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Article 8

Torts: Remedy of Personal Representative for the Wrongful Death of an Unborn Child

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of the court may be partial, one-sided, and give an advantage to the sustaining party. To say jurors must be insured freedom of action, and at the same time open the door for one side and not for the other, seems too high a price to pay for the assurance to jurors of serenity of mind.

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Torts — Remedy of Personal Representative for the Wrongful Death of an Unborn Child — Beatrice Verkennes, mother of the deceased child and wife of the plaintiff, engaged defendant physician to take care of her during pregnancy and the delivery of her child. While at the hospital defendant allegedly was negligent in properly aiding, treating, and caring for her during her confinement, and that by reason thereof the foetus died undelivered. *Held:* under a wrongful death statute, the personal representative of an unborn child alleged to be viable and capable of separate and independent existence, whose death was caused by the negligence of the physician in charge of the mother, may maintain an action therefor on behalf of the next of kin of such deceased child. *Verkennes v. Corniea et al., 38 N.W. (2d) 838, (Minn., 1949).*

There is a conflict of authority on the issue whether the special administrator for the unborn child has a cause of action on behalf of the unborn child. The majority of jurisdictions follow the early case of *Dietrich v. Inhabitants of Northampton.*[1] Justice Holmes there maintained that a child *en ventre sa mere* has no juridical existence, and is so intimately united with its mother as to be a "part" of her and as a consequence is not to be regarded as a separate, distinct, and individual entity. The reasoning thus expressed follows the common law.[2] In an Illinois case plaintiff's mother, ten days before being confined, negligently was injured in defendant's elevator. Plaintiff, who was born four days later, was also negligently injured. The State has an unlawful death statute, but in denying recovery to the child the opinion read:

> "That a child before its birth is in fact, a part of the mother, and is only severed from her at birth, cannot, we think, be successfully disputed. The doctrine of the civil law and the ecclesiastical and admiralty courts, therefore, that an unborn child may be regarded as in esse for some purposes, when for its benefit, is a mere legal fiction, which, so far as we have been able to discover, has not been indulged in by courts of common law to the extent of allowing an action by an infant for injuries occasioned before its birth. If the action can be maintained, it necessarily follows that an infant may maintain an action against its own mother for injuries occasioned by the negligence of the mother while pregnant with it. We are of the opinion that the action will not lie."[3]

[1] 138 Mass. 14, 52 Am. Rep. 242 (1884).
[2] 52 Am. Jur. 440, sec. 98.
[3] Allaire v. St. Luke's Hospital, 184 Ill. 359, 56 N.E. 638 (1900).

There are other leading cases that follow the common law doctrine, and maintain the wrongful death statute in no way changes it.[4]

Some cases deny recovery to the representative of the unborn child because there was no contract relation between the defendant and the unborn infant. They say that even though there is a contract relation between the defendant and the mother, injury to the unborn infant is too much of a coincident, and to respond with damages to it is beyond the limits of defendant's duty.[5]

Some authorities have taken the view of the Minnesota case but they are definitely in the minority. They say the taking of the life of an unborn child is considered a wrong against society. Consequently there is no logical reason for denying the right of civil compensation to one injured by the commission of a wrong while viable in the womb.[6] There are also cases which permit a child recovery after birth for injuries received while viable, under a wrongful death statute[7] or by construction of the state constitution.[8]

In a Wisconsin case[9] the plaintiff sustained injuries because of the negligence of the defendant. At the time of the injury the foetus was about five months of age, before it could have been viable. Plaintiff later was born and alleged she suffered from epileptic fits as a result of the parental injury. The Court said no cause of action accrued to an unborn child before it could be born viable. However, the dicta in the case said that a contrary rule might be urged if the infant was viable and defendant, being a doctor or midwife, had negligently injured an unborn child.

It seems that generally the courts have not permitted the next of kin of the viable infant recovery, or where the infant child lives, recovery by it. Recovery is not allowed because the defendant owes no duty of conduct to a person not yet in existence, or because of the difficulty of proving the causal connection between the negligence to the mother and then to the child. However, with modern day therapy and with more recent cases allowing recovery, it now seems courts may permit recovery upon proper proof.[10]

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[4] Magnolia Coca Coal Bottling Co., v. Jordan, 124 Tex. 347, 78 S.W. (2d) 944, 97 A.L.R. 1513 (1935); Buel v. United Railways Co., 240 Mo. 126, 154 S.W. 71 (1913).

[5] Buel v. United Railways Co., 240 Mo. 126, 154 S.W. 71 (1913); Nugent v. Brooklyn Heights R. Co., 154 App. Div. 667, 139 N.Y. Supp. 367 (1913).

[6] Birmingham Baptist Hospital v. Branton, 218 Ala. 464, 118 So. 741 (1928); Snow v. Allen, 227 Ala. 615, 151 So. 464 (1933); Kine v. Zuckerman, 4 Pa. D. & C. 227 (9124); Bonbrest et al. v. Kotz et al., 65 F. Supp. 138 (1946); Montreal Tramway v. LeVeille, 4 D.L.R. 337 (1933).

[7] Scott v. McPheeters, 33 Cal. App. (2d) 629, 92 P. (2d) 678 (1938).

[8] Williams v. Marion Rapid Transit, Inc., 87 N.E. (2d) 334, (Ohio, 1949).

[9] Lipps v. Milwaukee Electric Ry. and Light Co., 164 Wis. 272, 159 N.W. 916 (1916).

[10] PROSSER ON TORTS, § 118.