Buffalo Law Review

Volume 1 | Number 2 Article 18

12-1-1951

Negligence—Recovery Denied Where Plaintiff Was En Ventre Sa Mere

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NEGLIGENCE—RECOVERY DENIED WHERE PLAINTIFF WAS EN VENTRE SA MERE

An infant plaintiff brought an action through his Guardian ad litem for injuries allegedly sustained as a result of his mother's fall down a stairway in defendant's multiple dwelling house while plaintiff was en ventre sa mere in the ninth month of pregnancy. The Appellate Division affirmed the order of the lower court dismissing the complaint for failure to state a cause of action. *Woods* v. *Lancet*, 278 App. Div. 913, 105 N. Y. S. 2d 417 (1st Dept. 1951).

The decision in the instant case reflects the majority rule that, in the absence of a statute, the child or its personal representative has no right of action for prenatal injuries. *Allaire* v. *St. Luke's Hospital*, 184 Ill. 359, 56 N. E. 638 (1890), *Dietrich* v. *Northampton*, 138 Mass. 14, 52 Am. Rep. 242 (1884), *Drobner* v. *Peters*, 232 N. Y. 220, 133 N. E. 567 (1921), *Lipps* v. *Milwaukee Electric Ry. & Light Co.*, 164 Wisc. 272, 159 N. W. 916 (1916). The courts have differed on the grounds for denying recovery to the infant. The most common argument which has been advanced in support of the majority position is that since the unborn child is part of the mother, there is no separate person or human in esse at the time of the accident. *Dietrich* v. *Northampton, supra, Drobner* v. *Peters, supra, Allaire* v. *St. Luke's Hospital, supra.* Since one of the necessary elements to a cause of action based on negligence is a duty to conform to a particular standard of conduct toward another, the courts have repeatedly held that no duty of care can exist to an unborn child because it has no independent existence. *Nugent* v. *Brooklyn Heights Ry. Co.*, 154 App. Div. 667, 139 N. Y. Supp. 367 (2nd Dept. 1913), *app. dism'd without op.* 209 N. Y. 515, 102 N. E. 1107 (1913), *Lipps* v. *Milwaukee Electric Ry. & Light Co., supra.* The lack of precedent permitting recovery for injuries sustained by a child en ventre sa mere has influenced many decisions. See *Magnolia Coca Cola Bottling Co.* v. *Jordan*, 124 Tex. 347, 78 S. W. 2d 944 (1935), *In Re Roberts' Estate*, 158 Misc. 698, 286 N. Y. Supp. 476 (Surr. Ct. 1936). Also a fear of opening the door to fictitious claims, and the necessity of speculation as to the true cause of the child's injury have been offered as a rationale for denying recovery. *Newman* v. *Detroit*, 281 Mich. 60, 274 N. W. 710 (1937), *Magnolia Coca Cola Bottling Co.* v. *Jordan, supra.*

As early as 1900 in *Allaire* v. *St. Luke's Hospital, supra,* Justice Boggs based his dissenting opinion on the findings of medical science that the fetus was capable of an independent and separate life at a period in advance of birth. Recently some courts have adopted this liberal and realistic approach to the problem. In allowing recovery to the infant, these courts have distinguished between a viable child which is capable of an independent existence and a child which has not reached that stage of development. See page 1605 American Illustrated Medical Dictionary (19th ed.), *Bonbrest* v. *Kotz*, 65 F. Supp. 138 (D. C. 1946), *Damasiewicz et al* v.

Gorsuch et al, —— Md. ——, 79 A. 2d 550 (1951), *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). These jurisdictions now recognize a duty of care owing to a viable child since it is an independent person.

Since *Drobner* v. *Peters, supra,* the doctrine of stare decisis has been adhered to in New York as the basis for denying a cause of action for injuries sustained by an unborn child. *In re Roberts' Estate, supra.* See *Nugent* v. *Brooklyn Heights Ry. Co., supra,* denying recovery on a contract theory. The New York Courts regard the unborn child as a part of the mother for purposes of negligence, and therefore no duty of care extends to an infant en ventre sa mere. The majority opinion in *Drobner* v. *Peters, supra,* recognized that in New York in respect to property rights, the life of an infant begins at the moment of conception. *Marsellis* v. *Thalhimer,* 2 Paige 35, 21 Am. Dec. 66 (N. Y. 1830), *Wright* v. *Miller,* 8 N. Y. 9, 59 Am. Dec. 438 (1853); also see: *Quinlen* v. *Welch,* 69 Hun. 584, 23 N. Y. Supp. 963 *aff'd.* 141 N. Y. 158, 36 N. E. 12 (1894). However, the courts feel justified in recognizing property rights in an unborn child, while refusing to allow recovery for wrongful injuries inflicted on the infant in utero, because no problem arises as to any duty of personal care existing to the property owner, whereas in the tort situation, it is difficult to find any duty of care owing to an unborn infant which has no legal personality. In the realm of criminal law, the New York Penal Code imputes a legal personality to an unborn child in that it is manslaughter 1st degree to wilfully kill the child after it is able to stir in the womb by any injury inflicted upon the mother, N. Y. Penal Law §1050, and the mother herself may be guilty of a crime if she intentionally causes the death of "the quick child whereof she is pregnant," N. Y. Penal Law §1052. Even though the unborn child is treated as a separate entity in the criminal law, the courts fail to extend tort liability on the grounds that the crime causing the death of the infant does not imply liability to the child for personal injuries.

It is a recognized medical fact that the age of viability is usually seven months. Herzog, Medical Jurisprudence §860-975 (1931), 2 Taylor's Principles & Practice of Medical Jurisprudence (10th ed.). Since the plaintiff in the instant case was en ventre sa mere in the ninth month of his mother's pregnancy when the alleged injuries were sustained by him, he had reached the final stage of fetal development and was capable of surviving outside the womb. Where the child is viable, the law should recognize its independent personality and the resultant duty of care. If the New York Courts feel bound by stare decisis, it is believed desirable that the Legislature should take action in this area.

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