed to Paulus and Ulpianus seem to affirm the above conjecture. First of all, the two scholars agree with the previously cited Gaius’s dictum, whereby a

---

9 C 161 AD.


11 G. 3, 4: *Postumi quoque si vivo parente nati essent, in potestate eius futuri forent, sui heredes sunt*. See: Gaius (n 10) 79.

12 Gaius further explains that only *postumi sui* could benefit from the above cited presumption.

13 G. 1, 147: (…) *postumi pro iam natis habeantur* (…). See: Gaius (n 10) 26.
last will omitting a *postumus suus*\textsuperscript{14} was to be rendered invalid (*testamentum non valet*) and, hence, it could not be revised.\textsuperscript{15} Furthermore, Niczyporuk speculates that over time the succession rights were no longer attributed to the testator’s own children (here: sons) but they also extended to grandchildren or even great-grandchildren of the family father, who remained under the father’s parental authority.\textsuperscript{16}

The above view can be supported, if we consider new categories of *postumi* introduced over the course of time in Roman law, such as *postumi Aquiliani*, named after a Roman jurist – Gaius Aquilius Gallus. It should be mentioned that Gallus was a well-known author of a legal formula, referred to as *clausola Aquilli* or *Lex Gallus*, whereby a child born after the death of both his father and grandfather could still become the latter’s testamentary successor. Several conditions had to be fulfilled, first: the child’s father had to remain under the child’s grandfather’s (i.e. the testator’s) *patre potestas* at the moment of his death, second: the last will had to be drawn up when the child’s father was still alive, third: the father’s death must have preceded the grandfather’s death.\textsuperscript{17}

As for the remaining categories of *postumi*, one should also mention *postumi Vellaeani* (also known as *luniani*), whose prerogatives were granted by virtue of *Lex Junia Vallaea* (c 26 AD), and *postumi Iuliani*, described by the famous jurist –

\textsuperscript{14} Which means that the *postumus* was neither nominated as an heir, nor disinherited.

\textsuperscript{15} D. 28, 2, 7: (*Paulus libro primo ad Sabinum*) *Si filius qui in potestate est praeteritus sit et vivo patre decedat, testamentum non valet nec superius rumpetur, et eo iure utimur.* A similar view, attributed to Ulpianus, can be found in D. 28, 3, 3. See also: Niczyporuk (n 3) 119.

\textsuperscript{16} Niczyporuk (n 3) 117. Niczyporuk, cites, for example, a view attributed to Ulpianus in D. 28, 2, 12.

\textsuperscript{17} See: Niczyporuk (n 3) 125-129. See also: definition of the term ‘postumus Aquilianus’ in Berger (n 3) 640.
Julian. A *postumus Vellaeianus* had already been conceived at the time of drawing up his father's last will and he was later born in the father's lifetime. On the other hand, a *postumus Iulianus* had already been conceived at the time of creation of his grandfather's last will but he later survived his father (i.e. the testator's son). As a consequence, the *postumus* – in the scenario examined – was regarded as the grandfather's own *heres suus*. It can be suspected that extending the catalogue of *sui heredes* by further categories of *postumi* was justified by the need to fully recognise and respect the testator's wishes and preferences.

With regard to the rights attributed to *postumi alieni (extranei)*, for a long time these *postumi* were treated as *personae incertae*, 'since they could not be properly identified by the testator'. For example, Gaius, in the previously cited passage from the First Commentary, confirms that *postumi extranei* could not be appointed as testamentary heirs. However, as will be now explained, they still possessed some entitlements to inherit under the rules of intestate succession.

### 3. Postumi as Heirs under the Rules of Roman Intestate Succession

The succession rights of intestate *postumi* were regulated under both *ius civile* and praetorian law. According to some Roman law commentators, the right discussed was already acknowledged in some of the passages of Tables IV and V.

---

18 See: definitions of the terms: 'postumus Iunianus' and 'postumus Iulianius' in Berger (n 3) 640.
19 Niczyporuk (n 3) 121.
20 G. 1, 147: (...) *Hos etiam heredes instituere possumus, cum extraneos postumos heredes instituere permissum non sit.* See: Gaius (n 10) 26.
of the Law of the Twelve Tables.\textsuperscript{21} According to passages 4-5 of the Table V, if a person died intestate without leaving any \textit{sui heredes}, the succession mass was to be distributed amongst the decedent’s nearest male agnates.\textsuperscript{22} If no agnates were present, the entitlements were passed onto the decedent’s male gentiles.\textsuperscript{23} The order does not refer directly to the situation of a posthumous child, however, the passages discussed were interpreted by jurists in a consistent manner. Namely, they assumed that a child born after his father’s death was still considered as a marital one and, hence, was treated in an identical manner as his siblings, who were born in their father’s lifetime and who remained under his parental authority.\textsuperscript{24}

Several references to the abovementioned passages of the Law of the Twelve Tables can be also traced in the Digest. Celsus, for example, argues that, in compliance with the Law previously examined, an embryo (foetus) was to be treated as an heir according to the principles of intestate succession, as it already existed \textit{in rerum natura}, i.e. in ‘the world governed by the laws of nature’.\textsuperscript{25} Thus, the cited scholar somehow confirms that an embryo (foetus) was not treated as existing \textit{in rebus humanis}, i.e. ‘in the world governed by the laws of humans’.\textsuperscript{26} A


\textsuperscript{22} The agnatic tie was established by ‘descendance in the male line from a common ancestor’ See: definition of the term ‘agnatio’ in Berger (n 3) 358.

\textsuperscript{23} Gentiles can be described as a group of families (a clan), who descended from a common ancestor. As opposed to \textit{sui heredes}, neither agnates nor gentiles became owners of the inherited assets at the time of opening of the succession. The ownership was passed after they undisturbedly possessed these assets for one year. See: Berger (n 3) 482.

\textsuperscript{24} Niczyporuk (n 3) 132.

\textsuperscript{25} D. 38, 16, 7: \textit{(Celsus libro vicensimo octavo digestorum): [Lex duodecim tabularum eum vocat ad hereditatem, qui moriente eo, de cibus bonis quaeritur, in rerum natura fuerit] vel si vivo eo conceptus est, quia conceptus quodammodo in rerum natura esse existimatur.}

\textsuperscript{26} Niczyporuk (n 3) 133. See also: Julian’s deliberations in D. 38, 16, 6, where the scholar confirms that only those who existed \textit{in rerum natura} at the time of the intestate person’s death could inherit a legacy, according to the rules of succession \textit{ab intestato}. 
similar line of reasoning was followed by Ulpianus, who points out that, according to the Law of the Twelve Tables, ‘an unborn person’ *(qui in utero fuit)* could become an intestate heir, ‘providing that he was duly brought to birth’.\(^{27}\)

Furthermore, since *postumi* were (if born alive) treated in the same manner as the other *sui heredes* ‘of the same degree’, they preceded the secondary successors, i.e. agnates and gentiles, in the succession line. Finally, if the agnates were entitled to inheritance alongside *qui in utero fuit*, their rights were treated as ‘suspended’ until the latter’s birth.\(^{28}\)

As was previously mentioned, a posthumous child could also become an intestate heir by virtue of a praetor’s edict.\(^{29}\) The abovementioned type of entitlement, which due to its many aspects is not going to be analysed here in detail, was based on the principles of cognatic kinship\(^{30}\) and referred to as *bonorum possessio ab intestato*.\(^{31}\)

\(^{27}\) D. 38, 16, 3, 9: *(Ulpianus libro quarto decimo ad Sabinum)*: *Utique et ex lege duodecim tabularum ad legitimam hereditatem is qui in utero fuit admittitur, si fuerit editus. Inde solet remorari insequentes sibi adgnatos, quibus praeferur, si fuerit editus: inde et partem facit his qui pari gradu sunt, ut puta frater unus est et uterus, vel patrui filius unus natus et qui in utero est.*


\(^{28}\) Niczyporuk (n 3) 136.

\(^{29}\) The functions of praetorian law, i.e. a complementary system of equity developed by the praetors, was described by Papinian in the Digest as ‘supporting, supplementing and amending *ius civile*’ (D. 1, 1, 7, 1). Accordingly, praetors, as superior judicial officers, had discretion to allow (disallow) actions, remedies and equitable defences that would not be allowed (disallowed) under the system of civil law. The principles of praetorian law, concerning mainly succession and property, were included in edicts, issued by praetors at the beginning of their term. See: definitions of ‘edictum praetoris’ and ‘ius praetorium’ in Berger (n 3) 449 and 532.

\(^{30}\) Cognates can be described as ‘persons related through females’. The category also included former agnates, who had lost their agnatic tie due to adoption or emancipation. See: definition of ‘cognatio’ in Berger (n 3) 394.

\(^{31}\) See: Lee (n 4) 206-207; Borkowski (n 5) 223 and Niczyporuk (n 3) 139.

In general terms, the cognates, admitted to intestate succession under the principles examined, were divided into four groups (classes). The members of the higher-ranking classes were preferred over the members of the lower-ranking ones in the succession line. The first class of heirs, referred to as *unde liberi* consisted of the decedent's children, including the emancipated ones but excluding the adopted ones. The second class, referred to as *unde legitimi*, embraced persons, who would have been treated as legitimate heirs, had they been entitled to inherit.
In brief, a praetor could grant *bonorum possessio ab intestato* for the benefit of the decedent’s unborn cognatic relative, as long as such a relative had been conceived in the decedent’s lifetime and was subsequently born alive. Praetorian law further extended and complemented the narrow catalogue of *postumi*, who could become intestate heirs in line with the principles of Roman *ius civile*. According to the commentators, the entitlements in question were, most notably, granted to the intestate person’s step-siblings and to children of his emancipated descendants, who had been conceived in his lifetime but born after his death.

Furthermore, a pregnant woman could, upon request, be authorised to temporarily enter into possession of an estate, to which her child, once born alive, would be entitled. The authorisation discussed – referred to as *missio in possessionem ventris nominée* – was also granted by the praetor, if the estate was located in Rome, or by the praetor’s intendant, if it was located in one of the Roman provinces.\(^\text{32}\) The applicant had to fulfil two conditions. First, she had to be pregnant both at the time of opening of the succession and of submitting the application. Second, the child, entitled to the estate, must not have been effectively disinherited. The rationale behind creating the institution was to protect the rights of the unborn heir, here, regarded as a potential continuator of the family’s bloodline. In consequence, the pregnant woman, who availed of

---

under the principles of the *ius civile*. The third class, referred to as *unde cognati* can be defined as ‘cognates under the sixth and, partially, seventh degree’, who, again, would have been excluded from intestate succession under the *ius civile*. Finally, the fourth class comprised the decedent’s spouse, including a wife, who did not remain under the husband’s familial authority. Therefore, arguably, *postumi* could become beneficiaries of *bonorum possessio ab intestato* as first, second and third-class heirs. See: definitions of ‘bonorum possessio intestato (ab intestato)’ in Berger (n 3) 376 and Niczyporuk (n 3) 139.

\(^{32}\) See: Macer’s (D. 1, 21, 4, 1) and Ulpianus’s observations (D. 37, 9, 1) included in the Justinian’s Digest. See also: Niczyporuk (n 3) 145.
missio in possessionem for the benefit of the child she carried, was subject to criminal liability in cases, where she entered into possession of the estate in bad faith - i.e. while being aware that she was not pregnant - or where she unlawfully transferred the possession of the estate to another party. At the same time, following Paulus’s and Ulpianus’s observations from the Digest, Niczyporuk argues that missio in possessionem ventris nomine did not, in fact, furnish the pregnant woman with a ‘classic’ right to possess the estate. He further argues that, while giving regard to the heir’s unique position in the situations examined, the woman (or more commonly the appointed curator) enjoyed solely the rights to guard the estate (custodia) and to care for it (observatio).

To summarise, it could be observed that Roman succession law gradually and consequently broadened the scope of prerogatives attributed to postumi. The initial, rigid attitude under the archaic law visibly changed to a more favourable one during the post-classical period, mainly thanks to the remedies available under the praetorian law. In addition, considering the comprehensive character of legal protection provided to an embryo (foetus) and the pregnant woman by a curator ventris, which was thoroughly discussed in the previous part of this thesis, one could well assume that succession entitlements of an embryo (foetus) under Roman law were duly acknowledged and respected.

33 The criminal liability could be imposed on the pregnant woman after instituting an actio calumniae against her. See, for example: HJ Roby, Roman Private Law in the Times of Cicero and of the Antonines, vol. 1 (CUP 1902) 266 and 267.
34 See: D. 41, 2, 3, 23 (Paulus) and D. 10, 3, 7, 7 (Ulpianus). See also: Niczyporuk (n 3) 146-147 and 153.
35 However, even as late as under the rule of Justinian, certain postumi could not be still instituted heirs. According to Lee, these were children of the testator and a woman, whom he could not legally marry, as she had already been married to another man. See: Lee (n 4) 206-207.
CHAPTER 2
Succession Rights of an Embryo (Foetus) in Poland and Other Continental Jurisdictions

1. Succession Rights of an Embryo (Foetus) in Polish Law

The Polish Civil Code\textsuperscript{36} includes two associated provisions pertaining to the succession rights of an embryo (foetus).

First, a general principle from article 927 §2 provides that a child, who had already been conceived at the time of the opening of succession, has capacity to succeed, provided that he is subsequently born alive. The paragraph introduces an exception from a more general rule encapsulated in article 927 §1, whereby a person who does not exist at the time of opening of the succession has no capacity to inherit. The exception from §2 applies in cases of both testate and intestate succession.

Second, according to article 972 P.C.C., the exception discussed applies \textit{mutatis mutandis} to the case of a gift under a will (\textit{zapis}).\textsuperscript{37}

It should be further explained that under Polish civil law the mass of succession, identified with the entirety of inherited assets, includes in its scope all the

\textsuperscript{36}Civil Code 1964 (\textit{Kodeks cywilny}), Official Journal of the Republic of Poland No 1964.16.93 with subsequent amendments; hereinafter P.C.C.

\textsuperscript{37}Unlike Irish law of succession, Polish law does not distinguish between a gift in real property (a devise) and a gift in personal property (a bequest).
property rights and obligations of the deceased person.\(^{38}\) In addition, article 924 P.C.C. provides that succession opens at the moment of the testator’s (intestate person’s) death. Opening of the succession results in passing on the ownership of the inherited assets onto the decedent’s heirs.\(^{39}\) Nonetheless, distribution of these assets among the heirs will only be possible after acquisition of inheritance is ascertained before a designated organ and a relevant decision (of declaratory character) is issued.\(^{40}\)

Attention should also be drawn to the issue of liability for any outstanding debts included in the mass of succession.

After the succession opens, all the instituted heirs must decide individually whether to accept their shares in the succession or to renounce the inheritance. Firstly, according to article 1012 P.C.C., any of the heirs can expressly accept his share in the succession. In such case, referred to as simple acceptance, the heir will inherit all the succession assets, but he will also be liable without limitations with his whole personal property for any debts incurred by the decedent. Secondly, the heir can renounce the inheritance. In such cases a legal fiction described in article 1022 P.C.C. will apply, i.e. he will be treated by the law, as he had not survived the testator (the intestate person). Thirdly, the heir can accept his share in the succession with the reservation that he will only be liable for the

\(^{38}\) See P.C.C., art 922 §2.

\(^{39}\) According to article 925 P.C.C., it does not, however, include the rights that are either personal in nature or which will be passed onto certain individuals, irrespective of whether they have been indicated by the testator in his last will.

\(^{40}\) According to article 1018 §3 P.C.C., an organ competent in the cases discussed would be either a public notary or a court.
debts incurred by the decedent up to the value of the succession mass. The above type of acceptance, originating from Roman law, is referred to as acceptance under *beneficium inventarii* (the benefit of inventory).\(^{41}\)

If the heir does not make the declaration (in other words, if he remains silent) during the period of six months from the moment at which he learnt about his title to inheritance,\(^{42}\) it is assumed that he unconditionally accepted his share.\(^{43}\) However, in three instances, enumerated in the second sentence of article 1015 P.C.C., a ‘silent’ heir will be treated as having accepted his share under the benefit of inventory. The principle applies, firstly, to heirs who do not possess full capacity to perform legal acts (i.e. to minors younger than thirteen and to legally incapacitated persons\(^{44}\)); secondly, to persons who have not been legally incapacitated but who meet conditions of such incapacitation\(^{45}\) and, thirdly, to legal persons.

In addition, it should be noted that statutory representatives of an under age (or legally incapacitated) heir can still unconditionally accept the heir’s share in the succession or its renouncement. However, pursuant to articles 101 §3 and 156

\(^{41}\) It should be noted that the abovementioned type of acceptance is also recognised under French law of succession. However, it is not allowed in Germany, where heirs can only either accept or renounce their share in the succession, while the inventory is used solely for securing the inheritance and not for limiting the liability. See: S Farran, J Gallen, J Hendry and C Rautenbach (eds), *The Diffusion of Laws: The Movement of Laws and Norms Around the World* (Routledge 2016) 174.

\(^{42}\) P.C.C., art 1015 §1.

\(^{43}\) P.C.C., art 1015 §2 (the first sentence).

\(^{44}\) P.C.C., art 12. The concept of capacity to perform legal acts will be further elaborated in the subsequent, final part of this thesis.

\(^{45}\) In line with article 13 §1 P.C.C., a physical person, older than thirteen, can be incapacitated – i.e. assigned a legal representative (a guardian) by a family court – in cases where, due to his mental illness, mental impairment or any other form of mental distortion, he cannot control his own behaviour.
P.C.C., the declaration made on behalf of the heir in the situations examined requires prior authorisation from a guardianship court.

Considering the central question of this thesis, two issues require further elaboration. First, it is necessary to decide whether – both the declaration examined and the court’s (notary public’s) decision regarding acquisition (renouncement) of inheritance – can be issued before the birth of a child, who possesses a title to inherit. Second, if the answer is positive, we must indicate who would be entitled to represent the child for the purpose of submitting the declaration during the succession proceedings.

From the pragmatic point of view, it could be argued that article 927 §2 P.C.C. should, prima facie, place a child en ventre sa mère (here: A) in the same position as a child, who had already been born in the testator's (intestate person's) lifetime (here: B). In both situations, there is an identical factual outcome, as both A and B will be able to inherit. However, A’s personal right to accept his share in succession (or to renounce inheritance) will only become exercisable at the moment of his birth and as long as he is born alive, whereas B's right will, in principle, become exercisable at the moment of the opening of the succession. It remains irrelevant that in the majority of situations – in order to exercise the right discussed – both A and B will act through their statutory representatives.

Accepting a share in succession or renouncing inheritance on behalf of A would be equally impossible due to serious procedural limitations. First of all, as the right described in article 927 §2 P.C.C. is contingent upon A’s live-birth, the court
(notary public), on receiving the declaration, would have to ascertain acquisition of inheritance, while preserving its conditional character. Second, in cases where the succession mass included not only rights but also obligations, accepting the succession before A’s birth would paradoxically result in A being born as a debtor. Thirdly, in the event that A was stillborn, would the abovementioned court’s (notary public’s) decision be subject to subsequent renouncement?

From the wording of the previously mentioned provisions of the Polish Family Code, it is also apparent that in no event would the pregnant woman or her husband\textsuperscript{46} be able to accept (renounce) a share in the succession on behalf of the child they are expecting. Namely, while considering that B’s parents, who already exercise parental authority over B, are not able to accept (renounce) B’s share in the succession on his behalf without prior authorisation from a guardianship court, then it seems even less probable that the expectant parents, who do not possess parental authority in respect of A, could perform the actions discussed in his name.

The situation will not change even in case, where one of the expectant parents is appointed to act as A’s \textit{curator ventris} for the purposes of the succession proceedings. As was already explained in the preceding part of this thesis, the role of the \textit{curator ventris} on the grounds of Polish private law consists merely of securing and safeguarding the rights attributed to an embryo (foetus) that will be enjoyed by the resulting child in the event of his live-birth. Hence, in cases where

\textsuperscript{46} Or the man who voluntarily acknowledged his paternity before the designated organ.
the proceedings discussed have been initiated by the remaining heirs ‘in the absence’ of the heir *in utero*, the curator’s mission will boil down to taking procedural steps to ensure that the court’s (notary public’s) decision on the acquisition of inheritance (and its further distribution) is not issued until the latter is born.\(^{47}\)

Furthermore, it is necessary to determine how the previously mentioned six-month term from article 1015 §1 P.C.C., during which heirs decide whether to accept their shares in succession or to renounce inheritance, lapses in case where an heir was born after the opening of the succession. We could assume that in a vast majority of instances, the heir’s parents were aware of the fact that the succession had opened – or, in other words, they were aware of the fact that the testator (the intestate person) had died. We could equally assume that the unborn heir’s legal representative (more commonly, the mother) had learnt about his succession entitlement before he was born. Thus, in the scenarios discussed the six-month period would most likely begin at the moment of the child’s birth, or, in case where the child’s legal representatives did not know about the child’s title to inheritance before his birth\(^{48}\) – from the moment when they learnt about this occurrence.

Finally, it could be observed that the second sentence of article 1015 P.C.C. would seemingly apply *mutatis mutandis* to the case of a posthumous child. Accordingly,


\(^{48}\) For example, when the testator (intestate person) was the child’s unknown distant relative or when he had been previously declared as a missing person, but it was later established that his death occurred when the heir was *en ventre sa mère*. 
if simple acceptance of the child’s share in succession or its renunciation was not declared on behalf of that child during the prescribed statutory period, it will be ascertained that the child accepted his share in succession under *beneficium inventarii*.

2. Succession Rights of an Embryo (Foetus) in German and Italian Law

The Polish regulation of succession rights attributed to an embryo (foetus) is definitely not unique; it resembles in its core the corresponding solutions adopted in other continental jurisdictions, most notably, in Germany and in Italy.49

According to the second passage of §1923 of the German Civil Code,50 a person who was not yet alive (here, understood as ‘born alive’), but who was already conceived at the time of devolution of inheritance,51 is deemed to have been born before the devolution of inheritance took place. Despite slightly different wording of the statutory provisions, the German legislature and its Polish counterpart have visibly followed a similar concept. Namely, the child who was *in utero* at the time of the testator’s death, associated with ‘devolution of inheritance’, according to the German law or ‘opening of the succession’, according to the Polish law, is

---

49 On the margin, it should be noted that a similar solution can be found on the grounds of the Louisiana Civil Code. According to the Code’s article 26, ‘(a)n unborn child conceived at the death of the decedent and thereafter born alive shall be considered to exist at the death of the decedent’. See: Louisiana Civil Code <https://legis.la.gov/legis/Laws_Toc.aspx?folder=67&level=Parent> accessed 14 March 2016.
50 Civil Code 1900 (*Bürgerliches Gesetzbuch*), Federal Law Gazette I p 42, 2909; 2003 I p 738; hereinafter B.G.B.
51 Devolution of inheritance is understood as the transfer of ownership of the inherited assets from the testator (intestate person) onto his heirs.
to be treated as if he survived the testator (the intestate person), as long as he was born alive.

Similarly, the first sentence of article 462 of the Italian Civil Code\textsuperscript{52} acknowledges that all persons born or conceived \textit{(concepiti)} at the time of the opening of the succession are ‘capable of becoming heirs’. Similarly to the case of the Polish and German law, the opening of the succession takes place at the moment of the testator’s death. In addition, pursuant to the article’s second sentence, in the absence of contrary evidence, a child born within three hundred days of the testator’s death is presumed to have already been conceived at the time of the opening of the succession. The provision discussed applies \textit{mutatis mutandis} to the case of intestate succession.

The rights attributed to an embryo (foetus) under the Italian law have been additionally reinforced by article 715 I.C.C., pertaining to the rules of division of inheritance. Accordingly, if at the time of opening of the succession one of the heirs is still unborn, the division, which consists of estimating the value of the succession mass and its subsequent distribution amongst the heirs, cannot take place until that heir’s birth.\textsuperscript{53}

\textsuperscript{52} Civil Code 1942 \textit{(Codice civile)}, Official Journal of the Republic of Italy of 4 April 1942, No 79; hereinafter I.C.C.

\textsuperscript{53} Similarly, according to article 687 I.C.C., revocation of a testament may not take place until the birth of an heir, who remained \textit{in utero} at the time of the opening of the succession.
3. Succession Rights of an Embryo (Foetus) in French Law

Article 725 of the French Civil Code provides that: ‘in order to be eligible for any inheritance the child must exist at the moment of the opening of the succession or, having been conceived, be born viable’.

As was already explained in the introductory part of the thesis, viability, understood as a newborn child’s ability to survive or, in other words, to live independently in the extrauterine environment, represents a more restrictive criterion in comparison with the premise of being born alive. As far as the wording of article 725 F.C.C. is concerned, the criterion discussed was only introduced by the 2001 Amendment to the Civil Code.

It is also interesting to mention that historically in France, as in the other jurisdictions examined, the principles of succession law used to be intrinsically linked to the provisions of the law on legitimacy. In other words, enjoyment of particular succession rights depended on a given child’s familial situation. For that purpose, the Code introduced the ‘presumption of legitimacy’, while determining the shortest period of gestation as lasting not less than one hundred and seventy-nine days and the longest one – as lasting no more than three hundred days.

---

Hence, a posthumous child that was born no longer than three hundred days after his father’s death was still considered to be a legitimate one (*l’enfant légitime*) from the perspective of his succession entitlements. At the same time, it was not entirely clear whether the same presumption applied in cases where legitimacy was not in question, but it was necessary to calculate whether the child had already been conceived at the time of the death of another relative, such as, for example, an older sibling. It should be recalled that nowadays the presumption of paternity – which relies on the identical timeframe and is acknowledged in articles 314 and 315 F.C.C. – serves solely the purpose of establishing paternity of a given man (here: the mother’s husband).

The historic French law also recognised an unwritten, common custom of instituting a testamentary heir, who would not have been yet conceived at the time of the opening of the succession. It has been reported that, in spite of its popularity, the practice had been prohibited as early as in the sixteenth century. An explicit ban on allowing ‘a future descendant’ to inherit a share in the succession can be found, for instance, in article 133 of the Ordinance of Villers-Cotterets 1539 and in article 5 of the Ordinance of February 1731. However, at the time the prohibition was still being circumvented in practice by means of third-party stipulations and it remained in common usage until the end of the eighteenth century. The Napoleonic Code 1804, i.e. the predecessor of the

---

56 Planiol, for instance, seemed to have supported a more rigorous stance, by arguing that in the scenarios examined the posthumous child could not benefit from the legal presumptions, applied either directly or *per analogiam*, but he had to prove, while relying on the general rules of evidence, that he had been conceived in the decedent’s lifetime. See: The Louisiana State Law Institute (trs), *Treatise on the Civil Law by Marcel Planiol with the Collaboration of George Ripert*, vol 3(2) (12th edn, West Publishing Company 1959) 505.

57 The Louisiana State Law Institute (n 56) 424-425.
currently binding version of the Civil Code, put an end to the abovementioned custom. Similarly, in compliance with the contemporary succession law, it is not possible to make a testamentary gratitude for the benefit of an unidentified, potential natural person. At the same time, the historic custom should not be confused with an authorised, common practice of donating gifts for the benefit of a newly-married couple with a reservation that they will materialise at the moment of the donor's death. Such stipulations, mentioned in article 1082 F.C.C., are most frequently made at the time of signing of the marriage contract.

According to the second sentence of the provision, in case where the donor survives the donee, the gift, although intended only for the benefit of the spouse (spouses), will be legally presumed to benefit the descendant’s children who are to be born of the marriage.58

58 Similarly, in line with article 462 I.C.C., one can stipulate testamentary succession entitlements for the benefit of an individualised class of 'future children', i.e. children of a specified person living at the time of the testator's death, even though they have not been yet conceived.
CHAPTER 3
Succession Rights of an Embryo (Foetus) in Ireland and Other Common Law (Mixed) Jurisdictions

1. Succession Rights of an Embryo (Foetus) in the Law of England, Wales and Scotland

A rule, whereby an embryo (foetus) is equated with a child already born for the purposes of the law of succession, has been regarded as a rule of common law.59

In England and Wales the abovementioned rule had already been established and followed by the courts as early as in the nineteenth century;60 however, some earlier judgments, clearly inspired by the previously discussed Roman heritage, have also been reported.61

59 RRM Paisley, ‘The Succession Rights of the Unborn Child’ (2006) 10(1) Edin LR 28, 29. Contrary to Ireland, as will be further explained, in England and Wales there is no statutory principle that would be applicable in the context examined.
60 See, for example: Long v Blackall [1797] 3 Ves 486 30 ER 1119; Trower v Butts [1823] 1 Sim & St 181, 57 ER 72; Blasson v Blasson [1864] 46 ER 534; Re Burrows [1895] 2 Ch 497. On the margin, it is also interesting to observe that succession prerogatives of posthumous children also started being acknowledged in the nineteenth century by the American courts. One should mention, in particular, an equity ruling delivered in the case of Piper v Hoard [1887] 107 NY 73, 13 NE 626, where it was confirmed that succession law protected future rights of ‘potential heirs’. Here, the defendant fraudulently persuaded the plaintiff’s mother to marry the person indicated by him, while promising that the future child would receive a gift of a real estate. The plaintiff, who was born to the spouses of the arranged marriage, did not, however, receive the promised gift and the court ultimately decided that the defendant acted in bad faith. See also: Hall v Hancock [1834] 32 Mass (15 Pick) 255; Biggs v McCarty [1882] 86 Ind 352 and Deal v Sexton [1907] 144 NC 159, 56 SE 691.
61 These include, for instance: Marsh v Kirby [1634] 21 ER 512; Hale v Hale [1692] 24 ER 25; Gibson v Gibson [1698] 2 ER 1173.
Explicit associations with Roman law could be observed, for example, in the 1740 equity ruling delivered in the case of *Wallis v Hodson*.62 As Hardwicke LC argued, the plaintiff, who was *en ventre sa mère* and, consequently, a person *in rerum natura* at the time of the opening of the succession, was to be treated as a child born in her father’s lifetime ‘to all intents and purposes’ of the rules of both common and civil law.63

The short passage could suggest that, at least in the domain of the law of succession, the common law of England and Wales acknowledged and followed the previously discussed principle of civil law, whereby *nasciturus pro iam nato habetur, quotiens de commodis eius agitur*.64 Most notably, we could point to the caselaw ascertaining that an embryo (foetus) was to be treated in the same manner as the living heirs, as long as the element of *commodum* was present, or in other words, as long as acquiring the succession rights was truly and directly beneficial for the resulting child.

It should be, nonetheless, observed that the ‘best and direct’ benefit premise was previously a matter of judicial contention, as can be deducted from the analysis of the corresponding English caselaw. Initially acknowledged in *Trower v Butts*,65 it was subsequently rejected in *Re Burrows*,66 to be later reinstated in the House of Lords’ 1907 judgment delivered in the case of *Villar v Gilbey*.67 Here, George

---

62 *Wallis v Hodson* [1740] 26 ER 472. The same approach was followed, for instance, in *Doe v Clarke* [1795] 126 ER 617.
63 *Wallis v Hodson* (n 62) 473.
64 In common law countries, it is often referred to as the *pro iam nato* principle.
65 *Trower v Butts* (n 60).
66 *Re Burrows* (n 60).

377
William Rush drew a will in which he devised an estate to one of his heirs (his brother) for life and the reminder to the heir's (brother's) third, fourth and every other son successively in tail. In addition, a stipulation was made, whereby the heir's third and any subsequent son ‘born in the testator's lifetime’ were only allowed to take the estate for life. Before the court it was submitted that, at the time of the testator's death, his heir's third son, William Beaumaurice Rush, was still in utero. Hence, it was not clear whether the posthumous successor was entitled to inherit an 'estate tail', or only an 'estate for life', due to the fact that he had been born ‘in the testator's lifetime’.68

At first instance, Swinfen Eady J decided that William had not been born ‘in the testator's lifetime'. However, his decision was later reversed by the Court of Appeal on the grounds that the pro iam nato principle, described as 'a fixed rule of construction', necessitated broader interpretation of the expression thereof.69 The Court of Appeal’s judgment was challenged and the matter was finally brought before the House of Lords.

Loreburn LC reaffirmed, in the first place, that an embryo (foetus) was protected under the English law and could 'even be a party to an action'.70 It was confirmed that posthumous children came within the motive and reason of the gift, and, thus, they should be treated as already living at the time of the testator’s death,

---

68 Villar v Gilbey (n 67) 781 (Loreburn LC).
69 In the words of Cozens-Hard LJ: ‘(a)n fixed rule of construction the words child living at or born at a particular date include a posthumous child in the absence of any context indicating a contrary intention'.
See: Villar v Gilbey (n 67) 781 (Loreburn LC).
70 Ibid.
as long as a given stipulation was for their benefit. At the same time, all the Law Lords were in agreement that applying the *pro iam nato* ‘construction’ to the case of William Beaumaurice Rush would result in reducing his interest from an estate tail to a life estate and, therefore, the intended outcome would not be beneficial for him. Consequently, it was held that the expression ‘born in my lifetime’ included in Mr Rush’s last will, was to be construed in its natural and ordinary meaning and Swinfen Eady J’s judgment was eventually restored.

As can be deducted from this concise overview, at common law the *pro iam nato* principle was initially acknowledged in cases pertaining only to testamentary succession. However, while considering that nowadays a large percentage of population dies without leaving a last will, it would be very hard for any court or administrative organ not to extend its application to cases of intestate succession – with regard to both moveable and immovable property. Similarly, since contemporary common law no longer places a male heir in a privileged position on the grounds of intestate succession – i.e. succession law would no longer be ‘more beneficial’ to unborn heirs, if they were presumed to be males – it should be accepted that the rule applies equally to children of both sexes.

Finally, it is worth mentioning that identical prenatal prerogatives in the domain discussed have been recognised under Scottish common law since the second half

---

71 Ibid.
72 Ibid 783 (Atkinson L).
73 However, the distinction would still apply, for instance, in the context of succession of titles of honour. Paisley (n 59) 39.
of the seventeenth century. It has been observed that the pro iam nato rule has been relied upon in cases of both testate and intestate succession; in cases where the succession mass consisted of both moveable and immoveable property and, finally, also in cases concerning entitlement to legitim. In addition, the rule discussed has been supplemented by the corresponding statutory measures which deal with more ‘technical’ issues, such as, for instance, conveyances in fee to an embryo (foetus) or restrictions to the duration of liferents, associated with the rule against perpetuities.

2. Succession Rights of an Embryo (Foetus) in Irish Law

In Ireland the previously described rule of common law took the form of a statutory provision, namely section 3(2) of the Succession Act 1965, acknowledging that the descendants and the relatives of a deceased person, who remained en ventre sa mère at the time of his death, are to be treated as having been born in the lifetime of the deceased and having survived him.

---

74 See, for example: Bruce v Melville [1677] M 14880 (22 February and 24 July 1677) or Mountstewart v Mackenzie [1707] M 14903.
75 Paisley (n 59) 35 and 37. As should be briefly explained, under both continental and Scots law of succession, legitim represents the part of an estate reserved de jure to the offspring (but also to other close relatives) upon the death of the parent, regardless of the latter’s testamentary disposition. In case of having been omitted in the last will of the deceased, the beneficiaries of legitim can institute a claim against his testamentary successors.
76 In contrast to Ireland, the more general statute – i.e. the Succession (Scotland) Act 1964 (c 41) neither includes definitions of the terms: ‘child’, ‘issue’ or ‘posthumous child’, nor does it invoke the pro iam nato maxim.
77 See: Trusts (Scotland) Act 1961 (9 & 10 Eliz 2, c 57), s 5(2)(c).
78 See: Law Reform (Miscellaneous Provisions) (Scotland) Act 1968 (c 70), s 18(1).
79 Succession Act 1965 (No 27 of 1965).
According to Spierin, the Irish solution seems to be of more comprehensive character than the so far discussed English one, as the section examined embraces all the relatives of the deceased and not only his children.\(^{80}\) However, the cited commentators also point to some interpretational problems concerning application of the provision thereof. Namely, the Succession Act 1965 will most likely apply in the cases of intestacy, while it remains dubious whether it could be treated as a general rule for the construction of wills.\(^{81}\) Hence, it could be assumed that if the last will was drawn by a professional, who ordinarily draws last wills as a part of his legal practice, the drafter would normally take section 3(2) of the statute examined into consideration. Nonetheless, in the remaining scenarios it would be for the court to decide if, in compliance with the rules of common law, the heir, who was \textit{in utero} at the time of the testator’s death, would enjoy the right to inherit.\(^{82}\)

An important factor that should be acknowledged at this point is the different rationale between the principles of testate and intestate succession. In the former case, the emphasis has been placed on fulfilment of the will of the deceased (i.e. the key term here is ‘intention’). In the latter case, since the deceased’s last will has not been expressed, the legacy is to be distributed between the individuals belonging to certain ‘classes’ of heirs (i.e. the key term here is ‘distribution’).


\(^{81}\) Ibid 17-18.

\(^{82}\) Ibid.
It should also be observed that under the law of continental jurisdictions, the above discussed problem is not likely to arise, as the rule has been decided to apply in cases of both testate and intestate succession. The common law rule, however, is not equally straightforward. In fact, it would be far easier to apply the rule to the cases of intestate succession when the ‘intention’ element is by and large absent. At the same time, in cases of disputes concerning testamentary succession, the court would be compelled to decide whether the testator (testatrix) intended not to adhere to the principle.

Frequently, the mere character of the testamentary stipulation could indicate that the drafter of the last will did not or could not have had the embryo (foetus) in mind. Such would be, for instance, the case of stipulations providing that the gift would be given only to the issue who, at the date of vesting, were employed, were in education or were married.83 Finally, the court could simply apply section 3(2) of the Succession Act 1965 to the case of testamentary succession, by reasoning per analogiam.84

Furthermore, while being aware of the amendments introduced by the Land and Conveyancing Law Reform Act 2009,85 it is necessary to examine the potential impact that the rule against perpetuities and its abolition could have had on the application of section 3(2) of the Succession Act 1965. To recall, the rule,

83 Paisley (n 59) 41.
84 However, the legislature’s failure to provide an explicit, corresponding provision, which would be applicable to the cases examined has been described as ‘surprising’. See: Spierin (n 80) 18.
abolished as of 1 December 2009, limited the extent to which a given individual could create future interests in the land by means of his last will. In such scenarios, a child had to be conceived or born within twenty-one years of the death of the designated or implicit life in being. In case where an interest would extend the abovementioned period, the intended ‘future’ interest had to be rendered null and void.

Seemingly, however, the rule could not be regarded as relevant to the succession rights attributable to an embryo (foetus), at least with reference to intestate succession, as this issue had been independently and explicitly regulated in the previously mentioned section of the Succession Act 1965. Abolition of the rule means that the currently binding law no longer limits the time placed on vesting the interest in the land and, as a consequence, one may create a future interest in a child that could be born many years into the future, but is not yet conceived. In such case a trust of land will be imposed by virtue of section 18 of the 2009 Act. The trustees will be entitled to deal with the land, whereas the future interest will be treated as an equitable one and will be overreached on a sale.

It is important to bear in mind that section 16 of the Act in question has also abolished the rule referred to as ‘the old rule against perpetuities’ or ‘the rule against double perpetuities’, previously established in *Whitby v Mitchell*. This

---

86 Ibid s 16(c).
87 For further commentary on the rule against perpetuities and the consequences of its abolition from the point of view of the Irish law, see, for example: A Keating, *Succession Law in Ireland* (Clarus Press 2015) 56-57; J Mee, ‘From Here to Eternity?: Perpetuities Reform in Ireland’ (2000) 22 DULJ 91.
88 Land and Conveyancing Law Reform Act 2009, s 18(1)(c).
89 In other words, the interest attaches to the sale proceeds.
90 *Whitby v Mitchell* [1890] LR 44 ChD 85 (CA).
principle stated that where an interest in land was granted to an unborn person, any remainder over to the issue of that person and any subsequent limitations were void.

Finally, section 3(2) of the Succession Act 1965 does not account for the previously examined 'best benefit' premise. Hence, it is technically possible that the succession mass will consist mainly of debts. At the same time, it should be recalled that in some of the continental jurisdictions examined this burden can be mitigated by the fact that all minors always inherit as beneficiaries of the inventory, so they will only be liable for the deceased's obligations up to the value of the inherited estate.
CHAPTER 4
Position of a Posthumously Conceived (Implanted) Embryo under Succession Law

While discussing the potential succession rights of an embryo (foetus), one should mention some serious legal difficulties that have been experienced in cases where the prospective parents availed of assisted reproductive techniques in order to retrieve their gametes and, subsequently, to conceive their child (children).

In principle, it has been submitted that an artificially created and already implanted human embryo should enjoy identical succession entitlements as an embryo that came into an existence in consequence of sexual intercourse.\textsuperscript{91} At the same time, we must consider a less common scenario, where an embryo, whether still \textit{in vitro} or already implanted, was conceived after the testator's (intestate person's) death with the use of his cryopreserved semen. Here, it is not straightforward whether the man, who will undoubtedly be the resulting child's genetic father, would also be treated as the legal father. That, in turn, is likely to affect the child's position in respect of succession law.\textsuperscript{92}

\textsuperscript{91} See, for example: Z Czarnik and J Gajda, 'Ochrona Prawna Dziecka Poczętego In Vitro i Pozostającego Poza Organizmem Matki (Uwagi De Lege Lata i De Lege Ferenda)' (1990) 10-12 Nowe Prawo 104, 105.

\textsuperscript{92} For an interesting discussion concerning the status of children posthumously conceived by means of ART under the law of different jurisdictions, see, for example: M Nesterowicz, \textit{Prawo Medyczne} (Dom Organizatora 2000) 175 et seq; D Madden, \textit{Medical Law and Ethics} (Butterworths 2002) 178-179 and 188-202 or M Nesterowicz, 'Problemy Prawne Inseminacji \textit{Post Mortem}' (2002) 11(4) Prawo i Medycyna 31.
On the one hand, regard must be given to a conscious decision to procreate, made by a given individual during his lifetime. Becoming a genetic father, even if the child was to be conceived or born long after the man’s death, could allow the man to pass his legacy onto the first-line descendant. On the other hand, one could argue that authorising fertilisation post mortem might be incompatible with the principle of the child’s best interests, as it automatically prevents the potentially resulting children from being raised by both genetic (and legal) parents.

Secondly, from the succession law point of view, such authorisation leads to even more uncertainty, as a rightful heir may be conceived (born) many years after the legacy had already been passed onto the remaining heirs. Needless to say, prompt and predictable distribution of inherited assets has always remained the main objective behind the branch of law discussed.

The lawmakers’ attitude towards the posthumous use of gametes for the purpose of ART and the posthumous implantation of embryos can be described as neither consistent, nor uniform.

---

94 The concern for such ‘automatic fatherlessness’ was expressed, for instance, by O’Keefe J in an Australian case of MAW v Western Sydney Area Health Service [2000] NSWSC 358, [43-44] (O’Keefe J). See also: K Bills, ‘The Ethics and Legality of Posthumous Conception’ (2005) 5 Southern Cross University Law Review 1, 6. On the contrary, Simpson argues that: ‘(t)he posthumously conceived child is both the realisation of the father’s interest and a repository for the memory of him. Furthermore, (...) the child will be marked with its father’s death in ways which suggest substitution and replication’. See: B Simpson, ‘Making ‘Bad’ Deaths ‘Good’. The Kinship Consequences of Posthumous Conception’ (2001) The Journal of the Royal Anthropological Institute 1, 3.
Firstly, the practice discussed has been strictly prohibited by German law\textsuperscript{95} and partially prohibited by Polish law.\textsuperscript{96} As far as France is concerned, it should be noted that in the 1984 seminal case of \textit{Parpalaix v CECOS}\textsuperscript{97} the \textit{Tribunal de Grande Instance}\textsuperscript{98} of Créteil authorised the plaintiff, Corinne Parpalaix, to avail of her late husband’s cryopreserved semen in order to achieve conception. In 1981 Alain Parpalaix, a testicular cancer sufferer, secured a number of sperm samples at the Paris branch of CECOS,\textsuperscript{99} after being advised that the prescribed chemotherapy could potentially render him infertile. Soon after his death in 1983, his widow attempted to enter into possession of the samples but was prevented from doing so by the Director of CECOS.

In absence of any relevant statute or guidance from the Ministry of Health, Mrs Parpalaix and her parents-in-law decided to file a lawsuit against CECOS. Before the court the plaintiffs argued that the contested test tubes, containing frozen sperm of the deceased, constituted heritable property. Accordingly, the plaintiffs further claimed that they had already become owners of the test tubes in accordance with the rules governing intestate succession. It was also underlined that Mr Parpalaix had been frequently expressing his intention to become a father.


\textsuperscript{96} Namely, article 18(1) of the Treating Infertility Act 2015 (Official Journal of the Republic of Poland No 2015.1087) prohibits posthumous use of gametes for the purpose of assisted conception. At the same time, article 33 of the same statute allows for posthumous implantation of the already created embryos. Finally, according to article 21(3)(2), in case of the death of both the prospective parents (participating in either AIH or AID), the stored embryos can be anonymously donated to another couple.

\textsuperscript{97} \textit{Parpalaix v CECOS}, Judgment of 1 August 1984 delivered by the Tribunal de Grande Instance in Créteil, 1984 JCP II, \textit{Gazette du Palais} 2\textsuperscript{e} sem (Paris, 16-17 September 1984) 560; hereinafter \textit{Parpalaix}.

\textsuperscript{98} According to the French court structure, the civil court of first instance.

\textsuperscript{99} Centre for the Study and Conservation of Eggs and Sperm (\textit{Centre d’Etude et de Conservation des Oeufs et du Sperme}).
before he succumbed to cancer. CECOS, on the other hand, submitted that Mr Parpalaix had made an equally conscious decision to destroy the content of the test tubes in the event of his death, as could have been ascertained from the written agreement concluded between him and the Centre. It should be added that signing such an agreement was a part of the Centre's standard policy on the retrieval and storage of human gametes.

The *Tribunal de Grande Instance* rejected the above cited ‘property’ and ‘inheritance’ arguments, neither was it willing to debate on the issue of legal filiation of children conceived artificially *post mortem*. Moreover, it was argued that the French Civil Code did not apply to the agreement which envisaged destruction of the samples in the event of the death of their provider, since, according to the court, human sperm did not constitute a ‘thing in commerce’. At the same time, the court stated that CECOS had an explicit obligation to store the test tubes containing the samples and an implicit obligation to return them to the person for whom they were intended. As was explained, this obligation stemmed from respect for procreative autonomy of the deceased or, in other words, for his fundamental right ‘to give or not to give life’. In the end, the defendant Centre were instructed to hand back the test tubes to a physician, who was to be nominated by Corinne Parpalaix, so the couple's previous plans and wishes concerning their procreation could be eventually realised.

---

100 *Parpalaix* (n 97) 562.
101 Ibid.
102 *Parpalaix* (n 97) 561.
103 For more commentary concerning the *Parpalaix* case see, for example: DJ Jones, ‘Artificial Procreation, Societal Preconceptions: Legal Insight from France’ (1988) 36(3) AJCL 525.
Regardless of the outcome of the Parpalaix ruling, the French legislature subsequently put a ban on posthumous use of gametes for the purpose of assisted conception by virtue of the Act No 94-654, which came into force in 1994.\(^{104}\)

However, it is interesting to mention two most recently reported judgments issued by the French administrative courts, which concerned availability of assisted conception \textit{post mortem}.\(^{105}\) The first decision was delivered by the \textit{Conseil d'Etat}\(^{106}\) in May 2016 in the case of Mariana Gomez-Turri, a Spanish immigrant, whereas the second one was delivered by the administrative court of Rennes in October 2016 in the case of an unnamed French widow. Similarly to the facts in Parpalaix, both women lost their husbands prematurely due to illness and both of them wished to use their late husbands' cryopreserved semen in order to achieve pregnancy. Additionally, in both cases assistance in conception was sought outside France, i.e. in the countries where the procedure examined was legal.

In their two rulings the administrative courts underlined that French law clearly prohibits the use of ART in the present circumstances and does not leave much


\(^{106}\) According to the French court structure, the supreme court for administrative justice.
room for any administrative or judicial discretion. However, considering exceptional facts of the two cases – i.e. the use of another jurisdiction for implantation – the courts allowed for the sperm samples to be exported to the jurisdictions chosen by the interested parties. According to advocate David Simhon, who represented the unnamed widow, a contrary decision could run afoul of the right to respect for private and family life, guaranteed by Article 8 of the ECHR 1950.¹⁰⁷

As will be soon demonstrated, an identical outcome was achieved in the past English cause célèbre. The ruling, nonetheless, was not based on a broad interpretation of the notion of procreative liberty, or as Simpson argues, on ‘resort to personal sentiment’,¹⁰⁸ but on reliance of freedoms guaranteed under the European law.

As for all the jurisdictions of the United Kingdom, in compliance with section 28(6)(b) of the Human Fertilisation and Embryology Act 1990¹⁰⁹ in its original wording, a man, who had died before his sperm was used for the purpose of assisted conception, could not be treated as the legal father of any resulting child or children. Accordingly, such a child (children) did not enjoy any succession rights to the estate left by the deceased.¹¹⁰

¹⁰⁷ Le Cain (n 105).
¹⁰⁸ Simpson (n 94) 14.
¹⁰⁹ Human Fertilisation and Embryology Act 1990 (c 27); hereinafter the HFEA 1990.
¹¹⁰ The potential difficulties for the law of succession and administration of estates caused by authorising fertilisation post mortem were already acknowledged in the 1984 Report of the Committee of Inquiry into Human Fertilisation and Embryology, chaired by Dame Mary Warnock. See: Committee of Inquiry into Human Fertilisation and Embryology, Report of the Committee of Inquiry into Human Fertilisation and Embryology (Her Majesty’s Stationery Office 1988), paras 4.4 and 10.9 <http://www.hfea.gov.uk/docs/Warnock_Report_of_the_Committee_of_Inquiry_into_Human_Fe
The law was subsequently amended in 2003 in the aftermath of the formerly mentioned landmark judgment delivered by the English Court of Appeal in the case of *R v Human Fertilisation and Embryology Authority (ex parte Blood)*. The facts of the case were the following. In 1995, when Diane and Stephen Blood were on their way to start a family, Mr Blood contacted bacterial meningitis and, in consequence of further complications, he went into coma. Shortly before his death his wife requested to have his sperm retrieved and stored in order to be able to conceive the couple’s future offspring. The sperm was deposited with the Infertility Research Trust. However, the Human Fertilisation and Embryology Authority later prevented Mrs Blood from using the samples for the purpose of assisted conception, since Mr Blood had not consented in writing to the retrieval and storage of his semen. Hence, it was also submitted that the depository of the samples was not in possession of a valid storage licence, required by section 4(1)(a) and specified by Schedule 3 of the HFEA 1990.

In her appeal, following a rejected application for judicial review, Mrs Blood relied on section 4(1)(b) of the HFEA 1990, whereby the consent to storage of gametes was not required in cases, where the treatment was being provided ‘for the man and woman together’. She also insisted that her husband would have consented to retrieval and storage of his semen, had he been competent. Finally, it was argued that preventing Mrs Blood from taking her late husband’s sperm to Belgium in order to avail of ART, curtailed her freedom to obtain medical
treatment\textsuperscript{112} in another Member State of the European Union, enshrined in Articles 59 and 60 of the (then binding) EC Treaty.

Lord Woolf MR, who delivered the judgment on behalf of the Court of Appeal, proposed, in the first place, that storing human gametes without written consent of their provider, being an essential element of a valid storage licence, was against the provisions of the HFEA 1990.\textsuperscript{113} Secondly, according to the judge, the provider of the samples could no longer be treated as receiving medical treatment ‘together with the woman’ after his death.\textsuperscript{114} In fact, it would be very difficult to accept that a deceased person was receiving any form of medical care.

At the same time, the Court somehow bypassed the crucial question of consent to retrieval and storage and focused, instead, on the question of Mrs Blood’s (directly effective) rights stemming from the European Community law.\textsuperscript{115} Since exportation of gametes was already considered to be lawful under domestic law - pursuant to section 24(4) of the HFEA 1990 - it was decided that fulfilling the widow’s plea would not create ‘an undesirable precedent’.\textsuperscript{116} Accordingly, the Court ordered the Human Fertilisation and Embryology Authority to reconsider their decision. The onus of proof, this time, was placed on the Authority, who were to demonstrate that refusing exportation of Mr Blood’s sperm to another Member State would be necessitated in the light of the binding European law.\textsuperscript{117}

\textsuperscript{112} Which, here, was treated as a service.
\textsuperscript{113} Blood (n 111) 695 and 697 (Woolf MR).
\textsuperscript{114} Ibid 697 (Woolf MR).
\textsuperscript{115} Ibid 698-703 (Woolf MR).
\textsuperscript{116} Ibid 702 (Woolf MR).
\textsuperscript{117} Ibid 704 (Woolf MR).
In the aftermath of the Court’s judgment, the Authority eventually authorised Mrs Blood to use the samples for the purpose of assisted conception.

It should be noted that, although Diane Blood received considerable academic and political support in the course of her trial, the line of reasoning followed in her case by the Court of Appeal was duly criticised by some of the commentators. Keown, for instance, points to some serious ethical and legal uncertainties surrounding retrieval of gametes from a comatose patient. He argues that retrieving sperm in such circumstances, even if driven by altruistic motives, constituted a tort of battery, in addition to being ethically reprehensible. As was previously suggested, these concerns seem to have been overlooked in the Master of the Rolls’ ruling.

At the other end of the spectrum, a much firmer attitude towards capacity to consent to retrieval, storage and destruction of gametes after death was expressed in the English 2002 case of U v Centre for Reproductive Medicine. In short, Mr U’s sperm was to be surgically retrieved for the purpose of IVF. Before the procedure took place Mr U had signed a standardised consent form, whereby

---

118 Support was offered, inter alia, by Dame Mary Warnock, herself, in spite of the initial reluctance towards posthumous use of gametes for the purpose of ART, expressed in the previously cited Warnock Report (n 110). In her affidavit Dame Warnock explained that: ‘(...) Blood was such an unusual set of facts that the Committee had not even been thinking about the desirability or undesirability of what was being proposed at all’. See also: D Morgan and RG Lee, ‘In the Name of the Father? Ex Parte Blood: Dealing with Novelty and Anomaly’ (1997) 60(6) MLR 840, 845.

119 See, for example, J Keown, ‘Life after Death’ (1997) 56(2) CLJ 270; Morgan and Lee (n 118) 851.

120 As the Master of the Rolls explained: ‘(...) humanity dictated that the sperm was taken and preserved first, and the legal argument followed’. See: Blood (n 111) 690 (Woolf MR).

121 Keown (n 119) 272.

122 U v Centre for Reproductive Medicine [2002] EWCA Civ 565; previously ruled under the name: Centre for Reproductive Medicine v U [2002] EWHC 36; hereinafter U.
he allowed for use and storage of his semen in the event of his death. A month later, Mr and Mrs U attended a meeting with a specialist nursing sister in preparation for the first round of IVF. During the meeting the nurse asked Mr U to amend the consent form in order to make it compatible with the Centre’s ‘ethical policy’, which discouraged posthumous use and storage of human gametes. The man fulfilled her request. Unfortunately for the couple, the performed round of IVF proved unsuccessful and Mr U died unexpectedly of asthma shortly afterwards.

Before the High Court Mrs U argued that her husband withdrew his consent under undue influence. Butler-Sloss P, nonetheless, disagreed, while arguing that that the alleged 'pressure' was not significant enough to render Mr U incapable of making a conscious choice regarding the fate of the retrieved samples in case of his death.123 On appeal, the view of the presiding judge was upheld by Hale LJ.124 The Court of Appeal stressed that retrieval and continued storage of gametes was possible only in the presence of their provider's valid consent. Since Mr U's consent to posthumous use and storage of his semen had been effectively withdrawn, the respondent centre was no longer required to keep it.125

123 Centre for Reproductive Medicine v U (n 122) [28] (Butler-Sloss P).
124 Ibid [27-29] (Butler-Sloss P).
125 To recall, see also: Evans v Amicus Healthcare and Others [2004] EWCA Civ 727 (25 June 2004), where the Court of Appeal reiterated that consent to storage and use of gametes and embryos had to be given in writing and must not have been previously withdrawn. For critical commentary concerning the U case, see for example: SD Pattinson, 'Undue Influence in the Context of Medical Treatment' (2002) 5(4) Medical Law International 305 or M Donnelly, Healthcare Decision-Making and the Law. Autonomy, Capacity and the Limits of Liberalism (CUP 2010) 60-61.
While returning to *Blood*, it should be further explained that, after availing of medical assistance in Belgium, the widow subsequently gave birth to two sons. However, due to the then binding section 28(6)(b) of the HFEA 1990, her late husband's name could not have been revealed in the rubric entitled 'father' on the children's birth certificates. In consequence, Mrs Blood brought the proceedings before the High Court, while invoking the Human Rights Act 1998 in conjunction with the previously cited provision – i.e. Article 8 of the ECHR 1950.\(^{126}\) During the hearing, the government acknowledged incompatibility of section 28(6)(b) of the HFEA 1990 with the abovementioned provision of the 1950 Convention. This subsequently led to enactment of the Human Fertilisation and Embryology (Deceased Fathers) Act 2003, amending the primordial version of the section examined and extending application of the preceding section 28(5). In compliance with the newly added subsection 5A, the mother's deceased husband will be treated as a legal father of a child conceived after his death upon fulfilment of the conditions enumerated in points (a) – (f).

First of all, section 28(5A)(a) applies exclusively to the case of a child (children), who was conceived posthumously with recourse to ART.\(^ {127}\) Secondly the child's mother must have been married to the putative father immediately before his death.\(^ {128}\) Thirdly, the man must have consented in writing to the use of his semen after his death (or to implantation of the already created embryos)\(^ {129}\) and to

---

\(^ {126}\) See: *Blood v Secretary of State for Health* (HC, 28 February 2003).

\(^ {127}\) Namely, the embryo was either created or implanted after the death of the prospective father.

\(^ {128}\) HFEA 1990, s 28(5A)(c).

\(^ {129}\) Ibid s 28(5A)(d)(i).

395
being treated as the father of any resulting child (children).\textsuperscript{130} Fourthly, the child’s mother is also obliged to agree in writing to treating the man as the legal father.\textsuperscript{131} Such a declaration will be effective, if it is submitted not later than forty-two days following the child’s birth.\textsuperscript{132} Fifthly and finally, it must be demonstrated that no other man can be treated as the legal father of the child conceived and born in the circumstances examined.\textsuperscript{133}

The conditions from section 28(5A) apply \textit{mutatis mutandis} to the case of a deceased male partner of an unmarried mother, provided that the couple had been treated together before the partner’s death and that the remaining premises outlined in section 28(5B) of the Act have been satisfied.\textsuperscript{134}

After the 2003 Act entered into force, Diane Blood could achieve the ultimate goal of having her late husband’s name acknowledged in the couple’s sons’ birth certificates.\textsuperscript{135} One crucial question remains, namely: what legal consequences will such acknowledgment produce in the domain of the law of succession? Will the name of the mother’s late husband be mentioned in the child’s birth certificate merely for the purposes of civil registration? Or, perhaps, the main objective

\textsuperscript{130} Ibid s 28(5A)(d)(ii).
\textsuperscript{131} Ibid s 28(5A)(e).
\textsuperscript{132} In accordance with section 28(5E) of the Act that period has been shortened to twenty-one days with reference to Scotland.
\textsuperscript{133} HFEA 1990, s 28(5A)(f).
\textsuperscript{134} Furthermore, in compliance with sections 28(5C) and 28(5D) of the Act, the mother’s deceased husband (male partner) will also be regarded as the legal father in cases where the previously enumerated conditions have been met, but the embryos were created with the use of donor’s sperm.
behind such a mention would be to bring legal filiation in line with its genetic counterpart? Even assuming that a child can be born as a 'legally fatherless'\textsuperscript{136} one, it can never be born as a 'genetically fatherless' one. In the light of the strong scientific evidence, such as the DNA analysis, it will be undisputable that the child descended from the mother’s husband.

A clear answer to the above posed question has been provided by sections 28(5I) and 29(3B) of the HFEA 1990, introduced by virtue of the 2003 amendment. According to these provisions, in cases where the previously cited subsections 5A, 5B, 5C or 5D of the Act’s section 28 apply, the deceased man will be treated as the child’s legal father solely for the purposes of civil registration and ‘not for any other purpose’.\textsuperscript{137}

Such a cautious approach to the issue of succession rights in the context of posthumous conception was expressed, for instance, in a well-known 1983 ruling of the Californian Supreme Court, delivered in the case of \textit{Re Estates of Elsa and Mario Rios}.\textsuperscript{138} In short, Mr and Mrs Rios, who were wealthy co-owners of a rental property company, had been intending to have children together. Due to Mr

\textsuperscript{136}Since the \textit{pater is est quem nuptiae demonstrant} presumption, discussed in the preceding part of this thesis, cannot serve to establish legal filiation in case, where a child was born later than three hundred days after the death of his mother’s husband.

\textsuperscript{137}As section 28(5I) of the HFEA 1990 explains, ‘(t)he purpose referred to in subsections (5A) to (5D) above is the purpose of enabling the man’s particulars to be entered as the particulars of the child’s father in (as the case may be) a register of live-births or still-births kept under the Births and Deaths Registration Act 1953 or the Births and Deaths Registration (Northern Ireland) Order 1976 or a register of births or still-births kept under the Registration of Births, Deaths and Marriages (Scotland) Act 1965’.

Rios’s fertility issues, they decided to avail of IVF with the use of donated semen. In the aftermath of the procedure, which took place in Melbourne, two out of three resulting embryos were frozen and stored for the purpose of their future implantation in Mrs Rios’s uterus. Unfortunately, the couple were later killed in a plane crash in Chile, leaving behind a substantial legacy. In absence of the Rios’s last will, the court decided that the two frozen embryos could not be regarded as their issue and, therefore, even if a potential surrogate mother would agree on implantation, the resulting child (children) could not inherit.139

However, as a contradictory example, one could cite a Tasmanian 1996 case of Re Estate of the Late K.140 In this case, a couple, who availed of IVF, became parents of a baby boy. A year later, the husband died. Soon afterwards, his widow decided on implantation of the remaining, cryopreserved embryos and consulted the court with regard to the succession status of the potentially resulting child (children). Despite acknowledging that an embryo (foetus) was regarded neither as a person, nor as issue from the point of the succession law, Fraser J further concluded that: ‘(...) a child, being the product of his father’s semen and mother’s ovum, implanted in the mother’s womb subsequent to the death of his father is, upon birth, entitled to a right of inheritance afforded by law’.141

On that point, so far we have considered potential succession entitlements of an embryo that had been created with the use of cryopreserved semen (or

---

139 The share in the estate belonging to Mr Rios was eventually passed on to his son from the previous marriage, whereas the share belonging to his wife was passed on to her mother.
141 Ibid [46] (Slicer J).
implanted) after the death of the genetic father. Nonetheless, it is also necessary to consider the corresponding entitlements in the case, where an embryo had been created (or implanted) posthumously with the use of a cryopreserved ovum. Here, the person intending to raise the resulting child will be compelled to avail of the surrogate's services. Although the net outcome of the two scenarios will seemingly be identical – i.e. the child will be born after the death of a genetic parent or parents, the child's familial status will not be the same.

Unlike in the previously discussed scenario, a child born to a surrogate would not be regarded as legally 'motherless'. It is because in accordance with the previously discussed *mater is est quem gestatio demonstrant* presumption, most domestic laws will regard the surrogate as the child's legal mother. It is only when the child is formally adopted by his genetic mother, the genetic and legal motherhood fuse and the child can be granted succession entitlements. However, until that moment the child will be treated as the surrogate's descendant and also as her rightful heir. Obviously, if the genetic mother dies before her eggs are used to create the embryos (or before their implantation), adoption of the child will not be possible and the child will not be able to inherit. One can speculate that in case of a hypothetical dispute, it would be for the court to decide if such a child could be deemed a rightful heir of the genetic mother who had not given birth to him.\(^{142}\)

---

\(^{142}\) As for the United Kingdom, section 30(1) of the HFEA 1990 states that the genetic mother of a child delivered by a surrogate can become the child's legal mother by virtue of a parental order issued by the court in case where the commissioning couple has fulfilled premises further described in subsections (2) to (7).
In absence of an Irish statute regulating the use of ART, it is virtually impossible to determine either filiation of or any succession entitlements enjoyed by posthumously conceived children under the law of this jurisdiction. As rightly observed by Madden, currently, there is no legal prohibition of posthumous use of retrieved, stored sperm by the interested party, who, most frequently would be the prospective father's widow.\textsuperscript{143} Similarly, there have not been to date any reported court cases concerning legality of the procedure examined or discussing succession rights of either the widow or the resulting children under Irish law.

Nonetheless, Madden further reports that the Human Assisted Reproduction Unit of the Dublin's Rotunda Hospital normally asks recipients of fertility treatment to sign a consent form, stipulating that in case of the provider's death, the retrieved gametes would be left to perish and no other steps would follow.\textsuperscript{144} At the same time, she doubts whether a private law agreement concluded between the hospital and a patient could be upheld by the court, for instance, in case where that patient's last will had contained a stipulation to the opposite effect and his widow subsequently claimed to have constitutional rights to inherit (or use) the frozen gametes in accordance with the abovementioned legal document.\textsuperscript{145}

As a part of the statutory regulation of ART, the legislature would need to decide whether fertilisation \textit{post mortem} is to be authorised in this jurisdiction and, in cases of a positive answer, it would need to determine premises of such

\textsuperscript{143} Madden (n 92) 176. See also: D Madden, 'The Quest for Parenthood in Assisted Human Reproduction' (1999) 21 DULJ 1, 4.
\textsuperscript{144} Madden (n 92) 176.
\textsuperscript{145} Ibid.
authorisation. With reference to the legal status of a child (children) born as a result of the procedure, two matters deserve particular consideration. First, could such a child be still regarded as marital, despite the explicit formulation included in section 46(1) of the Status of Children Act 1987? Secondly, if the child was to be treated as marital and, in consequence, he could potentially become his father’s heir, it would need to be further clarified, whether – in cases of intestacy - a cryopreserved embryo would still be treated as ‘begotten’ under the previously examined section 3(2) of the Succession Act 1965.

With regard to succession law, the legislature could choose one of three models of regulation: the first, ‘liberal’ one, assuming unconditional enjoyment of the succession entitlements by children conceived post mortem by means of ART, the second, ‘restrictive’ one, similar to the one adopted under the HFEA 1990; or, finally, the third, based on compromise between the two opposite models.

On the one hand, it could be argued that opting for the liberal model encourages creation of embryos for merely materialistic motives – i.e. so the resulting child (children) had the right to a share in his late father’s estate. On the other hand, however, opting for the restrictive model, could place the resulting child in an unprivileged position vis-à-vis his siblings, who were conceived and (or) born in their father’s lifetime. Here, we could be easily faced with a somehow paradoxical

146 To recall, according to the above cited provision, if a woman gives birth to a child, either during a subsisting marriage to which she is a party, or within the period of ten months after its termination (by death or otherwise) then the woman’s husband is presumed to be the father of the child, unless the contrary is proved on the balance of probabilities. However, it has been argued that the child born as a result of posthumous conception could be still regarded as marital ab initio, if application of the presumption of paternity was to be extended in time to the moment of retrieval of the putative father’s semen, i.e. to the time when the genetic parents were both alive and still lawfully married. See: Madden (n 143) 9.
scenario. Namely, if an embryo was conceived as a result of a sexual intercourse which had taken place shortly before death of the genetic father, the resulting child would enjoy the right to inherit from his father’s estate; whereas if the same embryo was conceived by means of ART shortly after the death of the genetic father, the resulting child would not enjoy such a right.

The third, and perhaps the most recommended, compromise option would consist of introducing a fixed, statutory term during which the resulting child could rely on its right to have a share in the father’s legacy. Some authors have suggested that the duration of such a term should not exceed two years. The two-year period would allow the newly instituted heir not to interfere with administration of the estate, while preserving the procreative rights of both the genetic parents.147

In conclusion, posthumous conception and its potential consequences for the domain of succession should be regulated with particular diligence and care, for that the corresponding law could fulfil the necessary criteria of pragmatism, transparency, predictability but, above all, fairness. As Robertson accurately summarised, the issue examined: ‘(...) nicely illustrates how the importance of

147 Madden (n 143) 6. As should be explained, in line with the governmental proposals included in the recently published ‘General Scheme of the Assisted Human Reproduction Bill 2017’, artificial insemination post mortem (here, rather unfortunately referred to as ‘posthumous artificial reproduction’ or PAR) and retrieval of gametes for the purpose of the procedure is recommended to be authorised, subject to several conditions. Moreover, in line with Head 27 of the Scheme, a deceased person will not be treated as the legal parent of a child conceived via PAR, unless that child is born within thirty-six months of his death. As has been further explained, in recognition of the parent-child relationship, the child would enjoy succession rights and the deceased parent could also be named on the child’s birth certificate. See: Department of Health, ‘General Scheme of the Assisted Human Reproduction Bill 2017’ <http://health.gov.ie/blog/publications/general-scheme-of-the-assisted-human-reproduction-bill-2017> accessed 18 February 2018; Heads 23-28.
autonomy in resolving conflicts about new technology must be demonstrated and earned anew with each application and should not automatically control simply because an individual has expressed a wish’.\textsuperscript{148}

\textsuperscript{148} See: Bills (n 94) 4.
Conclusions

Vesting an embryo (foetus) with succession entitlements has been universally practiced since the Roman times. The rights in question are still being recognised in all the continental, common law and mixed jurisdictions examined. They are also exercised without major controversies, except for the case where a potential beneficiary was conceived posthumously via ART. The catalogue of entitlements secured by the law in the situations discussed can be described as broad and comprehensive, as it includes in its scope the entitlements governed by the principles of both testate and intestate succession. With regard to the first-mentioned type of succession, an embryo (foetus) can acquire the right to inherit under both general (a share) or a particular title (a legacy or devise).

In line with the structure of the preceding parts of this thesis, attention will be now drawn to the construction and the legal character of these rights.

According to all the scenarios currently analysed, the right to inherit comes into existence at the moment of the testator’s (intestate person’s) death, even if that moment occurred when some of his heirs or legatees had already been conceived but were yet unborn. Nonetheless, for the latter category of heirs, their right will only become exercisable at the time when they are born and provided that they are born alive.149 As a consequence, one could argue that it is not an embryo (foetus) that acquires the right to inherit a share in the succession mass (a testamentary gift), but it is, in fact, a child, who, once born alive, will be entitled

---

149 Or born and viable, according to the law of some jurisdictions, such as France.
to inherit the share (gift), with the only reservation that the entitlement examined stems from an occurrence that had taken place before that child was born.

Since ‘the gift will materialise at birth’,\(^{150}\) it could be further assumed that the provisions applicable to an embryo (foetus) on the grounds of succession law are strictly pragmatic in their nature, in a sense that they are meant to protect solely the rights of a future natural person. Similarly, the rights examined are frequently construed in a form resembling a legal fiction,\(^ {151}\) a feature relevant to both continental and common law countries. Such ‘fictional construction’ was invoked, for instance, by Baker P in the previously cited case of *Paton v British Pregnancy Advisory Service Trustees and Another*,\(^ {152}\) while he relied on Macmillan’s LJ’s statement from *Elliot v Joicey*.\(^ {153}\)

The term ‘legal fiction’ also comes to mind when one reiterates the wording of the corresponding Irish statutory provision and very similar wording of the continental codes’ articles, such as, for instance, §1923 B.G.B. To paraphrase, an heir who remained *in utero* at the time of the opening of the succession is considered to have been born before the succession opened.

\(^{150}\) E Jackson, *Medical Law. Text, Cases and Materials* (2nd edn, OUP 2010) 720. Jackson argues that, for the above cited reason, an embryo (foetus) cannot be regarded as enjoying the right to inherit the property.

\(^{151}\) The term can be defined as an assumption that something is true, irrespective of whether it is really true or not.

\(^{152}\) ‘From conception the child may have succession rights by what has been called a ‘fictional construction’ but the child must be subsequently born alive’. See: *Paton v British Pregnancy Advisory Service Trustees and Another* [1979] QB 276, 279 (Baker P).

\(^{153}\) *Elliot v Joicey* [1935] SC (HL) 57, 71 (Macmillan LJ).
In passing, from a more general perspective, the construction of a legal fiction is frequently adhered to on the grounds of succession law of continental countries. To provide some examples, according to article 32 P.C.C., if more than one person died as a result of the same dangerous and sudden occurrence, they are treated as if they had died simultaneously. Similarly, the fiction appears in the previously cited article 1022 P.C.C. which provides that an heir who decided to renounce his share in succession is regarded as if he had died before the testator (the intestate person). Hence, one could summarise that associations with legal fiction in the context of prenatal prerogatives, at least in the domain of succession, are, indeed, not surprising.

The explanation of such an approach can be deduced from the main, universal rationale behind the norms of succession law, previously outlined in the beginning of this part of the thesis, namely - the need to respect the owner’s will and intentions in the event of his death. In order to be able to fully achieve this goal, succession law relies on concepts and remedies that can be described as both ‘technical’ and ‘artificial’. While discussing the general reliance on the construction of a legal fiction, Paisley argues that the fiction discussed should be deemed ‘a pragmatic solution which both the deceased and society in general are likely to have wished’.155

---

154 In compliance with article 928 §2 P.C.C., an heir, who had been declared by the court as unworthy of inheritance would be treated in the same manner. The same fiction can be found in section 120(5) of the Succession Act 1965.
155 Paisley (n 59) 32.
At the same time, when referring to the rationale behind introducing prenatal prerogatives in the domain of Scottish succession law, Paisley further explains that these prerogatives are aimed at favouring an embryo (foetus) by means of what he describes as ‘an equitable effect’. Namely, in such a way the law furnishes a future child with a prerogative which would be otherwise only attributable to a child already born.\textsuperscript{156}

To follow Paisley’s line of argumentation, one could add that despite the fact that succession rights cannot be exercised before the birth of a potential heir or a legatee, they can be still regarded as tangible, respected and safeguarded. As was previously demonstrated, an estate cannot be effectively divided amongst the remaining heirs before the birth of the heir \textit{in utero}. Moreover, in some continental jurisdictions a \textit{curator ventris} can be appointed in order to preserve the rights of the ‘vulnerable’ heir. In some countries it is even possible to create interests for the benefit of unidentified children that will be conceived and born in the future.

As a result, some commentators argue that an embryo (foetus) can be regarded as enjoying a conditional capacity to inherit. The rights embraced by the capacity are contingent upon the child’s subsequent live-birth and are non-exercisable until that time. As Salmond puts it, ‘[t]here is nothing in law to prevent a man from owning property before he is born. His ownership is contingent, for he may never be born at all; but it is nonetheless real and present ownership’.\textsuperscript{157} Hence,

\textsuperscript{156} Ibid.
\textsuperscript{157} J Salmond, \textit{Jurisprudence} (6th edn, Sweet & Maxwell 1920) 277.
one could propose that the capacity to inherit forms an ingredient of a broader concept of legal capacity. In other words, if one possesses legal capacity, one also possesses capacity to inherit.\textsuperscript{158}

Accepting that an embryo (foetus) enjoys capacity to inherit would imply making a more powerful assertion, whereby an embryo (foetus) also enjoys some form of general legal capacity in the domain of private law. This issue will be now further analysed in the forthcoming, final part of this work.

\textsuperscript{158} A similar view was expressed, for example by A Kremis in Gniewek (n 47) 1426.
PART 5

CONCLUDING OBSERVATIONS
In line with the observations initially made, prenatal human life is still at the centre of rather emotional, contentious discourse which reflects on varying religious, philosophical, political and, finally, legal stances. With reference to law, the status of an embryo (foetus) has to be assessed in a comprehensive manner. Hence, as this author appreciates, potential questions of optimal abortion regulation are not likely to be escaped in this context.¹

On the other hand, however, assessing the issue examined exclusively from the private law perspective has served the purpose of demonstrating that the concept of foetal rights is far broader in its scope than foetal right to life, which both criminal and constitutional law focus upon. On that account, the author would argue in favour of creating a more convergent model of protection of an embryo (foetus) under Irish law, in general, while – at the same time – considering the divergence of functions fulfilled by public, as opposed to private law, as well as the divergence of terminology, methods of regulation, remedies, etc. that are characteristic of the two domains.

1. Remarks De Lege Lata

In the course of this research the author has examined two rights vested in an embryo (foetus), which are universally recognised in all the example continental and common law (mixed) jurisdictions. These were: firstly, the right to receive compensation for antenatal injuries and, secondly, the right to become an heir

(legatee) before one's birth. With reference to family law, an emphasis has been placed on two prerogatives specific to the law of continental Europe, i.e. the right to have one's paternity established by means of prenatal, voluntary acknowledgment and the right to be represented by a curator ventris.

The author finds it necessary to explain what is meant by legal personality and legal capacity, before assessing them in the context of antenatal rights. Undoubtedly, both terms could be described as attributes of persons – physical as well as artificial (legal). Nevertheless, while common law scholars seem to opt for the former term when discussing private law prerogatives of an embryo (foetus), their continental colleagues will more frequently adhere to the latter.

As for continental law, it should be mentioned that legal capacity and legal personality are sometimes being defined as synonyms.\(^2\) However, in line with some sources, the last-mentioned term is, in fact, broader and more comprehensive in its scope, since it includes 'all the consequences of being a person'.\(^3\) According to this author, legal personality depicts a more general status that the law awards to certain entities (e.g. individuals, corporations) as opposed to the other, non-privileged ones (e.g. animals, things).


Legal capacity, on the other hand, could be defined as a core attribute of legal personality. In the continental doctrine it is universally understood as an ability to become the right holder and a duty bearer\(^4\) in an abstract sense – without referring to a concrete, individualised legal relationship.\(^5\) Adversely, in common law countries, capacity (or lack of capacity) is established \textit{in concreto}, i.e. where a given person possesses (or lacks) specific attributes that are required in a particular scenario, such as, for example, capacity to enter a sale agreement, to marry, to adopt a child, to become a successor, etc.\(^6\) As Birks puts it, mere ‘possession of personality does not entail the possession of a fixed set of legal capacities’.\(^7\)

Furthermore, as far as continental private law is concerned, both legal personality and capacity should not be confused with a more qualified notion of the so-called ‘capacity to perform legal acts’.\(^8\) Its enjoyment allows for acquisition of individualised rights (duties) by one’s own actions, in one own’s name and in one own’s account. In principle, full capacity to perform legal acts – as Polish or German civil codes provide – will be vested in natural persons who have reached the age of majority and who have not been incapacitated.\(^9\)

\(^4\) Here, on the grounds of broadly defined private law.
\(^7\) Ibid 145.
\(^8\) \textit{Zdolność do czynności prawnych} (Polish) or \textit{Handlungsfähigkeit} (German).
To summarise, despite varying terminology, in both continental and common law jurisdictions the term ‘person’ seems to represent a natural (artificial) entity that can acquire rights and duties recognised by private law.\textsuperscript{10} Accordingly, for the purpose of the subsequent passage, the author will adhere to a joint term of legal personality (capacity), in order to decide whether an embryo (foetus) enjoys a more general status characterised by right-owning, duty-owing competences on the grounds of broadly defined private law of all the jurisdictions examined.

As was previously demonstrated on many occasions, individual prenatal rights in the domains of succession and family law had already been acknowledged at the times of Ancient Rome. Nonetheless, availability of the prerogatives examined was interpreted in a different way by Roman jurists, which, expectedly, led to diversity of conclusions in respect of the personality (capacity) issue.

For example, according to Ulpianus and Papinian, the rights pertaining to \textit{conceptus} were formulated for the sole benefit of the resulting, future child and, hence, as the two jurists further argued, both – the rights and the child – were, in fact, being born together. On that account, during the period of gestation the conjoined maternal and foetal organisms constituted a single entity, non-separable also in the legal sense.\textsuperscript{11}

Paulus, on the other hand, proposed that ‘the one whose birth was expected’ (\textit{qui nasci speratur}) was already deemed a proper human being, whenever the

\textsuperscript{10} See also: Steyn LJ’s definition of ‘person’ proposed in \textit{Deutsche Genossenschaftsbank v Burghope} [1995] 1 WLR 1580, 1588, which was approved by the majority of the House of Lords.

\textsuperscript{11} Ulpianus, D. 25, 4, 1, 1 and Papinian, D. 35, 2, 9, 1.
question concerned advantages that the resulting child would be vested with upon subsequent live-birth, with the leading example of the right to inherit. Finally, other scholars, including, for example, Julian and Celsus, believed that for almost all purposes of civil law a foetus should be treated as already existing in ‘the world governed by the laws of nature’ (in rerum natura), but it could not become a part of the ‘world governed by the laws of humans’ (in rebus humanis) until birth.

Due to the varying interpretative guidelines, the hitherto cited dicta of Corpus Iuris Civilis could not have helped to ultimately settle the question of foetal personality (capacity) under the law of late Ancient Rome. Numerous Romanists have since identified Paulus’s formula with a classic example of a legal fiction, whereby a child, at the moment of being born alive and viable, acquired rights which were linked to retrospective, prenatal occurrences. The fiction could be relied upon as long as the benefit premise (commodum) had been fulfilled. To

12 Paulus, D. 1, 5, 7: Qui in utero est, perinde ac si in rebus humanis esset custoditur, quotiens de commodis ipsius partus quaeritur (...). As the cited digest further explains, the above stance was adopted in response to factual scenarios, where pregnant freeborn women were being taken as prisoners by the enemies. Following the nasciturus pro iam nato maxim allowed the captive’s resulting child to maintain the status of a freeborn person and, on that basis, also to acquire the corresponding succession entitlements. See also: D. 50, 16, 231.

13 See: Paulus, D. 5, 4, 3.

14 See: Julian, D. 1, 5, 26 and Celsus, D. 38, 16, 7.


paraphrase Savigny's argument from his well-known *System of the Modern Roman Law*, a child *en ventre sa mère* was incapable of becoming either an owner or a creditor (debtor).\(^1^7\) A small group of scholars have, nonetheless, expressed an opposing view, while suggesting that the text of the Digests could be interpreted as confirming legal capacity of the *conceptus*. Nonetheless, there is no uniformity as to whether such – potentially acknowledged – personality operated in its full, unrestricted scope\(^1^8\) or in the scope restricted to defined benefits acknowledged by the norms of private law, primarily – as had been observed by Paulus – in the domain of succession.\(^1^9\)

The Roman dicta addressing the foetal status were later rediscovered by medieval civil law scholars, who are believed to be the authors of the modern version of the previously cited adage, whereby *nasciturus pro iam nato habetur quotiens de commodis eius agitur (quaeritur)*, i.e. an embryo (foetus) is treated as already born to the extent that his own benefits are concerned.\(^2^0\)

The *nasciturus* maxim – as was evidenced at many points of this thesis – is still being cited *verbatim* in statutes, judgments and legal commentaries worldwide. As will be further demonstrated, the contentious relationship between reception of the maxim and acknowledgment of foetal personality (capacity) also characterises contemporary law, as both the statutory solutions adopted in the

\(^1^7\) Savigny (n 15) 13.
\(^1^8\) Namely, whether a foetus *qua* foetus was already treated as a natural person with all the consequences envisaged by private law.
\(^2^0\) Hereinafter referred to as the *nasciturus* maxim.
area as well as the opinions of the doctrine visibly vary from country to country and from scholar to scholar.\textsuperscript{21}

As for the current statutory framework of the selected continental jurisdictions, Poland, alongside Germany,\textsuperscript{22} Italy\textsuperscript{23} and the Czech Republic\textsuperscript{24} belongs to the group of jurisdictions, where legal capacity in the domain of private law begins at the moment of birth, provided that the child was born alive. General, explicit stipulation to the effect can be found in article 8 §1 P.C.C.\textsuperscript{25}

On the other hand, the French Civil Code does not include any blanket formulas to the effect. As some commentators explain, in order to become a person and to acquire capacity under French private law, a newborn child has to be \textit{vivant et viable}.\textsuperscript{26}

As far as Polish law is concerned, it is, nonetheless, necessary to acknowledge that article 6 of the Act of 7 January 1993 on Family Planning, Protection of the Human

\footnotesize{\textsuperscript{21} For example, §22 of the Austrian Civil Code (A.B.G.B.) in its original, 1811 wording stipulated that an embryo (foetus) was protected by the – then binding – norms of private law from the moment of conception. The principle was described as a logical implication of the \textit{nasciturus} maxim, which had been previously acknowledged under Austrian law. See: Nawrot (n 16) 110-112.}

\footnotesize{\textsuperscript{22} B.G.B., §1.}

\footnotesize{\textsuperscript{23} Civil Code 1942 (\textit{Codice civile}), Official Journal of the Republic of Italy of 4 April 1942, No 79; hereinafter I.C.C., art 1.}

\footnotesize{\textsuperscript{24} Civil Code 2014 (\textit{Občanský zákoník}), 89/2012 Sb; §25.}

\footnotesize{\textsuperscript{25} As should also be explained, the current Code’s statutory predecessors adhered to the same solution. See: Decree on the Law of Persons 1945, Official Journal of the Republic of Poland, No 1945.40.223, art 2 §1; General Principles of Civil Law Act 1950, Official Journal of the Republic of Poland, No 1950.34.311 with amendments, art 6 §1.}

Foetus and the Conditions for Abortion Admissibility,\(^{27}\) which was often cited in the preceding parts of this thesis, did initially extend article 8 P.C.C. by an additional, second paragraph. The passage, which articulated *expressis verbis* that a ‘conceived child’ enjoyed legal capacity,\(^{28}\) was, nonetheless subsequently repealed by virtue of the Act’s 1996 amendment.\(^{29}\)

In the aftermath of the subsequent constitutional challenge, the Polish Constitutional Tribunal\(^{30}\) held that repealing the second paragraph of article 8 P.C.C. was compliant with the Polish Constitution.\(^{31}\)

While authorising the repeal, the Tribunal, nonetheless, underlined that removal of the blanket clause acknowledging foetal capacity did not mean that an embryo (foetus) lost an ability to become a holder of any rights envisaged by the norms of private law.\(^{32}\) It was also explained that foetal capacity under Polish private

---


28 The paragraph’s second sentence further specified that an embryo (foetus) acquired patrimonial rights and obligations as long as the resulting child was subsequently born alive. As a consequence, some Polish commentators propose that – during the period when the 1996 amendment of the Family Planning Act 1993 remained in force – an embryo (foetus) enjoyed legal capacity on the grounds of Polish private law. Moreover, as the wording of article 8 §2 P.C.C. may paradoxically suggest, acquisition of antenatal, non-patrimonial prerogatives was not contingent upon the born-alive condition. See, for example: S Dmowski and S Rudnicki, *Komentarz do Kodeksu Cywilnego. Księga Pierwsza, Część Ogólna* (6th edn, Lexis-Nexis 2006) 68 et seq; Pazdan (n 26) 938.


31 As was consequently repeated in various passages of the ruling, human life deserves legal protection at all stages of its development. However, the protection may not be equally intense at each point of its existence and may be curtailed in some specific circumstances envisaged by the law. See: Ibid para 3.

32 According to the judges, foetal life, well-being and, above all, dignity would be continuously awarded comprehensive legal protection. See: Ibid para 4.4.
law should not be equated with the general position of an embryo (foetus) within the entire domestic legal system.  

The above cited ruling did not, seemingly, resolve the problem of foetal capacity in Polish private law, but, instead, it added up to the – still perceivable – doctrinal confusion. As a result, some of the commentators interpret the Tribunal’s reasoning as confirming that an embryo (foetus) enjoys legal capacity, albeit conditional upon its subsequent live-birth and limited in its scope. The capacity discussed is regarded as an exception from the general proviso expressed in article 8 §1 P.C.C. Moreover, as Haberko suggests, with recourse to private law rights corresponding with protection of the foetal right to life, foetal capacity should be treated as both unlimited and unconditional.

In opposition, other Polish scholars have proposed that private law safeguards certain particular interests that have been vested in an embryo (foetus); however, the statutory solution adopted in Poland should be neither associated with the notion of legal capacity, nor should it be treated as an exception from the general principle articulated in article 8 §1 P.C.C.

---

33 Ibid para 4.4.
34 See, for example: K Pietrzykowski, Kodeks Rodzinny i Opiekuńczy, Komentarz (3rd edn, CH Beck 2002) 759; Nawrot (n 16) 322. See also: A Wolter’s gloss to the judgment of the Polish Supreme Court of 4 April 1966 [1996] 12 NP 1613, 1617.
35 The cited author points, most notably, to the right to physical integrity and to the right to be born healthy. See: J Haberko, Cywilnoprawna Ochrona Dziecka Poczętego a Stosowanie Procedur Medycznych (Wolters Kluwer 2011) 127.
36 Ibid.
37 See, for example: G Bieniek in G Bieniek et al, Komentarz do Kodeksu Cywilnego. Księga 3: Zobowiązania, vol 1 (9th edn, Lexis-Nexis 2008) 628; Dmowski and Rudnicki (n 28) 70; Wypiórkiewicz (n 2) 34.
Seemingly, analogous lack of clarity emerges from the study of German commentary on the issue of the foetal status. Namely, while, according to some sources, an embryo (foetus) can derive rights while still in utero – which may even suggest recognition of some form of limited foetal capacity under German private law – according to the others, the law does not treat an embryo (foetus) as a subject of rights or as an addressee of duties; several provisions of B.G.B. protect the retrospectively created interests of the resulting child, but only where he is subsequently born alive. Interestingly, even those commentators who argue in favour of existence of the foetal capacity, further – quite bizarrely – propose that the question of the foetal status under German private law boils down to application of ‘the nasciturus fiction’ formulated for the purposes of the law of succession.

A more consequential attitude towards the issue of foetal status could be, prima facie, deducted from brief analysis of caselaw of England and Wales. In this context, it seems appropriate to recall the statement made by Sir George Baker P in *Paton v British Pregnancy Advisory Service Trustees and Another*, whereby an embryo (foetus) cannot, in English law and, assumingly, under civil law of other common law jurisdictions ‘(...) have any right of its own at least until it is born and has a separate existence from the mother’.

---

40 Foster (n 38) 419.
41 *Paton v British Pregnancy Advisory Service Trustees and Another* [1979] QB 276; hereinafter *Paton v BPAS*.
42 Ibid 279 (George Baker P).
Furthermore, the rather peculiar construction of tortious liability for antenatal
harm, subsequently adopted under both statutory and common law of the
jurisdiction seems to support the above cited proposal. Namely, as was stated by
the English Court of Appeal in the joint cases of *Burton and De Martell*, the injury
to an embryo (foetus) must be equated with an injury inflicted to the resulting
child at the moment of its live-birth; being the point at which the duty of care
‘crystallises’ and ‘the child inherits her damaged body’.\(^\text{43}\) A similar line of
reasoning had been followed by the legislature in the previously enacted
Congenital Disabilities (Civil Liability) Act 1976, whereby liability to a child under
the Act’s sections 1, 1A or 2 is understood as ‘(...) liability for personal injuries
sustained by the child immediately after its birth’.\(^\text{44}\) On the grounds of family law,
an embryo (foetus) can be neither treated as an addressee of the child protection
laws, nor – in any of the jurisdictions examined – can it be made a ward of court.

The undeniably complex understanding of antenatal rights in private law of
England and Wales makes it difficult to demonstrate any straightforward links
between the rights in question and the concept of foetal personality. It could be,
*prima facie*, highly appropriate to conclude at this point that an embryo (foetus)
does not become a person in any respect until the moment of live-birth.\(^\text{45}\)

\(^{42}\) *Burton v Islington Health Authority; De Martell v Merton and Sutton Health Authority* [1991] 1

\(^{43}\) Congenital Disabilities (Civil Liability) Act 1976 (c 28); s 4(3).

\(^{44}\) The above approach was followed, for instance, by the US Supreme Court in the landmark
case of *Roe v Wade* [1973] 410 US 113, 159. See also: T Stoltzfus Jost, ‘Rights of Embryo and
At the same time, a different observation could be made with recourse to Australian law, if looking at the previously discussed 1972 ruling, delivered by the Supreme Court of Victoria in the case of *Watt v Rama*.\(^{46}\) There, legal personality of an embryo (foetus) was decided to be intrinsic to the *nasciturus* maxim, i.e. it was described as coming into operation at any time where it was necessary to secure best interests of the resulting child. While relying on some historic English succession law cases, Gillard J argued that the maxim had been fully incorporated by common law.

With reference to Irish law, no explicit statement, either confirming or denying foetal personality, can be found in any of the relevant judgments or statutory provisions, i.e. section 58 of the Civil Liability Act 1961 or section 3(2) of the Succession Act 1965. Arguably, for the purposes of tort and succession law, an embryo (foetus) will be deemed as having already been born, as long as the resulting child was subsequently born alive. Reliance on the *nasciturus* maxim does not, however, explain, whether the legislature meant to protect strictly the interests of the resulting child or whether a foetus *qua* foetus is capable of acquiring any rights in the two abovementioned domains.

In addition, mere acknowledgment of ‘the right to life of the unborn’, pursuant to the wording of Article 40.3.3° of *Bunreacht Na h’Éireann* – which remains in force at the time of writing this thesis – does not allow this author to affirm that an embryo (foetus) can, in any domain of Irish law, be equated with or treated in the

---

\(^{46}\) *Watt v Rama* [1972] VR 353.
same manner as a child or as a physical person. Furthermore, assessment of the foetal status under the Irish Constitution becomes even more complex, if we consider the Supreme Court’s narrow interpretation of the provision, acknowledged in Roche v Roche, or, more importantly, in its more recent, previously cited, judgment, delivered on 7 March 2018 in the case of M (Immigration - Rights of Unborn) v Minister for Justice and Equality and Others, where it was declared that the only constitutional prerogative enjoyed by the ‘unborn’ is the right to life. On that account, Article 40.3.3° cannot be treated as a comprehensive source of any antenatal rights including, quite paradoxically, the right to life, if looking from the perspective of protection offered to an embryo in vitro.

At the same time, it is apparent that, despite the existing, visible divergences between common law and continental legal families, the lawmakers’ attitudes towards foetal rights and foetal status share some visible similarities.

First, under the law of torts, a foetus qua foetus is already owed a duty of care, or – in the continental context – it enjoys the right to have its physical integrity preserved. On the other hand, where a preconception injury occurred, we could argue that the duty (right) discussed had been violated by an act (omission) which preceded the duty’s (right’s) existence, but whose effects materialised

47 Roche v Roche [2010] IESC 10; hereinafter Roche.
49 Except for scenarios, where a lawful termination of pregnancy is authorised on the grounds of domestic law.
50 And not the existence of the embryo (foetus) benefiting from it.
some time afterwards. Therefore, despite the explicit formulations previously cited, the duty of care does not seem to crystallise at the moment of birth and the child does not seem to ‘inherit’ his imperfect body. At the same time, although congenital defects may be diagnosed at earlier stages of pregnancy or even treated in utero, an action in tort becomes, in any event, available solely when the resulting child is subsequently born alive. Accordingly, live-birth of a child, who suffers from a congenital defect causally linked to a wrongful act (omission) of another person – as opposed to mere diagnosis of such a defect – will trigger the tortfeasor's remedial obligation to pay compensatory damages.

As far as family law is concerned, in the majority of jurisdictions examined, Poland and Ireland included, expectant parents exercise quasi-parental rights in respect of an embryo (foetus). Furthermore, despite the fact that some continental countries recognise prenatal acknowledgment of paternity via formal, voluntary declaration, the corresponding rights and obligations flowing from the father-child relationship become both tangible and legally exercisable only at the point of the live-birth birth of the resulting child.

An analogous solution has seemingly been adopted on the grounds of domestic succession laws, where an embryo (foetus) technically acquires the right to become an heir (legatee) at the time of opening of the succession; however, a

---

53 Which is the moment of death of the testator (intestate person).
division of the inherited assets cannot be formalised until the resulting child is born and on the condition that he is born alive.

To follow on these observations, this author would, in the first place, unequivocally reject the hypothesis, whereby an embryo (foetus) is to be regarded as an integral part of the maternal organism (pars viscerum matris) on the grounds of broadly defined private law. Adhering to the stance would imply virtually absurd conclusions, for instance, that an expectant father acknowledges paternity of a part of his pregnant partner’s body or that a part of her body acquires the right to sue for damages or to inherit.

At the other end of the spectrum, the hypothesis, whereby an embryo (foetus) enjoys legal personality (capacity) in both its proper sense and in its full scope cannot be upheld, either. As for Polish private law, due to the previously acknowledged 1996 amendment of article 8 P.C.C., such a conjecture could be potentially regarded as interpretatio contra legem. A similar conclusion may be reached in respect of the remaining example jurisdictions, if one considers that none of the legislatures has opted for an explicit, unambiguous statutory disposition, supporting the hypothesis discussed. Moreover, with reference to common law of England and Wales, the latter has been explicitly rejected in caselaw.

As should be recalled, lack of personality (capacity) sensu stricto does not, however, mean that an embryo (foetus) is not, in any way, protected within the private law domain. On that account, this author ultimately supports the third of
the hypotheses initially proposed, whereby a human being acquires full legal personality (capacity) at the moment of live-birth.\textsuperscript{54} An embryo (foetus), on the other hand, acquires individualised, enumerated rights, which have been either indicated by statute or acknowledged by means of a judicial decision.\textsuperscript{55} In addition, it should be observed that the catalogue of the hitherto acknowledged foetal prerogatives is not exclusive and, in line with a universally recognised practice, its boundaries can be extended, as long as a broader interpretation is being relied upon.\textsuperscript{56}

As far as the construction and practical operation of the supported hypothesis are concerned, the author finds it necessary to establish, in the first place, whether the concept of legal fiction (\textit{fictio iuris}) truly bears any particular relevance in the present context. To recall, a legal fiction is typically based on the assumption that a given occurrence is to be treated as true in a concrete set of circumstances, irrespective of whether it is or is not true in reality.\textsuperscript{57} In other words, a norm (institution) construed upon a \textit{fictio iuris} considers a fact that had never taken place and attaches a certain legal outcome to it. The fiction serves both pragmatic

\textsuperscript{54} As Nawrot rightly argues, the fact that legal capacity is acquired at the moment of live-birth does not mean that one becomes a human being on condition of being born alive. The solution serves to emphasise the fact that born rather than unborn human beings play an important role in shaping civil relations. See: Nawrot (n 16) 311.

\textsuperscript{55} To put it in the words of Marcel Planiol, while a \textit{nasciturus} acquires rights, a \textit{natus} acquires the capacity to exercise them. See: Planiol (n 26) 246.

\textsuperscript{56} As an example, we could cite the emerging notion of 'genomic torts', which were discussed in the second part of this thesis. In the present context, the 'extended' foetal prerogative could be described as the right to receive compensation for prenatal injuries caused by negligently performed IVF or by use of defective genetic material in the course of ART.

\textsuperscript{57} J Law and EA Martin, \textit{A Dictionary of Law} (6th edn, OUP 2006) 222.
and equitable purposes, by providing legal remedies in cases where they would not be otherwise available.58

One of the most common legal fictions, recognised under private law of both continental and common law countries, seems to be the one of ‘legal person’. Here, it is universally assumed that particular, enumerated entities, such as, most notably, corporations, are to be treated as if they were natural persons (i.e. humans).59 On that account, it could be proposed that application of fictio iuris should place an artificial (juristic) person in a very similar (albeit not identical) position to the natural person, if looking from the perspective of enjoyment of rights.

Accordingly, if the ‘acquisition of enumerated foetal rights’ hypothesis was to be regarded as operating through some form of a legal fiction, then, once applied, it should theoretically place an embryo (foetus) in the same position as the child already born. However, as was already evidenced throughout this thesis, such alignment is never achieved in practice. A foetus qua foetus cannot institute a claim for antenatal harm, even in cases where the damage, estimated during an antenatal examination, can be unequivocally attributed to another party’s

58 On that account, legal presumptions, are sometimes treated as a type of such fiction. See, for example: A Breczko’s definition of ‘legal fiction’ in in Kosikowski and Smoktunowicz (n 3) 237.
59 Another fiction, frequently relied upon in succession law worldwide, assumes that an heir, who rejected his share in the estate is to be treated as he had not survived the testator (or the intestate person) with all the legal consequences that such a decision may imply. A similar observation could be made in respect of an heir who has been declared as unworthy to inherit or in respect of an absent natural person, who has been officially declared as deceased. See, for example: P.C.C., arts 29, 39 and 928; Presumption of Death (Scotland) Act 1977 (c 27), s 3; Presumption of Death Act 2013 (England and Wales) (c 13), s 3(2).
wrongdoing; it cannot dispose of the inherited gift or share; it cannot be made a
ward of court in common law jurisdictions.

Here, the, *prima facie*, fictional construction, which, as for Irish private law,
appears in the previously cited sections of the Civil Liability Act 1961 and the
Succession Act 1965, should be deemed as a statutory requirement to equate an
embryo (foetus) with a child already born, so that the relevant prerogative could
simply begin its existence. At the same time, the right enjoyed by a foetus *qua*
foetus and by a child cannot, in this author’s view, be considered as equal. On that
account, the *nasciturus* maxim, frequently referred to as a ‘civil law fiction’, does
not bear much resemblance to other fictions operating in the domain of private
law in Ireland and elsewhere.

In search for a more suitable analogy, the author proposes, yet again, to rely on
the comparative method of legal research. Here, reference could be made,
particularly, to two institutions originating from continental private law, namely:
expectation of a right (also referred to as ‘an expectative’) and the so-called
*negotium claudicans*.

The former term derives from the Latin verb *expectare*, meaning ‘to await’. Hence,
it is most commonly associated with expressions, such as ‘promise’ or ‘future
prospects’. In essence, a prospective beneficiary of a partially acquired
substantive right will be vested with an anticipatory grant during the period

---

60 See: Nawrot (n 16) 316.
leading to complete and final acquisition of the right in question.\footnote{See, for example: M Pazdan’s definition of ‘an expectative’ in Kosikowski and Smoktunowicz (n 3) 211.} Proper acquisition of the right will be conditional, i.e. dependent on a future, uncertain occurrence.\footnote{As for Polish law, the term ‘expectative’ was formally defined as a patrimonial, transferable right, which is capable of being inherited. See: Judgment of the Polish Supreme Court of 26 June 2001 [2001] 2 OSNC 26.} Furthermore, during the transition period, a holder of an expectative will be legally entitled to undertake acts aimed at preserving the substantive right, which he anticipates to benefit from.\footnote{See, for example: P.C.C; art 91.} In Poland, for example, by virtue of article 19(1) of the Housing Associations Act 2000,\footnote{Housing Associations Act 2000, Official Journal of the Republic of Poland No 2001.4.27.} a person, who concluded a construction contract with a housing association will hold an expectative to become a future, individual owner of a separated dwelling unit. The promise will be binding from the moment of conclusion of the abovementioned contract.

The latter term, also linked to the law of Ancient Rome, could be literally translated as a ‘limping legal act’.\footnote{Under Roman law, a dispositive, binding legal transaction, performed in the benefit of a minor had to be approved by the minor’s legal representative (guardian, tutor), after the beneficiary concerned reached the age of majority. See, for example: M Kuryłowicz and A Wiliński, Rzymskie Prawo Prywatne. Zarys Wykładu (Wolters Kluwer 2008) 101.} Namely, a legal act, such as, for example, conclusion of a civil contract, will be deemed a \textit{negotium claudicans}, if it was undertaken by a person, who had either lacked capacity to perform legal acts in general\footnote{i.e. a minor older than thirteen or a partially incapacitated adult.} or had not been authorised to perform the very act, in particular.\footnote{i.e. a sham agent.} In the two scenarios, the act – in order to be treated as valid – will require approval by the competent third party.\footnote{i.e. a legal representative of the minor (the incapacitated person) or the rightful patron.} If approved, the act will be legally efficient ex
nunc, whereas in case of the third party’s refusal, it will be rendered invalid ex tunc, i.e. treated as non-existent from the very beginning.\textsuperscript{69}

As could be observed, the construction of foetal rights under Irish private law combines elements of both these institutions. Similarly to the case of an expectative, a future and uncertain occurrence of live-birth (conditio iuris) marks the beginning of the extrauterine period of human existence, but also the final point of its intrauterine stage, while appreciating that coming into life and living remains a continuous process. However, unlike a holder of an expectative, an embryo (foetus) does not become a merely ‘potential’ or ‘prospective’ beneficiary of the individualised antenatal rights. At the same time, we could argue that such fully and effectively acquired rights are somehow ‘limping’, in a sense that they remain inactive unless and until their holder is subsequently born alive.

According to this author, the ability of an embryo (foetus) to become a beneficiary of the rights discussed is implicitly guarded by the best interest premise. Therefore, instead of being the frequently cited ‘civil law fiction’, the nasciturus maxim serves, in fact, to demarcate the boundaries of the scope of foetal prerogatives under private law. On that account, it may be considered as a decisive factor, while introducing laws pertaining to an embryo (foetus) in the areas hitherto unregulated.\textsuperscript{70} Moreover, as a prenatal counterpart of the child

\textsuperscript{69} See: P.C.C.; arts 18 §1 and 103. See also: Z Radwański and A Olejniczak, Prawo Cywilne – Część Ogólna (CH Beck 2011) 348-349; M Pazdan and M Zachariasiewicz, ‘The Effects of Corruption in International Commercial Contracts’ in B Lewaszkiewicz-Petrykowska (ed), Rapports Polonais. 19th International Congress of Comparative Law, Vienne 20-26 July 2014 (Łódź University Press 2014) 123. A similar solution of ‘pending validity’ (schwebend unwirksam) can be found in §108 B.G.B.

\textsuperscript{70} Pazdan (n 26) 943.
welfare premise, the maxim acknowledges the human origins of a nasciturus or, in other words, the indisputable continuity of the embryo – foetus – child life cycle. In this author’s opinion, relying on the humanity argument seems both more logical and consistent than promoting the popular, albeit rather enigmatic concept of ‘foetal dignity’.

Furthermore, supporting the hypothesis, whereby an embryo (foetus) acquires certain rights, which become fully effective in the event of the subsequent live birth, enables the resulting child to make advantage of certain pre-birth occurrences without the need of being conclusive on the personality (capacity) issue. In consequence, questions of when human life begins as well as criteria of personhood or viability become irrelevant in the private law context. As Dworkin neatly puts it, ‘the laws do not need to suggest or declare that a foetus is a person, they might simply state what is legal and what is not’.71

Such a moderate approach also ensures harmonious interpretation of the entirety of norms concerning the rights attributable to an embryo (foetus), while generally assuming that a given entity either enjoys legal personality (capacity) in private law or it does not possess the abovementioned attribute. In that way we can reject the dualistic solution previously presented, whereby foetal capacity would be fully recognised in respect of the rights intrinsic to life (health), but would be limited in respect of any other rights, such as, for instance the right to inherit. Additionally, from an Irish perspective, accepting the hypothesis

discussed could lead to ultimate departure from Article 40.3.3° of Bunreacht Na hÉireann, which would help to rediscover the forgotten private law dimension of foetal rights in this jurisdiction.

As for another argument, due to the ‘extraordinary physical enmeshment’,° characterising the relationship between the embryo (foetus) and the pregnant woman, the rights (interests) acquired by the former cannot be considered separately from the rights (interests) already enjoyed by the latter. In particular, the pregnant woman’s own legal personality (capacity) may, by definition, not allow for parallel recognition of full personality (capacity) of her embryo (foetus).

Last but not least, as far as the born alive rule is concerned, the universal pragmatism compels the lawmakers to draw the boundary of legal personality (capacity) at the moment of live-birth. Theoretical deliberations on the ontological status of an embryo (foetus) should not create an obstacle to introducing new solutions of immediate practical significance. These – with reference to Irish private law on foetal rights – will be presented in the subsequent and final section of the thesis.

2. Remarks *De Lege Ferenda*

In summary, the foetal status under currently binding law of this jurisdiction is still largely regulated *in abstracto*, i.e. with recourse to general, open-ended statutory clauses, non-binding guidelines drawn by advisory bodies and, exceptionally, some technical specifications. Those sources are accompanied by a handful of rulings and commentaries, which frequently link prenatal rights to ‘respect’ and ‘dignity’ enjoyed by the child *en ventre sa mère*.

On the one hand, proceeding with any future reforms in the area examined can be, *prima facie*, regarded a virtually impossible task. It is because the directions of future legal developments are likely to be influenced by varying ethical (religious) values that the persons enacting and applying the law avow to. On the other hand, it is possible to disagree on the hierarchy of values, while – at the same time – agreeing on action in search for a feasible consensus. The moderate solution, however difficult to reach, is preferred over the state of legislative vacuum, which leads to potential circumvention of the law, in line with the *nullum crimen sine lege* maxim.

First of all, medical advancements pertaining to the prenatal phase of human life need to be duly and consistently reflected by the law of tort. As Safjan accurately observes, here, the difficulties might not stem from the fact that the law cannot keep in pace with the science, but from the fact that jurists may often be helpless
in their attempts to propose solutions, which would safeguard both maternal and foetal interests in the most effective manner.\footnote{See: M Safjan, ‘O Metodach Rozwiązywania Dylematów Bioetyki’, (1992) 5(555) Państwo i Prawo 51, 54.}

The tort law remedies should, in principle, guarantee a speedy trial and adequate compensation for the injured party. The considerable difficulties with establishing a breach of the duty of care (unlawfulness) in cases, where prenatal harm occurred, may not be simply overcome by imposing strict liability on healthcare providers or by introducing no-fault liability or \textit{ex gratia} payment schemes for infants injured in the course of delivery.

Reinforcement of professional accountability and transparency in the context of providing antenatal medical care, paired with more lenient causation standards at trial may be the recommended direction of future reforms, also in this jurisdiction. This author proposes that such reinforcement should be achieved at two levels: first, at the level of professional accountability (i.e. accountability for performance) and second, at the organisational level – in order to better identify and improve unsafe clinical practices.\footnote{Such as, for example, allocation of tasks, supervision, administration of medical records, certifying results of medical investigations, management of care plans, system of referrals, etc. See: R Watcher, ‘Personal Accountability in Healthcare: Searching for the Right Balance’ (2012) The Health Foundation Thought Paper <https://www.health.org.uk/sites/default/files/PersonalAccountabilityInHealthcareSearchingForTheRightBalance.pdf> accessed 24 November 2018.} According to Watcher, ‘most errors involve dysfunctional systems rather than bad individuals’.\footnote{See: R Watcher, ‘Personal Accountability in Healthcare: Searching for the Right Balance’ (2012) The Health Foundation Thought Paper <https://www.health.org.uk/sites/default/files/PersonalAccountabilityInHealthcareSearchingForTheRightBalance.pdf> accessed 24 November 2018.} As Watcher further argues, achieving the right balance between accountability of individual
practitioners and accountability of the leaders of healthcare organisations will best help to improve the safety of patients.\footnote{Ibid.}

In addition, a statutory clause limiting maternal liability for antenatal harm to cases of intentional conduct and gross negligence on the grounds of the Civil Liability Act 1961 – paired with the consistent regulation in the domain of criminal law\footnote{i.e. providing that the woman would not bear criminal liability for performing an abortion or for attempting to perform it, in case where he resulting child had survived the procedure.} – would allow the legislature to achieve and preserve the balance between foetal rights, the principle of full compensation and the principle of maternal autonomy.

As far as family law is concerned, protection of an embryo (foetus) offered at the prenatal stage of human life should – to the highest possible extent – mimic the parallel biological processes. On that account, the rights to represent an embryo (foetus) and to make important decisions concerning its wellbeing should, optimally, be vested in the prospective parents, particularly, in the pregnant woman. In addition, parents of a pregnant minor should be \textit{de iure} vested with representation powers in respect of both their daughter and her foetus. This author supports recognising parental, prenatal power of legal representation by means of a corresponding statutory clause, which could be introduced, for instance, in the Children and Family Relationships Act 2015.
In addition, allowing an expectant father to formally acknowledge his filiation before the child’s birth,\(^7^8\) being an idea clearly inspired by the continental law, would enable him to act in foetal interest alongside the pregnant woman or, in cases of her declared incapability, on behalf of both the expectant parents.\(^7^9\)

Arguably, this solution could contribute to limiting the need for State intervention to cases of insolvable family disputes. Furthermore, in cases where the State’s agencies intervene \textit{in loco parentis}, they should only be authorised to do so if the improper maternal behaviour seriously endangers foetal wellbeing and there is no prospect of reconciliation. At the same time, as both the pregnant woman and the foetus remain in a particularly vulnerable position, the intervention discussed should only be allowed by means of a judicial decision and only in exceptional circumstances, analysed with recourse to the case-by-case approach.

At the same time, unlike the natural defensive mechanisms that can only be effective inside the maternal body, the proposed, extended form of ‘parental-like’ protection under family law should not be understood as pertaining exclusively to the new life remaining \textit{in utero}. In that sense, acquisition of the right to be protected by the prospective parents will not depend on the location of a given embryo but rather on its dependence on the female body to survive, develop and, finally, to be born. Following the last-mentioned interpretational guideline would allow the prospective parents, who have availed of assisted conception, to

\(^{78}\) Or introducing a relevant, rebuttable presumption to the effect.

represent the interests of their artificially generated embryos during the period preceding implantation in the womb.

The author supports explicit recognition of the *sui generis* status of an embryo *in vitro* under the forthcoming Irish statute pertaining to assisted reproduction. Accordingly, she believes that protection offered to the latter should be, in principle, narrower in its scope to the protection offered to an embryo *in vivo* and to the foetus.\(^80\) Recognising the special status, which is based on the embryo’s potential to thrive *in utero*\(^81\) would, on the one hand, allow the prospective parents to exercise more effective control over their embryos *in vitro* but, on the other hand, authorise the medical practitioners to perform certain activities, which are normally associated with property law (e.g. donation, storage) but which are inherent to performance of ART.\(^82\)

In addition, the statute should specify the conditions of performing PGD and undertaking lawful and ethical embryo research. The regulation should also address the law of torts, i.e. stipulate whether the researcher (PGD provider) would be liable in tort vis-à-vis the resulting child.\(^83\) The statute should also set out the scope of rights and obligations – including the right of prenatal representation – of other individuals involved in ART, such as, most notably,

---

\(^{80}\) See, for example: Safjan (n 73) 51; J Ostojska, ‘O Problemie Podmiotowości Prawnej Embrionu *In Vitro*’ (2012) 46(14) Prawo i Medycyna 84, 97-98.
\(^{81}\) However, it would not be correct to talk about a ‘potential embryo’ in this context.
gametal cell donors and surrogate mothers. Furthermore, if artificial insemination *post mortem* was to be authorised by the abovementioned statute, the author supports vesting the resulting children with succession rights, as long as they were conceived during a relatively short period of time (e.g. two years) following the death of the genetic father.

Finally, also in relation to succession law, the author recommends introducing an explanatory clause in the wording of section 3(2) of the Succession Act 1965, whereby the provision examined could be applied *mutatis mutandis* in all cases of testamentary succession. To recall, the Succession Act 1965 will most likely apply in the cases of intestacy, but it is not clear that it could be treated as a general rule for the construction of wills. The author believes that an explanatory clause to this effect would make the law more comprehensive and coherent and would offer better protection of antenatal rights in the area of succession law.

At the time of writing the final passage of this thesis, Ireland may, finally, be on its way to achieve a more comprehensive system of protection of antenatal rights. The abovementioned, long-awaited statute regulating ART may finally materialise after the governmental approval of the General Scheme of Assisted Human Reproduction Bill 2017.84 The forthcoming referendum on the fate of Article 40.3° of *Bunreacht Na hÉireann* may also help to clarify the Irish position on pregnancy termination under the domestic law.85

Regardless of the extreme, bipolar emotions surrounding the topic of foetal rights and foetal moral status in Ireland, the author’s major research target was to escape the narrow box of the abortion conundrum. It is hoped that the recommended broader, cross-border approach to this highly controversial issue may better serve the interests of all the laws’ addressees – including those yet to be conceived, those yet to be born and those, who simply wish to avail of their prenatal past without providing some undisputable evidence of when their life truly began.

BIBLIOGRAPHY

1. Abel EL, ‘Was the Fetal Alcohol Syndrome Recognized in the Ancient Near East?’ (1997) 32(1) Alcohol and Alcoholism 3

2. Abel EL, ‘Was the Fetal Alcohol Syndrome Recognized by the Greeks and Romans?’ (1999) 34(6) Alcohol and Alcoholism 868

3. Albertsworth EF, ‘Recognition of New Interests in the Law of Torts’ (1922) 10(6) CLR 461


34. Buckland WW, *The Main Institutions of Roman Private Law* (CUP 1931)


40. Carolan M, ‘HIV Mother to Be Treated to Reduce Risk to Baby’ *The Irish Times* (Dublin, 20 July 2002) 4

42. Casey J, Constitutional Law in Ireland (3rd edn, Sweet & Maxwell 2000)


47. Ciszewski J and Stępień A, Prawo Cywilne w Pytaniach i Odpowiedziach (Lexis Nexis 2007)


49. Coghlan D, ‘Cluskey Becomes Third Minister to Reject Amendment’ The Irish Times (Dublin, 15 February 1983)

50. Collins English Dictionary

52. Committee of Inquiry into Human Fertilisation and Embryology, Report of the Committee of Inquiry into Human Fertilisation and Embryology (Her Majesty’s Stationery Office 1988)


54. Congregation for the Doctrine of the Faith’s Official Website


64. Creasy RK, Resnik R and Iams JD (eds), Creasy and Resnik’s Maternal - Fetal Medicine: Principles and Practice (6th edn, Saunders 2009)


68. Davies M, Textbook on Medical Law (Blackstone Press 1996)


78. ‘Diane Blood Registers Sons’, BBC News, 01 December 2017
   <http://news.bbc.co.uk/2/hi/uk_news/england/nottinghamshire/3252436.stm> accessed 3 February 2017


80. *Didaché Apostolorum* (Teaching of the Apostoles)
   <http://www.thedidache.com> accessed 3 March 2017


83. ‘Doncaster NHS Pay Out £2.45m for Cerebral Palsy Boy’ BBC News


   <https://www.theguardian.com/science/2003/sep/19/genetics.uknews> accessed 3 February 2017
95. ‘Dziecko Olimpijczyka Walczy o Życie. Lekarze Stracili Stanowiska’  
*Gazeta Wyborcza* (Warszawa, 29 November 2012)  

96. ‘Eating Well in Pregnancy’  


98. *Encyclopaedia Britannica*  


104. ‘Father Seeks Court Order to Block Abortion Referendum’, *The Irish Times* (Dublin, 8 June 1983) 11


111. Fortin JES, ‘Can You Ward a Foetus?’ (1988) 51(6) MLR 768


115. Fraser P, *A Treatise on The Law of Scotland, as Applicable to the Personal and Domestic Relations*, vol 2 (T & T Clark 1846)


127. Gottwald P, Schwab D and Büttner E, Family and Succession Law in Germany (Kluwer Law International 2001)


130. Green Paper on Abortion (Stationery Office 1999)


140. Harsch D, ‘Society, the State and Abortion in East Germany’ (1997) 102(1) The American Historical Review 53


142. Health Service Executive, ‘National Consent Policy 2014’  

143. ‘Healthy Eating for Pregnancy’  

144. Healy J, Medical Malpractice Law (Round Hall 2009)


168. John Paul II (Pope), Evangelium Vitae: Encyclical Letter Addressed by the Supreme Pontiff Pope John Paul II to All the Bishops, Priests and Deacons, Men and Women Religious, Lay Faithful and All People Of Good Will on the Value and Inviolability of Human Life (Veritas 1995)


171. Jones J, ‘37% Against Holding Abortion Referendum’ The Irish Times (Dublin, 17 February 1983) 7

172. Jones KL and Smith DW, ‘Recognition of Fetal Alcohol Syndrome in Early Infancy’ (1973) 2 The Lancet 999

173. Jones KL, Smith DW, Ulleland CN and Streissguth AP, ‘Pattern of Malformation in Offspring of Chronic Alcoholic Mothers (1973) 1 The Lancet 1267


207. Lenz W and Knapp K, ‘Foetal Malformations due to Thalidomide’ (1962) 7 German Medical Monthly 253


216. Louisiana State Law Institute (trs), Treatise on the Civil Law by Marcel Planiol with the Collaboration of George Ripert, vol 3(2) (12th edn, West Publishing Company 1959)


219. Madden D, Medical Law and Ethics (Butterworths 2002)

220. Madden D, ‘Recent Developments in Assisted Human Reproduction: Legal and Ethical Issues’ (2002) 7(2) MLJ 1 53


227. Martin D (ed), Studia Gaiana, vol 1 (editio minor, Koninklijke Brill 1964)


229. Mason JK, Law and Medical Ethics (Butterworths 1994)
230. Mason JK, ‘Case Commentary: What’s in a Name? The Vagaries of Vo v France’ (2005) 17(1) CFLQ 97

231. Mason JK, McCall Smith RA and Laurie GT, Law and Medical Ethics (6th edn, Butterworths 2002)

232. Mason JK, McCall Smith RA and Laurie GT, Law and Medical Ethics (7th edn, OUP 2006)


244. McMahon BME and Binchy W, Irish Law of Torts (Professional Books Ltd 1981)


247. Mee J, ‘From Here to Eternity?: Perpetuities Reform in Ireland’ (2000) 22 DULJ 91


252. Mohd Nor SN, The Ethics of Human Cloning with Reference to the Malaysian Bioethical Discourse (Brill 2006)


255. Morawski L, Wstęp do Prawoznawstwa (9th edn, Dom Organizatora 2008)


257. Moyle JB (trs), The Institutes of Justinian (5th edn, The Lawbook Exchange 2002)


259. Murphy E, ‘No Fault Compensation for Medical Negligence’ (1989) 9 ILT 216

260. Murphy J and Witting C, Street on Torts (19th edn, OUP 2012)


267. Nesterowicz M, Prawo Medyczne (Dom Organizatora 2000)


284. Onufrio MV, ‘The Constitutionalization of Contract Law in the Irish, the German and the Italian Systems: Is Horizontal Indirect Effect Like Direct Effect?’ (2007) 7 InDret 1


289. Oxford English Dictionary
<http://oxforddictionaries.com/definition/filiation?q=filiation> accessed 17 April 2015


297. Pattinson SD, Medical Law and Ethics (2nd edn, Sweet & Maxwell 2009)


327. Savigny von FC, *Traité de Droit Romain*, vol 2 (Firmin Didot Frères 1840-1851)


331. Schewppe J (ed), *The Unborn Child, Article 40.3.3° and Abortion in Ireland: Twenty Five Years of Protection?* (The Liffey Press 2008)


334. Sengpiel V et al, ‘Maternal Caffeine Intake During Pregnancy Is Associated with Birth Weight but not with Gestational Length: Results from a Large Prospective observational Cohort Study’ (2013) 11 BMC Medicine 42


340. ‘Should I Limit Caffeine during Pregnancy?’
   <http://www.nhs.uk/chq/Pages/limit-caffeine-during-pregnancy.aspx> accessed 16 June 2017


345. Skowrońska-Bocian E (ed), Prace z Prawa Cywilnego (CH Beck 2010)


347. Smithells RW, ‘Defects and Disabilities of Thalidomide Children’ (1973) 1 BMJ 269


350. Smyczyński T, ‘Nasciturus w Świecie Ustawodawstwa o Przerywaniu Ciąży’ (1993) 1 Studia Prawnicze 73

351. Smyczyński T, Prawo Rodzinne i Opiekuńcze (2nd edn, CH Beck 1999)


354. Sokołowski T, ‘Sytuacja Prawna Małoletniej Matki przed Urodzeniem Dziecka’ (1995) 57(3) RPEiS 1


368. ‘Taoiseach Warns on Wording’, The Irish Times (Dublin, 6 September 1983)


370. The Code of Canon Law


372. Thomas Aquinas, *Summa Theologæ*;  
<http://www.documentacatholicaomnia.eu/03d/1225-1274_Thomas_Aquinas_Summa_Theologiae_%5B1%5D_EN.pdf> accessed 7 March 2017

373. Thomas Aquinas, *Commentarium in Sententiis*  
<https://www.scottmsullivan.com/AquinasWorks/Sentences.htm> accessed 29 March 2018


375. ‘Today Tonight Referendum Results Special’, 8 September 1983  
<http://www.youtube.com/watch?v=t507IF7XrCY> (Alice Glenn v Monica Barnes);  
<http://www.youtube.com/watch?NR=1&feature=endscreen&v=qrSLRRGCSi> (Brendan Shortall v Adrian Hardiman);  


378. ‘UK Chief Medical Officers’ Low Risk Drinking Guidelines’  


394. Winfield PH, 'The Unborn Child' (1942) 8(1) CLJ 76


399. Wood AW, *Kant’s Ethical Thought* (CUP 1999)

401. World Health Organisation’s official website
<http://www.who.int/en/> accessed 18 April 2018


403. Xing C et al, ‘Benzene Exposure Near the U.S. Permissible Limit Is Associated with Sperm Aneuploidy’ (2010) 118(6) Environmental Health Perspectives 833

