

MORAL DAMAGES TO THE UNBORN: ANALYSIS OF THE LEGAL ASPECTS OF THEIR PROTECTION

Juliana Peixoto Bezerra de Melo¹

RESUMO: Inicialmente será feita uma abordagem histórica sobre o surgimento dos direitos do nascituro e a sua definição no campo doutrinário e legal. Serão abordadas ainda as teorias sobre a situação jurídica do nascituro e qual delas foi adotada pelo Código Civil, pela doutrina e jurisprudência brasileira. Por fim, será apresentada uma análise dos aspectos jurídicos sobre a possibilidade de proteção e eficácia em relação aos danos morais do nascituro.

Palavras-chave: Nascituro. Dano moral. Direitos da personalidade. Dignidade da pessoa humana.

ABSTRACT: Initially, a historical approach will be taken to the emergence of the rights of the unborn child and their definition in the doctrinal and legal fields. Theories on the legal status of the unborn child will also be addressed, and which of them was adopted by the Civil Code, by the Brazilian doctrine, and by the courts. Finally, an analysis of the legal aspects regarding the possibility of protection and effectiveness in relation to moral damages to the unborn child will be presented.

Keywords: Unborn child. Moral damages. Right to a personality. Dignity of the human being.

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1 INTRODUCTION

Even if not yet born, Brazilian law protects the rights of the unborn child from the moment of conception. Thus, although not considered a person in the legal sense, the rights of the unborn child are recognized and protected from the moment of conception, in accordance with their personality and their status as a developing human being.

As there is no specific law in Brazil that protects the moral rights of the unborn child, this paper focuses on natalist, conditional personality, and conceptionist theories, the constitutional and legal provisions for protection that underpin the granting of this right to the unborn child, and the position of the courts on the matter.

Through doctrinal and jurisdictional understanding, the paper aims to demonstrate that, although Article 2 of the Civil Code expressly provides that natural persons may only acquire rights and obligations from the moment of live birth, the unborn child is liable to suffer moral

¹Graduada em Direito e Administração pela Universidade Federal do Amazonas (UFAM); Advogada.

damages, as it is the holder of personality rights and protected by the principle of dignity as a human being.

Therefore, it is irrelevant that the unborn child is unaware of the world around it, since it is protected by certain rights from conception, which are considered fundamental to its development and existence as any human being.

2 HISTORICAL ORIGINS OF THE RIGHTS OF THE UNBORN

It was in the city of Thebes, in ancient Greece, where the first protection of the rights of the unborn child was reported, with penalties for those who practiced abortion (GONZÁLEZ, 2013 s.p).

Rodrigues presents the views of some philosophers on the issue of abortion in Ancient Rome:

In ancient Greece and Rome, abortion was a common practice. In an analysis of Greek social practices dating from 1922, there are no fewer than 12 pages containing lists of abortive preparations, instruments, injections, pessaries, and tampons used by Greek doctors to induce abortion. It is also reported that Hippocrates advised women to take large leaps in order to provoke abortion. However, he preferred to advise women to use contraceptives. Socrates was also in favor of facilitating abortion whenever a woman desired it. Plato proposed that women over the age of 40 should be required to have abortions, but he was equally in favor of contraceptive alternatives. Aristotle, finally, recommended abortion before the fetus became animated, which at the time was believed to occur after the first 60 days of conception. He, too, was in favor of giving preference to the use of contraceptives. (RODRIGUES, 1984, p.17 *apud* APARECIDA, 2019 s.p)

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It can be noted that the leading philosophers and thinkers of the time were already debating the issue and recording their preferences for contraceptive methods over abortive methods, considering the condition of the fetus as a being.

3 DOCTRINAL AND LEGAL DEFINITION OF UNBORN

Silva's (1998) doctrine highlights that the word *nascituro* [Portuguese for “unborn”] derives from the Latin *nasciturus*, the past participle of *nasci*, meaning one who is about to be born.

Other scholars also present the concept of the unborn child:

The unborn child is a being that has already been conceived, distinct from those who have not yet been conceived, and who may be subject to rights in the future, depending on birth, in the case of potential offspring. This situation brings us to the notion of contingent rights, which are rights that exist merely as a potentiality, a possibility. (VENOSA, 2005, p. 153.)

An unborn child is one who is about to be born, whose rights are protected by law; one who, having been conceived, has not yet been born and who, in intrauterine life, has formal legal personality with regard to personality rights, acquiring material legal

personality and obtaining property rights, which remained in a potential state, only upon being born alive. (DINIZ, 1998. p. 334.)

In the legal definition, Art. 2 of the Civil Code states that “A *person’s civil personality begins at birth with life; but the law protects the rights of the unborn child from conception onwards*”.

An unborn child should not be confused with “potential offspring,” which is also protected by law in Article 1799, I, of the Brazilian Civil Code: “*In testamentary succession, the unborn children of persons designated by the testator may also be called upon to inherit, provided they are alive when the probate proceedings commence.*” Thus, the unborn child can be understood as an entity *that has already been conceived*.

4 THEORIES: NATALIST, CONDITIONAL PERSONALITY, AND CONCEPTIONIST

The author Tartuce (2012), in his article “*A Situação Jurídica do Nascituro: Uma Página a Ser Virada No Direito Brasileiro*” [The Legal Status of the Unborn Child: A Page to be Turned in Brazilian Law], presents these theories as follows:

a) Natalist

The unborn child would have no rights, but merely an expectation of rights, as it is not considered a person.

By adopting the natalist theory, the Civil Code only grants legal personality to the 1911 unborn child upon live birth, but protects their rights from conception onwards.

However, there is a contradiction in this context, since rights cannot be “attributed” to someone who does not have legal personality, just as the unborn child cannot be ignored as if it did not exist.

b) Conditional personality

This theory argues that civil personality begins at live birth, but the rights of the unborn child are subject to a suspended condition, i.e., they are contingent rights. In other words, as it depends on a condition, the right of the unborn child will depend on its live birth, as explained by the following authors:

The theory of personality is one in which civil personality begins at live birth, but the rights of the unborn child are subject to a suspended condition, i.e., they are contingent rights. As is well known, a suspended condition is an accidental element of a legal transaction or act that makes its effectiveness subject to a future and uncertain event. In this case, the condition is precisely the birth of the child who was conceived. As a basis for the thesis and the existence of rights under a suspensive condition, Article 130 of the current Civil Code can be cited. (TARTUCE, 2013, p.118).

[...] suspended condition of live birth, that is, if the unborn child comes into the world alive, its personality is retroactive to the date of its conception.” (VASCONCELOS, 2010, p. 32)

This theory runs counter to current legislation, since it admits that personality rights only exist after birth, whereas the Civil Code (Article 2) clearly states that they exist from conception.

c) Conceptionist

The conceptionist theory was introduced by the Pact of San José, Costa Rica, arising from the American Convention on Human Rights of 1969 and incorporated into our Constitution in its Article 5, § 3, and into the Civil Code, which establishes that the unborn child acquires civil personality at conception.

Influenced by French law, this theory argues that legal personality begins at conception, when a human being is generated, with its own existence and totally distinct from the maternal organism.

Conceptionists consider that the unborn child has legal personality and should, therefore, be recognized as a person and as a subject of law, since rights cannot be granted to those who are not recognized as persons:

[...] there is no question of expecting rights for the unborn child, as these are not conditional on birth with life, but exist independently of it. (PAMPLONA FILHO; ARAÚJO, 2007, p. 39).

The embryo or unborn child has its rights protected by law from the moment of conception, because from that moment on it has its own organic and biological existence and life, independent of its mother. If the law protects it, it is because it has legal personality. In intrauterine life, as in vitro, it has formal legal personality, but only acquires material legal personality rights if it is born alive, at which point it will be entitled to the property rights that were in a potential state and the right to compensation for moral and property damage suffered by it. (DINIZ, 2002, p. 113).

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The author Tartuce (2012) disputes the first two theories, given that they treat the unborn child as a thing, only acknowledging its status as a human person in the event that it is born alive. However, for him, in the conceptionist theory, there is a view more closely linked to fourth-generation rights, where the unborn child is defined as a human person with rights and duties.

5 LEGAL ASPECTS OF PROTECTION IN RELATION TO MORAL DAMAGES TO THE UNBORN CHILD

5.1 ANALYSIS OF CONSTITUTIONAL AND SUB-CONSTITUTIONAL PROVISIONS

The Federal Constitution of 1988 expressly incorporated into its text the principle of human dignity (Art. 1, item III), classified as a supreme value and defined as a foundation for

the Republic. From the perspective of human dignity, life must be considered from conception, since today it is a constitutional civil right.

As a fundamental right, enshrined in Article 5, *caput*, of the Federal Constitution, life and its protection are prerequisites for the existence and enjoyment of other rights that should be available to the individual. Taking a broader interpretation, one can conclude that the rights of the unborn child from conception also include its honor.

Dignity is a right guaranteed to all people, without exception, under the Constitution of the Republic. Plácido e Silva (1967, p. 526) states that:

Dignidade [Portuguese for "dignity"] is a word derived from the Latin *dignitas* (virtue, honor, consideration). As a rule, it is understood to mean moral quality, which, when possessed by a person, serves as the basis for the respect in which they are held. It is also understood as the person's own conduct, through which they earn public esteem. In a legal sense, dignity also extends to the distinction or honor conferred on a person, consisting of a high-ranking position or title; in Canon Law, it indicates the benefit or prerogative of an ecclesiastical position.

As seen, dignity is guaranteed to the unborn child and, in order for them to develop healthily, it is necessary that their rights are enforced, as established in the Children and Adolescents Statute, in its articles 7 and 8.

Article 8 of the Children and Adolescents Statute (Law No. 8,069/90 – ECA) establishes:

Article 8. All women are guaranteed access to women's health and reproductive planning programs and policies, and pregnant women are guaranteed adequate nutrition, humane care during pregnancy, childbirth, and the postpartum period, as well as comprehensive prenatal, perinatal, and postnatal care within the scope of the Unified Health System.

§1. Prenatal care shall be provided by primary care professionals.

§2. The pregnant woman's primary healthcare professionals shall ensure that, during the last trimester of pregnancy, she is referred to the facility where she will give birth, guaranteeing her right to choose.

The Civil Code also provides for the right of the unborn child with regards to probate:

Art. 1,784 Once the probate process has begun, the inheritance is immediately transferred to the legitimate and testamentary heirs.

Art. 1,798 Persons born or already conceived at the time of the opening of probate are entitled to inherit.

Art. 1,799 In testamentary succession, the following may also be called upon to inherit:

I - the children, not yet conceived, of persons designated by the testator, provided that they are alive when the probate proceedings commence;

For some scholars, the aforementioned material law adopts the conceptionist theory when it refers to donations to the unborn child:

Art. 542, CC: Donations made to the unborn child shall be valid if accepted by their legal representative.

It is worth noting that Draft Law No.

478/2007, presented by Bassuma and Martini (2007, p.1), is currently being considered by the National Congress, with the

aim of creating the Statute of the Unborn, based on the following grounds:

[...] aims to make protection for the unborn child comprehensive, especially with regard to personality rights. Thus, it emphasizes the right to life, health, honor, physical integrity, food, family life, and prohibits any form of discrimination that may deprive the unborn child of any right on the basis of sex, age, ethnicity, appearance, origin, physical or mental disability, life expectancy, or crimes committed by their parents.

In this context, Clayton Reis (2010, pp. 40-41) concludes:

It makes no sense to deny dignity to the unborn child because it has not yet been born. Even though it has not yet been born, it has not lost its status as a human being in the process of developing. It possesses all the fundamental elements that identify a human person and, consequently, the rights of personality that ensure the right to legal protection through the protection of moral damages, among others. In fact, it is precisely this human being, who longs to be born, totally defenseless, who deserves the greatest and most unrestricted protection of the legal system. The dignity found in this defenseless being is certainly greater than that of those who have their own defense mechanisms, such as irrational animals. In this particular case, the legal system is contradictory. Although it offers protection to the sick and elderly, such as the recent Law on the Statute of the Elderly, it does not indicate the special protection that unborn children deserve.

Therefore, it can be inferred that the valuable constitutional principles, in the broadest sense, uphold the rights of the unborn and protect them. However, what should be sought is a more robust legislation that expressly establishes this protection for the unborn.

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5.2 DOCTRINAL UNDERSTANDING OF MORAL DAMAGES TO THE UNBORN CHILD

As discussed in the previous topic, Article 2 of the Civil Code provides that a person's civil personality begins at live birth, but establishes an exception for the rights of the unborn child, which are guaranteed from conception. In this regard, Gagliano explains the details of how a newborn can acquire their personality:

It arises from the moment of live birth (Art. 2 of CC/02 and Art. 4 of CC/16). It arises from the moment of live birth (Art. 2 of CC/02 and Art. 4 of CC/16). The moment the cardiorespiratory system begins to function, clinically measurable by Galen's hydrostatic docimasia test, the newborn acquires legal personality, becoming a subject of law, even if he or she dies minutes later. (GAGLIANO, 2012, p.114).

Thus, the interpretation based on doctrinal understanding is that legal personality begins in two possible ways: the first, through live birth, i.e., when the child is separated from the mother's body, they receive air in their lungs; while in the second case, through the use of an artificial method, a procedure called Galen's hydrostatic docimasia or pulmonary docimasia,

a technique in which, at birth, a single breath is sufficient for the child to be considered born alive.

Although Article 2 of the Civil Code of 2002 adopted the natalist theory, Civil Law is far from unanimous in recognizing the personality of the unborn child, a situation that generates doctrinal divergences and has led several scholars to adopt the conceptionist theory, which argues that the unborn child is a human person and has rights protected by law:

The Federal Supreme Court itself does not have a definite opinion on the matter, having applied both theories, sometimes following the natalist theory and sometimes following the conceptionist theory. (GONÇALVES, 2017, p.106).

The word “person” in the legal sense is classified as synonymous with legal subject. It can be defined as any “entity capable of exercising rights and submitting to duties in the legal sphere, that is, one who may be the active or passive party in a legal relationship” (FARIAS; ROSENVALD, 2006, p. 96).

Therefore, it is not only inserted in the quality of being human (a natural person), but also related to a legal entity, aiming to achieve a common interest. Upon acquiring personality, these individuals or legal entities begin to act as subjects of law, becoming able to perform acts and conduct business in the legal sphere.

Reale (2000, p. 232) highlights: “The idea of personhood is fundamental both in the field of ethics and in the strict field of Law. Human beings are persons because they are valuable in themselves, as the center of recognition and convergence of social values.” Article 1 of the Civil Code establishes that: “Every person is capable of rights and duties in civil society.”

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As personality rights are innate and intrinsic to the human condition, ownership and protection of these rights are guaranteed to all human beings, regardless of race, sex, age, beliefs, financial status, or intellectual capacity. As such, the unborn child, from the moment of conception, is considered an independent living being and, therefore, distinct from the mother, with genetic and biological autonomy, and should be treated as a human being, even in the state of formation.

From conception onwards, the right to life, physical and mental integrity, honor, image, privacy, and name are recognized and protected. Similarly, “the right to claim child support, recognition of parentage, prenatal care, and compensation for any damages caused by the violation of their image or honor” (FARIAS; ROSENVALD, 2006, p. 186).

Diniz (2009, p. 196) argues how the rights of the unborn child should be exercised:

The unborn child has legal capacity, but not the capacity to exercise it, and its parents or, in the event of their incapacity or impossibility, the guardian of the womb or the

unborn child must look after its interests, taking procedural measures on its behalf, administering the assets that will belong to it if it is born alive, defending its possession on its behalf, safeguarding its share of the inheritance, accepting donations, or protecting its legal expectations. Upon their live birth, their parents assume parental authority; if there was a guardian of the womb, their duties will cease, the guardianship will end, and a guardian will be appointed for the newborn.

Article 2 of the Civil Code states:

Art. 2. A person's civil personality begins at birth with life; but the law protects the rights of the unborn child from conception onwards.

Moral damages and personality rights are intrinsically linked. As the Federal Constitution enshrined the principle of human dignity as the foundation of the Democratic Rule of Law, human beings are recognized as the core and foundation of society.

According to this understanding, if the unborn child is harmed in its dignity as a human being or in its personal rights, it is permissible to seek compensation in court on its behalf for the moral damage suffered.

Currently, moral damages are viewed as a technical matter, that is, in relation to the violation of a personality right. They are no longer related to a negative and subjective understanding, but are now qualified in a technical and objective manner.

Due to the fragility that characterizes the unborn child, it is imperative to grant broad legal protection to its rights, which must be protected, under penalty of violating human essence itself. Under the current Democratic Rule of Law, selective dignity, in which only those born alive are considered human beings worthy of dignity, is no longer acceptable.

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According to Reis (2010, p. 24), limiting personality rights on the grounds of the unborn child's incapacity is unacceptable, given that it has a life from the moment of conception. According to the author, the natalist theory is no longer in line with the current legal order, as it conflicts with the full realization of human dignity.

So, with the acceptance of the conceptionist theory, it's understood that there's broad protection of the rights of the unborn child, and not just a mere expectation of rights or a mere suspended condition, as defended by the natalist and conditional personality theories.

5.3 BRAZILIAN CASE LAW ON MORAL DAMAGES TO THE UNBORN CHILD

Although the Brazilian Civil Code has adopted the natalist theory, the Federal Supreme Court (STF) is still undecided on the use of the natalist and conceptionist theories, while the Superior Court of Justice (STJ) has adopted the conceptionist theory.

Although the natalist thesis has been adopted by classical scholars, the conceptionist theory has been accepted in case law, specifically in decisions handed down by the Superior

Court of Justice, which has awarded moral damages in favor of an unborn child, thereby rejecting the thesis that live birth is a condition for the fetus to acquire legal personality.

On 26/02/2002, Justice Sálvio de Figueiredo Teixeira, in ruling on Special Appeal No. 399028/SP, SP, considered a case still under the 1916 Civil Code, concerning compensation for children whose father died in a traffic accident, one of whom was still unborn at the time of the accident, and adopted the conceptionist thesis, recognizing this right to the fetus:

CIVIL LAW. MORAL DAMAGES. DEATH. HIT-AND-RUN. TRAIN. LAWSUIT FILED 23 YEARS AFTER THE EVENT. NO STATUTE OF LIMITATIONS. INFLUENCE ON AMOUNT. PRECEDENTS OF THE PANEL. UNBORN CHILD. RIGHT TO MORAL DAMAGES. DOCTRINE MITIGATION. FIXATION IN THIS INSTANCE. POSSIBILITY. APPEAL PARTIALLY UPHELD.

I - According to the Panel's guidance, the right to compensation for moral damages does not disappear with the passage of time (provided that the statute of limitations has not expired), but it is a fact to be considered when determining the amount.

II - The unborn child is also entitled to moral damages for the death of the father, but the fact that they did not know him in life has an influence on the determination of the amount.

III - It is recommended that the amount of moral damages be set immediately, including in this instance, in order to provide a definitive solution to the case and avoid inconveniences and delays in the judicial resolution.^[3]

According to this unanimous decision, “the unborn child is also entitled to moral damages for the death of the father, but the fact that they did not know him in life has an influence on the determination of the amount.” Based on this understanding, the pain suffered by the unborn child is certainly less than that felt by a child who lived with their father for many years and then lost him. However, this is only a matter of degree, and does not exclude the granting of moral damages to the unborn child.

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Another basis extracted from the aforementioned decision concerns the issue of the statute of limitations, considering the period of twenty-three years from the date of the child's father's death. The Superior Court of Justice rejected this request on the grounds that the statute of limitations does not apply to those who are absolutely incapable. This decision crystallizes the conceptionist thesis of the acquisition of personality, given that only those who have personality can be considered incapable and, therefore, holders of rights.

In another ruling, now under the current Civil Code, the STJ upheld the understanding regarding the recognition of moral damages in favor of the unborn child, as a result of the death of the father in a workplace accident (Special Appeal No. 931556/RS):

CIVIL LIABILITY. WORKPLACE ACCIDENT. DEATH. COMPENSATION FOR NON-MATERIAL DAMAGE. UNBORN CHILD. FIXING THE AMOUNT OF INDEMNITY. DIES A QUO. INFLATION ADJUSTMENT

DATE SET BY THE JUDGE. INTEREST FOR LATE PAYMENT. DATE OF THE HARMFUL EVENT. CIVIL PROCEDURE. ADDITION OF DOCUMENTS DURING THE APPEAL PHASE. POSSIBLE, PROVIDED THAT THERE IS NO BAD FAITH ON THE PART OF THE PARTY AND THAT THE OPPORTUNITY FOR A HEARING IS PROVIDED. CANCELLATION OF THE PROCEEDINGS. NO DAMAGE. UNNECESSARY.

- It is impossible to accept a reduction in the amount set as compensation for moral damages in relation to the unborn child, in comparison with other children of the deceased who were already born at the time of death, since the basis for compensation is the existence of suffering that cannot be quantified with precision.
- Although there are many factors to consider when determining the amount of compensation for moral damages, it is mainly based on the severity of the injury that the judge sets the amount of compensation.
- Monetary correction is due on the amount of compensation for moral damages set as of the date of arbitration. Precedents.
- Default interest, in the case of workplace accidents, is subject to the regime of non-contractual liability, and therefore Court Summary No. 54 applies, accounting for it from the date of the harmful event. Precedents.
- It is possible to submit documental evidence in the appeal, provided that there is no evidence of bad faith on the part of the party and that the adversarial principle is observed. Precedents.
- Civil procedure is governed by the principle of procedural instrumentalism, whereby acts that fulfill their essential purpose without causing harm to the litigants shall be deemed valid. Special appeal by the plaintiffs partially upheld and, in this part, granted. The defendant's special appeal is dismissed.

In reviewing the case, Justice Nancy Andrichi followed the same reasoning as Justice Sálvio de Figueiredo Teixeira in recognizing the award of compensation to the unborn child, but she disagreed on the amount, arguing that it would be impossible to reduce the amount of compensation for moral damages in relation to the unborn child compared to other children of the victim, who were already born at the time of the accident, since the basis for compensation is the existence of suffering that cannot be precisely quantified. 1918

In light of this ruling, it is clear that it is possible to equate the unborn child with those who already have extrauterine life.

Moving away from accidents that caused the death of the unborn child's future father, there are also other rulings recognizing the possibility that, after being born alive, the child may seek compensation for deformities or permanent physical problems resulting from poor medical care, lack of examination, or incorrect prescription of medication during prenatal examinations, as in the following decision by the Superior Court of Justice, in the Regulatory Appeal in the Bill of Review, AgRg in Ag No. 1092134/SC:

CIVIL AND CIVIL PROCEDURAL - REGULATORY APPEAL IN A BILL OF REVIEW - CIVIL LIABILITY - ACTION FOR DAMAGES - MEDICAL MALPRACTICE - OXYGEN THERAPY - RETROLENTAL FIBROPLASIA - RETINOPATHY OF PREMATURE - CHILD WITH 90% (NINETY PERCENT) LOSS OF VISION - LIABILITY PROVEN BY THE COURT "A QUO" - SUMMARY 7/STJ - MATERIAL, MORAL, AND AESTHETIC DAMAGES - REASONABLENESS OF THE AMOUNT OF COMPENSATION -

EXTENSION OF THE JUDGMENT OF SPECIAL APPEAL 1.086.451/SC, REGARDING INTEREST, TO THE APPELLANT.

I - The civil liability of the Appellant, in this case, arose from the proven failure to provide hospital services for the care of the newborn, which unequivocally caused the disease of retrolental fibroplasia - retinopathy of prematurity - which compromised more than 90% (ninety percent) of the child's vision.

This conclusion cannot be dismissed by this Court, as it depends on a review of the factual and evidentiary record. II - There is no way to dismiss the joint liability of the doctor and the hospital where the unborn child was admitted in this case, since the medical staff, although functionally autonomous, was administratively subject to the hospital's regulations, a relationship that broadly characterizes a relationship of subordination, in addition to the fact that the hospital received funds from Social Security. Precedents.

III - Considering the permanent damage to the health of the unborn child and the evident liability, there is no reason to change the amount of compensation given the reasonableness of the level at which it was set, being BRL 76,000.00 (seventy-six thousand) for moral damages and BRL 30,400.00 (thirty-four thousand) for aesthetic damages.

IV - With regard to default interest, the effects of the partial acceptance of the Special Appeal filed by the physician, Rogério Antônio Gaio, M.D. (REsp 1.086.451/SC), are extended to the Appellant, establishing that, also with regard to ASSEC, default interest shall accrue from the date of service and not from the date of the harmful event. Regulatory Appeal denied.

Apparently, the case law of the higher courts has recognized the right of the unborn child to compensation for prenatal damage against its perpetrator, whether it be the mother, in accordance with Article 186 of the Civil Code, or the doctor (Article No. 951 CC and Law No. 8078/90). The basis for this damage to the unborn child's physical integrity is the loss of their ability to experience the pleasurable situations of life. 1919

The Statute of the Unborn, Draft Law No. 478/2007, establishes in its Article 21 the possibility of civil compensation for moral damages suffered by the unborn child. This provision enshrines the understanding that the Brazilian legal system has increasingly solidified the granting of compensation to the unborn child for moral damages due to the violation of its personality rights.

In this regard, it is worth highlighting the decision of Justice Paulo de Tarso Sanseverino, Judge-Rapporteur in Special Appeal No. 1120676/SC:

SPECIAL APPEAL. SECURITY LAW. DPVAT INSURANCE PREGNANT WOMAN HIT BY CAR. FETAL DEATH. RIGHT TO COMPENSATION. INTERPRETATION OF LAW No. 6104/74.

1 - A pregnant woman was hit by a car while riding her bicycle on a public road, resulting in the death of her fetus four days later, at thirty-five weeks of gestation.

2 - Recognition of the right of parents to receive compensation for personal injury, as provided for in the legislation regulating DPVAT insurance, in light of the death of the fetus.

3 - Protection afforded by the legal system to intrauterine life, from conception onwards, based on the principle of human dignity.

4 - Systematic-teleological interpretation of the concept of personal injury provided for in Law No. 6,194/74 (Articles 3 and 4).

5 - Special appeal granted, with the judge-rapporteur dissenting, and the request upheld.

The rights of the unborn child are defended through representation by its mother, except in cases where she does not have parental authority, in which case a guardian would be appointed, under the terms of the Brazilian Civil Code. This guardian, called a guardian of the womb, is the person entrusted with the task of protecting the rights of the unborn child.

Following this line of reasoning, the courts allow for compensation for the death of an unborn child, since it is considered a person from the moment of conception, even in the face of the seemingly contradictory wording of Article 2 of the Civil Code, which should be interpreted using a systemic approach rather than in isolation, thus following the same arguments used by the conceptionist school of thought. If compensation for the death of the unborn child is not granted, it would be condoning the unlawful act that prevented the attainment of personality.

6 CONCLUSION

Thus, it can be concluded that limiting personality rights on the grounds of the unborn child's incapacity is inadmissible, given that it has life from the moment of conception. The natalist theory accepted by the Civil Code is not in accordance with the constitutionalization of civil law, since it conflicts with the full realization of the principle of human dignity.

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With the acceptance of the conceptionist theory, it's understood that there's broad protection of the rights of the unborn child, and not just a mere expectation of rights or a mere suspended condition, as defended by the natalist and conditional personality theories.

Thus, it is clear that doctrine is moving toward replacing the natalist theory with the conceptionist theory, evolving through the adoption of the thesis that the unborn child is bestowed with legal personality, both formally and materially. In this vein, the current case law of the Superior Court of Justice is moving toward adopting the conceptionist theory when it acknowledges in its judgments that the unborn child can suffer moral damages.

As seen in the event of the loss of their parent in an accident caused by a third party, since the death of the father will have repercussions on the child's future life, leaving them unable to enjoy his company, care, and affection, and with possible psychological problems due to feelings of frustration at the absence of a father figure.

As such, part of the doctrine regarding case law understands that, under the current Democratic Rule of Law, selective dignity, in which only those born alive are considered human beings worthy of dignity, is no longer acceptable. It is no longer conceivable that the

incapacity of the unborn child is a factor limiting its personality rights, considering that it has life from the moment of conception.

Finally, from all that has been presented, it can be concluded that moral damages to the unborn child must be awarded, because personality rights are inherent to human nature and exist independently of the personality or ability of the individual, and must be preserved for their development as a human being, as well as respect for their dignity, life, physical and mental integrity, honor, image, privacy, and name.

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