ORAL ARGUMENT – 01/07/04
02-0894
UT MEDICAL CENTER V. LOUTZENHISER

CLINTON: This court should conclude that the notice provision of the Texas Tort Claims Act is a jurisdictional prerequisite to the state's waiver of sovereign immunity under the act. And because the plaintiff in this case did not comply with the notice provision, the court should render judgment dismissing plaintiff's claims for lack of subject matter jurisdiction.

This court recently recognized in Wichita Falls State Hospital v. Taylor, citing Federalist 81 by Alexander Hamilton, that it is in the nature of sovereignty not to be amenable to suit without its consent. And this is an exemption enjoyed by every state in the union.

Accordingly this court held back in 1847 in _____ v. _____, and again in 1936 in State v. Isabel, that the State of Texas cannot be sued without its consent. And then only in the manner indicated by that consent. The manner indicated by that consent in this case is the Texas Tort Claims Act. And specifically §101.101, the notice requirement act, which entitles the state entity to notice within 6 months of an incident alleged to have caused an injury to a plaintiff.

Because as the court held in Texas Dept. of Transportation v. Jones, a TC is without subject matter jurisdiction over a suit against the State without its consent. Then the manner of the state's consent must also limit a TC's jurisdiction. Because in this case, the notice provision is a part of the manner in which the state legislature has indicated its consent to sue, it must necessarily follow that the notice provision also limits a TC's jurisdiction to hear suits against the state.

BRISTER: We in the past have said that to determine whether the legislature intended a provision to be jurisdictional, we looked at such things as the presence or absence of specific consequences in the statute for noncompliance. In other words, in this case there is no consequence that is mandated by the statute that says unless you provide notice within the 6 months, the cause is subject to dismissal. Why shouldn't we apply that same thinking to this case?

CLINTON: The first reason is the one I just stated. Which is that the court has stated and it is inherent in the doctrine of sovereign immunity jurisprudence that a state can only be sued with its consent. And then only in the manner indicated by that consent. And this is the manner indicated by that consent.

BRISTER: Which case says only in the manner. In other words, every condition put on it has to be fulfilled before jurisdiction comes into place.

CLINTON: Hosner(?) v. DeJung(?), 1 Tex 764 @ 769 says, "No state can be sued in her own courts without her consent, and then only in the manner indicated by that consent."

BRISTER: So the new thing in the legislature is tell us not only the limitations periods, but in several statutes tell us exactly how the case should be submitted to the jury. In other words who's name should be in the jury question and who's not. Presume the legislature could do that, could have a procedure saying how the jury charge is drawn up, and if they did then your argument is because that's one of many procedures in the tort claims act, the court has jurisdiction when it's filed, to do discovery, to try the case, but if you submit it wrong - POOF jurisdiction goes away at the end of the trial.

CLINTON: Because it is the manner of...

BRISTER: I mean they can tell us to try that it that way. They can tell us when to file it, but do we really want jurisdiction to go in and out like that? And I suppose if we reverse it and send it back and they submit it right this time, then jurisdiction comes back.

CLINTON: Well they couldn't submit it right in this case. Because the notice provision has already expired.

BRISTER: My question is, is every procedural matter put in the Texas Tort Claims Act jurisdictional?

CLINTON: Yes. Because those are indications of the state's consent to sue, they should be considered jurisdictional. However, the state could also decide that curable restrictions on the waiver of sovereign immunity from suit could be non jurisdictional. One possible way that the court could decide that would be following the position of Essenberg, which said that a presentment clause which could be cured by abatement could later then be complied with, and therefore, not be jurisdictional.

OWEN: What's the consequences for the finality of judgments if we say that this is jurisdictional? Suppose a governmental entity did not raise the notice issue, and the case was tried. Is that judgment subject to collateral attack on down the line as void because the TC didn't have jurisdiction?

CLINTON: Because subject matter jurisdiction can be raised at any time, just like the use and property requirements of the Tort Claims Act, a state could raise that at anytime.

OWEN: Why isn't the San Antonio CA's decision in Martinez more well reasoned on that score in terms of finality of judgments and not being able to rummage through old judgments and look up and see if notice requirements were met?

CLINTON: In Martinez v. Val Verde Hospital, is that the case that the court is referring to?

OWEN: Yes.

CLINTON: Well in that case the court did say that the notice provision was not jurisdictional. But that would be inconsistent with the doctrine of sovereign immunity, which says that a state can raise sovereign immunity at anytime. Courts have no subject matter jurisdiction against the state without their consent.

BRISTER: Why isn't sovereign immunity destroyed because you win by summary judgment rather than plea to the jurisdiction?

CLINTON: The reason that it matters that it's jurisdictional is for a variety of reasons. First and foremost it would be that the state can raise it at anytime. So that it wouldn't be waived if the state didn't bring it up at the beginning of trial or even during trial. But secondly, this is a matter of the state's limited resources. If you require the state to subject itself to discovery and even possibly a long expensive trial over a suit that the state has not waived its sovereign immunity, then the court is subjecting the state to expenditures that the legislature chose the state not be subjected to.

O'NEILL: But in a case that's going to have issues regarding notice, whether it's jurisdictional or a matter of affirmative defense subject to summary judgment, you're going to still have to do that discovery anyway. The only real difference it makes is that it will subject these judgments to collateral attack. Otherwise, you can get a summary judgment heard just as quickly, it disposes of it just as well, but the only difference then is going to be that you are going to have judgments out there subject to collateral attack down the road. Would that be right?

CLINTON: In the limited cases in which the notice provision is a fact issue, that may be correct. But there are a great number of cases which the notice provision is not a fact issue. Specifically in this one for example. It is uncontested that notice was not provided within 6 months of the incident alleged to have caused the injury.

O'NEILL: Why wouldn't summary judgment not take care of that just as well?

CLINTON: Because that may occur down the road that a court rules on summary judgment. It is also a matter of whether the state could appeal. So if the TC incorrectly ruled that the notice provision was complied with, then the state would have to subject itself to an entire suit. Whereas, if the TC incorrectly rules that the notice provision has been complied with, and it is a jurisdictional matter, then the state has an immediate interlocutory appeal to end the suit at that stage without the expense of a full fledged trial.

OWEN: Looking at the statute it talks in terms of entitlement. It says a governmental unit is entitled to receive notice of a claim. That suggests that perhaps ____ can be waived. Is that correct? It doesn't say that the TC can only exercise jurisdiction if.

CLINTON: I don't think that it necessarily follows that subject matter jurisdiction, or that the notice provision could be waived just because it says that it is entitled to. Especially when you

look at §101.025, which says that sovereign immunity to suit is waived and abolished to the extent liability is created by this chapter. This court held in Kathy v. Booth, that liability is not created by the chapter if a plaintiff does not comply with the notice provision. So based on the plain language of the statute, 101.025, it must be that sovereign immunity from suit is not waived if you do not comply with the notice provision. Otherwise the court would have to reverse Cathy v. Booth and say that it is not true that liability from suit is not waived if someone fails to comply.

HECHT: There are cases to which we have alluded where notice is a very difficult issue. For example in actual notice cases. And there's a great deal of uncertainty about what state employees knew, when they knew it, and what they knew about what happening. It's hard to think of those kinds of issues in jurisdictional terms, but your position requires that they be treated that way. Is that correct?

CLINTON: That's correct. This is essentially very similar to the use and property requirements. In that it restricts the class of claims over which the state has waived its sovereign immunity from suit. So that some will fall within and some will fall outside of the class of claims. And just like the use and property provisions, as this court has held on multiple occasions such as Tex. Dept. of Crim. Justice v. Miller, and TNRCC v. White, that those use and property requirements are jurisdictional restrictions on the suit.

Just like those use and property requirements there will sometimes be factual concerns that the court will not be able to dispose of immediately. But that does not affect whether or not those provisions are jurisdictional. It just affects whether or not the court will be able to make a legal determination of whether those jurisdictional _____ are complied with.

O'NEILL: How do we square your position with Duvie(?)

CLINTON: That's a very good question. And the reason is that the legal rationale in Duvie(?) is that the TC has inherent subject matter jurisdiction over suits against private parties. Therefore, the TC will automatically have jurisdiction against suits between private parties and, thus, it wouldn't matter whether a litigant complied with the statutory prerequisite to a cause of action involving private parties because the TC would already have jurisdiction over the matter.

In this case as the court recognized in Texas Dept. of Transp. v. Jones, TC's do not have inherent subject matter jurisdiction over suits against the states. Therefore, you must comply with the statutory provisions in order to invoke the TC's subject matter jurisdiction.

Moreover, in this case it is uncontested the plaintiffs did not comply with the notice provision. Specifically, the plaintiffs allege that the incident alleged to have caused their injuries occurred on Jan. 21, and Jan 28, 1992. The plaintiff Loutzenhiser, however, did not file his complaint until Dec. 16, 1994, almost three years later. So that was the first formal written notice of any possible complaint against the defendant.

HECHT: Do you say that the parents could give notice on behalf of the child?

CLINTON: Yes. Moreover, the only informal, nonwritten _____ was given almost 8 months after the birth of the child, which was a telephone call from the child's father on Sept. 1, 1992. Therefore, it is uncontested that there was no notice given to the University in this case within 6 months of the incident alleged to have caused the injury to the plaintiff.

O'NEILL: But now you would acknowledge that's a bit of a perverse result. Your claim then expires before you even know it exist?

CLINTON: It's not that the claim expires. According to the court's jurisprudence right now, there is no cause of action until the birth of the child. It's not that the claim expires. It's that the notice provision runs. Because the notice provision is tied to the date of the injury.

O'NEILL: A claim is defeated before it's even known.

CLINTON: That's correct.

O'NEILL: And how do you address their equal protection argument?

CLINTON: First and foremost, there can be no equal protection violation with regard to the status of a fetus, because there is no discrimination based on whether the person is fetus in this case. Because the notice provision runs against all parties. Any players. It does not make a class of persons for whom the notice provision runs against.

Indeed, this was recognized a long time ago. For example, Sanford v. Texas A&M Univ, 680 S.W.2d 650: when a plaintiff was exposed to a pesticide in 1975, and the doctors diagnosed an injury based on exposure to that pesticide in 1980 - 5 years later. And the Beaumont CA correctly decided that the plain language of the notice provision says you only get 6 months from the alleged incident. It is indeed unfair, but that doesn't make it one in which the court can force the state legislature to waive sovereign immunity.

Indeed, the court recently wrote in Dallas Area Rapid Transit v. Whitley, that we recognize that the plaintiff suffered terrible injuries, and that it is unlikely he will recover any meaningful compensation for them under the tort system. But the legislature has enacted only a limited waiver of sovereign immunity, and the terms of that waiver do not permit the plaintiff to recover against the state. Therefore, the court reversed the judgment of the CA and dismissed the case for lack of subject matter jurisdiction.

PHILLIPS: I think I heard you just say that the first informal notice came 8 months after birth.

CLINTON: No. Eight months after the alleged incident.

PHILLIPS: And 16 days after birth?

CLINTON: I didn't count the days, but I trust your calculation. So, therefore, J. O'Neill, it may indeed be unfair. However, because the inherent nature of sovereign immunity is unfair because some claims are waived and some claims are not permitted, then that is the choice of the legislature. And that's the decision of the legislature.

Moreover, there is a rational basis with regard to the protection clause. Even if there was some discrimination based on the status of a fetus, which there clearly is not in this case, because there is a broader group of claims for which sovereign immunity is not waived. But even if there were, there is clearly a rational basis for the notice provision. And that is, as the court wrote in Kathey v. Booth. It permits the state to protect against unfounded claims, to preserve evidence, to settle claims, and to prepare for trial. Moreover, it also permits the state to write a clear bright line rule to say that if you do not give us notice within 6 months of the incident alleged to have caused the injury, the state can move on, and the legislature can expend resources and direct its resources elsewhere.

This is the policy choice of the legislature. And because sovereign immunity is a constitutional principle, the court should not use another constitutional principle to force the legislature to do something that it has an inherent constitutional right not to do.

* * * * * * * * * *

RESPONDENT

BLEAKLEY: J. Gonzalez concurring in Nelson wrote it is my hope that the courts and legislatures of this nation and our society will continue to ponder the meaning and value of life even that of those yet unborn. Through this process of reflection and discussion, hopefully the pendulum of public opinion will swing toward the recognition of the rights of the unborn.

J. Godbey in effect recognized that right at the trial level when in distinguishing the case of Fider(?) from the present case, he found that Fider(?) was factually distinguishable because it involved an action that occurred, while this case involves an action that occurred while the mother was pregnant, not simply while the child was a minor, and, thus refused to apply the notice provision as being applicable to the child.

He did so on the basis of the determination that to do so would in fact be an unconstitutional infringement upon the child's right for a remedy. That is implicit in his holding. I'm not suggesting that he determined that, but there could be no other reason that I can conceive that would allow such a determination by J. Godbey at the trial level.

PHILLIPS: And you've found other cases that discussed how the right to the remedy work in a claimant's common law in nature but is brought against the sovereign who is entitled constitutionally to sovereign immunity, as opposed to a common law assertion against a private

person?

BLEAKLEY: The common law right for a claim based on a _____ injury as this court determined in _____, back in the early 70's, is a right that has been preserved. And I would be the first to admit that the issue of whether or not the Texas Tort Claims Act in fact creates a statutory right of action, or whether or not it simply revises a common law right, is somewhat unclear. There is no case directly on point. Therefore, the issue of whether or not this may be...

PHILLIPS: We tried to settle that in Cathey. There's no creation of a right here. It merely removes a disability. If this were against a private hospital, then we would be looking at open court jurisprudence. But it's not against a private hospital. It's against the state. And do we have authority about how that right to a remedy jurisprudence operates when you have this other constitutional principle on the other hand?

BLEAKLEY: I think it boils down and my response to that would be that we must look at equal protection as the principle that's being violated here. And I think contrary to the suggestion by my learned opponent, the issue is that the notice provision in the statute in fact creates a subclass of Texas citizens, unborn children injured prenatally, who in fact do not even become persons under the law of Texas until they are born. It unlawfully I believe discriminates against them because what justification is served by the purpose of this statute?

HECHT: Does it have the same effect against claimants who don't know that they've been injured?

BLEAKLEY: That's true. The arguable difference is that first of all is an existence of a person who has at least the opportunity to have some type of representation. For example with a mentally incompetent. An alert guardian perhaps as a matter of prudence could provide notice in a timely fashion. The unborn child whose 6 months expires in utero(?) doesn't have that opportunity. And that does not serve the purpose of the statute, which is the idea of settling claims, preparing for a trial, or...

HECHT: So you're comfortable with the discovery rule, but not with this application of the statute against a fetus?

BLEAKLEY: That's correct. My point to even further refine it in that regard would be at the moment of birth, which is when I believe that the 6 months should be triggered, that would not be a discovery principle. That's in fact under Texas law, that's when the person, and how can you have a personal injury such as enumerated in the Texas statute created, until in fact you have a person? So the incident is actually the date of birth. And that's not a discovery principle. That's simply when the cause of action that could exist in fact begins to exist.

HECHT: Do you think that the state could just refuse to waive immunity for injuries to fetuses?

BLEAKLEY: I think so.

HECHT: They just pick them out and say we're going to waive immunity for suits or injuries to people who are born, but not for injuries to fetuses?

BLEAKLEY: I think they could do that.

HECHT: How is that any worse than this?

BLEAKLEY: It would be worse, because it would obviously indicate the intent. I think that the legislature here has obviously created a situation where they are not obviously intending to exclude fetuses. But we must look at the net result of that. In fact there is a defacto by virtue of the fact that human pregnancy is 9 months long, exclusion of this class of children.

HECHT: So if the legislature is mean that's okay. But if they are stupid, then that's a problem.

PHILLIPS: If this is just an accidental result, the legislature never thought about it, or they wouldn't have written the statute this way. Did you make any attempt to petition the legislature to give you special permission to sue?

BLEAKLEY: No. I did not.

O'NEILL: If we were to decide that this was not a jurisdictional matter, but something more appropriate for an affirmative defense subject to summary judgment, would we reach that issue?

BLEAKLEY: I believe it would be appropriate to reach the issue that there is a denial of equal protection. Whether or not it's considered to be a jurisdictional issue or a nonjurisdictional, my point on the jurisdictional issue is that the hallmark of jurisdictional statutes are exhausting in requirements as this court stated in Essenberg when it overruled the 5th.

O'NEILL: But we would only be doing it as a matter of the practicality because if we found that it was not a jurisdictional matter it would go back to the TC to decide the issue. Right?

BLEAKLEY: That's right.

O'NEILL: So we wouldn't have to address it, but we could choose to.

BLEAKLEY: Actually the matter has been decided by the TC, 5 years before it chose to bring its plea to the jurisdiction the matter was raised by summary judgment by the state and denied by J. _____ at that time. In fact in his opinion at the trial level he called up the order denying the so called plea to the jurisdiction, because he effectively treated the plea as a motion for reconsideration

of the denial for summary judgment.

The dilemma that I believe we're all confronted with is that under Texas law when a Texas precedent establishes quite clearly that when the legislature uses the word "individual" for person, that it did not intend those words to be construed to include an unborn fetus. So contrary to every other single class of persons, such as mentally incompetent or people who are misdiagnosed with cancer only to find out 5 years later that they have a terminal illness, the unborn fetus is in a special class, in a special category that is really singled out and effectively deprived of the right that every other single Texas citizen has, which is to bring a claim under the Texas Tort Claims Act, assuming that they can comply with the notice provision. And by definition, a fetus injured in the first trimester pregnancy is precluded from such an effort. And I believe that that is perhaps the essence of the constitutional issue.

I'm not urging that this is an open court violation, because it's somewhat questionable in the various proceedings whether or not the Texas Tort Claims Act revives a common law cause of action, or if in fact creates it. I believe that J. Livingston in his dissent in the Crier case obviously took that position that it was just a _____. But I don't think this court needs to go that far and treat this as an open courts violation.

HECHT: The troubling thing here is that you say the way this works it falls unfairly on fetuses because obviously they can't give notice. They don't even know that it's happened. But yet you're not troubled if the legislature just said we're not going to have these claims at all. Then it would not just work an unfairness. It would be a determination. We're not going to hear these claims.

BLEAKLEY: If I said that, perhaps I may have misunderstood you.

HECHT: We should clear that up. I asked you did you think that the state could just refuse to waive immunity from suits for injuries to fetuses?

BLEAKLEY: I think they could, but I think we would be back before your honors asking you to declare that...

HECHT: Oh. You mean they could just like they can do anything. But they couldn't do it and get away with it.

BLEAKLEY: That's correct.

PHILLIPS: And you say today that your case is really equal protection more than open courts _____. But your brief doesn't really talk about equal protection. Are there cases out there about a state's choice to make a limited waiver of its immunity as violating either state or federal equal protection?

BLEAKLEY: The Sullivan case dealt with student transfer rules. And the issue was the blanket proscription of the ability of students transferring to different high schools and their preclusion from participating in athletics was deemed to be in violation of the equal protection. The holding was that with respect to the purpose and the rules they made no provision that distinguished legitimate transferred athletes from those who were recruited for purposes of participating in athletics. I happen to think that that was a very good decision. My only comment on that would be that comparing the facts of these two cases, this is a much stronger position. Because there is absolutely no basis to achieve the purpose of the act, which is to prevent frivolous claims, to settle claims, or prepare for trial. It serves no purpose to deny the unborn child access to the courts in the limited fashion that the state has proscribed.

PHILLIPS: Did our court discuss sovereign immunity in UIL? The position is frequently taken that UIL is a private organization.

BLEAKLEY: No. They did not discuss sovereign immunity in that context. The analysis dealt with the issue of equal protection and the kinds of thoughts that go in to equal protection. And here rather than being a transferred athlete this is a matter of biology. By definition this is a child that was incapable of meeting the notice provision. And that does not serve the purpose of the notice provision. There's no rational justification for this particular subclass of Texas citizens to be deprived. That would be the essence of my argument on the equal rights protection aspect.

PHILLIPS: Your first argument as I understand it is that the injury didn't occur until birth. And so then we don't reach any constitutional issues. But if there is an injury on the date that this incident happened, then your argument is automatically any unborn children, or is it unborn children whose parents or future guardians don't have the ability to know they've been injured because of the nature of the incident?

BLEAKLEY: Adopting J. Godbey's point of view, Trider - arguably there was an adult present that could have represented the interest of the child. A child say for example that's injured in the last trimester of pregnancy, at least they will have 30-45 days to scramble around and provide notice if that is what this court would require. But the first trimester injured child by definition is precluded automatically from participating in this statutory scheme.

OWEN: How is that different from a child who is injured in utero(?) the month before it's born, but the injury is not ascertainable until the child is about 1 year old?

BLEAKLEY: I don't believe it is different because we're thinking in terms of fairness. Assuming that the legislature has a purpose of preventing claims from being brought and fulfilling the purpose of the statute, which is ___ settlement and prepare for trial, arguably the second child has someone that can represent their interests because they are at least in existence.

OWEN: It's undisputed that no, it's not possible to diagnose the injury? The injury doesn't develop until the child is 1 year old?

BLEAKLEY: But there is some case law to that effect that says basically tough coming from the various CA's.

OWEN: In equal protection terms, how is that different?

BLEAKLEY: It's different only in the sense of the impossibility aspect of it. And one, there is some possibility.

OWEN: In my example there is no possibility that it can be diagnosed until the child is 1.

BLEAKLEY: I would agree that that would be an unfair situation. And if I were an attorney representing such a child I would be arguing similarly before your honor at the present time that that would be an unjust result. But I'm not there.

OWEN: Unjust is one thing. I guess what I'm struggling with is the legislature has only waived sovereign immunity in certain instances. For example, the use of tangible personal property. You could argue that precisely the same kind of injury can occur by the negligence of the state. It just so happens they didn't use tangible personal property that caused it. It's certainly unfair that one plaintiff can recover and the other one can't. But is that equal protection violation.

BLEAKLEY: I believe it elevates to an equal protection when you have the situation that we have presently, which is by definition no one can ever recover.

OWEN: In my example, by definition you can't recover either.

BLEAKLEY: And I understand the distinction. That's an individual situation. What we're talking about is a subclass. We're talking about all children that are injured in the first trimester of pregnancy are automatically precluded from participating under the Texas Tort Claims Act. By definition. The fact that there may be a harsh result or two, or three or four elsewhere can't be my focus. I don't agree with the way that the harshness has been applied in other situations. Here we're talking about the distinction being an entire subclass of Texas citizens.

PHILLIPS: What level of scrutiny do you claim we should apply in analyzing your equal protection argument?

BLEAKLEY: I think it's certainly a quasi suspect class. But even if it's not, if a nonsuspect class is determined and perhaps unborn children are in that category, the court must look at the rationale the reason for the existence of the notice provision, which is again the three things I mention: evaluating frivolous claims; promoting settlement; and preparing for trial. How can the state in fact do such a thing if there is no child or person in existence?

HECHT: We focused you entirely on whether this should be a requirement at all. What

difference does it make to you if it is a requirement whether it's a jurisdictional requirement or just one that you are going to lose on?

BLEAKLEY: I don't think there is a distinction in terms of the test that should be applied. Although the exhaustion requirements are usually the hallmark of a jurisdictional statute, such as in Essenberg. And I don't believe that this particular notice provision is an exhaustion component. It's simply a notice.

HECHT: But from your perspective whether you lose by a plea to the jurisdiction or motion for summary judgment it doesn't really matter?

BLEAKLEY: It doesn't matter.

* * * * * * * * * *

REBUTTAL

PHILLIPS: Surely the state tort claims act is subject to equal protection analysis if attack is properly made. Is it not?

CLINTON: I don't think that's a safe assumption. Because as the court recognized in Wichita Falls State Hospital, sovereign immunity is of constitutional consequences. It is something that the states enjoyed when they entered the union.

PHILLIPS: If the state legislature said only one sex or only one racial group could bring a suit against the state, that would be fine?

CLINTON: I think in that case it is possible because that would be subjected to higher scrutiny...

PHILLIPS: So rational scrutiny - only people North of the Brazos River can sue. That's okay?

CLINTON: I can't see how...

HECHT: But you've conceded - the first question was, is the tort claims act subject to equal protection? You said you're not sure. And then the next question was, you feel they can't discriminate on the basis of race or gender? And you said surely not. So now it does apply.

CLINTON: I think you would probably have to make an exception to the inherent doctrine of sovereign immunity to permit an equal protection claim under any circumstances.

HECHT: So you would say that the equal protection provision only applies for suspect classes, but not others, or are we back at rational basis?

CLINTON: It probably shouldn't ever apply under any circumstances. Now the court could create an exception if it wished to where the other doctrines say that courts should very strict scrutiny over the circumstances. But because sovereign immunity is inherently a constitutional matter, it doesn't seem that the founders intended sovereign immunity to be amenable, for the legislature to be forced to waive sovereign immunity because of another constitutional doctrine or else they would have written such.

PHILLIPS: So the legislature could waive it only as to people who vote in one political party primary?

CLINTON: Based on the doctrine of sovereign immunity, it appears that that could be the case.

O'NEILL: How do you address their argument that because a fetus is not a person until a live birth, and there can't be an injury or incident regarding a person until that time. Because that would take care of the entire notice argument.

CLINTON: This court actually already decided that question in Brown v. Schwartz, in which the court wrote that the statute of limitations begins to run at the time of the injury inside the womb. So therefore, the injury occurred inside the womb. That the cause of action only accrues after the child is born. But the injury occurred inside the womb.

HECHT: And the notice statute is written in terms of incident.

CLINTON: That's correct. The notice statute actually isn't written in terms of injury. It's written in terms of the incident alleged to have caused the injury. So even if you change the definition of injury and said that in some way an injury could never occur inside the womb, it still wouldn't comply with the notice provision because it says the incident alleged to have caused the injury.

On whether the statute expressly states the consequences of noncompliance, it also does not do so in the use and property requirements in the Tort Claims Act. So the court has already decided that the statute doesn't have to specifically state what the consequence of noncompliance is for something to be jurisdictional.

Could the legislature accept fetuses from the notice provision? And I think that's the remedy that the other side is asking for and that actually might invoke equal protection concerns. Because then the legislature would be creating a class of persons for whom they are treating differently. So that would actually create the equal protection concerns. Where there are none now because as J. Owen pointed out, all persons are discriminated against if they cannot learn of their injury.

Moreover, a fetus in this case actually could present - if the parents of the fetus

knew of the injury or knew or the incident alleged to have the caused the injury, the parents or an attorney could give notice. Now that wouldn't mean the cause of action accrued at that time. It just means the notice provision would have been satisfied. So a fetus technically could satisfy the notice provision even before it was born.

If the legislature wanted the tort claims act to have a tolling provision, it could have written that in, and it did not do so in the tort claims act. So therefore, the inherent doctrine of common law or another provision wouldn't toll the notice provision. And more specifically, I believe they do toll with regard to statute of limitations, not this notice provision. So even technically they wouldn't apply.