

ARE PARENTS LIABLE FOR THEIR BABIES' PRENATALLY ACQUIRED INJURIES?

CARLO V. BELLINI, MD; ALBERTO M. GAMBINO, PHD

Abstract

External factors can interfere with pregnancy; some of them are factors of parental origin, such as active or passive smoking or alcohol use; some are of environmental origin such as air or water pollution; some are due to medical errors that expose the developing being to harm. Sometimes these factors cause the death of the fetus; sometimes they just injure it with relevant consequences after birth. We discuss the paradox that if prenatal harm is caused by doctors or social factors, the authors of the harm will be prosecuted, while if the harm is provoked by parents, they have no legal consequences. The present paper illustrates this paradox and concludes that parents who provoke an avoidable preterm birth or any other avoidable harm with postnatal consequences are morally guilty of the same fault of care that they would be accused of if they unwillingly caused harm to an already born baby.

Key words: Pregnancy; Fetus; Parents

The placenta is a filter that shields the fetus from hazards, but it cannot prevent all noxious factors either chemical or infective. Such factors affect the fetus through its mother, via voluntary ingestion/absorption (alcoholic drinks, tobacco, unprotected contact with notoriously infective subjects) or via involuntary ingestion/absorption (air or water pollution, contact with infected subjects). These factors can cause severe damage to the fetus.¹⁻⁴ When the fetus is born and grows up, it can suffer the consequences of these hazardous factors. Even before birth, a fetus can be harmed by substances ingested by its mother, the consequences of which he/she will suffer throughout all his/her life. Maternal alcohol ingestion can cause the so-called fetal alcohol syndrome, characterized by malformations, mental delay, heart disease; tobacco smoke can damage the placenta with consequent fetal growth restriction and low birth weight and future asthma. Heavy metals that can be present in the air or water are absorbed by the mother and affect the fetus, causing mental retardation and malformations. Also stress not prevented or voluntarily chosen in pregnancy is a risk factor as well as the decision of delaying childbearing when this is not due to external factors and conditions. In fact, delayed childbearing is correlated with a higher risk of preterm birth and birth anomalies.

Social Responsibilities

People who harm fetuses, exposing mothers to poisons or undue stress, can be liable, some legislations agree that they should pay for it. A legal responsibility exists in damaging fetuses when this is due to the lack of respect of work rules. Stress and fatigue women go through during stressful jobs as employees or workers^{5,6} are risk factors of preterm birth, and possible causes of severe brain or lung damage for the baby. Employers who do not follow all guidelines to preserve women and their future babies from harm due to stress can be legally sued. When a correlation between

fetal harm and postnatal damage is evident, those responsible can be prosecuted. This was the case regarding lead intoxication in Myamata (Japan),⁷ methyl isocyanate intoxication in Bophal (India),⁸ and the phocomelia epidemic due to thalidomide in US in the '60s. The area of law that deals with negligence on the part of manufacturers is called product liability, and this responsibility is to be considered for the damages that it can provoke before or after birth. The moral responsibility in this case is evident: the consequences a baby is forced to suffer because of prenatal harm are so indicative of an unfair exposure to toxic substances or to stressful jobs that anyone would agree to prevent these types of risks with sanctions.

Medical Responsibility

Even in the field of medical responsibility it is evident that, if a baby is born with a damage that could be preventable, the doctor who took care of the pregnancy and did not prevent the damage is morally responsible—for instance, if a doctor has neglected to make a diagnosis of a curable disease and the baby has suffered injuries from this disease. It can also happen that a doctor may suggest the use of drugs that can harm the fetus, such as in the case of phocomelia epidemics due to thalidomide. Doctors have the sacred responsibility of “do not harm” and to preserve health.

The paradox of doctors prosecuted for the birth instead of the abortion of a baby is reported. This case is very complicated: babies born instead of being aborted have prosecuted (by proxy) the supposed responsible. For instance, in the case of prenatal misdiagnosis of fetal morphological normality, made in reality on a damaged fetus, it was stated that having been born with such diseases was “per se” a harm for the baby, and the doctor who made the erroneous diagnosis was consequently prosecuted. This principle has been criticized, because it places lower moral value on the disabled.⁹

Parental Responsibility

But when the prenatal harm visible in an already born baby is caused by the parents, it seems that none should be guilty. A father can expose the mother and consequently the baby to passive smoke or to violent stress¹⁰ throughout pregnancy, and if the baby gets injured, he will have no responsibility for this harm. A mother can drink alcohol and choose stressful behaviors in pregnancy (loud music, stressful journeys), or she can delay pregnancy to a maternal age where babies' birth anomalies, prematurity, and brain damage are more frequent, without responsibility or legal consequences.

When an already born baby is unintentionally harmed by the parents, it is considered an accident, but, despite the comprehensible indulgence, it is also juridically relevant, unless the accident or the absence of a cause-effect connection are evident.^{11,12} A child who is injured because of a parent's negligence can sue that parent; children usually sue because parents often have liability insurance that would cover some or all of the medical expenses that would have to be paid due to the child's injuries. On the other hand, parents can also cause permanent harm prenatally with postnatal consequences, but they cannot be sued by the law. If a parent voluntarily administers an alcoholic substance to his/her baby without health consequences, the parent is prosecuted for maltreating; if a mother ingests alcohol during pregnancy with catastrophic consequences for the baby (three, four years later, i.e. when he/she

is already a citizen and a person) she (or whoever induced her to perform like this) is immune from prosecution.

What Follows for Ethics from the Legal Discussion?

If we consider the moment of the injury, isolated from the context, injury is done on a fetus, who in a juridical sense is not a person. Nevertheless, if we consider the consequences, they will be suffered by a baby, who is a full person.

Of course, this is just a side of the question: if a human fetus is a person, he/she should receive all possible guarantees about his/her health and survival, and a debate on this issue is still ongoing in western countries.

But a minimum agreement should be reached about one point: when a fetus is harmed, he/she can suffer the consequences of this harm when he/she will be born (and will have legal rights). But have we obligations toward a fetus because it will be a person in the future? And, more broadly, have we obligations toward future generations?¹¹ We should consider these questions in western society, which does not grant a moral status to the human fetus. According to Hardin,¹² the only relevant relations are those in the “here and now.” This has the consequence that we have no duty towards future generations. MP Golding¹³ argues that our obligations to future generations are, at best, minimal. He argues that: “obligations to future people are, obviously, distinct from obligations to current people: it’s hard to make sense of the idea of obligations to people one million or ten million years in the future.” However, though there is a tradition among utilitarian thinkers to discount the value of future happiness/unhappiness when it is being weighed next to present happiness/unhappiness, “he accepts that we have obligations toward our offspring i.e., children, grandchildren and great-grandchildren because we share a “common life” with these group.” A deontological theory accounts that the people of the future have a fundamental right to both life and health.¹⁴ Because we are united as a unique species, future and present generations are members of the “special” human moral community. Our moral duty to future generations emerges from our recognition that as a species we share common natural rights. Indeed, future generations will be “worse off” if we deprive them of the basic right to survival. Feinberg describes this concept in the ecological scenario: our descendants “have an interest in living space, fertile soil, fresh air, and the like” that we are obliged to consider, because “whoever these human beings may turn out to be, and whatever they might reasonably be expected to be like, they will have interests that we can affect, for better or worse, right now.”¹⁵ The fundamental principles are based on sustainability with the overarching objective that “no generation should needlessly, now or in the future, deprive its successors of the opportunity to enjoy a quality of life equivalent to its own.”¹⁶

We should also consider the point of view of those who consider the fetus having a moral status: a fetus has “per se” the right to be shielded from harms not only because it will give rise to a baby, but because it has intrinsic value.

However, the non-maleficence principles requires us to not harm. We must carefully notice the paradox here: the principle is legally protected when it comes to harm from some sources (medical, society), but not from others (family). On the one hand, we should treat parents with compassion when they unwillingly harm their

baby. On the other hand, we should reaffirm that they had a moral duty to care for the baby even before birth and that they failed that duty.

We add a consideration: this shows the apparent inconsistency in the laws that reflect a view of the unborn that can't be consistently held. In fact, scientific literature shows with no doubt the human features of the unborn child: hearing, movements, reactions, and suffering, thus every harm a fetus goes through is potentially painful and interferes with the development of human life.

Conclusions

A different assessment of parents' and doctors' or society's responsibilities in relation to prenatal harm with postnatal consequences is evident. Parents have a direct responsibility on the baby's outcome, causing such outcomes and being held morally or legally responsible. We do not consider it fair that parents are not held legally responsible for giving birth to drug-addicted babies or for fetal alcohol syndrome (though that may not be the case in all states). Many people are induced to believe that if a sanction does not exist, then a risk for health does not exist, and this contrasts with evidence. In some cases, people who caused prenatal harm to the fetus (e.g. via preterm birth induced by stress) are prone to be litigious against the doctors for a sense of guilt¹⁷ and do not accept the evidence of having been responsible. Allowing a prenatal gray zone where any parental behavior is justifiable, despite severe consequences for babies' health, is unfair. It contrasts with the future babies' interests and undermines the efforts for an effective prevention of prenatal stressors and biological risks.

Thus a moral responsibility of parents toward the developing being is to be clearly affirmed. This paper is voluntarily drawn to discuss why parents seem to have no legal responsibility if they harm their unborn baby even—and this is the paradox—if the baby will be born and will suffer the consequences of the prenatal harm. The paradox is that after birth the baby will get legal rights and will not be able to use them if the harm is due to the parents, but will be able to use them if the harm is due to anyone else. We think this is due to the fear that, recognizing parents' responsibility and liability in prenatal harm, an obvious admission of their responsibility and liability should follow in the case of abortion. But this leaves the baby harmed before birth by their parents without any legal guarantees, and this is not only a paradox, but it is an injustice toward his/her rights, which are safeguarded for a similar harm when due to society or doctors.

Endnotes

1. Gray BA, Holland C. Implications of psychoactive 'bath salts' use during pregnancy. *Nurs Womens Health*. 2014 Jun-Jul;18(3):220-30. doi:10.1111/1751-486X.12123. Review. PubMed PMID: 24939199.
2. Illsinger S, Das AM. Impact of selected inborn errors of metabolism on prenatal and neonatal development. *IUBMB Life*. 2010 Jun;62(6):403-13. doi: 10.1002/iub.336. Review. PubMed PMID: 20503433.
3. Abate P, Pueta M, Spear NE, Molina JC. Fetal learning about ethanol and later ethanol responsiveness: evidence against "safe" amounts of prenatal exposure. *Exp Biol Med* (Maywood). 2008 Feb;233(2):139-54.
4. Andersson NW, Hansen MV, Larsen AD, Hougaard KS, Kolstad HA, Schlünssen V. Prenatal maternal stress and atopic diseases in the child: a systematic review of observational human

- studies. *Allergy*. 2016 Jan;71(1):15-26 Review. PubMed PMID: 26395995.
5. Das JK, Kumar R, Salam RA, Lassi ZS, Bhutta ZA. Evidence from facility level inputs to improve quality of care for maternal and newborn health: interventions and findings. *Reprod Health*. 2014 Sep 4;11 Suppl 2:S4. doi: 10.1186/1742-4755-11-S2-S4. Epub 2014 Sep 4. Review. PubMed PMID: 25208539; PubMed Central PMCID: PMC4160922.
 6. Romito P. Work and health in mothers of young children. *Int J Health Serv*. 1994;24(4):607-28. Review. PubMed PMID: 7896465.
 7. Monti A. [Chemical intoxication of the fetus and infant]. *Minerva Med*. 1974 Dec;65(93 Suppl):9-10.
 8. Weill H. Disaster at Bhopal: the accident, early findings and respiratory health outlook in those injured. *Bull Eur Physiopathol Respir*. 1987 Nov-Dec;23(6):587-90.
 9. Bennett R. The fallacy of the Principle of Procreative Beneficence. *Bioethics*. 2009 Jun;23(5):265-73.
 10. Hoffman MC, Mazzoni SE, Wagner BD, Laudenslager ML, Ross RG. Measures of Maternal Stress and Mood in Relation to Preterm Birth. *Obstet Gynecol*. 2016 Mar;127(3):545-52.
 11. Pilkington E. Outcry in America as pregnant women who lose babies face murder charges. *The Guardian* June 24, 2011.
 12. Hardin G, "Who Cares for Posterity?" from *The Limits of Altruism*, Bloomington: University of Indiana Press, 1977.
 13. Golding MP: Obligations to future generations. *The Monist* (January, 1972), p. 86.
 14. Godofsky J: Future generations and the right to survival: a deontological analysis of the moral obligations of the present to future people. *TCNJ Journal of student scholarship* 2010;12:1-9 available at the following URL: <http://joss.pages.tcnj.edu/files/2012/04/2010-Godofsky.pdf> .
 15. Feinberg J. "The Rights of Animals and Unborn Generations," in *Social Ethics*, ed. Mappes TA and Zembaty JS (New York, McGraw-Hill) 1977:358-359.
 16. Kadak AC. Intergenerational risk decision making: a practical example. *Risk Anal*. 2000 Dec;20(6):883-94.
 17. Cacciatore J. Psychological effects of stillbirth. *Semin Fetal Neonatal Med*. 2013 Apr;18(2):76-82.

Carlo V. Bellieni, MD, is a neonatologist and member of the Pontifical Academy for Life. He is member of the European Society for Pediatric Research and of the Italian Society of Pediatrics and Italian Society of Neonatology. He is author of more than 300 publications, mostly on infantile pain. He resides in Siena, Italy.

Alberto M. Gambino, PhD, is professor of Private Law and prorector of the European University of Rome, Italy. He is President of the Italian Academy of the Internet Code and Scientific Director of the journal "Diritto, Mercato e Tecnologia." He is president of the association "Scienza e Vita." He currently resides in Rome, Italy.