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INFANTS — LIABILITY IN TORT FOR INJURIES TO INFANTS EN VENTRE SA MERE

The doctrine of *stare decisis* rests upon the principle that the law should be fixed and definite, following previously adjudicated cases as precedent. In no field has this principle become so thwarted as in tort actions by a child for injuries sustained *en ventre sa mere* i.e., in its mother's womb.[1] Courts which have had the opportunity to decide the question have made recourse to the fact that recovery was denied at common law. Such a statement is clearly erroneous since no English court had adjudicated the question.[2] The first case to decide the issue arose in Massachusetts in 1884.[3]

The decision most frequently cited and relied upon as authority for the rule denying recovery for prenatal injuries is the early Massachusetts case of *Dietrich v. Inhabitants of Northampton.*[4] The case involved a woman four or five months pregnant who slipped and fell, because of a defect in a highway, as a result of which she sustained a miscarriage. The child being little advanced in foetal life failed to survive the premature birth. The facts indicated that the child was not directly injured unless by a communication of the shock.[5] The Massachusetts court held that the child was not a person but only a part of the mother and that any recovery must be obtained by her. On common law principles the injuries to a child are not recoverable by the mother and there is no case allowing recovery by her.[6] The result of the court is sound if as in the facts of the case, the mother is only injured and the child is not directly affected thereby. To extend this

[1] James M. Kerr, *Action By Unborn Infant,* 61 CENTRAL LAW JOURNAL 364 (1905), ". . . — and their slavery to 'precedent' is nowhere in our jurisprudence more markedly apparent than in the reasoning of some of the judges who seek to justify a ruling against the right of an infant to maintain such an action."

[2] WINFIELD, A TEXTBOOK OF THE LAW OF TORT, p. 102. The author explains that where the injury is a prenatal physical one to the child himself there is no English authority in point.

[3] Dietrich v. Inhabitants of Northampton, 138 Mass. 14, 52 Am. Rep. 242 (1884). See also Bliss v. Passanesi, 95 N.E. (2d) 206 (Mass., 1950), in which the court intimates if the case would have been of first impression in the state, recovery may have been allowed.

[4] *Ibid.*

[5] As is evident from numerous American cases, recovery in tort for purely nervous shock is not allowed. The weight of authority in the United States is to deny recovery for physical injuries due to fright without impact, although an increasing number of jurisdictions have been adopting the rule allowing recovery. Wisconsin in Pankopf v. Hinkley, 141 Wis. 146, 123 N.W. 625 (1909), allowed a woman to recover for a miscarriage directly resulting from extreme fright or shock which was caused by the defendant's negligence. However, recovery for mental anguish has been denied in Wisconsin in Gatzow v. Buening, 106 Wis. 20, 81 N.W. 1003 (1900). Jurisdictions allowing recovery for shock, where it operates through the mind, generally limit it to a shock which arises from a reasonable fear of immediate personal injury to oneself. Applying this principle of personal apprehension of injury to a child in its mother's womb is clearly impossible unless it could be imputed from the mother.

[6] Damasiewicz v. Gorsuch, 79 A. (2d) 550, 559 (Court of Appeals of Maryland, 1951).

rule to cases in which the child is directly injured by the defendant's negligent act is either to deny the causal effect, or the existence of the child. Prosser in his Hornbook on Torts, lists two reasons for the denial of recovery for prenatal injuries. The defendant can owe no duty to a person not in existence at the time; the difficulty of proving a causal connection between the negligence and the damage is too great and there is too much danger of fictitious claims.[7]

A denial of a cause of action because of the difficulty of proof is to deny a fundamental principle of our law that for every wrong there is a remedy. The difficulty is one of fact and not of law. In many other actions the problem of proof does not void the cause of action. Cases sounding in fraud and negligent actions in which injuries are not physically apparent involve questions which are difficult to prove yet to deny recovery on this ground is clearly untenable.

To contend that no duty is owed because no person is in existence at the time of the injury, is a valid and logical argument if it can be assumed that the basic premise is correct i.e., a denial of the existence of the child until birth. The fact remains, however, that a child is in esse from the moment of conception.[8] To contend that an unborn child, whatever stage it has reached in the gestation period, is a part of the mother, is to deny the very concept of being. It cannot be disputed, however, that a child in its mother's womb depends at least for a certain minimum period upon its mother for protection and sustenance, but this in no way deters from the fact that the child is in being. Although proof of a causal connection between the negligence and the injury to the human foetus in its early stages of life is extremely difficult yet inexpediency should not eliminate the right.[9] This may in some degree explain the absence of litigation in regard to injuries sustained by infants before viability[10] but most American jurisdictions deny recovery entirely.

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[7] PROSSER ON TORTS, pp. 188-189.

[8] *Ibid.* See also Bonbrest v. Kotz, 65 F. Supp. 138, 140 (1946), in which the District Court for the District of Columbia states, "From the viewpoint of the civil law and the law of property, a child en ventre sa mere is not only regarded as a human being, but as such from the moment of conception—which it is in fact."

[9] Superior Transfer Co. v. Halstead, 189 Md. 536, 56 A. (2d) 706 (1948). This case illustrates the difficulty of proving that the defendant's negligence was the cause of the injury. *Infants—Unborn Children—Liability for Injuries Negligently Inflicted on Viable Unborn Child,* 63 HARVARD L. REV. 173 (1950), which states, "The case for recovery for injuries occurring before the seventh month would appear no less meritorious, even though the problem of proof increases as injury occurs earlier in gestation."

[10] Lipps v. Milwaukee Electric Ry. & Light Co., 164 Wis. 272, 159 N.W. 916 (1916), involved a non-viable child. The court denied recovery to a child that was injured while non-viable, about five months old, intimating, however, that a contrary rule may be urged when the infant is viable. The court refering to a non-viable child said, "Since a nonviable child cannot exist separate from its mother, it must, in the law of torts, be regarded as a part of its mother, and

That the civil law,[11] criminal law,[12] and the law of property[13] consider a child in being before birth cannot be denied, but the courts have been reluctant to extend this principle into the field of negligence. In the absence of statute,[14] state courts of final jurisdiction, with one exception,[15] have decided the question according to the precepts of the common law. They have until recent times denied the right to maintain the action but have differed radically as to the grounds for denial. Lack of precedent,[16] the child is a part of the mother,[17] a causal connection is based on conjecture,[18] it is the duty of the legislature to remedy,[19] and no duty arises because the contract exists with the mother and not the child[20] are the principle reasons advanced for denying recovery.

A group of cases have arisen in which recovery was denied because a contractual relation existed with the mother but not with the child. These cases arose in situations in which the woman while with child was injured on a common carrier. An early Irish decision[21] denied that an unborn child has a cause of action for injuries sustained while traveling on the defendant's train. The court said the contract of passage was with the mother and not with the child. A New York court[22] under a similar fact situation also denied recovery for prenatal injuries

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hence, being incapable of a separate existence, it is not an independant person or being to whom separate rights can accrue. Its rights are merged in those of the mother of whom it forms a part."

[11] Cooper v. Blanck, 39 So. (2d) 352 (La. App., 1923). The case was decided under the civil law of Louisiana allowing recovery under the wrongful death statute for injuries received by a child when eight months old in its mother's womb, the injuries resulting from falling plaster from the ceiling of the bedroom. The case also furnishes on p. 355 a table showing the relation between the months of intrauterine life, the number of cases born and the percentage of survival.

[12] State v. Walters, 199 Wis. 68, 225 N.W. 167 (1929).

[13] WIS. STAT. (1949 sec. 237.07, "posthumous children are considered living at the death of their parent." Property law considers a child in being for all purposes which are to its benefit i.e., taking by will or descent.

[14] California has allowed a child *en ventre sa mere* a cause of action by statute. CIVIL CODE OF CALIFORNIA, sec. 29, "A child conceived but not yet born, is to be deemed an existing person, so far as may be necessary for its interest in the event of its subsequent birth; but any action by or on behalf of a minor for personal injuries sustained prior to or in the course of his birth must be brought within six years from the date of the birth of the minor, and the time such minor is under any disability mentioned in section 352 of the Code of Civil Procedure shall not be excluded in computing the time limited for the commencement of the action." Scott v. McPheeters, 33 Cal. App. (2d) 629, 92 P. (2d) 678 (1939), the court indicated that in the absence of the statute there would be no cause of action at common law.

[15] *Supra,* note 11. Louisiana allows recovery under the civil law.

[16] *Supra,* note 3.

[17] Allaire v. St. Luke's Hospital, 184 Ill. 359, 56 N.E. 638 (1900).

[18] Magnolia Coca Cola Bottling Co. v. Jordan, 124 Tex. 347, 78 S.W. (2d) 944 (1935).

[19] Newman v. City of Detroit, 281 Mich. 60, 274 N.W. 710 (1937).

[20] Nugent v. Brooklyn Heights R. Co., 154 App. Div. 667, 139 N.Y. Supp. 367 (1913).

[21] Walker v. Great Northern R. Co., Ir. L.R., 28 C.L. 69 (1891).

[22] *Supra,* note 20.

because the child was not a passenger, consequently no breach of the contract of carriage was involved. The court said, ". . . the child in its distinct entity was not a passenger, and the company owed it as a separate person no duty in the matter of safe carriage." The court failed to distinguish an action based on tort and one sounding in contract. A cause of action for negligence is not based on contract but upon the duty owed and a breach thereof. That a carrier owes a duty of care to a small child carried in its mother's arm as well as one carried in the womb seems beyond dispute. These cases by emphasizing the contract of passage and disregarding the tort have evaded the primary question; does the child as a person have a right to maintain an action for prenatal injuries negligently sustained? A Canadian decision[23] allowing recovery clarifies the question of tort or contract. The court said:

> "The argument that the company's liability is founded in contract cannot, in my opinion, be maintained. This is not the case of a person not a party to the contract suing for the breach of it. The respondent does not seek to recover from the company on the ground that it failed to perform its contract with the mother, but on the ground that it committed an independent tort against the child. The fault which constitutes a wrong to the child may also constitute a breach by the company of its contract with the mother, but . . . the existence or non-existence of the mother's contract is entirely irrelevant in tort."

However, many more recent American decisions have decided that the common carrier is not liable, basing their decisions not on contract but upon the fact that no cause of action existed at common law.[24]

The Illinois court in *Allaire v. St. Luke's Hospital*[25] squarely faced with the issue of liability for injuries to infants *en ventre sa mere* emphatically denied it. The plaintiff's mother about to be delivered of child went to the defendant hospital for that purpose and while being carried in an elevator was negligently injured, as a result of which the child was crippled for life. The court expounded as its reason, the ground used in the *Dietrich case*[26] i.e., the child was in view of the common law a part of the mother. Justice Boggs dissented, a dissent which has appeared in many later cases as support for the proposition that a child can maintain an action for prenatal injuries. Although the

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[23] Montreal Tramways v. Leveille, 4 Dom. L.R. 337 (1933). This case was expressly decided on the civil law prevailing in the Province of Quebec.

[24] Stanford v. St. Louis-San Francisco Ry. Co., 214 Ala. 611, 108 So. 566 (1926); Buel v. United Rys. Co. of St. Louis, 248 Mo. 126, 154 S.W. 71 (1913); Ryan v. Service Co-Ordinated Transport, 18 N.J. Misc. 429, 14 A. (2d) 52 (1940).

[25] *Supra,* note 17. The later Illinois decision, Smith v. Luckhardt, 299 Ill. App. 100, 19 N.E. (2d) 446 (1939), also denied recovery.

[26] *Supra,* note 3.

dissent limits recovery to infants viable[27] at the time of the injury, instead of from the moment of conception, yet the decision has set the trend for recovery. Justice Boggs said:

> "A feotus in the womb of the mother may well be regarded as but a part of the bowels of the mother during a portion of the period of gestation; but if, while in the womb, it reaches that prenatal age of viability when the destruction of the life of the mother does not necessarily end its existence also, and when, if separated prematurely, and by artifical means, from the mother, it would be so far a matured human being as that it would live and grow, mentally and physically as other children generally, it is but to deny a palpable fact to argue there is but one life, and that the life of the mother."[28]

The American courts in the various states down through the years have consistently refused a child injured before birth the right to maintain an action for its injuries. The New York court in *Drobner v. Peters,*[29] which involved a pregnant woman falling into a coal hole negligently permitted by the defendant on his premises, allowed recovery differentiating it from the early case of *Nugent v. Brooklyn Heights R. Co.,*[30] which was based on contract. The court was swiftly corrected in its errant ways when the case was overruled on appeal.[31] A pregnant woman whose unborn child was injured by falling plaster as a result of the defendant's negligence was denied recovery under the Rhode Island wrongful death statute, since the court would not allow the child's next of kin to recover under the statute after his death because he could not have maintained the action had he lived.[32] Texas denied liability for injury to a viable child because the insurmountable difficulty of proving proximate causation outweighed any consideration favoring the creation of a cause of action.[33] In 1940 when a case involving prenatal injuries was first presented to an appellate court in Pennsylvania[34] it was held that since the common law considered the mother and child as one until birth, the child, independent of statute, cannot have a cause of action. The court cited the Restatement of Torts which states, "A person who negligently causes harm to an unborn child is not liable to such child for the harm."[35] That the Restatement reaches

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[27] DORLAND, THE AMERICAN ILLUSTRATED MEDICAL DICTIONARY, (21 ed., (1948), "viable. Capable of living; especially capable of living outside of the uterus; said of a fetus that has reached such a stage of development that it can live o utside the uterus."
[28] *Supra,* note 17.
[29] 194 App. Div. 696, 186 N.Y. Supp. 278 (1921).
[30] *Supra,* note 20.
[31] Drobner v. Peters, 232 N.Y. 220, 133 N.E. 567 (1921).
[32] Gorman v. Budlong, 23 R.I. 169, 49 A. 704 (1901).
[33] *Supra,* note 18. See also Lewis v. Steves Sash & Door Co., 177 S.W. (2d) 350 (Tex. Civ. App., 1943).
[34] Berlin v. J. C. Penny Co., 339 Pa. 547, 16 A. (2d) 28 (1940).
[35] RESTATEMENTS OF TORTS, sec. 869 (1939).

this conclusion can only be explained that it is truly a restatement of the law at the time of the adoption of this rule, for the courts up to that time had been unanimous in their denial of liability.

1949 marks the year when a State court of last resort recognized that there was a cause of action, in the absence of statute, for a child that had negligently sustained prenatal injuries. The Ohio court in *Williams v. Marion Rapid Transit Inc.*,[36] held that a child *en ventre sa mere* at the time it sustained injury as a result of the defendant's negligence in causing his mother to fall while alighting from the defendant's bus, was a "person" within the constitutional provision allowing every person a remedy for injury done to his person. This case was followed a year later in Ohio by *Jasinsky v. Potts*[37] which was brought under the wrongful death statute, the court allowing the administrator of the child to recover. A Federal decision emanating from the District of Columbia[38] allowed an infant to recover for injuries sustained, while being taken from its mother's womb, through the professional malpractice of the defendant. The court in reference to the ground that the child is a part of the mother said:

> "As to a viable child being "part" of its mother—this argument seems to me to be a contradiction in terms. True it is in the womb, but it is capable now of extrauterine life—and while dependent for its continued development on sustenance derived from its peculiar relationship to its mother, it is not a 'part' of the mother in the sense of a constituent element—as that term is generally understood. . . . Indeed, apart from viability, a non-vaible foetus is not part of its mother."

These cases were followed in 1951 by a Maryland decision[39] which allowed recovery for prenatal injuries received in an automobile accident as a result of the defendant's negligence. The court after an exacting and comprehensive review of the authorities concluded that the common law allows recovery since, "the common law does not depend upon the knowledge of fact, although such knowledge, or lack of it, may result in different interpretations at different times. The law itself deals with rights, and since we now know that a child does not continue until birth to be a part of its mother, it must follow that as soon as it becomes alive it has rights which it can exercise." About four months after this decision was rendered, the Supreme Court of Georgia[40] also had recourse to decide the question. The plaintiff's mother while en route to the hospital in the defendant's ambulance for the purpose of giving

[36] 152 Ohio St. 114, 87 N.E. (2d) 334, 10 A.L.R. (2d) 1051 (1949). See also Verkennes v. Corniea, 229 Minn. 365, 38 N.W. (2d) 838 (1949).
[37] 153 Ohio St. 529, 92 N.E. (2d) 809 (1950).
[38] Bronbrest v. Kotz, *supra,* note 8, p. 140.
[39] *Supra,* note 6.
[40] Tucker v. Howard L. Carmichael & Sons, Inc., 208 Ga. 201, 65 S.E. (2d) 909 (1951).

birth to her child, was injured as a result of a collision. The court deciding the question for the first time allowed recovery, basing it upon the common law. "There is nothing in the common law to indicate that it would withhold from such a child (infant *en ventre sa mere*) its processes for the purpose of protecting and preserving the person as well as the property of such child." The court could not conceive that the common law would attribute "a greater concern for the protection of property than for the protection of the person." A recent and most important decision on this question has been rendered by the New York court of final jurisdiction. The court, after holding to the contrary for thirty years, has allowed recovery to a viable child that has sustained injuries for ". . . justice (not emotionalism or sentimentality) dictates the enforcement of such a cause of action. . . ."[41]

What had been a settled and inflexible rule of law for sixty-five years has in the last few years been progressively weakened. Courts realizing the basic injustice resulting by denying an infant *en ventre sa mere* a cause of action have allowed viable infants to maintain it, barring non-viable infants because of the problem of proof. That the courts in the future may allow recovery for non-viable infants can be anticipated. Originally the line of recovery was drawn at parturition; now viability is determinative; ultimately the moment of conception may be the controlling factor.

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[41] Woods v. Lancet, ... N.Y. ...., ... N.E. (2d) .... (1951).