The Linacre Quarterly

Volume 35 | Number 3 Article 10

August 1968

Abortion: Part X: A Legal Review

Paul V. Harrington

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Rt. Rev. Msgr. Paul V. Harrington, J.C.L.

It will be interesting and important to inquire what status the civil law, in its development, has accorded to the unborn fetus. In general, this will be investigated with specific reference to the rights accorded to the fetus under the common law, under the statutory law of the individual states and by reason of the interpretation of the law by various courts in their judicial decisions.

One must keep in mind that the law and legal jurisprudence necessarily depend upon the medical sciences for the knowledge and information which is required for the determination and verification of conception, the beginning of human life, the nature, growth and development of intra-uterine life, the duration of pregnancy, the problems and complications of pregnancy and the entire process of delivery.

Obviously, the law can never be ahead of medical research but must always await the findings of science and allow sufficient time for their confirmation and proven worth. It will take some period of time for the experimental conclusions to be printed in the text books and journals and to be absorbed by the lawyers and jurists, who ultimately will find the proper cases and circumstances to pply and invoke the new data. A ve obvious example of this would be the determination of pregnan Before the certain, probable and p sumptive signs of pregnancy were ermined relatively recently, the o certain indication of a pregnanc was the actual movement of the c d within the mother. This would us lly occur about the fourth monti and was referred to as "quicke ng" and the mother was described s "quick with child." Since this w the first certain sign that a pregna y actually was in progress, the w, with reference to the unborn f us and its rights, would only consider such rights as dating from the fir sign of movement. Any refere ce to a pregnancy possibly existing before quickening was mere suspicion or conjecture and was too te uous upon which to recognize life, the right to life and other rights, which have their origin in true existence.

Since the discovery of the Aschheim-Zondek test for the determination of pregnancy and since this is reliable in better than ninety-five percent of cases, the law has abandoned the former criterion of "quickening" and will now accept the findings of the Aschheim-Zondek test.

(Monsignor Harrington is Vice-Officialis for the Archdiocese of Boston.)

A. English Law and Jurisprudence

Blackstone, in his famous Commentary, states:

> "Life is the immediate gift of God, a right inherent by nature in every individual; and it begins in contemplation of the law as soon as an infant stirs in the mother's womb. For if a woman is quick with child, and by a potion, or otherwise, killeth it in her womb; or if anyone beat her, whereby the child dieth in her body, and she is delivered of a dead child; this, though not murder, was by the ancient law homicide or manslaughter."[1]

In English common law, it was understood that a fetus was not a human being, in the sense that the extinction of its life was true murder, that it was not a reasonable creature and that it did not have a life separate and independent of the mother but, relying on the ancient Roman Law, it believed that the fetus was part of the viscera of the mother.

Stephen declares: "The line must obviously be drawn either at the point where the foetus begins to live, or at a point at which it begins to have a life independent of its mother's life, or at a point where it has completely proceeded into the world from its mother's body. It is almost equally obvious that the last of these three periods is the one which it is most convenient to choose .... The line has in fact been drawn at this point by the law of England."[2]

With reference to civil matters and the right of the unborn child to hold title to property and to inherit a legacy, Blackstone says:

> "An infant, in the mother's womb, is supposed in law to be born for many purposes. It is capable of having a legacy, or a surrender of a copyhold estate made to it; and it is enabled to have an estate limited to its use, and to take afterwards by such limitation, as if it were then actually born."[3]

The Civil Law of England clearly held that, once a child was actually born and could prove it was in existence in the uterus at the time a right would have been available to it, then it would enjoy the right of being considered in law a person from the very moment of its conception. Lord MacMillan, in 1935, in *Elliot v. Joicey* concluded that a fetus in the womb was to be regarded as a living person with reference to all matters that would be to its advantage but no other person could derive a benefit from an unborn child until it were actually born.[4]

In 1907, the House of Lords in *Villar v. Gilbey* stated that the ordinary meaning of laws that refer to "children" or "issue" would not normally include the intrauterine fetus but a departure from the strict meaning would be justified so that a fictional construction might be given to them whereby an unborn child might be considered as already born for purposes of benefiting from a right to which he would be entitled if he were born. This fictional construction was always predicated on the fact of a subsequent live birth.[5]

In the same year of 1907, the English Court of Appeal in *Williams v. Ocean Coal Co. Ltd.* held that the fictional construction that had been applied with reference to real property in *Villar v. Gilbey* should be extended to include personal property so that an unborn child might be considered a

dependent under the Workers' Compensation Act and receive a benefit by reason of his father's death, which had occurred prior to the fetus' birth.[6] In 1909, The House of Lords affirmed this interpretation.[7]

In 1909, the English Court of Appeal, again considering the legal status of an unborn child, declared in *Schofield v. Orrell Colliery Co.*:

"Of course an unborn child is not born – it is not an existing person in the ordinary sense of the word. All our statutes are, of course, framed in language suitable to the case of existing persons, and thus the peculiar fiction of the law by which a non-existent person is to be taken as existing is not provided for in their language; therefore you can always show that the language of a statute does not fit the case of the unborn. But that is not the way to consider statutes when you are dealing with cases in which the law has given the same rights to a non-existent child as to an existing child. The true way of interpreting the language of a statute in such a case is to assume that the child is born, and then to draw deductions in the same way as we should in the case of an existing person."[8]

In the first decade of this century, it was necessary to postulate this fiction of law, if legal rights were to be vested in and accrue to the fetus because embryology had not as yet advanced to the point where it could definitively state that human life existed from the very moment of conception, that the entire process of pregnancy was a continuous growth and development of this same human life, that the fetus was an entirely independent entity, dependent upon the mother only for circulatory and nutritional needs, that birth was merely one more milestone along the road of this development, whereby the human child could now exist completely separate from the mother and that the process of life, which began at conception, continues uninterruptedly through in uterine gestation, the period of birth nfancy, childhood, adolescence young adulthood and is completed ly after twenty-five years of . This important knowledge and d would not become available until e fourth and fifth decades on this c tury. At that time, the mere ficti of law could be abandoned becau the law could now vest rights in the tus as it vests rights in other persons cause its truly human life, existing rom the very moment of concepti enables the fetus to be considere human person.

In 1891, an Irish Cour eard the petition of a female infa who was seeking recovery for injuri which she had sustained, while s in her mother's womb, by reaso f being a passenger with her mothe n a train that was involved in a co ion. This accident and the ensu injuries caused her to be born manently injured, crippled and defo ed.

It was the claim of the nfant that her mother was quick with child at the time that she boarded a ain of the Great Northern Railroad of Ireland, that the mother purcha a ticket, that the train was ha dled in a negligent manner, thus making the railroad liable for the in uries which she sustained and for which she should be allowed to recover.

The Irish Justices, who decided this case, considered merely the contractual implications and the liability of the Railroad by reason of contractual obligations; they completely ignored the Tortious action, which in fact, was the only action presented by the infant plantiff. The Judges declared that, by reason of the purchase of a ticket, the Railroad assumed responsibility for the safe carriage of the mother but that this responsibility could not be extended to the unborn, unseen child, who had purchased no ticket and who did not even exist as far as the Railroad was concerned because they were not informed in advance that the passenger was pregnant and they could not reasonably be expected to presume or foresee this contingency.[9]

This decision has been criticized not merely for its failure to consider the action of Tort but also because of the very narrow, limited and constricted view of contractual liability.[10] The question of whether or not the plaintiff sustained injury by reason of the defendant's negligence – the principal issue – was never studied or resolved. The remarks of Justice O'Brien are worthy of note as a curious piece of legalism, which concentrates on the narrow and limited view and entirely ignores the broader implications:

"In law, in reason, in the common language of mankind, in the bond of physical union, and in the instinct of duty and solicitude, on which the continuance of the world depends, a woman is the common carrier of her unborn child, and *not a railway company.*"

The English jurisprudence considered not merely the rights of a child to sue after its birth for injuries sustained while it was still in its mother's womb, since it was truly a living person at that time, but it also considered the right of a fetus to sue for these injuries even before it was born. As definitely favoring such a right, Justice Buller arguing against the nonentity of a fetus, stated:

"Let us see what this nonentity can do. He may be vouched in a recovery, though it is for the purpose of making him answer over in value. He may even be an executor. He may take under the Statutes of Distributions. He may take by devise. He may be entitled under a charge for raising portions. He may have an injunction, and he may have a guardian. Some other cases put this beyond all doubt. In *Wallis v. Hodson*, Lord Harwick says, 'The principle I go upon in the question is, that the plaintiff was *en ventre sa mere* at the time of her brother's death, and consequently a person *in rerum natura*, so that, by the rules of the common and civil law, she was to all intents and purposes a child as if born in the father's lifetime.' In the same case Lord Hardwick takes notice that the civil law confines the rules to cases where it is for the benefit of the child to be considered as born, but notwithstanding he states the rule to be that such child is considered living to all intents and purposes . . . . . Why should not children *en ventre sa mere* be considered generally as in existence? They are entitled to all the privileges of other persons."[11]

Many cases in the English and Australian Courts, centered on the right of a fetus to petition, even before its birth, for injuries sustained during its intra-uterine life, were decided on the principle that the suit might be instituted before birth but final adjudication of the claim could not be made until after the child had been safely born.[12]

Justice Martin in *Manns v. Carlon*, decided in 1940, shows the reticence of the Courts in Australia to enter a final judgment before the actual birth of the child:

"It seems that what authority there is, is in favour of the view that a child *en ventre sa mere* has a right of action, but whether that right is a vested right which enables a claim to be made on its befalf before birth or only becomes vested when it is born alive is a difficult question on which I do not intend to express an opinion, as, in any event, I consider a stay should be granted. But in any event the balance of convenience seems to be in favour of granting a stay of the trial until the birth of the child or further order and, if the child be stillborn, I grant liberty to the defendants to apply to strike out of the statement of claim all reference to it."[13]

B. American Law and Jurisprudence

There has been a tradition in the American Law and jurisprudence with respect to the status and rights of a fetus and there has been a growth and development in this area of the law in recent years, which has corresponded to medical research and new medical findings and discoveries.

The rights of the fetus might be ascertained readily and conveniently if we were to investigate separately and individually each category of the law that might have particular and specific reference to an unborn child. Thus, we shall proceed by considering the right of the fetus: to sue for injuries sustained during intrauterine life, to receive support, to inherit, to recover under Workmen's Compensation, to have a guardian appointed and to sue in his own name by the intervention of a guardian, to be born and to live; finally, we shall study the constitutional personality of the fetus or the rights of a fetus under a State Constitution.

1. The Right of the Fetus to Sue for Pre-Natal Injuries

In 1879, an Iowa court held that a father could not recover for injuries sustained by a fetus who had been the victim of a miscarriage.

In 1880, a suit was entered against the Town of Danville, Vermont, for indemnification for injuries sustained by an unborn, who subsequently died. This was one of the earlier cases of this type and set a pattern and a precedent for deciding similar cases for many years in the future. In this case, the Court ruled that the mother could not recover for the grief and sorrow she experienced by reason of the death of her unborn child. Grief was too nebulous, personal and a tract a concept to warrant concret tangible and definite compensat n. The decision states:

"Any injured feelings fo wing the miscarriage, not part of the p naturally attending it, are too ren e to be considered an element of da ge. If the plaintiff lamented the loss of offspring, such grief involves too much lement of sentiment to be left to the c ecture and caprice of a jury. If like Rac , she wept for her children and wo not be comforted, a question of cont ng damage is presented, too delicate to weighed by any scales which the has yet invented."[15]

A more celebrated, be r known and often quoted case is *Dietrich v. Inhabitants of Nort pton of 1884.* In this suit, the m er alleged that, because of a de t in the highway, resulting fro negligent maintenance, she slipped d fell and, being gour or five mon pregnant, the fetus was born pre urely and lived only ten or fift minutes. Justice Oliver Wendell lmes, the Chief Justice of the Sup e Court of Massachusetts, rendered e opinion. He stated:

"But no case, so far as we ow, has ever decided that, if the infant s ived, it could maintain an action for injur received by it while in its mother's w b. . . . . If we should assume, irrespectiv of precedent, that a man might owe a civil uty and incur a conditional prospective li lity in tort to one not yet in being, an if we should assume also that causing infant to be born prematurely stands on the same footing as wounding o poisoning, we should then be confronted by the question raised by the defendant, whether an infant dying before it was able to live separated from its mother could be said to have become a person recognized by the law as capable of having a *locus standi* in court, or of being represented there by an administrator. . . . . As the unborn child was a part of the mother at the time of the injury, any damage to it which was not too remote to be recovered for at all was recoverable by her, we think it clear that the statute sued upon does not embrace the plaintiff's intestate within its meaning . . . ."[16]

Justice Holmes denied the right of recovery because he felt the unborn child, being a part of the mother and not separate, distinct and independent of her, had no personal existence which the law could recognize and, further, there was no precedent which had allowed for recovery for pre-natal injury or for wrongful death.

One might question the statement of lack of precedent because Justice Holmes could have considered the declaration of Justice Buller (cf. supra) in *Thellusson v. Woodford* to the effect that a fetus was not a legal nonentity.

Hay has some interesting observations to make on Holmes' decision:

"Justice Holmes assumed from the lack of precedent that the common law forbade such a suit, and at least one judge has followed the *Dietrich* case on the specific grounds that Justice Holmes knew the common law better than he did (*Damasiewicz v. Gorsuch* (1951), 197 Md. 417). It is significant, however, that no case had ever denied recovery for prenatal injuries, and it has been said that there was no common law on the point until Justice Holmes said there was. If this is so, the common law denial of recovery was not the reason for the decision but the result of it."[17]

Gordon notes that "Holmes' *fiat* is the extent of the authority of the case" and that his opinion "bristled with dicta and an inexplicable error."[18] The error was that the Justice, in considering the analogy between the criminal law statutes, concerning an attack upon the unborn child, and an action of tort, failed to take the two statutes and read them together and thus, by neglecting the one and studying only the second, he drew a false conclusion.

In any event, Holmes' opinion prevailed and was quoted as the law and authority from 1884 until 1946.

In addition to the fact that an unborn child was not considered as a separate and distinct entity from the mother and thus could not be granted legal recognition or given legal existence, there was added another complicating factor to the right of recovery for injuries sustained in the prenatal stage and this was the question of proving the cause of the injuries and their effect, if any, upon the subsequent birth or death of the fetus and the condition of the fetus at birth. In the *Walker v. Great Northern Railroad of Ireland* of 1891 (cf. supra), Justice O'Brien raised this question of proof:

"There are instances in the law where rules of right are founded upon the inherent and inevitable difficulty or impossibility of proof. And it is easy to see on what a boundless sea of speculation in evidence this new idea (to allow an action for prenatal injuries) would launch us. What a field would be opened to extravagance of testimony, already great enough – if Science could carry her lamp . . . .into the unseen laboratory of nature – could profess to reveal the causes and things that are hidden there – could trace a hair-lip to nervous shock, or a bunch of grapes on the face to the fright – could, in fact, make *lusus naturae* the same thing as *lusus scientae*. There may be a question of evidence . . . . but the law may see such danger in that evidence, may have such a suspicion of human ignorance and presumption, that it will not allow any question of evidence to be entered into at all."[19]

This opinion of Justice O'Brien had great weight and evidence in subsequent decisions in American courts, where the right to recover was

denied because of the difficulty in proving cause and effect relationship between the prenatal injuries and survival and death, on the one hand, and condition at birth, on the other hand.

In *Magnolia Coca Cola Bottling Co. v. Jordan (1935),* the plaintiff alleged that she was involved in an automobile accident by reason of the defendant's negligence and, as a result, her twins were born prematurely and on of them was bruised and died nineteen days after birth. The court quoted from Justice O'Brien, approved his conclusions and declared that many fictitious claims would be entered if recovery were allowed. The decision stated:

"The law gives to parents no cause of action for the loss of a child which dies as a proximate result of injuries while it is still quick in the womb of its mother, even though such injuries may be inflicted by the negligence of the defendant."[20]

This 1935 decision, which was the precedent for all Texas decisions for the ensuing thirty years, was set aside by the Texas Supreme Court only in November, 1967. In this most recent case, Mrs. Leal sued the C. C. Pitts Sand and Gravel Company for $50,000, complaining that her infant was born two or three months prematurely and died within two days and the premature birth was caused by an accident between her family car and the sand truck, which was driven in a negligent manner. The District Court and the Court of Civil Appeals denied any recovery to the plaintiff, but the Texas Supreme Court, in an opinion written by Associate Justice Zollie Steakley, recognized that the unborn infant had life and rights, separate from the mother, and granted compensation to the mother. [21]

All the criteria and pr ciples, denying recovery, are set for in the opinion of Justice Ronan in e *Bliss v. Passanesi* case, argued be re the Supreme Court of Massach tts in 1950:

"A review of all these subsequen ecisions denying relief for prenata injuries demonstrates that they were base pon the grounds that there was lack of ecedent, that there was due regard for th principle of stare decisis, that the unborn ld was a part of the mother, that any cau relation between the prenatal injury and e death or condition of the child wou rest on speculation and conjecture, nd that recognition of any cause of act in favor of the child or its estate would e rise to fictitious claims."

In considering the guments adduced for the right of ecovery, Justice Ronan continues:

"We readily concede the stren of these grounds, but there is also str th in the arguments to the contrary, in ding that based upon the practical d ficulty of reliable proof."[22]

Chronologically, after t *Dietrich* decision, the next importan case to be considered is the *Allaire v. St. Luke's Hospital.* The interesting as ct of this case is not the majority opi on, which reechoed the Holmes' d tum but rather the prophe ic and future-looking dissenting pinion of Justice Boggs.

The plaintiff in this cas is a male infant, Thomas E. Allaire who sued, through his mother and a torney, St. Luke's Hospital in Chicago Illinois. He claims that on February 2 1896, his mother was a patient at said hospital for purposes of a confinement prior to his birth, which was imminent. At the direction of hospital attendants, his mother was being transported via an open elevator from the second floor to the obstetrical suite. She was seated on a chair in the elevator and, as the elevator ascended, the left side of her body became entangled on some object projecting out from the wall of the shaft. The impact threw the patient to the floor of the elevator and, as a result, she was "greatly cut, mangled, bruised and the bones thereof broken and said mother greatly and grievously bruised, hurt, jammed, and wounded in her left hip, thigh, side and body and other personal injuries."

The plaintiff was born on February 6, 1896, and alleges that, by reason of the accident in which his mother was involved and the injuries sustained by her, he was born injured and deformed. "His left foot, left limb, left side and left hand were and became and hitherto have been and still are wasted, withered and atrophied and his said foot smaller than natural by more than one-half and made thereby to turn inward and the sole thereof upward and his said limb shorter than natural by more than four inches and his said hip, side and arm by reason of said negligence and injuries became and are made shrunken, atrophied and paralytic and his said limb without flesh thereon and from thence hitherto have so been and still are, and said plaintiff thereby greatly and sadly crippled for life."

In the hearings before the trial and appellate courts, the verdict favored the hospital. The infant then sued before the Supreme Court of Illinois, and the decision was rendered by a *per curiam* opinion, which was adverse to the plaintiff. This Tribunal agreed completely with and affirmed the decision of the appellate court, which accepted the findings of the *Dietrich* and *Walker* cases. The majority opinion favored the position that the unborn child, while in its mother's womb, is a part of the mother and not separate and distinct from her and becomes independent only when severed at birth; that the fetus was not in legal existence at the time of the accident; that the injuries were sustained by the mother and were recoverable only by her; that neither statutory law nor the common law recognized the right of an infant to sue for prenatal injuries; that, if tradition and precedent is to be changed and new rights are to be accorded, this must be accomplished by the legislature and not by the courts; that an unborn child is recognized as the subject of rights not by factual existence but by a legal fiction.

Justice Boggs, in his dissent, agreed that there was no precedent, by adjudicated case, for allowing a child, once born, to sue for injuries sustained in his mother's womb but added:

"An adjudicated case is not indispensable to establish a right to recover under the rules of the common law. Lord Mansfield declared: 'the law of England would be an absurd science were it founded upon precedents only. Precedents were to illustrate principles, and to give them a fixed certainty'."

Boggs continues:

"At the common law, actions were maintainable to recover damages occasioned by injuries to the person or the plaintiff, whether inflicted intentionally or through the negligence of the defendant. The governing principle illustrated by such cases is that the common law by way of damages, gave redress for personal injuries inflicted by the wrong or neglect of another. The case disclosed by the declaration under consideration is embraced within the limits of the principle thus recognized and it is clear recovery could have been maintained at common law unless the fact the plaintiff was unborn when the alleged injuries were inflicted would have operated to deny a right of action."

Justice Boggs demonstrated an awareness of the true life and human existence of a fetus when he stated:

"Medical science and skill and experience have demonstrated that at a period of gestation in advance of the period of parturition the foetus is capable of independent and separate life and that, though within the body of the mother, it is not merely a part of her body, for her body may die in all of its parts and child remain alive and capable of maintaining life, when separated from the dead body of the mother. If at that period a child so advanced is injured in its limbs or members, and is born into the living world suffering from the effects of the injury, is it not sacrificing truth to a mere theoretical abstraction to say the injury was not to the child, but wholly to the mother?"

"A child in *ventre sa mere* was regarded at the common law as in esse from the time of conception for the purpose of taking any estate, whether by descent or devise, or under the statute of distribution, if the infant was born alive after such a period of foetal existence that its continuance if life was or might be reasonably expected. .... If, in the contemplation of the common law, life begins as soon as the infant is able to stir in the mother's womb, and that an injury inflicted upon an infant while in the womb of the mother shall be deemed murder if the infant survive the wound during prenatal life, but succumbs to it, and dies from it after being born, and if every legitimate infant in *ventre sa mere* is to be deemed as born for all purposes beneficial to the child, why should it be supposed the common law would have denied to an infant born alive the right to recover damages for the injury inflicted upon it while in the womb of the mother? Had such injury, though inflicted on the child while in the mother's womb, been sufficient to cause the death of the infant after it had been born alive, the common law would have regarded the injury as having been inflicted upon a human being, and punished the perpetrator accordingly; and, that being true, why shoud the infant which survives be denied the right to recover damages occasioned by the same injury? In the case at bar the infant, when the injury was inflicted, had, as the declaration alleged, reached that advanced stage of foetal life which would have, according to the experience of mankind, and according to the medical learning of the age, e owed it with such vitality and vigor, d with members and faculties so far con lete and mature, that it could have intained independent life, and the deat of the mother would not have deprived f life. It is but natural justice that such a nfant, if born alive, should be allowed to ntain an action in the courts for injuries wrongly committed upon its person whil o in the womb of the mother."

Justice Boggs declared at the precedent of the *Dietrich* c could not apply to the present tuation because in that case, the fet was not viable but in this contro y "the child had reached that stag f foetal life when it was capable of ntinued existence independent of th mother; that its person was injured w in itself and it was afterwards born ive, and with sufficient strength and maturity to maintain independent istence, and still lives"; and that the le of the *Walker* case was not applic e to the instant litigation because, i hat case, the Railroad did not kno he fetus was in existence because th pregnant condition of the mothe was not known but, in the presen case, the hospital knew the mother as gravid and received her for th express purpose of delivering her aby; also, the Railroad may not h e had a liability towards the un rn child because no contractual elationship had been initiated by the pu chase of a ticket but, in the current se at bar, the hospital assumed the responsibility to care for mother and child in view of the compensation it receive d.

Justice Boggs concludes:

"If, in delivering a child, an attending physician, acting for a compensation, should wantonly or by actionable negligence injure the limbs of the infant, and thereby cause the child, although born alive and living, to be maimed and crippled in body or members, it would be abhorrent to every impulse of justice or reason to deny to such a child a right of action against such physician to recover damages for the wrongs and injuries inflicted by such physician. The appellee corporation owed it as a duty to the plaintiff, though unborn, to bestow due and ordinary care and skill to the matter of his preservation and safety before and at the time of his birth. .... Should compensation for his injuries be denied on a mere theory – known to be false – that the injury was not to his person, but to the person of his mother? The law should, it seems to me, be that whenever a child in utero is so far advanced in prenatal age as that, should parturition by natural or artificial means occur at such age, such child could and would live separable from the mother, and grow into the ordinary activities of life, and is afterwards born, and becomes a living human being, such child has a right of action for any injuries wantonly or negligently inflicted upon his or her person at such age of viability, though then in the womb of the mother."[23]

The opinion of Justice Boggs, while not controlling in the *Allaire* case, is nevertheless an important and momentous one, because it is the first recorded opinion in American jurisprudence, which held that a living, viable fetus, while in the uterus, is an independent person with human life, possesses rights including the right to bring action to recover damages for injuries, wantonly and negligently inflicted and that natural justice and reason dictate there must be a legal remedy for wrongs suffered. The Boggs opinion is also a landmark and a milestone in jurisprudential development inasmuch as it laid the foundation and groundwork for future decisions, which would allow recovery.

The Boggs rationale prevailed in only two cases[24], while the Holmes' dictum triumphed in most cases until the 1950's.[25]

In 1933, an Ohio court indicated that the right to sue and recover should be denied for reasons of convenience and public policy.[26] In the same year, the Supreme Court of Canada declared that the injured child, if he is born alive and if he continues to live, must bear the results of his injury throughout life and, therefore, he should have the right in justice to recover damages for his infirmity.[27]

In 1942, Chief Justice Brogan, in a dissenting opinion, inquired why the courts felt bound to follow the precedent, denying personality to an unborn fetus in tortious actions, when in other fields of the law, such a one was recognized as an individual person when it was to its benefit.[28]

The general reasons for continuing the denial of the right of the unborn to sue were: the lack of legal precedent, the inability of medical science, at that time, to determine the viability of the fetus and to prove conclusively a casual relationship between the negligent act and the injuries sustained and, finally, because of the danger of fictitious claims.

In *Damasiewicz v. Gorsuch,* two important principles were set forth: that one must draw a distinction between the right to bring a suit and the ability to prove one's allegations conclusively; that the courts have always been engaged in differentiating legitimate claims from false claims.[29]

An Illinois court suggested that, if justice requires that every wrong be righted by the law, the legislature should set forth by statute the right of the unborn to sue; this should not be declared by the courts.[30] An Ohio court denied this assertion: "No legislative action is required to authorize recovery for personal injuries caused by the negligence of another. Such right was one existing at common law"[31]

One final objection was raised to the right to sue for prenatal injuries and that was the danger that, if the right were granted and recognized, a child, when born, could sue his mother for any negligence that might be attributable to her.[32]

The first significant change from the *Dietrich* rule came in a decision of the Federal Court of the District of Columbia in 1946 in the *Bonbrest v. Kotz* litigation.[33] This was a malpractice suit in which the physician was charged with professional negligence during the delivery, which resulted in injuries to the child. The causal relationship between the *modus operandi* of the doctor and the sustaining of injuries by the child was clearly proved, so that there was no danger of a fictitious claim. The decision remarked: "The law is presumed to keep pace with the sciences and medical science certainly has made progress since 1884 (when the Holmes' opinion was rendered)".

The important contribution of the *Bonbrest* case is the recognition that a *viable* fetus has the right to sue for injuries which were inflicted in the latter stages of its prenatal existence because the *viable fetus* is an independent entity and separate, in its existence, from the mother. This is emphasized in the sentence of the court:

> "Judicial opinion . . . . has held that . . . . prenatal injury offered no basis for an action in tort in favor of the child or its personal representative. This conclusion is predicated on the assumption that a child *en ventre sa mere* . . . . is so intimately united with its mother as to be a "part" of her and as a result is not to be regarded as a separate and distinct and individual entity. This rather anomalous doctrine was announced by Mr. Justice Holmes in *Dietrich v. Inhabitants of Northampton*. . . . . As to a viable child being a 'part' of its mother – this argument seems to me to be a contradicti in terms. True, it is in the womb, but i s capable now of extra-uterine life – d while dependent for its continued dev pment or sustenance . . . . it is not a 'r t' of the mother in the sense of a nstituent element. . . . . Indeed apart fro iability, a non-viable fetus is not a p of the mother."[34]

It is important to note th the law vests rights only in *perso* – either real and in actual existe e or by fiction of law; either p ysical or moral. In the early comm law, and unborn had rights, by a fic n of law, – as if they were exis g – in property and under lls. The embryological knowledge the time would not allow for a doct e of real, human, physical existen for an unborn fetus as a separate, stinct and independent person. Und Holmes' rule, the unborn fetus wa onsidered as part of the mother and, ereby, the mother was the person w sustained the injuries and she was e person who recovered damages. J tice Boggs in *Allaire* was convince that the unborn fetus was an dependent *person,* who should be re ognized as having the right, when bor to sue for prenatal injuries but his convictions were not followed. In *Bonbrest,* the *viable* fetus was considered by the law to be an independent enti y in whom legal rights could be veste including the right to bring an a ion. Later, other courts were to consider a *non-viable* fetus as an individual *person,* who could bring a tort action. The conclusion is important: the law vests rights only in *persons* and if the law grants rights to a *non-viable fetus,* the law recognizes such as a *person.*

So deeply entrenched in American jurisprudence was the Holmes' ruling and the *Dietrich* finding that it remained the law in many states until the 1960's. From the time of the *Bonbrest* decision in 1946 up to the present, there were simultaneous, parallel legal positions: some jurisdictions were still denying a tort action; some states were granting the right to sue provided that the fetus was viable at the time of the injury and was subsequently born alive; other states were according the right to a fetus who was actually non-viable at the time the trauma was experienced, again providing that there was a live birth; a third group of states was actually holding that the right to bring an action was recognized even if the fetus was stillborn.

Minnesota was the first state to have its court of last appeal grant to a child the right to recover damages for injuries sustained in its prenatal life after it had become viable and this was in 1949.[35] From 1946 until 1967, twenty-one states have accorded the right to sue to a child who was a viable fetus at the time of injury and was later blessed with live birth.[36]

In 1953, Illinois, in two separate cases, reversed the 1900 decision of *Allaire* and finally adopted the position of Justice Boggs as set forth in his dissenting opinion.[37]

During this twenty-one year period, some states, in earlier decisions adopted the Holmes' rule and reversed themselves in later decisions and allowed and recognized the right to sue. Massachusetts provides such an example.

In 1950, in *Bliss v. Passanesi,* Justice Ronan, noting that a precedent was being established which was contrary to the *Dietrich* finding, and recognizing the validity of their arguments, maintained that:

> "The Dietrich case not only established the law in this Commonwealth since its rendition more than sixty years ago but it is still supported by the great weight of authority in other jurisdictions. We are not inclined to overrule the Dietrich case."[38]

In 1952, the Supreme Court of Massachusetts decided the *Cavanaugh v. First National Stores, Inc.* case. A child brought an action by his next friend alleging that on December 25, 1945 "he was a living entity, existing as a developing child, quick with life and viable in the womb of his mother . . . . who then was pregnant with him for six months; that his mother purchased and ate unfit turkey supplied by the defendant; that as a result she became sick and was caused next day to have a premature childbirth; and that the plaintiff was born blind . . . . otherwise not fully, normally and naturally developed." After considering the rulings of recent years "allowing recovery by a child for prenatal injury . . . . we are not prepared to overrule our earlier decisions, which began nearly seventy years ago."[39]

An action was brought by *Zella Keyes* as administratrix of the estate of Duncan Reed against the *Construction Service Inc.* alleging "that while her interstate was an existing viable child in his mother's womb, he received bodily injury in a collision of automobiles, causing him to be born prematurely, and which said bodily injuries resulted in his death." The Supreme Court, while not actually deciding the case because the actual live birth of the child was not clearly proved, did return the case to the trial court for the verification of this fact, thereby indicating that the right to sue and to recover would be recognized once all the facts, required by law, are established.

The Supreme Court in its decision in 1960 stated:

"We are asked to reexamine previous decisions of this court and again decide whether a child or his legal representative may recover in an action of tort for prenatal injuries caused by the negligence of a third party who was not the child's mother."

Some quotations from this ruling should be pointed out and carefully considered:

"Reasons generally advanced for recognizing a child's right of action for prenatal injuries are: Natural justice demands recognition of a legal right of a child to begin life unimpaired by physical or mental defects resulting from the injury caused by the negligence of another. A manifest wrong should not go without redress. Since the law protects an unborn child in the descent and devolution of property whenever it would be for the benefit of the child and in the enforcement of criminal law, the unborn child is regarded as a legal entity; therefore by analogy the law should recognize the right of an unborn child not to be injured tortiously by another. . . . . No new reason has been advanced in recent years for allowing recovery other than the growing body of precedent in favor of it and the progress made in medical science. . . . . This substantially is now held to be the law by a majority of the State Appellate Courts and by the District Court of the United States for the District of Columbia. . . . . We have held that when a debatable question has been considered and definitely decided in a reasonable manner it is usually the part of wisdom, in the absence of important new considerations, to adhere to the decision made. Although this doctrine is salutary it may be more important in a given case that the court be right, in the light of later examination of authorities, wide and more thorough discussion and reflection upon the policy of the law, than that it adhere to previous decisions. We think it advisable that in respect to the subject of prenatal injury the law of this Commonwealth should be in general in harmony with that of the large and growing proportion of the other States which have adopted in principle the rule proposed by Judge Boggs."[40]

Missouri, Illinois and New Jersey are other States that reversed earlier decisions that refused to allow or recognize the right to sue fo prenatal injuries.[41]

A 1955 decision from the Court of Appeals in Kentucky unde ned and emphasized the *legal perso ity* of a fetus within the terms of he state statute precisely becaus it was considered biologically to b person:

"The most cogent reason, we elieve, for holding that a viable unborn hild is an entity within the meaning of e general word *person* is because, biolo ally speaking such a child is, in fact, presently existing person, a living human ing."[42]

There are presently th states – Rhode Island, Alabama a Michigan – that have not had the portunity to reverse their standin decisions simply because no cases recovery have been filed recently. l s clear by a ruling in 1960 that, w the next case, Michigan will allow covery.[43]

Some states – Nebrask Oklahoma and Alaska – by reas of broad reasoning in recent de ons, leave doubt as to what posi n will be taken in subsequent petit s.[44]

Clearly the majority o risdictions recognize the right of a ild to sue, after his birth, for dama s sustained while a viable fetus.

In 1953, there was a departure from the viability requirement In the *Kelly v. Gregory* case, the plaintiff alleged that he was injured du ng the *third* month of his mother's pregnancy. In granting him, as born, the right to sue for recovery for such injury, Justice Bergan declared:

"Legal separability should begin where there is biological separability. We know something more of the actual process of conception and fetal development now than when the common law cases were decided; and what we know makes it possible to demonstrate clearly that separability begins at conception. The mother's bilogical contribution from conception on is nourishment and protection, but the fetus has become a separate organism and remains so throughout life. That it may not live if its protection and nourishment are cut off earlier than the viable stage . . . . is not to destroy separability; it is rather to describe the conditions under which life will not continue."[45]

By reason of recent development in the science of embryology, whereby human life is considered to be present from the moment of conception, the law can recognize the pre-viable fetus as a *person* and vest it with rights, particularly the right, if born, to sue in its own name or by next friend for injuries sustained before it reached viability or, if it dies before birth, the right of beneficiaries to bring action under the wrongful death statute.

Where subsequent birth was verified, several states have already accorded the right to bring action for injuries sustained by the non-viable fetus.[46]

The University of Pennsylvania Law Review notes:

"The injustice of excluding actions by nonviable fetuses becomes manifest when it is realized that the results of the negligent actor's conduct are precisely the same whether the fetus was viable or not. Perhaps this consideration alone would have eventually induced most courts to drop the viability rule. But that development has been hastened by increasing awareness that the concept of viability is highly relative, depending for its application on a multitude of different facts in different situations. Thus, it is not only unjust but unworkable. . . . . There is little doubt that this trend will continue, and that the law will someday make no distinction as to injuries sustained in the previable stage as a basis for a cause of action for prenatal injuries."[47]

In the most recent case decided in favor of recovery for injuries received in the pre-viable state, the mother was about three and a half months pregnant when she was involved in an accident, which was allegedly caused by the defendant's negligence and the injuries resulted in a premature birth and the prematurity brought on death. The child lived about two and one-half hours after birth. The Supreme Court of Massachusetts held that the intestate was a *person* within the understanding of the Wrongful Death Act and the administrator of his estate could bring action for his death. The decision declares:

"In the case at bar, where the fetus was not viable, we must decide whether there is a sound distinction from the situation where the fetus is viable. . . . . In the vast majority of cases where the present issue has arisen recovery has been allowed. . . . . There is no longer lack of precedent. The advancement of medical science should take care of most of these arguments (i.e. against recovery). The element of speculation is not present to any greater extent than in the usual tort claim where medical evidence is offered and the issue of causation must be weighed with great care. . . . . We are not impressed with the soundness of the arguments against recovery. They should not prevail against logic and justice. We hold that the plaintiff's intestate was a *person*."[48]

The Supreme Court of Pennsylvania has held that "medical authorities have long since recognized that a child is in existence from the moment of conception."[49]

Two courts have recognized the right to recover for injuries sustained in the very *first* month of pregnancy – Illinois and Pennsylvania.[50] Georgia has accorded the right with reference to injuries in the *second* month of pregnancy.[51]

A further reason to justify actions for injuries sustained in the pre-viable

period is the consideration that recent medical findings indicate that much damage is done to the fetus in the first trimester of pregnancy. "Indeed .... there is substantial medical authority which indicates that congenital structural defects occasioned by environmental factors can be sustained *only* within the earliest stages of the *previable* period. Judicial disallowance of actions for injuries to nonviable fetuses may well be a denial of the most meritorious claims."[52]

By reason of the above evidence, it is abundantly clear that the greater number of Courts recognize the *legal personality* of the *viable* fetus and the definite tendency for the future is to abandon completely the arbitrary distinction between non-viability and viability and thereby recognize the *legal personality* of the *non-viable* or *pre-viable* fetus and accord the right, after birth, to bring action for injuries sustained in the first twenty-six weeks of intrauterine life.

The above rights and actions are, however, predicated upon and limited by the subsequent live birth of the child. If the child is born alive and even if it survives only a matter of a few minutes or a few hours, the right to sue for prenatal injury is recognized. What about the fetus who is not born alive; the fetus who dies in the uterus by reason of the very injuries sustained? Is there a right to his parents, to his beneficiaries to recover or to be compensated for his death?

The first reaction might be that if a child, when born, can sue for injury, certainly parents should be able to initiate action for his death, since death is a greater evil than injury. This would definitely be the logical approach but the law cannot always follow or be based upon pure logic.

There are many factors to be considered in the cases of stillborns, e.g., what is the real basis of the right to recover? Is recovery of benefit to the dead child or merely compensation to the parents for their sorrow and loss? How are the legal derivations and analogies to be applied? Is recovery a compensatory mechanism or merely punitive action for negligent conduct? Is natural justice involved in these death actions, whereby there must be found a legal right for every wrong or injury? Is factual birth that important a happening that its absence can restrict or deny the right of recovery?

However these questions may be answered, it would appear that, as regards the right to recover when a fetus is stillborn, there cannot or should not be any distinction as to whether the death occurred in the viable or non-viable states. However, the justification used in the prenatal injury cases would seem equally applicable here, no matter what type of death statute is involved. It is just as illogical to permit recovery for the estates of viable fetus and to deny it to those of nonviable fetuses; the loss to the parents is the same."[53]

The same author notes:

"On the basis of legislative intent, however, limiting recovery to surviving infants is no more justifiable than a similar distinction between viable and nonviable fetuses. Moreover, in a death action it is the parents that are claiming compensation, not the fetus. As long as the parents are recognized to have a compensable interest in the case of death caused by prenatal injuries where the fetus initially survives birth, there is no reason why recovery should be denied in stillborn cases. The essential interest in both situations is the expectation of the parents. In those cases where recovery is allowed, it, in effect, compensates for emotional distress resulting from frustration of this expectation. .... The absurdity of drawing the line of liability at survival is pointedly illustrated by the recent action of a Pennsylvania court in granting letters of administration to the estates of two of a set of triplets while denying them as to the third; all three were allegedly killed by prenatal injuries sustained in an automobile accident, but while two survived birth for a few minutes, the third was stillborn."[54]

The essential difference between the action at law if the fetus is born alive or is stillborn is that, in the case of a live birth, even though death ensues almost immediately, there is an action that survives the death and that can be brought in the name of the deceased by the one who administers his estate; whereas if the fetus is stillborn, the action is brought by parents or beneficiaries in their own name for compensation for their loss without any reference to the rights of the stillborn.

In this connection, Gordon remarks:

"To attack the requirement of live birth is, practically speaking, to abandon an interest in the fetus and to embrace a policy that declares that the beneficiaries of a stillborn infant ought to recover under the Wrongful Death Statutes."[55]

A further difficulty in the allowance of an action for a stillborn is a very practical one – what criterion or norm is to be used to regulate the amount of compensation?

Hay addresses himself to this problem:

"Since most states have compensatory wrongful death statutes – that is, the amount of recovery is limited to the amount the deceased person could reasonably have been expected to contribute to the person suing – such an action is usually worth no more than nominal damages. Future income of a child born dead had he lived is certainly speculative, and the expenses of raising the child would definitely be great, so *financial loss* usually cannot be proved. If the amount recoverable under the wrongful death statute is proportional to the fault of the defendant, then a suit on behalf of a baby born dead is meaningful."[56]

Gordon, reflecting on this problem of compensation, declares:

"Although it is true that parents have been able to recover substantially for the loss of a minor child, the grant of compensation to the beneficiaries of such a minor, and a fortiori to the parents of an infant in utero, is in reality compensation for sentimental loss framed as though it were pecuniary loss. The award is pure speculation .... A fundamental basis of tort law is the provision of compensation to an innocent plaintiff for the loss that he has suffered. Tort law is not, as a general rule, premised upon punishing the wrongdoer. It is not submitted that the tortious destroyer of a child in utero should be able to escape completely by killing instead of merely maiming. But it is submitted that to compensate the parents any further than they are entitled by well-settled principles of law and to give them a windfall through the estate of the fetus is blatant punishment. The actual – pecuniary – loss basis of compensation in wrongful death actions has, where the award will be based on speculation, given way in some states to a fixed sum of money. It has been suggested that the same principles be adopted in the unborn plaintiff class of case."

It would appear that the entire matter of wrongful death actions can be considered from the point of view of the basis or the right to bring an action. Gordon claims that there are three bases – causative, legal and biological.

The causative approach completely ignores the fetus and his rights and considers merely the causal relationship between the negligent conduct or action of a possible defendant and the injury sustained. In this analysis, birth is the donor of the right to sue and, in the eventuality of a stillborn, there could not be any action.

The legal approach is based upon an advantage to be gained by the plaintiff – what is to his benefit. If a fetus dies, he can derive no advantage or benefit by bringing a tort action – the benefit would be to his beneficiaries – and, thus, no action would be allowed.

The biological approach depends upon the concept of life, which becomes the grantor of rights and wherever there is life, there is a right to sue for the extinction of that life. According to modern scientific investigation, this life begins at conception. Since life and not birth is the basis of the right to sue, in the event of a stillbirth, a wrongful death action could be accorded.[58]

Despite the above-mentioned difficulties surrounding suits, entered on behalf of stillborns, some courts have recognized the right to sue and have entertained such suits.

The first case in the United States was heard in the State of Minnesota in 1949 – *Verkennes v. Corniea.* The mother had suffered a rupture of the uterus during labor and both she and the child died. A suit was filed on behalf of the deceased alleging negligence against the attending physician and the hospital.[59] In 1954, a case was returned by the court of last appeal in Mississippi to the trial court so that arguments on the question of negligence could be weighed by the jury, since a directed verdict had been given in the original trial. This was also a malpractice suit and the return to the trial court, for the consideration of negligence, clearly implied that the deceased child had the right to bring the action.[60]

Many states, in recent times, basing their findings on the principle that life – and not birth – is the donor of the right to sue, have recogni-d and entertained actions of recov-y with reference to stillborns.[61]

Tennessee, South C-rolina, Massachusetts and Alaska Co-ts have declared that live birth cr-tes the fullness of the legal personali-, which, in turn, grants the right t- sue for recovery for injuries sustain- during intrauterine life. Thus, no a-ion can be filed on behalf of a chi- who is born dead.[62]

Without considering th- possible pre-natal injuries and condi-ns that could beset a fetus or witho- delving into the matter of negligen-e or the proof of negligence, – s-ce these matters would be outside t- scope of this paper – it is advisab-, at this juncture, to mention that t- right to enter an action might be cognized and allowed but a verdic- favoring actual recovery cannot and -ill not be entered until there is legally -ceptable proof that the fetus was i-ured and that the negligent act of on- who had a duty towards the fetu- was the cause of the injury and, in t-e event of a subsequent death, that -he injury was the cause of death. I- short, it must be established that th- defendant had a responsibility towards the fetus and that there existed a d-ect causal connection between his allegedly wanton and negligent act, the injury and the subsequent death.

Under the restrictions and limitations set forth above, the American Jurisprudence does grant the right to sue for prenatal injuries to a fetus during its intrauterine life – even though, in the opinion of some, this right may not be exercised until after live birth – since the law vests rights only in persons, the law, therefore, recognizes the non-viable and the viable fetus as a legal person.

It should be recalled that some courts have recognized and granted the right to bring suit on behalf of a fetus, who was never born alive.

Some proponents of liberal abortion take the position that, because some courts have insisted on a live birth before an action could be instituted, this fact seriously limits or diminishes the right of the fetus – even to the point of inferring that there is no right until there is a birth.

This writer would suggest that a true and valid distinction can and should be made between the basic, radical right and the exercise of the right. Applying this distinction to the matter at hand, a fetus would be considered to have the right, from the moment of conception throughout the period of his intrauterine life up to the moment of birth, to receive professionally competent care and the right to sue for any wanton and negligent act that might cause him injury but the actual filing of the suit would have to await his birth. The right to sue he has before he is born; the exercise of this right he has from the moment of birth.

Since the basic right to sue for injuries is vested in the fetus during pregnancy, it must be concluded that the law recognizes the fetus as being a person with human life that must be respected and with rights – among which is the right to live and to be born.

(to be continued)

FOOTNOTES – PART X

1) I *Comm.* (3rd ed.), 129,

2) *History of Criminal Law,* Vol. 3, p. 2.

3) I *Comm,* 130.

4) A.C. 209 at p. 238.

5) A.C. 139

6) 2 K.B. 422 at 429.

7) A.C. 433

8) 1 K.B. 178.

9) *Walker v. Great Northern Railway Co. of Ireland,* 28 L.R. IR. 69

10) Beven, *On Negligence,* 4th ed., Vol. I, pp. 73 et seq.; Salmond, *On Torts,* ed., p.370.

11) *Thellusson v. Woodford,* 4 Ves. 227 at p. 322.

12) *The George and the Richard,* L.R. 3 Ad. and E. Cas. 466 at p. 482; *Williams v. Ocean Coal Co. Ltd.,* 2 K.B. 422 at p. 429; *Villar v. Gilbey,* A.C. 139 at p. 144; *Manns v. Carlon,* V.L.R. 280; 46 A.L.R. 184; *Elliot v. Joicey,* A.C. 209 at p. 239.

13) V.L.R. 280; 46 A.L.R. 184.

14) *Kanz v. Ryan,* 51 Iowa 232, 1 N.W. 485.

15) *Bovee v. Town of Danville,* 53 Vt. 183.

16) 138 Mass. 14.

17) *The Law of Prenatal Injuries,* 37 University of Colorado Law Review, p. 274.

18) *The Unborn Plaintiff,* 63 Michigan Law Review, pp. 582, 583.

19) 28 L.R. Ir. at 81-82

20) 124 Tex. 347, 78 S.W. 2d 944.

21) *Boston Pilot,* November 11, 1967

22) 95 N.E. 2d 206.

23) 56 N.E. 638; 184 Ill. 359

24) *Cooper v. Blanck* 39 So. 2d 352 (La. App. 1923); *Kline v. Zucherman* 4 Pa. D. and C. 227 (1924) but this finding was subsequently overruled in *Berlin v. J. C. Penny Co.* 339 Pa. 547, 16 A. 2d 28 (1940).

25) *Gorman v. Budlong*, 23 R.I. 169, 49 Atl. 704 (1901); *Drobner v. Peters*, 232 N.Y. 220, 133 N.E. 567 (1921); *Stanford v. St. Louis – San Francisco R. Co.*, 214 Ala. 611, 108 So. 566 (1922); *Magnolia Coca Cola Bottling Co. v. Jordan* 124 Tex. 347, 738 S.W. 2d 944 (1936); *Bliss v. Passanesi*, 326 Mass. 461, 95 N.E. 2d 206 (1950); *Jacketti v. Pottstown Rapid Transit Co.*, 67 Montg. Co L. Rep. 37 (Pa. County Ct. 1950); *Cavanaugh v. First National Stores, Inc.* 329 Mass. 179, 107 N.E. 2d 307 (1952); *Turknett v. Keaton*, 266 F. 2d 572 (5th Cir. 1956) (This is a federal case applying the State law of Texas).

26) *Krantz v. Cleveland*, 32 Ohio N.P. 445, 452.

27) *Montreal Tramways v. Leveille*, 4 D.L.R. 337, 344.

28) *Stemmer v. Kline*, 128 N.J.L. 455, 468, A 2d, 684, 687.

29) 197 Md. 417, 437, 79 A. 2d 550, 559 (1951)

30) *Smith v. Luckhardt*, 299 Ill. App. 100, 108, 19 N.E. 2d 446, 450, (1939)

31) *Williams v. Marion Rapid Transit Inc.*, 152 Ohio St. 114, 128, 87 N.E. 2d 334, 340 (1949)

32) *Allaire v. St. Luke's Hospital* 184 Ill. 359, 56 N.E. 638 (1900); *Stanford v. St. Louis and S.F. Ry., 214 Ala. 611*, 108 So. 566 (1926)

33) 65 F. Supp. 138

34) *loc. cit* at 139-140

35) *Verkennnes v. Corniea*, 229 Minn. 365, 38 N.W. 2d 838.

36) *Bonrest v. Kotz*, 65 F. Supp. 138 (1946); *Verkennes v. Corniea*, 229 Minn. 365, 38 N.W. 2d 838, (1949); *Williams v. Marion Rapid Transit, Inc.* 152 Ohio St. 114, 87 N.E. 2d 334 (1949); *Tucker v. Howard L. Carmichael and Sons, Inc.* 208 Ga. 201, 65 S.E. 2d 909 (1951); *Damasiewicz v. Gorsuch*, 197 Md. 417, 79 A. 2d 550 (1951); *Woods v. Lancet*, 303 N.Y 349, 102 N.E. 2d 691 (1951); *Amann v. Faidy*, 415 Ill. 422, 114 N.E. 2d 412 (1953); *Rodriquez v. Patti*, 415 Ill, 496, 114 N.E. 2d 721 (1953); *Steggall v. Morris*, 363 Mo. 1224, 258 S.W. 2d 577 (1953); *Rainey v. Horn*, 221 Miss. 269, 72 So. 2d 434 (1954); *Tursi v. New England Windsor Co.*, 19 Conn. Supp. 242, 111 A. 2d 14 (Super Ct. 1955); *Mitchell v. Couc* 285 S.W. 2d 901 (Ky., 1955); *A llison v. Pomeroy*, 205 Ore. 690, 2 P. 2d 225 (1955); *Worgan v. Greggo l Ferrara, Inc.*, 50 Del, 258, 128 . 2d 557 (1956); *Poliquin v. MacI ald*, 101 N.H. 104, 135 A. 2d) (1957); *Wendt v. Lillo*, 182 F. Su 56 (N.D. Iowa 1960); *Keyes v. nstruction Serv. Inc.* 340 Mass. 633; 5 N.E. 2d 912 (1960); *Hall v. Murp* 236 S.C. 257, 113 S. E. 2d 790 (1); *Hale v. Mannion*, 189 Kan. 143, 8 P. 2d 1 (1962); *Shousha v. Matthe Drivurself Serv.* 210 Tenn. 384, 358 W. 2d 471 (1962); *Seattle First Nat al Bank v. Rankin*, 59 Wash. 2d 28 367 P. 2d 835 (1962); *Leal v. C. C. s Sand and Gravel Company* (Texas 967 – no citation available at time preparation of the article).

37) *Amann v. Faidy*, 415 Ill 2, 114 N.E. 2d 412 (1953); *Rodriqu Patti*, 415 Ill. 496, 114 N.E. 2d 721 953).

38) 326 Mass. 461, 95 N.E. 206 (1950).

39) 329 Mass, 179, 180-181 07 N.E. 2d 307, 308 (1952).

40) 165 N.E. 2d 912-915.

41) *Steggall v. Morris*, 363 . 1224, 258 S.W. 2d 577 (1953); *A nn v. Faidy*, 415 Ill. 422, 114 N.E. 412 (1953); *Smith v. Brennan*, 31 N 353, 157 A, 2d 497 (1960).

42) *Mitchell v. Couch*, 285 S W. 2d 901.

43) *LaBlue v. Specker*, 100 W. 2d 445.

44) *Drabbels v. Skelly Oil Co.*, 155 Neb. 17, 50 N.W. 2d 229 (1951); *Howell v. Rushing*, 261 P. 2d 217 (1953); *Mace v. Jung*, 210 F. Supp. 706 (Alaska, 1962).

45) 282 App. Div. 542, 12 N.Y.S. 2d 696 (1953).

46) *Kelley v. Gregory*, 282 App. Div. 542, 125 N.Y.S. 2d 696 (1953); *Hornbuckle v. Plantation Pipe Line Co.* 212 Ga. 504, 93 S.E. 2d 727 (1956); *Bennett v. Hymers*, 101 N.H. 483, 147 A. 2d 108 (1958); *Smith v. Brennan*, 31 N.J. 353, 157 A. 2d 497 (1960); *LaBlue v. Specker*, 358 Mich. 558, 100 N.W. 2d 445 (1960); *Sinkler v. Kneale*, 401 Pa. 267, 164 A. 2d 93 (1960); *Daley v. Meier*, 178 N.E. 2d 691 (1961); *Sana v. Brown*, 35 Ill. App. 2d 425, 183 N.E. 2d 187 (1962); *Torigian v. Watertown News Co., Inc.*, 225 N.E. 2d 926 (1967).

47) *The Impact of Medical Knowledge on the Law Relating to Prenatal Injuries*, 110 University of Pennsylvania Law Review, 564.

48) *Torigian v. Watertown News Co., Inc.* 225 N.E. 2d 926 (1967).

49) *Sinkler v. Kneale*, 401 Pa. 267, 164 A. 2d 93 (1960).

50) *Daly v. Meier*, 33 Ill. App. 2d 218, 178 N.E. 2d 691 (1961); *Sinkler v. Kneale*, 401 Pa. 267, 164 A. 2d 93 (1960).

51) *Hornbuckler v. Plantation Pipe Line Co.*, 212 Ga. 504, 93 S.E. 2d 727 (1956).

52) 110 *University of Pennsylvania Law Review*, 563.

53) 110 *University of Pennsylvania Law Review*, 564, 565 footnote 66.

54) *loc. cit.*, 556, 557, footnote 18.

55) 63 *Michigan Law Review* 594.

56) 37 *University of Colorado Law Review* 280.

57) *loc. cit.* 594, 595.

58) *loc. cit.* 591.

59) 229 Minn. 365, 38 N.W. 2d. 838 (1949).

60) *Rainey v. Horn, 221 Miss. 269, 77 So. 2d 434 (1954).*

61) *Verkennes v. Corniea*, 229 Minn. 365, 38 N.W. 2d 838 (1949); *Valence v. Power and Light Co.*, 52 La. 2d 847, 50 So. 2d 847 (1951); *Rainey v. Horn*, 221 Miss. 269, 77 So. 2d 434 (1954); *Porter v. Lassiter*, 19 Ga. App. 712, 87 S.E. 2d 100 (1955); *Mitchell v. Couch*, 285 S.W. 2d 901 (Kentucky, 1955); *Worgan v. Greggo and Ferrara Inc.* 50 Del. 258, 128 A. 2d 557 (1956); *Stidam v. Ashmore*, 109 Ohio App. 431, 167 N.E. 2d 106 (1959); *Gorke v. LeClerc*, 23 Conn. Supp. 256, 181 A. 2d 448 (1962); *Hale v. Manion*, 189 Kan. 143, 368 P. 2d 1 (1962); *Maryland v. Sherman*, 234 Md. 179, 198 A. 2d 71 (1964); *Gullborg v. Rizzo*, 331 F. 2d 557 (applying Pennsylvania law, 1964).

62) *Hogan v. McDaniel*, 204 Tenn. 235, 319 S.W. 2d 221 (1958); *Shousha v. Matthews Drivurself Serv.*, 210 Tenn. 384, 358 S.W. 2d 471 (1962); *Hall v. Murphy*, 236 S.C. 257, 113 S.E. 2d 790 (1960); *Keyes v. Construction Serv. Inc.*, 340 Mass. 633, 165 N.E. 2d 912 (1960); *Mace v. Jung*, 210 F. Supp. 706 (Alaska, 1962).