ties and the perceived loss caused by the adult child's death to the other family members.

Nonviable Fetus May Recover for Loss of Parent's Consortium

Angelini v. OMD Corp., 410 Mass. 653, 575 N.E.2d 41 (1991).

This decision concluded that a nonviable fetus had a claim for loss of parental consortium. The child's father was injured as a passenger in an automobile accident and sued the driver and the bars that served the driver before the accident. The child further alleged that the father intended to provide support to his unborn child but the support was diminished as a result of the accident. At the time the parent was injured, the plaintiff was a nonviable fetus. The trial court dismissed the child's claim because he was nonviable at the time of the accident. The state supreme court reversed.

Although Massachusetts had recognized that a child had a right to loss of consortium due to the injuries to a parent, it had refused to extend the doctrine in cases in which a legal relationship such as cohabitation between the parties did not exist. To continue the line drawing, the court looked to cases determining the basis for damages associated with prenatal injuries. In these cases, the Massachusetts courts extended a cause of action to a fetus in two related circumstances. First, the child could recover if it was born alive when the injury occurred before viability. Second, the infant's estate could recover for severe injuries after viability if the injuries were fatal. The court, therefore, concluded that viability of the fetus did not control the result.

The court further noted that a child born after a parent's wrongful death could collect damages for the parent's death. To maintain consistency between the statutory interpretation and judicial developments of common law, it followed that the child should be able to collect for injuries to the parent that were not fatal. The court, therefore, concluded that a child conceived before the parent's accident and subsequently born alive could recover damages for loss of consortium if he could also demonstrate a reasonable expectancy that the parent would have provided for his care.

Thermographic Treatment Covered as Diagnostic Service

Thermographic Diagnostics, Inc. v. Allstate Insurance Co., Case No. A-89/90 (N.J. Sup. Ct. 1991) (Lexis, State lib., N.J. file).

In this case, the New Jersey Supreme Court concluded that an insurance policy providing for diagnostic services extended coverage for thermography exams. Thermography is a diagnostic procedure that measures infrared energy emitted by the skin to determine the presence of temperature differences between corresponding areas of opposite sides of the body. The insurers in this case refused to pay for treatments and argued that it was not of proven medical value and therefore was experimental. The supreme court affirmed the lower courts' determination that the costs were covered under the state's no fault law but left open some issues concerning the appropriate cost of the treatment.

At the heart of the court's interpretive problem was the application of the New Jersey no fault statute which directed insurers to cover reasonable and necessary diagnostic services. The insurers argued that the payments should not be made unless the tests were generally accepted by the medical community. In response, the court noted that the legislative purpose in adopting the no fault statute was to balance several competing concerns including compensation, cost containment, and the reduction of litigation. The court rejected the insurers' proposed interpretation because it placed too much emphasis on the goal of cost containment and was inconsistent with the law's recognition of other less scientific forms of treatment such as religious healing. To better strike a balance between the competing factors, the court concluded that a necessary medical expense under the Act is one incurred for a treatment, procedure, or service ordered by a qualified physician based on the physician's objectively reasonable belief that it will further the patient's diagnosis and treatment. The use of the treatment, procedure, or service must be warranted by the circumstances and its medical value must be verified by credible and reliable evidence. That standard was consistent with the reparation objectives of the Act in that it would allow reimbursement for innovative medical procedures warranted by the circumstances that have demonstrable medical value but have not yet attained general acceptance by a majority of the relevant medical community. It would also accommodate reimbursement for promising experimental medical techniques constituting the only realistic means for treatment of certain patients, which the insurers admitted would not qualify under a general-acceptance standard.

Setting the reasonable amount of compensation also proved difficult to the court. After the litigation began, the state established a set of fees which it determined were reasonable but the list did not contain a fee for thermography. Under the regulations concerning services for which there was not an established fee, the fee was to be a reasonable amount considering the fee schedule for similar services in the region where the service was provided. Though the court felt that these regulations provided a guide for setting a reasonable level, they might not be appropriate in this particular case. The court noted that the charges sent to the insurers were facially unreasonable since there was a substantial profit flowing to the limited partnerships whose members ordered the tests and also were owners of the thermography lab. Moreover, the court found a large disparity between the cost of the service and the cost of the equipment to provide the service compared to that of more expensive services such as CAT scans. As a result, the court remanded the determination of the fees' reasonableness to the trial court.

Damages under CERCLA May Reach Four Times Response Costs

United States v. Parsons, 936 F.2d 526 (11th Cir. 1991).

In this case, the Eleventh Circuit Court of Appeals concluded that the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) provided for damages of up to four times the government's cost of