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Tort Actions for Injuries to Unborn Infants

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TORT ACTIONS FOR INJURIES TO UNBORN INFANTS

Recently two American courts [1] have recognized a right of infants to recover for prenatal injuries. In so meeting the challenge of the common law that "for every wrong there is a remedy" they have taken a step which no other court of final jurisdiction has taken on the strength of the common law alone.

THE AUTHORITIES

It is somewhat surprising that until less than sixty years ago no one had attempted to assert in a court of law that he should be allowed to recover for impairments to his body resulting from injuries wrongfully inflicted upon that body while still in the womb of his mother, but the failure to claim this right does not necessarily mean that the common belief was that such an action could not be maintained.[2] Whatever the reason for the hundreds of years of silence, the case of *Dietrich v. Inhabitants of Northampton*,[3] decided by the Supreme Court of Massachusetts in 1884, touched off a string of over a score of cases from that date until the present, involving in some way the asserted right to recover for prenatal injuries.[4] In that case a mother who was more than four months pregnant fell as a result of defendant's negligence and suffered a miscarriage. There were some indications of life in the child for about

1. Verkennes v. Corniea, 38 N. W. 2d 838 (Minn. 1949); Williams v. Marion Rapid Transit, Inc., 152 Ohio St. 114, 87 N. E. 2d 334 (1949), *affirming* 82 N. E. 2d 423 (Ohio App. 1948), 38 KY. L. J. 142, 63 HARV. L. REV. 173, 1949 U. OF ILL. L. FORUM 537.

2. More probable reasons are: natural hesitancy to bring a new type of action (which increases with the passing of time), the relative infrequency with which such injuries arise in such manner that a case could be easily made out, and general ignorance of the cause of injuries apparent at birth.

3. 138 Mass. 14, 52 Am. Rep. 242 (1884).

4. Stanford v. St. Louis-San Francisco Ry., 214 Ala. 611, 108 So. 566 (1926); Scott v. McPheeters, 33 Cal. App. 2d 629, 92 P. 2d 678, *rehearing denied*, 93 P. 2d 562 (1939); Bonbrest v. Kotz, 65 F. Supp. 138 (D. D. C. 1946); Smith v. Luckhardt, 299 Ill. App. 100, 19 N. E. 2d 446 (1939); Allaire v. St. Luke's Hospital, 184 Ill. 359, 56 N. E. 638, 48 L. R. A. 225, 75 Am. St. Rep. 176 (1900), *affirming* 76 Ill. App. 441 (1898); Dietrich v. Inhabitants of Northampton, 138 Mass. 14, 52 Am. Rep. 242 (1884); Newman v. City of Detroit, 281 Mich. 60, 274 N. W. 710 (1937); Verkennes v. Corniea, 38 N. W. 2d 838 (Minn. 1949); Buel v. United Rys. of St. Louis, 248 Mo. 126, 154 S. W. 71, 45 L. R. A. (N. S.) 625, Ann. Cas. 1914C, 613 (1913); Stemmer v. Kline, 128 N. J. L. 455, 26 A. 2d 489, 684 (1942), *reversing* 19 N. J. Misc. 15, 17 A. 2d 58 (Cir. Ct. 1940); Drobner v. Peters, 232 N. Y. 220, 133 N. E. 567, 20 A. L. R. 1503 (1921), *reversing* 194 App. Div. 696, 186 N. Y. Supp. 278 (1st Dep't 1921), *and* 184 N. Y. Supp. 337 (Sup. Ct. 1920); Nugent v. Brooklyn Heights R. R., 154 App. Div. 667, 139 N. Y. Supp. 367 (2d Dep't 1913), *appeal dismissed*, 209 N. Y. 515, 102 N. E. 1107 (1913); Williams v. Marion Rapid Transit, Inc., 152 Ohio St. 114, 87 N. E. 2d 334 (1949); Mays v. Weingarten, 82 N. E. 2d 421 (Ohio App. 1943); Berlin v. J. C. Penney Co., 339 Pa. 547, 16 A. 2d 28 (1940); Kine v. Zuckerman, 4 Pa. D. & C. 227 (1924); Gorman v. Budlong, 23 R. I. 169, 49 Atl. 704, 55 L. R. A. 118, 91 Am. St. Rep. 629 (1901); Magnolia Coca Cola Bottling Co. v. Jordan, 124 Tex. 347, 78 S. W. 2d 944, 97 A. L. R. 1513 (1935), *reversing*, 47 S. W. 2d 901 (Tex. Civ. App. 1932); Lipps v. Milwaukee Electric Ry. & Light Co., 164 Wis. 272, 159 N. W. 916, L. R. A. 1917B, 334 (1916); Montreal Tramways v. Leveille, [1933] Can. Sup. Ct. 456, [1933] 4 Dom. L. R. 337; Walker v. Great Northern Ry., 28 L. R. Ir. 69 (Q. B. 1891); *cf.* Stafford v. Roadway Transit Co., 70 F. Supp. 555, 570 (W. D. Pa. 1947).

fifteen minutes and on this basis administration was taken out. In an action by the administrator under a wrongful death statute allowing recovery for the death of any person resulting from tortious conduct on the part of another it was held, in an opinion by Mr. Justice Holmes, that the child was not at the time of the injury a "person" within the meaning of the statute.[5] Unfortunately, the facts in this first case offered little natural appeal toward allowing a new cause of action to be maintained. Causal relation would have been very difficult to prove;[6] it is very doubtful that the infant was born alive;[7] if it was born alive its death resulted not directly from an injury but from the fact that it was born before it became viable (capable of sustained separate existence);[8] and the only recovery possible was under a cause of action which did not exist at common law but was purely statutory.[9] The holding of the case was perhaps justified under the facts, but the weight later given the case as authority for holding that no cause of action could be maintained for prenatal injuries was not warranted.

The next case involving the point was an Irish case decided in 1891,[10] where again the issue was not raised in its most appealing form. There the mother was injured while a passenger on defendant's trolley, and the child, which was subsequently born alive, was also injured. While some of the court expressed an opinion that no action would lie for prenatal injuries since the infant was but a part of the mother,[11] the basis of the holding was that defendant owed no duty to the child since the only contract was with the mother.[12] This case has not only been generally followed where the duty supposedly could rest only on a contract,[13] but it has also been cited as authority for allowing no recovery under any circumstances.[14]

With these two off-center cases as the only authority on the point it is

5. "If we should assume . . . that a man might owe a conditional prospective liability in tort to one not yet in being, and if we assume that causing an infant to be born prematurely stands on the same footing as wounding or poisoning, we should then be confronted by the question . . . 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 *locus standi* in court, or of being represented there by an administrator." 138 Mass. 14, 16, 52 Am. Rep. 242, 244 (1884).

6. It is difficult to prove with any degree of certainty the cause of a miscarriage. See *infra* pp. 289-92.

7. Muscular twitchings resulting from change of temperature and contact with air are sometimes mistaken for signs of life. 1 GRAY, MEDICAL JURISPRUDENCE 411 (11th ed. 1860).

8. Mere deprivation of sustenance is not as obviously a direct injury to an infant as other injuries and is more easily characterized as one to the mother only.

9. No cause of action existed at common law for wrongful death. PROSSER, TORTS 950 (1941); TIFFANY, DEATH BY WRONGFUL ACT § 1 (2d ed. 1913).

10. Walker v. Great Northern Ry., 28 L. R. Ir. 69 (Q. B. 1891).

11. "[W]hen the act of negligence occurred the plaintiff was not *in esse,* was not a person, or a passenger, or a human being." *Id.* at 84.

12. For further discussion of this point see *infra* p. 293.

13. *E.g.,* Nugent v. Brooklyn Heights R. R., 154 App. Div. 667, 139 N. Y. Supp. 367 (2d Dep't 1913), *appeal dismissed,* 209 N. Y. 515, 102 N. E. 1107 (1913).

14. *See, e.g.,* Allaire v. St. Luke's Hospital, 184 Ill. 359, 57 N. E. 638, 640, 48 L. R. A. 225, 75 Am. St. Rep. 176 (1900); Gorman v. Budlong, 23 R. I. 169, 49 Atl. 704, 705, 55 L. R. A. 118, 91 Am. St. Rep. 629 (1901).

not too surprising that no action was allowed when the first really favorable case was brought before the Illinois Supreme Court in 1900. In *Allaire v. St. Luke's Hospital,*[15] plaintiff's mother entered defendant's maternity hospital for the purpose of being delivered of her child, the plaintiff; she was severely injured in an elevator accident resulting from defendant's negligence, and when the plaintiff was born four days later it was discovered that he too had suffered serious injuries. For these injuries he brought an action seeking compensation. A duty could easily have been established; the child was viable at the time of the injury and did in fact survive;[16] the causal relation was obvious; and plaintiff's body was in fact impaired after his birth.[17] Yet the court denied the power of the common law to grant recovery. Much emphasis was placed by the court on the absence of any precedent on which the action could be sustained and the holdings and dicta of the two previously adjudieated cases, but the real basis of the decision is expressed in the statement that "a child before birth is, in fact, a part of the mother, and is only severed from her at birth." [18] From this the court reasoned that the only injury was to the mother and that the only action was for injuries to her.

These three cases formed the pattern into which the cases of the next half century were to fall. The same arguments for allowing an action were advanced in ncarly all the cases and were rejected in nearly the same way. The law came to be accepted to be what nearly all the courts had said, either by holding or dictum—that an infant *en ventre sa mere* is not *in esse* until birth so as to be entitled to the protection of the law; that there is no legally protectible entity until birth.

The doctrine that an unborn infant is only a part of its mother did not stand without opposition, however. There were some scathing opinions by dissenting justices; [19] in disposing of a case before them on other grounds, several courts refused to express an opinion on the broad question,[20] and one

15. 184 Ill. 359, 56 N. E. 638, 48 L. R. A. 225, 75 Am. St. Rep. 176 (1900), *affirming* 76 Ill. App. 491 (1898).

16. Viability at the time of injury was to become important because of this case. Boggs, J., in a dissenting opinion said that after an infant became capable of independent existence he was a person in the eyes of the law and was entitled to compensation for injuries to his body occurring after that stage was reached. 56 N. E. at 641. This theory was adopted by courts which later allowed action for prenatal injuries.

17. If the only injury was not permanent and ceased to exist before birth the question would arise whether there could be any damage where there was no opportunity for suffering.

18. 56 N. E. at 640.

19. *See* Allaire v. St. Luke's Hospital, 184 Ill. 359, 56 N. E. 638, 640, 48 L. R. A. 225, 75 Am. St. Rep. 176 (1900) (Boggs, J., dissenting), 76 Ill. App. 441, 450 (1898) (same case in lower court; Windes, J., dissenting); Stemmer v. Kline, 128 N. J. L. 455, 26 A. 2d 489, 684, 685 (1942).

20. Buel v. United Rys. of St. Louis, 248 Mo. 126, 154 S. W. 71, 45 L. R. A. (N. S.) 625, Ann. Cas. 1914C, 613 (1913) (holding limited to action under wrongful death statute); Lipps v. Milwaukee Electric Ry. & Light Co., 164 Wis. 272, 159 N. W. 916, L. R. A. 1917B, 334 (1916) (holding limited to cases where infant not viable at time of injury).

court expressly indicated that it disagreed with the majority courts;[21] several intermediate courts allowed recovery in well considered opinions, though they were subsequently reversed;[22] a lower Pennsylvania court allowed recovery in a case which stood for sixteen years before being overruled;[23] the Supreme Court of Canada allowed an action to be maintained, partially on the strength of vestiges of the civil law;[24] a California court allowed an action on the basis of a statute;[25] and the District Court for the District of Columbia sustained an action based solely on the common law.[26] Nevertheless, until 1949 there was no holding by an appellate court, based on the common law alone, that an action would lie for prenatal injuries.

This was the unfavorable state of the law when *Williams v. Marion Rapid Transit* [27] was decided by the Supreme Court of Ohio in July, 1949. That case involved injuries to a viable infant as a result of a fall sustained by the infant's mother as she alighted from defendant's bus. In holding that there was an injury to the person of the infant for which recovery could be had the court reasoned that when a child reached such a stage of development that the death of the mother could not deprive it of life it was a person within the meaning of the Constitution.[28]

Following close on the heels of the Ohio court, but apparently with no knowledge of its holding, came the Supreme Court of Minnesota. In *Verkennes v. Corniea,*[29] an expectant mother entered defendant's hospital for delivery of her baby, but, as a result of negligence on the part of the defendant doctor, both mother and child died before delivery. The administrator of

21. "It is to this conclusion that an unborn child is not in existence so as to be entitled to the protection of his person as well as his property that I dissent." Nugent v. Brooklyn Heights R. R., 154 App. Div. 667, 139 N. Y. Supp. 367, 370 (2d Dep't 1913), *appeal dismissed,* 209 N. Y. 515, 102 N. E. 1107 (1913) (holding based on absence of duty).

22. Stemmer v. Kline, 19 N. J. Misc. 15, 17 A. 2d 58 (Cir. Ct. 1940), *rev'd,* 128 N. J. L. 455, 26 A. 2d 489, 684 (1942); Drobner v. Peters, 194 App. Div. 696, 186 N. Y. Supp. 278 (1st Dep't 1921), *rev'd,* 232 N. Y. 220, 133 N. E. 567, 20 A. L. R. 1503 (1921); Magnolia Coca Cola Bottling Co. v. Jordan, 47 S. W. 2d 901 (Tex. Civ. App. 1932), *rev'd,* 124 Tex. 347, 78 S. W. 2d 944, 97 A. L. R. 1513 (1935).

23. Kine v. Zuckerman, 4 Pa. D. & C. 227 (1924), *overruled by* Berlin v. J. C. Penney Co., 339 Pa. 547, 16 A. 2d 48 (1940).

24. Montreal Tramways v. Leveille, [1933] Can. Sup. Ct. 456, [1933] 4 Dom. L. R. 337.

25. Scott v. McPheeters, 33 Cal. App. 2d 629, 92 P. 2d 678, *rehearing denied,* 93 P. 2d 562 (1939).

26. Bonbrest v. Kotz, 65 F. Supp. 138 (D. D. C. 1946), 32 CORNELL L. Q. 609, 95 U. OF PA. L. REV. 96, 32 VA. L. REV. 1203.

27. 152 Ohio St. 114, 87 N. E. 2d 334 (1949).

28. "To hold that the plaintiff in the instant case did not suffer an injury in her person would require this court to announce that as a matter of law the infant is a part of the mother until birth and has no existence in law until that time. In our view such a ruling would deprive the infant of the right conferred by the Constitution upon all persons, by the application of a time-worn fiction not founded on fact and within common knowledge untrue and unjustified." 87 N. E. 2d at 340. The portion of the Constitution referred to provides that "All courts shall be open, and every person, for any injury done him in his land, goods, person, or reputation, shall have remedy by due course of law. . . ." OHIO CONST. Art. I, § 16. The constitutions of most states have similar provisions.

29. 38 N. W. 2d 838 (Minn. 1949).

the infant's estate brought an action under a wrongful death statute which provided for recovery in any case where the decedent would have had an action had he lived. Following the reasoning first laid down in the dissent of Judge Boggs in the *Allaire* case, the court held that the infant would have had an action had it lived, since it was viable at the time of the injury, and that the action would thus lie under the death statute.

Thus, while it is still true that a majority of the adjudicated cases have refused to entertain actions for prenatal injuries,[30] there is now respectable authority for the doctrine that after birth an infant may recover damages for prenatal injuries to his person sustained after he became viable.[31] The latter view has also received the almost unanimous approval of legal writers.[32]

THE MERITS

The most customary method of argument when a new problem must be solved is by the use of analogies, and several analogous situations involving legal treatment of the unborn child had been solved and their solutions become settled parts of the common law at the time the *Dietrich* case arose. One such analogy was the doctrine that intentionally inflicting injuries upon a quick child for the purpose of killing it constituted murder or manslaughter if the

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30. Stanford v. St. Louis-San Francisco Ry., 214 Ala. 611, 108 So. 566 (1926), Smith v. Luckhardt, 299 Ill. App. 100, 19 N. E. 2d 466 (1939); Allaire v. St. Luke's Hospital, 184 Ill. 359, 56 N. E. 638, 48 L. R. A. 225, 75 Am. St. Rep. 176 (1900), *affirming* 76 Ill. App. 441 (1898); Dietrich v. Inhabitants of Northampton, 138 Mass. 14, 52 Am. Rep. 242 (1884); Newman v. City of Detroit, 281 Mich. 60, 274 N. W. 710 (1937); Buel v. United Rys. of St. Louis, 248 Mo. 126, 154 S. W. 71, 45 L. R. A. (N. S.) 625, Ann. Cas. 1914C, 613 (1913); Stemmer v. Kline, 128 N. J. L. 455, 26 A. 2d 489, 684 (1942); Drobner v. Peters, 232 N. Y. 220, 133 N. E. 567, 20 A. L. R. 1503 (1921); Nugent v. Brooklyn Heights R. R., 154 App. Div. 667, 139 N. Y. Supp. 367 (2d Dep't 1913), *appeal dismissed*, 209 N. Y. 515, 102 N. E. 1107 (1913); Berlin v. J. C. Penney Co., 339 Pa. 547, 16 A. 2d 28 (1940); Gorman v. Budlong, 23 R. I. 169, 49 Atl. 704, 55 L. R. A. 118, 91 Am. St. Rep. 629 (1901); Magnolia Coca Cola Bottling Co. v. Jordan, 124 Tex. 347, 78 S. W. 2d 944, 97 A. L. R. 1513 (1935); Lipps v. Milwaukee Electric Ry. & Light Co., 164 Wis. 272, 159 N. W. 916, L. R. A. 1917B, 334 (1916); Walker v. Great Northern Ry., 28 L. R. Ir. 69 (Q. B. 1891). While some of these cases might be distinguished on the facts from future cases, all denied recovery on some basis.

31. Scott v. McPheeters, 33 Cal. App. 2d 629, 92 P. 2d 678 (1939); Bonbrest v. Kotz, 65 F. Supp. 138 (D. D. C. 1946); Verkennes v. Corniea, 38 N. W. 2d 838 (Minn. 1949); Williams v. Marion Rapid Transit, Inc., 152 Ohio St. 114, 87 N. E. 2d 334 (1949); Montreal Tramways v. Leveille, [1933] Can. Sup. Ct. 456, [1933] 4 Dom. L. R. 337; *see* Nugent v. Brooklyn Heights Ry., 154 App. Div. 667, 139 N. Y. Supp. 367, 370 (2d Dep't 1913), *appeal dismissed*, 209 N. Y. 515, 102 N. E. 1107 (1913).

32. Albertsworth, *Recognition of New Interests in the Law of Torts*, 10 CALIF. L. REV. 461, 463, 470 (1922); Anderson, *Rights of Action of an Unborn Child*, 14 TENN. L. REV. 151 (1936); Frey, *Injuries to Infants* en Ventre sa Mere, 12 ST. LOUIS L. REV. 85, 95 (1929); Kerr, *Action by Unborn Infant*, 61 CENT. L. J. 364, 372 (1905), Morris, *Injuries to Infants* en Ventre sa Mere, 58 CENT. L. J. 143, 148 (1904); Straub, *Right of Action for Prenatal Injuries*, 33 LAW NOTES 205 (1930); Winfield, *The Unborn Child*, 4 U. OF TORONTO L. J. 278, 285, 294 (1942), 8 CAMB. L. J. 76 (1942); Notes, 38 KY. L. J. 142 (1949), 26 NEB. L. REV. 431 (1947); 22 B. U. L. REV. 621 (1942); 32 CORNELL L. Q. 609 (1947); 63 HARV. L. REV. 173 (1949); 34 MINN. L. REV. 65, 66 (1949); 1949 U. OF ILL. L. FORUM 537 (1949). *But cf.* RESTATEMENT, TORTS § 869 (1939) (no recovery for negligent injuries, but no position taken as to malicious torts).

child died from those injuries after birth.[33] This analogy was rejected by the courts on the ground of dissimilarity between criminal and civil law.[34] Similarity also exists in the rules of the law of property by which a child *en ventre sa mere* is regarded as *in esse* from the time of conception.[35] It was also established law that an action might be maintained after birth under Lord Campbell's Act for the wrongful death of the infant's father occurring while the infant was still in the womb of its mother.[36] These analogies were also rejected, on the ground that they were the results of mere fictions and that those fictions should not be further extended in the absence of precedent.[37]

The contention that it was a fiction to say that there was an entity in existence before birth was promptly and properly denied.[38] Medical men consider the foetus a separate entity from the time of conception [39] and at a certain stage of development the infant becomes sufficiently independent to survive if separated from the mother.[40] To say that an infant is until birth but a part of the mother is contrary to scientific fact and common sense.[41]

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33. Rex v. Senior, 1 Mood. Cr. C. 346, 168 Eng. Rep. 1298 (1832). For a later case see Clarke v. State, 117 Ala. 1, 23 So. 671 (1898).

34. "Crimes are offences against the public; they are those acts or attempts which tend to the prejudice of the whole community. . . . Tort, on the other hand, is a private wrong. . . . The sanction of the one is punishment; the result of the other is compensation." Walker v. Great Northern Ry., 28 L. R. Ir. 69, 88 (Q. B. 1891). Granting the validity of this distinction it would nevertheless seem that the doctrine evidences a recognition of a living entity which could be the subject of a felonious act.

35. "Let us see, what this non-entity can do. He may be vouched in a recovery, though it is for the purpose of making him answer over in value. He may be an executor. He may take under the Statute 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." Thellusson v. Woodford, 4 Ves. 227, 322, 31 Eng. Rep. 117, 163 (1799). *See* Blasson v. Blasson, 2 De G. J. & S. 665, 670, 46 Eng. Rep. 534, 536 (1864); Montreal Tramways v. Leveille, [1933] Can. Sup. Ct. 456, 461, [1933] 4 Dom. L. R. 337.

36. The George and Richard, L. R. 3 Ad. & Eccl. 466 (1871). For a later case see Nelson v. Galveston, H. & S. A. Ry., 78 Tex. 621, 14 S. W. 1021 (1890).

37. These rules are said to come from civil law doctrines. Thus the Digest of Justinian provided: *"Qui in utero est: perinde ac si in rebus humanis esset custoditur, quotiens de commodis ipsius partus quaeritur,"* D.1.5.7, and *"Qui in utero sunt, in toto paene jure civili intelleguntur in rerum natura esse."* D.1.5.26. *See* Blasson v. Blasson, 2 De G. J. & S. 665, 670, 46 Eng. Rep. 534, 536 (Ch. 1874); Montreal Tramways v. Leveille, [1933] Can. Sup. Ct. 456, 461, [1933] 4 Dom. L. R. 337.

38. The absurdity of the doctrine that an unborn child is but a part of the mother is obvious. Thus, it is not uncommon for a living infant to be born after the death of the mother. Could it be said that such a child, as a part of the mother, died also?

39. 1 BECK, ELEMENTS OF MEDICAL JURISPRUDENCE 276 (11th ed. 1860); GRAY, ATTORNEY'S TEXTBOOK OF MEDICINE 694 (2d ed. 1940).

40. Viability is usually achieved after 28 weeks. MITCHELL AND NELSON, TEXTBOOK OF PEDIATRICS 260 (4th ed. 1945); POTTER AND ADAIR, FETAL AND NEO-NATAL DEATH 119 (1940).

41. "Such law is a reproach to civilization. It seems illogical to say the action can not be maintained because the child is a part of the mother. Long before it sees the light it is a living soul, pulsating with life, making its presence known by most vigorous action oftentimes, a distinct entity moving and having its being, though carried by the mother and attached to her by the umbilical cord. Why may it not be wronged? Why may it not suffer injuries? It can not be contended for a moment that the physician attending at the birth of a child would not be liable in damages to the child, if, after delivering it from its mother, but before he cut the connecting cord, he should willfully and maliciously wrench off both its arms. Could it be said that such an injury was to the mother, and that she must sue for and recover the damages to her child in such

There is before birth a distinct entity, capable of being injured and of carrying forward those injuries into postnatal life. This entity is recognized by the law in analogous situations and protected in some of its interests. The real problem would seem to be, not "Is there a legally protectible entity?" but rather, "Does this entity have a legally protected interest in his bodily welfare before birth?" [42] It is submitted that the rule of the majority courts is really just a rule of convenience, regardless of the fictions utilized by the courts to support the rule. What they seem really to mean is that this interest will not be legally protected. No doubt it was felt that these actions involved such inherent difficulties of proof [43] and were so susceptible to fraudulent suits,[44] that juries would be incapable of properly handling them. Thus, believing that submitting these actions to juries might result in substantial injustice, the courts kept them out of their hands by holding as a matter of law that no such action would lie.

While the law should strive to protect as many interests as it can in the light of justice and prevailing public policy, there are still many injuries for which the law provides no remedy—many interests which are not legally protected.[45] The basic problems are whether public policy favors protection of the particular interest over freedom of conduct of others, and whether practical considerations permit that policy to be served without defeating some other policy.[46] It would seem that in general public policy would be the same for both prenatal and postnatal injuries, and so the real issue is whether the practical considerations are substantially the same. Since some of the majority courts have felt there was so much greater difficulty of proof to warrant denying an action for prenatal injuries a consideration of the nature of some acts and injuries which would probably be the bases of the bulk of litigation on this cause of action, if allowed, may be helpful. Therefore, these acts and injuries, and problems of proof of causation will be discussed.

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a case, because the doctor had not severed the umbilical cord—because the child was still a part of the mother? I think not." Windes, J., dissenting, in Allaire v. St. Luke's Hospital, 76 Ill. App. 441, 453 (1898).

42. *Cf.* GREEN, RATIONALE OF PROXIMATE CAUSE § 2 (1927).

43. "But 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 would launch us . . . if Science . . . could profess to . . . trace a hare-lip to nervous shock, or a bunch of grapes on the face to the fright." Walker v. Great Northern Ry., 28 L. R. Ir. 69, 81 (Q. B. 1891).

44. "The real reason for these holdings, we think and it is not at all concealed in some of the opinions, is a rule of convenience. There would be many cases, it is feared, that would be founded on fraud and possibly injustice might result from them." Brogan, J., dissenting, in Stemmer v. Kline, 128 N. J. L. 455, 26 A. 2d 489, 684, 687 (1942). *See* Stanford v. St. Louis-San Francisco Ry., 214 Ala. 611, 108 So. 566 (1926); Drobner v. Peters, 232 N. Y. 220, 133 N. E. 567, 568, 20 A. L. R. 1503 (1921); Magnolia Coca Cola Bottling Co. v. Jordan, 124 Tex. 347, 78 S. W. 2d 944, 949, 97 A. L. R. 1513 (1935); Lipps v. Milwaukee Electric Ry. & Light Co., 164 Wis. 272, 159 N. W. 916, 917, L. R. A. 1917B, 334 (1916).

45. For instance, a young woman might have a very real interest in the bodily welfare of her fiancé. Yet the law would give her no protection in that interest.

46. *Cf.* Pound, *The Limits of Effective Legal Action*, 3 A. B. A. J. 55, 65-70 (1917).

TYPES OF INJURIES AND PROBLEMS OF PROOF

Perhaps the most frequent type of injury to unborn infants, and one which will provoke a good portion of the litigation if actions for prenatal injuries are allowed, is the type resulting from acts of physicians in delivering infants.[47] The use of instruments, especially, frequently results in such injuries as disfigurations, fractures, nerve injuries, and damage to muscles.

Another type of injury in which the damage is somewhat similar is that class in which some trauma is inflicted upon the mother and through her body to the foetus.[48] The damage in these instances usually consists of fractures, bruises or similar damage, but other types of damage might be alleged.[49]

The reproductive process, a very complex and delicate one, is frequently upset before completion,[50] and it is an accepted medical fact that an infant delivered prematurely is very likely to be afflicted with various ailments, difficulties and predispositions.[51] Terminations of pregnancy before completion of the gestation period may at times be causally connected with any of a wide variety of factors,[52] and since many of those factors might result from wrongful conduct on the part of a defendant considerable litigation should be expected involving such damage.[53]

Malformations are a type of damage which occurs in a number of pregnancies. While laymen are prone to speculate and often attribute such damage to some unusual occurrence during the pregnancy, relatively little is known as to the causes. There are two factors, however, which very definitely may cause malformations.

Roentgen rays have the effect of halting cell growth or even destroying

47. See STANDER, TEXTBOOK OF OBSTETRICS 713-17 (3d ed. 1945). An injury of this type was alleged in Scott v. McPheeters, 33 Cal. App. 2d 629, 92 P. 2d 678 (1939). It has been suggested that injuries occurring during the birth process might be classified as postnatal injuries. 32 CORNELL L. Q. 609, 611 (1947).

48. Several adjudicated cases have involved injuries of this type: *e.g.*, Stanford v. St. Louis-San Francisco Ry., 214 Ala. 611, 108 So. 566 (1926); Allaire v. St. Luke's Hospital, 184 Ill. 359, 56 N. E. 638, 48 L. R. A. 225, 75 Am. St. Rep. 176 (1900); Newman v. City of Detroit, 281 Mich. 60, 274 N. W. 710 (1937).

49. For example, in Montreal Tramways v. Leveille, [1933] Can. Sup. Ct. 456, [1933] 4 Dom. L. R. 337, it was alleged that plaintiff was born with a club foot as a result of a fall suffered by the mother two months prior to plaintiff's birth.

50. It is estimated that abortion or miscarriage occurs in as many as one in every two and three-tenths pregnancies. GRAY, ATTORNEY'S TEXTBOOK OF MEDICINE 693 (2d ed. 1940). In addition it is estimated that from five to ten per cent of all births are premature. MITCHELL AND NELSON, TEXTBOOK OF PEDIATRICS 260 (4th ed. 1945).

51. Some special predispositions are: congenital atelectasis, intracranial hemorrhage, pneumonia and other respiratory difficulties, epidemic diarrhea, acidosis, edema, less resistance and greater susceptibility to illness, less recuperative powers and a tendency to develop rickets even when vitamin D is administered. MITCHELL AND NELSON, TEXTBOOK OF PEDIATRICS 263 (4th ed. 1945).

52. Some causes of prematurity are: chronic maternal illness, toxemia of pregnancy, disturbances of the uterus and birth canal, maternal intoxication by alcohol or heavy metals, disturbance of the foetus, advanced age of parents and pregnancies at short intervals, trauma, nonobstetric surgery and severe emotional disturbances. *Id.* at 260.

53. *E.g.*, Dietrich v. Inhabitants of Northampton, 138 Mass. 14, 52 Am. Rep. 242 (1884); Gorman v. Budlong, 23 R. I. 169, 49 Atl. 704, 55 L. R. A. 118, 91 Am. St. Rep. 629 (1901).

cells when applied to human bodies, and the immature cells of a foetus are far more easily harmed than those of an adult. Because of this, it is not uncommon for a foetus to be damaged by the application of Roentgen rays to a pregnant woman for diagnostic or therapeutic purposes.[54] Medical experience has proved that a high percentage of children irradiated while *in utero* suffer ill health or defects,[55] the most common of which are microcephaly (an abnormality in which the head and brain are very small and idiocy is usually present) and deformities of the eyes and limbs.[56] While these malformations are usually caused by exposure during the first five months of pregnancy, actual instances prove that serious damage may be done to the foetus at any stage of pregnancy.[57] Such damage has been alleged in several previous cases[58] and no doubt would be alleged in many more if these actions were sustained.

Another factor recognized by the medical profession as capable of causing malformations and defects is rubella[59] contracted by a woman during the early part of pregnancy.[60] The variety of malformations is large,[61] and the frequency of occurrence under such circumstances has been found to be very high.[62]

The difficulties of proving causal relation in actions for prenatal injuries must vary to some extent with each case, but some general observations may be made with regard to each of the classes of injuries related above.

Of the three types of injuries suggested as likely to compose the bulk of prenatal injuries for which actions will be brought, traumatic injuries are the most easily connected with tortious conduct. A torn-off ear would have

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54. MURPHY, CONGENITAL MALFORMATIONS 87 (2d ed. 1947); Dunlap and Smith, *Medicolegal Aspects of Injuries from Exposure to Roentgen Rays and Radioactive Substances,* 1 OCCUP. MED. 237, 285 (1946), 11 Mo. L. REV. 137, 187 (1946); Miller, Corscaden and Harrar, *The Effect of Radiation on the Human Offspring,* 31 AM. J. OBST. & GYNEC. 518 (1936).

55. In one recent study, 50.7% of children studied who had been irradiated while *in utero* suffered ill health or defects. MURPHY, CONGENITAL MALFORMATION 99 (2d ed. 1947).

56. Dunlap and Smith, *Medicolegal Aspects of Injuries from Exposure to Roentgen Rays and Radioactive Substances,* 1 OCCUP. MED. 237, 285 (1946), 11 Mo. L. REV. 137, 187 (1946).

57. MURPHY, CONGENITAL MALFORMATIONS 100 (2d ed. 1947).

58. Smith v. Luckhardt, 299 Ill. App. 100, 19 N. E. 2d 446 (1939); Stemmer v. Kline, 128 N. J. L. 455, 26 A. 2d 489, 684 (1942).

59. Rubella—German measles. Not only might a tort action be based on the negligent exposure of a pregnant woman to the disease, but perhaps also against an attending doctor who did not perform a therapeutic abortion where the disease was contracted in the early stages of pregnancy. This course of action has been advocated as proper medical practice. Warkany, *Etiology of Congenital Malformations,* 2 ADVANCES IN PEDIAT. 1, 59 (1947).

60. MURPHY, CONGENITAL MALFORMATIONS 101 (2d ed. 1947).

61. *E.g.,* eye defects, cardiac lesions, severe deafness, dental defects, microcephaly, mental deficiency, retarded development. *Id.* at 103.

62. In one recent survey it was discovered that 87% of women questioned who were infected with rubella during the first three months of pregnancy bore malformed children. Abel and Van Dellen, *The Effects of German Measles During Pregnancy,* 32 J. LAB. & CLIN. MED. 1536 (1947).

no more probable cause than the use of forceps in delivery, and a severe bruise or fractured skull would usually result only from the application of extreme force to the mother's body. Proof of causal relation is also made easier in such cases by the fact that the infant is usually available for examination soon after the injurious act occurs,[63] and because the damage is ordinarily of such a nature as can be determined at that time. In general, there should be little more trouble in proving the cause of such injuries than there would be if the injury had occurred after birth.

Damage resulting from premature delivery is more indirect in nature and proof of causal relation between the damage and an alleged wrongful act is more difficult. For although it is relatively simple reasonably to prove that certain damage results from prematurity it is often difficult to prove the cause of premature delivery.[64] While it may at times be causally connected with any of a wide variety of factors,[65] at other times no cause can be determined.[66] Some of these factors are often present in extreme degrees and yet the infant is carried to full term, and not infrequently more than one factor is present which could have caused the premature delivery. For these and other reasons proving causal relation is difficult.[67] But there is no apparent reason why it would be difficult to prove causal relation in such a case than in one where the mother seeks recovery for injuries and includes miscarriage as an element of damage.[68] The difficulties of proof have not here been found to be insurmountable.

In general, it is more difficult causally to connect malformations with a specific factor than any other class of injuries. Despite intensive study by medical science no specific reason can be given for most malformations.[69] However, as previously detailed, if the mother was irradiated while pregnant or contracted rubella during the early months of pregnancy and an infant was subsequently born with a malformation, that malformation could be ascribed

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63. This is true not only where the injury occurs during delivery but also where a blow to the mother is alleged as the cause, for a foetus is extremely well protected and almost any blow sufficient to injure the foetus would also terminate pregnancy. The presence of some types of damage could be determined by X-ray while the child was *in utero*.

64. HERZOG, MEDICAL JURISPRUDENCE § 956 (1931); MITCHELL AND NELSON, TEXTBOOK OF PEDIATRICS 260-61 (4th ed. 1945).

65. See note 52 *supra*.

66. MITCHELL AND NELSON, TEXTBOOK OF PEDIATRICS 261 (4th ed. 1945).

67. Of course at times causal relation is quite apparent, as where labor pains and loss of amniotic fluid start soon after severe trauma, if the true facts are known. However, since many material facts are exclusively within the mind of the mother it is sometimes difficult to learn the true facts.

68. See, *e.g.*, Frye v. East St. Louis & Interurban Water Co., 294 Ill. App. 468, 14 N. E. 2d 263 (1938); Chicago v. Didier, 131 Ill. App. 406, *aff'd*, 227 Ill. 571, 81 N. E. 698 (1907); Avery v. Thompson, 117 Me. 120, 103 Atl. 4, L. R. A. 1918D, 205, Ann. Cas. 1918E, 1122 (1918); Parker v. City of St. Joseph, 71 S. W. 2d 108 (Mo. App. 1934).

with assurance to the presence of that factor.[70] Showing the presence of one of these factors would also seriously discount a plaintiff's allegation that the malformation resulted from some other cause, such as physical force.[71]

In summation, it may be said that while difficulties of proof would no doubt arise in actions for prenatal injuries those difficulties would ordinarily be no greater than in other actions which are generally allowed. Even the cause of malformations may be proved in some not-unusual circumstances. While juries might allow recovery out of ignorance or sympathy where causal relation was not reasonably proved if the decisions were completely within their discretion, the courts retain sufficient control to prevent untoward results. In most cases causal relation would have to be supported by testimony of expert medical witnesses.[72] Thus there could be no recovery unless there was a difference of opinion among experts or inconclusiveness in their testimony. Besides, courts are more prone to decide causation as a matter of law in actions where the determination depends on facts and circumstances not matters of common experience, but requiring expert testimony.[73] There would seem to be no reason why substantial justice could not be done by the strict application of rules of evidence and scientifically enlightened control by the courts. If such control is exerted there is no difficulty for it "is for the plaintiff to make out his case. If he does so there is no difficulty. If he does not there is no liability." [74]

In addition to the problems arising in connection with proof of causal relation, there are similar difficulties in proving negligence, or breach of duty. But proof of negligence does not involve difficulties which are peculiar to actions for injuries to unborn infants, and no detailed consideration need be given to them.

Assuming that an infant before birth is a legally protectible entity and that an action will lie for injuries to the body of such an infant, many other problems will arise requiring the application of old doctrines to new facts.

DUTY

The most outstanding problem, and one with which several courts denying recovery were concerned, involves an important element in the conventional

69. It is aso true, however, that great progress has been made in recent years. For discussion, see Warkany, *Etiology of Congenital Malformations,* 2 ADVANCES IN PEDIAT. 1, 49 (1947).

70. MURPHY, CONGENITAL MALFORMATIONS 111 (2d ed. 1947).

71. Mechanical force rarely leads to malformation. Gruenwald, *Mechanism of Abnormal Development,* 44 ARCH. PATH. 398, 415 (1947).

72. See Smith, *Scientific Proof,* 16 So. CALIF. L. REV. 120 (1943).

73. As an example of the different attitude of courts in determining factual causation when it depends on medical testimony and when it depends on circumstances which would be within the common experience of the jury, *compare* Berryhill v. Nichols, 171 Miss. 769, 158 So. 470 (1935), *and* Lippold v. Kidd, 126 Ore. 160, 269 Pac. 210, 59 A. L. R. 875 (1928), *with* Reynolds v. Texas & Pac. Ry., 37 La. Ann. 694 (1885).

74. 1 BEVEN, NEGLIGENCE 75 (4th ed., Byrne & Gibb, 1928).

theory of liability for negligence—existence of a duty on the part of defendant to exercise reasonable care toward the plaintiff.[75] Of course "the statement that there is or is not a duty begs the essential question—whether the plaintiff's interests are entitled to legal protection against the defendant's conduct," [76] but since most courts have adopted this device as a tool for measuring liability, prenatal injuries must meet the same tests as other injuries. Some courts have said there could be *no* duty toward an unborn infant because there was no entity *in esse* until the time of birth,[77] but such a theory is deflated by a recognition of an infant *en ventre sa mere* as a legally protectible entity. There remains the problem, however, of whether there is a duty under the particular circumstances.

Consider the carrier cases. Several courts have denied recovery in cases involving injuries negligently inflicted by public carriers while the mothers were passengers on the ground that there was no duty toward the unborn infant, since the only contract was with the mother.[78] This reasoning is not entirely sound. While it is usually stated that a carrier's duty toward its passengers arises from the contract, the statement is somewhat inaccurate. The duty arises from the undertaking and it is only incidental that the undertaking usually results from a contract.[79] Thus there is no contract with an infant in its mother's arms for whom no fare is paid, yet the carrier undertakes to perform the same services for the child as for the mother and the same duty of care exists toward both.[80] May not there then be an undertaking to carry safely unborn infants as well? True, in the case of an infant in arms the carrier knows of its presence while it does not know of the presence of an infant still in its mother's womb, but this distinction should not control. Even when pregnancy is not obvious a carrier should know that a percentage of its female passengers will be pregnant and even that some of the infants *en ventre sa mere* will be viable at the time.[81] By allowing the mother to ride a duty is assumed to the child. In view of the fact that no greater obligation of care is placed on the carrier it should make no difference whether the child is carried in the arms or in the womb. In either event there is a foreseeable plaintiff and there should be a duty to use reasonable care toward that plaintiff.

In malpractice actions even less difficulty should be encountered in es-

75. HARPER, TORTS § 68 (1933); PROSSER, TORTS § 31 (1941).

76. PROSSER, TORTS 180 (1941). See Green, *The Duty Problem in Negligence Cases,* 28 COL. L. REV. 1014, 1025 (1928), also in GREEN, JUDGE AND JURY 59 (1930).

77. "The injuries were, when inflicted, injuries to the mother . . . and defendant owed no duty of care to the unborn child . . . apart from the duty to avoid injuring the mother." Drobner v. Peters, 232 N. Y. 220, 133 N. E. 567. 568. 20 A. L. R. 1503 (1921).

78. *E.g.,* Nugent v. Brooklyn Heights R. R., 154 App. Div. 667, 139 N. Y. Supp. 367 (2d Dep't 1913), *appeal dismissed,* 209 N. Y. 515, 102 N. E. 1107 (1913); Walker v. Great Northern Ry., 28 L. R. Ir. 69 (Q. B. 1891). *But cf.* Montreal Tramways v. Leveille, [1933] Can. Sup. Ct. 456, [1933] 4 Dom. L. R. 337.

79. PROSSER, TORTS 204 (1941).

80. See 13 C. J. S., *Carriers* § 680 (1939).

81. Frey, *Injuries to Infants* en Ventre sa Mere, 12 ST. LOUIS L. REV. 85, 93 (1929).

tablishing a duty. If the accident occurs during delivery not only does the doctor know of the child when he undertakes to act but a contract could usually be made out.[82] Where the accident occurs during treatment of the mother the same result should obtain. A doctor should determine whether a woman is pregnant before giving treatment.[83]

Circumstances in which the duty is not dependent upon such an undertaking should ordinarily present no peculiar problem. For instance, one driving an automobile is under a duty to all persons within the scope of the risk he creates. If there is a duty toward the mother it would seem that there should be a duty to her unborn infant just as there would be to a child standing beside the mother and obscured from the driver's view by the mother's body.[84]

WRONGFUL DEATH

Another problem which has been present in several cases, and one which will frequently be encountered if actions for prenatal injuries are allowed, is that arising where death results from an injury to an unborn foetus. All states have statutes providing some type of recovery for wrongful death, with the type allowing a new cause of action to designated beneficiaries being the most common.[85] However, other states have statutes preserving the cause of action the decedent would have had if he had lived,[86] and some states have both types. Since recovery under either type is conditioned upon the decedent's right to have recovered for the injury,[87] no action can be maintained under either type of statute according to the majority rule. If it is held, though, that an action will lie for prenatal injuries, deaths resulting from those injuries would seem to fall within a literal interpretation of either type of statute. Peculiar problems may be presented, however.

Suppose a situation such as that in the *Verkennes* case where the foetus was viable at the time of the negligent act but because of that act the infant was stillborn. If the action was brought under a survival statute rather than a death act the problem would arise whether any damage can be suffered before birth so that a cause of action can vest.[88]

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82. *I.e.*, a third party beneficiary contract.

83. Dunlap and Smith, *Medicolegal Aspects of Injuries from Exposure to Roentgen Rays and Radioactive Substances*, 1 OCCUP. MED. 237, 287 (1946), 11 Mo. L. REV. 137, 190 (1946).

84. PROSSER, TORTS 190 (1941).

85. Actions of this type embrace two main theories of compensation: loss to surviving relatives, and loss to the estate. MCCORMICK, DAMAGES § 95 (1935); TIFFANY, DEATH BY WRONGFUL ACT c. 2 (2d ed. 1913).

86. Damages are limited to those accruing to decedent before death in many states, but some states which have no other death act allow loss to the estate as an element of damages. MCCORMICK, DAMAGES § 94 (1935); PROSSER, TORTS 956 (1941).

87. Such a result would not have been expected from the theory of those death acts creating a new cause of action, but most of those statutes were patterned after Lord Campbell's Act, which expressly conditioned recovery on the absence of a defense against the decedent. 9 & 10 VICT. c. 93 (1846).

88. This situation would seem to be analogous to that in which decedent dies instantly

Even if death resulted soon after birth there are reasons which might influence courts to deny recovery if possible. Public policy is not as strong for allowing recovery to persons injured indirectly (or perhaps not at all) as it is for allowing compensation to one who suffers actual physical injury;[89] and, as in all actions for wrongful death of infants, any damages to the estate are largely speculative[90] and it is doubtful that the family suffers any real pecuniary loss.[91] The cumulative effect of these factors, plus the already present fear of possible fraudulent and ill-founded suits based on prenatal injuries, might be to cause courts allowing recovery where the child lives to seek some method to strike down actions where death results before or soon after birth.[92] It is difficult to see how any substantial injustice would result from such a holding, but if it did legislatures could more specifically provide for actions in these cases.

The problems just discussed, and others,[93] are problems which will be encountered under any theory of actions for injuries to infants *en ventre sa mere;* but there are other problems and objections peculiar to the theory adopted by the two most recent cases—a theory ascribing personality to viable unborn infants and conditioning recovery upon viability at the time of injury.

Viability Theory

Ascribing personality to unborn infants causes immediate difficulty because an unborn infant, even if viable, is not a "person" within common understanding of the term, although it is recognized as a distinct entity. It also makes deaths of such infants, occurring even before birth, within a literal interpretation of wrongful death statutes, when allowing recovery is perhaps undesirable from the standpoint of policy.

The viability limitation is also objectionable. An obvious objection to this

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or without an interval of suffering. Some courts deny recovery under survival statutes in that type of case. *E.g.,* Great Northern Ry. v. Capital Trust Co., 242 U. S. 144, 37 Sup. Ct. 41, 61 L. Ed. 208 (1916).

89. Prosser, Torts 954 (1941).

90. This is true because so little is known as to the child's probable earning capacity at such an undeveloped stage.

91. McCormick, Damages § 101 (1935). See also Dublin and Lotka, The Money Value of a Man 50 (2d ed. 1946) (study of cost of raising a child to the age of 18).

92. One court, though arguing that recovery should be allowed if the child lived, denied recovery under a death statute. The court's reasoning was that since no action for prenatal injuries had ever been sustained at the time the statute was passed it could not be presumed that the intention of the legislature was to allow recovery for deaths resulting from such injuries. Buel v. United Rys. of St. Louis, 248 Mo. 126, 154 S. W. 71, 45 L. R. A. (N. s.) 625, Ann. Cas. 1914C, 613 (1913).

93. Contributory negligence on the part of the mother might be important in a few states which impute negligence from a parent to a child in the parent's custody. Day v. Cunningham, 125 Me. 328, 133 Atl. 855 (1926); Gallagher v. Johnson, 237 Mass. 455, 130 N. E. 174 (1921). Most states have now rejected the imputed negligence doctrine. Brennan v. Minnesota D. & W. R. R., 130 Minn. 314, 153 N. W. 611 (1915); Roanoke v. Shull, 97 Va. 419, 34 S. E. 34 (1899); see Prosser, Torts 420 (1941). Different problems arise where death results and the contributorily negligent parent is a beneficiary under a death statute. For discussion and collection of authorities, see 2 Vand. L. Rev. 722 (1949).

limitation is that all chance for recovery is denied to plaintiffs whose injuries occur before viability but whose cases may be just as meritorious, their damage just as severe, and their chances of proving causal relation often as good. Another objection is the impossibility of determining viability[94] at the time of the injury unless delivery follows soon after. The tests of viability usually employed by doctors [95] will of necessity be forsaken for a test based on the elapsed time of the gestation period. Such a test is a very rough standard at best [96] and actually determines viability with little certainty. Even if delivery followed soon after the injury problems would be presented, for a question would arise as to how long an infant must live after birth to prove viability.[97]

In spite of these objections to the viability limitation it has been supported by writers[98] on the ground that it offers a convenient method for cutting off liability for damages from injuries occurring early in pregnancy, in which causal relation is generally thought to be extremely difficult of proof.[99] However, it has been shown that in some actions for injuries of this type the burden of proof could be adequately met, and compensation should not be denied to a deserving plaintiff merely because of a rule of convenience, unless the purposes of that rule can be effectively served in no other way.[100]

These injustices and difficulties of administration inherent in the viability theory are undesirable and should be eliminated if possible. While that theory represents a courageous and progressive step it should not be accepted as a polished end-result. Consideration should be given to other possible theories.

ALTERNATIVE THEORIES

One possible theory which would eliminate some of the objections to the viability theory involves recognition of a distinct entity from the time of conception, having a potentiality of personality but not becoming a person until birth. Toward the potential person there may be a duty to exercise care with

94. The limitation is only a rule of convenience, since from a physiological standpoint there is as much a living being immediately after conception as at any other time before birth. Viability is achieved at some indefinite point in a continuous process and any rule setting a certain time in the gestation period is artificial. *See* Magnolia Coca Cola Bottling Co. v. Jordan, 124 Tex. 347, 78 S. W. 2d 944, 949, 97 A. L. R. 1513 (1935); 1 BECK, ELEMENTS OF MEDICAL JURISPRUDENCE 276 (11th ed. 1860).

95. Standards of weight and measurement, especially length, are far more reliable as tests of viability. HAYT AND HAYT, LAW OF HOSPITAL, PHYSICIAN AND PATIENT 325 (1947).

96. Not the least of its weaknesses is the impossibility of determining the time of conception in the majority of cases. HERZOG, MEDICAL JURISPRUDENCE § 956 (1931).

97. If injury and birth occurred before that stage of gestation set for viability how long would the infant have to live to rebut the presumption, or if occurring after that time how quickly would death have to follow to prove non-viability?

98. 1949 U. OF ILL. L. FORUM 537, 541 (1949); see Albertsworth, *Recognition of New Interests in the Law of Torts*, 10 CALIF. L. REV. 461, 463, 469 (1922).

99. Malformations resulting from environmental factors usually are caused before viability. See MURPHY, CONGENITAL MALFORMATIONS 100 (2d ed. 1947); Abel and Van Dellen, *The Effect of German Measles During Pregnancy*, 32 J. LAB. & CLIN. MED. 1536 (1947).

100. Might not the purposes of the rule be served by strict rules of proof and evidence in such cases?

regard to the unborn foetus, so that his body will not be tortiously impaired when he comes into enjoyment of it at birth. A prenatal tortious injury to that body would impose a conditional prospective liability on the tortfeasor. If the person subsequently came into being and suffered from the injury liability would be complete. If complete personality was never achieved there would be no liability for there would have been no damage to a person.

A somewhat similar theory was advanced in *Kine v. Zuckerman.*[101] The court there likened prenatal injuries to those which might result to an infant at or shortly after birth from a dangerous apparatus installed in the infant's home sometime before his birth by a defendant. The essence of the two theores is the same—*i.e.,* recognition of the fact that the actionable injury occurs at birth, that the injury is to a living person.[102]

Such a theory, if adopted, would allow recovery for injuries to infants *en ventre sa mere* sustained at any time from conception till birth upon their being born with a damaged body and presenting proper proof. It would also permit courts to deny recovery under wrongful death statutes at least where the infant was stillborn, and perhaps where the infant was born alive but was not viable and therefore did not survive.

Conclusion

That an infant *en ventre sa mere* is a distinct entity is a scientific, commonsense, legally recognized fact. That this entity may suffer prenatal injuries and carry those injuries into postnatal life is well known. That in many cases adequate proof of causal relation could be made has been demonstrated. That no flood of fraudulent and ill-founded suits would result from allowing such actions is proved by the experience of those jurisdictions allowing them. That an action should lie for prenatal injuries, if justice is to done, is an inescapable conclusion. The two recent cases are strong indications that this conclusion will be reached by many courts in the future. Whatever the reasons were for the holdings of the early cases on this point there appear to be no valid reasons for such holdings at the present. Courts will likely express an attitude similar to that of Mr. Justice Holmes, to the effect that "It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past." [103]

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101. 4 Pa. D. & C. 227 (1924).
102. Recognition of a right to be born with a sound body was advocated in 15 Harv. L. Rev. 313 (1901).
103. Holmes, *The Path of the Law,* 10 Harv. L. Rev. 457, 469 (1897), also in Holmes, Collected Legal Papers 187 (1920).