

A pregnant woman, whose due date for the delivery of her viable fetus was less than a month away, was walking in a parking lot and looking at her cell phone. She was hit by a car driven by a police officer, who had just received word of an emergency and carelessly failed to see the woman. Several days later, the woman gave birth to a child who suffered neurological damage as a result of the accident.

The woman, on behalf of her child, brought a negligence suit against the police officer for damages associated with the physical injuries suffered by the child. The woman and the police officer were found to be equally at fault for the accident.

The jurisdiction has adopted a modified comparative fault statute that bars a plaintiff from recovery against a defendant whose fault is less than or equal to that of the plaintiff.

In the child's suit against the police officer, will the child be likely to recover for her injuries?

- A. No, because the child was in utero at the time of the accident.
- B. No, because the firefighters' rule applies to police officers.
- C. Yes, because the child was viable at the time of the accident.
- D. Yes, because the woman was not at greater fault than the police officer.

Explanation:

Scope of defendant's duty of care

Cardozo view Duty owed only to persons who might be foreseeably harmed as a result of defendant's negligence (ie, persons within zone of foreseeable harm)

(majority rule)

Andrews view Duty owed to everyone on earth if anyone might be foreseeably harmed as a result of defendant's negligence

(minority rule)

To recover in a **negligence action**, the plaintiff must establish four elements: duty, breach, causation, and damages. The majority rule is that the defendant owes a **duty of care** to the plaintiff only if the plaintiff is a member of the **class of persons** who might be **foreseeably harmed** as a result of the defendant's negligent conduct (sometimes called "foreseeable plaintiffs"). If a pregnant woman is a member of this class, then a duty is also owed to her **unborn child**—but **only if the fetus was viable** at the **time the injury occurred**.

Here, the police officer owed a duty of care to the pregnant woman because it was foreseeable that someone in the parking lot might be harmed by the police officer's negligent driving. As a result, the police officer also owed a duty to the woman's child, who was unborn (ie, in utero) but *viable* at the time of the accident **(Choice A)**. And since the police officer breached that duty by carelessly failing to see the woman and caused the child's neurological damage, the child can recover from the police officer for her injuries.*

*The result would be the same under the minority rule (Andrews view) because the scope of duty under this rule is much broader—it extends to everyone if anyone might be foreseeably harmed.

(Choice B) Although the firefighters' rule applies to police officers (and other emergency professionals), it does not excuse their negligence. Instead, it bars emergency professionals from recovering damages for injuries attributable to the special dangers of their job.

(Choice D) The woman and the police officer were equally at fault for the accident. So had the woman been the plaintiff, she could not recover under this jurisdiction's **modified comparative fault** statute. But the plaintiff in this action is the child—not the woman. And since a negligent parent's fault is not imputed (ie, assigned) to a child plaintiff in a suit against a third party, the woman's relative fault is of no consequence here.

Educational objective:

Under the majority rule, a duty of care is owed to any person who might be foreseeably harmed by the defendant's negligent conduct. Additionally, any duty to a pregnant woman is also a duty to her unborn, viable child.

References

Restatement (Second) of Torts § 281, cmt. c (Am. Law Inst. 1965) (explaining that an actor can only be negligent toward the class of persons who might be foreseeably harmed by his/her conduct).

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