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Prenatal Injury: Recovery or Anomaly?

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passes by children and the dangerous propensities of his instrumentality.

From the plaintiff's viewpoint, the adoption of the restatement position will greatly facilitate the recovery of damages in cases where all the dictates of human decency require that damages be awarded. Lawyers will no longer be hampered by the necessity of proving that an instrumentality was so especially and unusually attractive to children as to constitute an implied invitation to them, nor will they be confronted with the often impossible task of proving that the dangerous instrumentality was the thing that actually lured the child onto the land in the first place. From the landowner's standpoint, the restatement position will cast upon him somewhat greater burdens in that he will have to make more effort to inform himself as to whether children will be likely to trespass, and whether they will be apt to discover the dangerous condition after they get on the land; he will also have to take into consideration ways and means of protecting such children from injury which is unreasonably threatened by dangerous instrumentalities which perchance they may not discover before trespassing.

To sum up, adoption of the restatement view on attractive nuisance should promote a much more equitable disposition of the cases than has heretofore been had in Montana.

ROBERT W. MAXWELL

PRENATAL INJURY: RECOVERY OR ANOMALY?

En ventre sa mere is a term descriptive of an unborn child. According to Black's Law Dictionary,[1] for some purposes the law regards an infant en ventre as in being. The examples given are: it may take a legacy, have a guardian, and an estate may be limited to its use. The common law, while it recognized and protected the rights and interests of an unborn child in some respects; flatly denied them in others, most obviously where a tort was concerned. The rationale most relied upon seemed to be that an unborn child was but a part of the mother, and had no existence or being which could be subject to injury. This view in the field of torts was flatly contradictory of recognition given the rights of an infant en ventre sa mere in other branches of the law.

[1]BLACK'S LAW DICTIONARY (4th ed. 1951) p. 619.

Blackstone, after declaring the right of personal security to be an absolute right, said:

> "The right of personal security consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health . . . Life is a right inherent by nature in every individual; and it begins, in contemplation of law, as soon as an infant is able to stir in the mother's womb."[2]

It is common knowledge today that such an argument, denying the existence or life of an unborn child, is fallacious. Medical science has proven that an infant en ventre sa mere is not merely part of its mother, for it can be separated from her through mischance, artificially, or in cases where the mother dies, as early as six months in its development, and remain alive as an individual. When an unborn child is harmed, and it dies, or it lives and carries the crippling marks of the injury throughout its life, is it reasonable to say that the only damage has been to the mother?

It will be the purpose of this article to point out the many ways in which the common law protected the rights of infants en ventre sa mere, to show that there is no reasonable basis for denying those rights where a tort is concerned, and to trace the recent trend in the statutes and the cases away from such a contradictory distinction.

The law has consistently recognized and protected the interests of unborn children in the field of trusts. A covenant to stand seised to the use of an unborn relative was valid at the common law.[3]

Folk v. Hughes[4] upheld the interests of beneficiaries who were as yet unborn at the creation of a trust in their favor.

One of the leading cases on this point is *Morsman v. Commissioner of Internal Avenue.*[5] The opinion explains the rule that a present trust may be created where the beneficiary is an unborn child. The child cannot take an immediate interest; but the express trust springs up when he is born. As was pointed out in *Folk v. Hughes,* such a beneficiary can enforce his right. This clearly recognizes and protects the child's interest while en ventre sa mere.

[2]Quoted from dissenting opinion in Allaire v. St. Luke's Hospital, 184 Ill. 359, 75 Am. St. Rep. 176, 48 L.R.A. 275, 56 N.E. 638 (1900).
[3]GRAY, RULE AGAINST PERPETUITIES, § 62.
[4]100 S. Car. 220, 84 S.E. 713 (1915).
[5]90 F(2d 18, 113 A.L.R. 441 (C.C. 8th, 1937) cert. denied 302 U.S. 701, 58 S.Ct. 20, 82 L.Ed. 542 (1937).

The *Restatement of Trusts*[6] approves the rule that an unborn child can be the beneficiary of a trust.

The same rights are recognized and protected in the case of *Hills v. Travelers Bank & T. Co.*[7] The Court held there that neither the presence of the attorney general of the state nor the parents of unborn children as parties to the suit for termination of a trust would afford adequate representation for unborn children so as to make a decree binding upon them.

Both at common law and under statutes, posthumous children may inherit under the laws of intestate succession, as heirs and distributees. In *Barnett v. Pinkston*,[8] the Alabama Court states the well-supported proposition that children en ventre sa mere shall be considered in esse for most purposes of property; holding that a child born two months after the death of the father was regarded in law as a 'living child' at the death of the father, and took a vested remainder.

In Montana, Section 91-417 of the Revised Codes,[9] relating to inheritance by right of representation, states that posthumous children are considered as living at the death of their parents. Under this statute, the case of *Haydon v. Normandin*[10] holds that a child unborn at the time of the death of the father is deemed to have been then living, and enjoys all the rights of inheritance conferred upon a living person.

Another section of the Montana code[11] protects the interest of a child en ventre sa mere even further, by providing that when a testator has a child born after making of his will, either in his lifetime or *after his death,* and leaves the child unmentioned and unprovided for, the child takes as if on intestacy. This is a common statutory provision. Numerous cases from other states are cited in *Corpus Juris Secundum.*[12]

Under the law of wills, it is well established that a testator may provide for children yet unborn, and their rights will be protected. This rule has been extended in many states, by statute, to include class dispositions. For example, a Montana statute provides that a child en ventre sa mere at the testator's

[6]I RESTATEMENT, TRUSTS, § 112.
[7]Hills v. Travelers Bank & T. Co., 125 Conn. 640, 7 A (2d) 652, 123 A.L.R. 1419 (1939).
[8]Barnett v. Pinkston, 238 Ala. 327, 191 So. 371 (1939).
[9]R.C.M. 1947, § 91-417.
[10]55 Mont. 539, 179 P. 460 (1919).
[11]R.C.M. 1947, § 91-135.
[12]26 C.J.S. *Descent* and *Distribution* § 45.

death, or at any period when a disposition to a class vests in right or possession, takes if within the description of the class.[13]

A quotation from Lord Coke will best illustrate the position of the common law in the criminal field:

> "If a woman be quick with child and by a potion or otherwise killeth it in her womb; or if a man beat her, whereby the child dieth in her body, and she is delivered of a dead child, this is a great misprision, and no murder; but if the child be born alive, and dieth of the potion, battery or other cause, this is murder. . . ."[14]

If life begins in the contemplation of the common law as soon as the infant stirs en ventre sa mere (Blackstone's statement supra), and the law at that time recognized the infant's right of personal security, to the extent that if it died of prior injuries after it was born, it was murder as to the wrongdoer; then it is difficult to see why the law should not equally protect the infant's right of personal security as to every injury while en ventre sa mere. It has been recognized that this distinction is not a compelling one, and legislatures in a good many states have provided appropriate penalties for the killing of an unborn child, under penal enactments. A few cases under such statutes will be cited by way of example. In *Dawson v. State*[15] the Supreme Court of Arkansas affirmed a conviction of manslaughter in the killing of an unborn child.

State v. Bassett[16] is a New Mexico decision where the defendant was granted a new trial, on evidentiary grounds, after conviction of murder in the second degree. He was convicted of killing an unborn child by abortion, under a statute making the death of *either* the child or the mother murder in the second degree. A similar statute, cited in *People v. Stahl*,[17] provides that such killing shall constitute the crime of manslaughter.

If an unborn child is to be recognized as an individual, so that his *life* is protected separately from that of his mother, is there any sound reason to flatly deny him any remedy for a tort?

The great majority of decisions, until recently at least, denied recovery in tort for prenatal injuries. To better understand the problem, it would be profitable to examine some of these holdings. One of the earliest cases, and one most relied on

[13]R.C.M. 1947, § 91-223.
[14]MIKELL, CRIMINAL LAW (3rd ed. 1933) p. 143.
Accord: Clarke v. State, 117 Ala. 1, 23 So. 671, 67 Am. St. Rep. 157 (1898); Shedd v. State, 178 Ga. 653, 173 S. E. 847 (1934).
[15]121 Ark. 211, 180 S.W. 761 (1915).
[16]26 N. Mex. 476, 194 P. 867 (1921).
[17]234 Mich. 569, 208 N.W. 685 (1926).

in denying recovery, is *Dietrich v. Inhabitants of Northampton.*[18] There, the mother fell because of a defect in the highway. She was between four and five months advanced in pregnancy, and the child did not survive its premature birth. The Court ruled that an action by an administrator for the child could not be maintained. The opinion relies on lack of precedent, stating in part:

> "No case, so far as we know, has ever decided that, if the infant survived, it could maintain an action for injuries received by it while in its mother's womb."

The Court further states that as the child was a part of its mother at the time of the injury, any damage not too remote was recoverable by her. In this connection it should be noted that the infant was not viable, that is, not so far advanced that it could live independently when separated by such an accident. The Court suggests that if there were a tort liability in such a case, the question would be whether an infant, *not yet viable,* would be a person with legal standing to be represented by an administrator. This question is not completely answered in the case.

A very recent Massachusetts decision, *Bliss v. Passanesi,*[19] denies recovery by the administrator of a deceased child for death from injuries sustained while en ventre sa mere, and for conscious suffering before death. The facts differed from the *Dietrich* case, in that here the infant was viable. The opinion discusses recent cases that have allowed recovery in similar circumstances, and concedes the strength of the grounds advanced, but also gives weight to an argument that has been presented to the contrary, that is the difficulty of reliable proof. The most significant statement, however, is this:

> "We do not intimate what our decision would be if the question were presented for the first time . . . We are not inclined to overrule the Dietrich case."

It is interesting that the court, in relying heavily on the principle of stare decisis, made no mention of the obvious difference in the two cases; the viability of the child in the *Bliss* case. Some courts have hinged recovery on this very distinction, as will be seen later.[20]

Recent specific legislation in Massachusetts has recognized the rights of infants en ventre sa mere. A 1950 amendment to

[18]138 Mass. 14, 52 Am. Rep. 242 (1884).
[19].....Mass....., 95 N.E. (2d) 206 (1950).
[20]*Infra* note 33.

the Massachusetts Workmen's Compensation Act[21] defines children as including "any children of the injured employee conceived but not born at the time of the employee's injury. . . ."

An Illinois case denying an action for injuries received before birth, and used widely as a precedent, is that of *Allaire v. St. Luke's Hospital.*[22] There the child's mother entered a hospital for maternity confinement, and was seriously injured while being taken up on a defective elevator. The child was injured in the accident, and although born alive a few days later, and about ten years old at the time of suit, was permanently and seriously crippled. The Court held that the infant, suing through his next friend, could not maintain an action. The opinion adopts the view that a child en ventre sa mere is but a part of the mother, and characterizes recognition of the unborn child in other branches of law as a legal fiction that should not be applied to negligent injury, citing the *Dietrich* case as authority. The dissenting opinion of Boggs, J. has been widely quoted by proponents of recovery, for its convincing reasoning. Boggs answers the lack of precedent:

> "An adjudicated case is not indispensable to establish a right to recover under the rules of the common law . . . New and peculiar cases must arise from time to time . . . these may either be referred to some principle previously declared, or to some one which now, for the first time, there is occasion to apply . . . 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 that plaintiff was unborn when the alleged injuries were inflicted would have operated to deny a right of action."

He goes on to point out that science has conclusively proven that a viable child, capable of separate existence, is not merely a part of the mother; and as in this case where it goes on to live in a crippled condition it is but natural justice that it should be allowed an action for its injuries just as any other person. Boggs reasons that the *Dietrich* case has no application, since there the child was not viable, and the Court did not state outright that they intended the holding to cover that situation. Many text writers have endorsed Boggs' statement of what the law should be; that when an unborn child is viable, and injured en ventre sa

[21]Laws of Massachusetts C. 152, § 32 (c) & (d), § 35 A.
[22]184 Ill. 359, 56 N.E. 638, 48 L.R.A. 225, 75 Am. St. Rep. 176 (1900).

mere, that it has a right of action for such injuries as are evident and can be proved after its birth.

In *Buel v. United Rys. Co.*[23] the Missouri Court ruled that a wrongful death statute could not have been intended to provide recovery for the death of a person after birth, caused by negligent injuries before birth; since there was no precedent at common law allowing recovery for injuries received while en ventre sa mere. The *Dietrich* and *Allaire* cases were cited, and the Court said "it is not necessary to rule upon the rationale of these decisions."

In *Drobner v. Peters*[24] the New York Court ruled that an action by an infant for prenatal injury may not be maintained at the common law. Cardozo, J. dissented. The majority opinion enumerates the instances in which an unborn child is protected by the law, in addition to those above stating that a female under sentence of death may not be executed if she is quick with child. But they decided the analogies were not controlling, and hesitated to establish a principle of liability against precedent. This Court also cited the *Dietrich* and *Allaire* cases.

Stanford v. St. Louis-San Francisco Ry. Co.,[25] in stating that the authorities are unanimous in holding that a prenatal injury affords no basis for an action in damages, cites the cases that we have examined above. The opinion further states that:

> "It may be that in a few instances hard cases may arise wherein a child may be burdened through life with an affliction produced before its birth, while, on the other hand, many cases might arise, should the rule be different, where the recovery would be based upon the merest conjecture or speculation as to whether or not the prenatal injury was the cause of the death or condition of the child."

It is the opinion of this writer that difficulty of proof should not be a valid reason for laying down a flat rule of law denying recovery under any and all circumstances. This is actually a question of evidence, and not one of tort. It would be far better to allow the injured plaintiff to present his case for what it is worth, subject to all the safeguards that have grown up in the evidentiary field, and under appropriate instructions from the court regarding the legal weight of such evidence. Actual injury is surely capable of clear medical proof, in view of the advanced state of medical science today. It is entirely practical to allow

[23]248 Mo. 126, 154 S.W. 71, 45 L.R.A.N.S. 625 (1913).
[24]232 N.Y. 220, 133 N.E. 567, 20 A.L.R. 1503 (1921).
[25]214 Ala. 611, 108 So. 566, 25 N.C.A.A. 874 (1926).

recovery only on such clear proof, and deny it where the claim is not proved. Under such circumstances, the possibility that speculative or fraudulent claims will possibly be made should not operate to deny recovery altogether, but the problem is simply one of adequate proof. This would work no hardship on the defendant, since under present procedure his experts will be allowed to examine the plaintiff, if living; and if not, then the same evidence will be available to him, substantially, as is available to the plaintiff's representative.

A very applicable analogy might be drawn here to tort recovery for mental pain and suffering. Although there has been a good deal of controversy on this point, the clear tendency of the courts today is to allow such recovery. One of the chief grounds of denial has been difficulty of proof, and this has been largely overcome by recognizing it as a question of the law of evidence, and allowing recovery in a proper case, after the evidentiary safeguards have been applied. This development is discussed in *Prosser On Torts.*[26] Mental pain and suffering offer a much greater chance for false or conjectural claims than do prenatal injuries, for the latter are physical injuries and capable of physical proof.

A Texas case,[27] decided in 1935, based its denial of damages for death of a child from prenatal injuries upon its wrongful death statute, which provided that the wrongful act must be such that, if death had not resulted, the injured party would have had an action for the injury himself. The Court went on to say that it had found no decision allowing recovery for prenatal injury, either to the child if it lived, or to the beneficiaries if it died. Recent cases, which will be discussed, have supported the proposition that there is sound basis for such recovery.

The very recent case of *Drabbels v. Skelly Oil Co.*[28] was decided under a similar wrongful death statute. There the Michigan Court held that a child born dead has no action at common law for injuries before birth; consequently no action survives to the representative under the statute. The Court said:

> "We adhere to the rule that an unborn child is a part of the mother until birth, and as such, has no juridical existence. There are cases holding that a child born *alive*[29] may maintain an action for prenatal in-

[26] PROSSER, TORTS (1941) § 34, p. 210-213.
[27] Magnolia Coca-Cola Bottling Co. v. Jordan, 124 Tex. 347, 78 S.W. (2d) 944, 97 A.L.R. 1513 (1935).
[28] .....Nebr....., 50 N.W. (2d) 229 (1951).
[29] My own italics.

juries . . . This question, however, is not before us and we leave it for determination if and when it arises."

The Restatement of Torts[80] states:

"A person who negligently causes harm to an unborn child is not liable to such child for the harm." The caveat to this section: "The Institute takes no position upon the question whether there is liability to a child hurt while unborn by a person who intentionally or recklessly and without excuse harms the mother or child."

This section is cited in *Berlin v. J. C. Penney Co.*,[81] a recent case denying recovery for injuries sustained while en ventre sa mere. Again, in *Stemmer v. Kline*,[82] the Court denies recovery for such injuries, even though the child was born alive and still living in a crippled condition. The opinion says, in part:

"We therefore willingly subscribe to the rule formulated in Restatement of the Law of Torts, Vol. 4, paragraph 869 . . . it follows that the judgment in favor of the plaintiff must be reversed."

Upon reading the applicable section of the Restatement, and the Caveat, the obvious question that comes to mind is: why the distinction? Perhaps the Institute felt that there was no duty of care in the negligent injury. In answer to such argument, it should be sufficient to point out that common knowledge tells us a great many females are or may be in the enceinte condition, and that injury to them will likely result in or include injury to the infant. Further, in a good many of the cases examined, the pregnancy was so far advanced as to be obvious, or involved treatment by a physician for that very reason. In any event, in view of recent cases allowing recovery (which will be cited *infra*), and the great amount of legal writing favoring such view, should not the Institute's rule be re-examined?

Without discussing further cases in detail, it will be seen that the usual reasons for denying recovery are lack of precedent; stare decisis; difficulty of proof with the possibility of claims based on conjecture; identity of the child with the mother and no separate being; and absence of statute providing for such recovery. These have all been discussed here to some extent, but the case of *Stemmer v. Kline supra* offers further illustration. There the defendant physician diagnosed the infant's mother as suffering from a tumor, and gave X-ray treatments over a period

[80] IV RESTATEMENT, TORTS, § 869, p. 404.
[81] 339 Pa. 547, 16 A(2d) 28 (1940).
[82] 128 N.J.L. 455, 26 A (2d) 489 (1942).

of time. The patient was actually pregnant, which available tests would have shown, but for defendant's negligence in not applying them. The plaintiff was born an idiot, without power to walk, talk, or see. The jury found these injuries to be the direct result of the negligent treatment, their finding supported by competent evidence. In such a case, should the Court feel strictly bound by stare decisis and lack of precedent for recovery, without a searching inquiry into the merits of the action and the great injustice of its decision? It is submitted that the six Justices who disagreed with the majority on the point involved herein took the better view of the function of the law. Where fundamental justice can only be done by allowing recovery, and that can be accomplished by applying established principles in a logical fashion, then the courts should not feel that they are foreclosed by the lack of precedent on the particular facts.

Before turning to a consideration of the recent cases allowing recovery, it might be worthwhile to examine *Lipps v. Milwaukee Electric Ry. & Light Co.*,[23] a Wisconsin case. There, in denying recovery for injuries suffered while en ventre sa mere, at about five months development, the Court said:

> "We go no further than the facts of the case require, and hold that no cause of action accrues to an infant en ventre sa mere for injuries received *before it could be born viable.* Very cogent reasons may be urged for a contrary rule where the infant is viable . . . As to such cases we express no opinion."

In view of such a decision, confined strictly to the facts involved, one wonders whether the *Dietrich* case has not been cited for more than was intended in that holding. In a great majority of cases examined, the *Dietrich* case was cited for the rule that there simply is no such cause of action at the common law, and many of the subsequent cases so citing it have been altogether different in their factual situations.

The Court in the *Lipps* case disposes of the analogy between other branches of the law in recognizing infants en ventre sa mere, together with medical recognition of the separate entity, in these words:

> "The law cannot always be scientific or technically correct. It must often content itself with being merely practical."

It is the contention of this article that in allowing recovery,

[23]164 Wis. 272, 159 N.W. 916 (1916).

the law would be both technically correct and overwhelmingly practical.

The case of *Montreal Tramways v. Leveille*,[84] although a Canadian decision, is of interest on the problem. There the Court held that an infant who was injured while en ventre sa mere, through the negligence of another, and survived, could recover for such injuries. To the contention that an unborn child was but part of the mother, without separate existence, the opinion answered that under the civil law, a conceived but unborn child is regarded as already existing for all purposes to its benefit. Citing early common law acceptance of this proposition in the law of Wills, the Court suggests that those judges considered the rule to be of general application. In regard to the criminal field, the opinion says:

> "If the law recognizes the separate existence of the unborn child sufficiently to punish the crime, it is difficult to see why it should not also recognize its separate existence for the purpose of redressing the tort. . . ."

Holding the civil law rule to be of general application, and the unborn infant an existing person in the eyes of the law at the time of the injury, recovery was allowed.

The case of *Cooper v. Blanck*,[85] decided under the civil law of Louisiana, awarded damages to the parents of a child who died three days after birth from prenatal injuries, both for the death of the child and for the child's suffering. The Court interpreted a wrongful death statute as including infants en ventre sa mere, holding that another statute, declaring that children in the mother's womb are considered as already born, is sweeping and not restricted to property rights in succession. On the question of damages, the Court said:

> "Mere difficulty in assessing damages resulting from a wrongful act does not prevent an award."

In 1946, the Federal District Court for the District of Columbia sustained an action for prenatal injuries in the absence of statute creating such a right.[86] The child was injured through malpractice while in the process of removal from its mother's womb, and demonstrated its viability by surviving. The Court discusses the *Dietrich* decision at some length, but does not find it controlling, especially in view of the fact that the infant

[84]1933 Can. S. Ct. 456, 4 D.L.R. 337 (1933).
[85]39 So. (2d) 352 (1923).
[86]Bonbrest v. Kotz, 65 F. Supp. 138 (D.C. 1946).

there was nonviable. The opinion answers the absence of precedent in these words:

> "The absence of precedent should afford no refuge to those who by their wrongful act, if such be proved, have invaded the right of an individual. . . . What right is more inherent, and more sacrosanct, than that of the individual in his possession and enjoyment of his life, his limbs and his body?"

In the case of *Tucker v. Howard L. Carmichael & Sons Inc.*,[37] the Georgia Court held that an infant could maintain an action for prenatal injuries, suffered through the negligent driving of an ambulance in which his mother was a passenger. The opinion says that it would be illogical, unrealistic, and unjust for the law to withhold processes to protect the person of an unborn child, while at the same time protecting his property rights. In the Court's decision it is said:

> ". . . We are satisfied that, without any legislative action, courts of Georgia have the authority now, based upon the common law, to grant such relief. . . ."

Damasiewicz v. Gorsuch[38] held that a child who was injured while en ventre sa mere, and born prematurely and blind because of the accident, was entitled to recover for the injury if it were shown to be negligent. The Maryland Court discusses the authority on this subject exhaustively, coming to the conclusion that recovery is justified, and that this view is fully supported by modern medical knowledge and by recent cases, "We are determining now what the common law of Maryland always has been."

The most recent case on this point is *Woods v. Lancet*,[39] holding that an unborn child injured while viable, is entitled to recover for such injury after birth. This case expressly overrules the prior New York decision in *Drobner v. Peters* (discussed *supra*). The opinion reviews the present state of the decisions, and sums up the question thus:

> "Shall we follow *Drobner v. Peters*, or shall we bring the common law of this State, on this question, into accord with justice? . . . We should make the law conform to right."

A recent Minnesota decision added to those jurisdictions allowing recovery. In *Verkennes v. Corniea*,[40] the personal repre-

[37] 208 Ga. 201, 65 S.E. (2d) 909 (1951).
[38] .....Md....., 79 A (2d) 550 (1951).
[39] .....App. Div....., 102 N.E. (2d) 691 (1951).
[40] .....Minn....., 38 N.W. (2d) 838 (1949).

sentative of an unborn child alleged to have been viable at the time of its death through negligent injury, was held to have an action under the wrongful death statute. The statute provided, in effect, that when death is caused by a wrongful act or omission, the representative of decedent may maintain an action if the decedent, had he lived, could have sued for injury from the same act. In allowing the action, the Court endorses the holding in the *Bonbrest* case.

Section 16 of Article I of the Constitution of Ohio requires that:

> "All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law. . . ."

In *Willaims v. Marion Rapid Transit, Inc.*[41] the Supreme Court of Ohio held that injuries wrongfully inflicted upon an unborn viable child are injuries done him in his person, within this provision, and after birth he may maintain an action to recover damages. The Court reasoned that to hold that a child has no existence in law until birth would be depriving it of a right conferred by the State Constitution, by the use of a fiction not founded on fact and within common knowledge untrue and unjustified. This Ohio decision was followed in 1950 by another Ohio case, that of *Jasinsky v. Potts.*[42] This case is very similar to the *Verkennes* case, in that it involved a wrongful death statute substantially the same as that of Minnesota. The Court held that under such statute, the administrator of a child who was injured while en ventre sa mere, and died subsequently to birth, could maintain an action for such wrongful death.

The California Code[43] provides that:

> "A child conceived, but not yet born, is to be deemed an existing person, so far as may be necessary for its interests in the event of its subsequent birth."

In *Scott v. McPheeters*[44] this code provision was construed, and the word *interests* held to include the right to maintain an action for a tort committed upon a child before its birth. After reviewing the problem, the Court decided that such interpretation was not based on a fiction, but upon the established and recognized fact that an unborn viable child is a being separate and distinct from its mother.

[41]152 Ohio St. 114, 87 N.E. (2d) 334 (1949).
[42]153 Ohio St. 529, 92 N.E. (2d) 809 (1950).
[43]Civil Code of Cal. § 29.
[44]33 Cal. App. (2d) 629, 92 P(2d) 678, rehearing denied 33 Cal. App. (2d) 640, 93 P(2d) 562 (1939).

The only Montana decision concerned with injury to an unborn child is the case of *Hosty v. Moulton Water Co.*[45] This case has been cited in support of the proposition that recovery cannot be had for the death of an unborn child, at the suit of the mother.[46] A careful reading of the opinion leaves considerable doubt that this question was fully considered. The complaint charged that, through negligence of the defendant, plaintiff was so injured and mentally disturbed that, being pregnant, she lost her child and became sick, and on that account suffered great pain and injury. The defendant filed a general and special demurrer, the latter for uncertainty. The trial court sustained both demurrers, and plaintiff did not amend. The trial court then ordered judgment against the plaintiff "upon the merits" and entered judgment dismissing the complaint. On appeal, the Montana Supreme Court ruled that the special demurrer was properly sustained, but did not pass upon the merits because of the uncertainty of the complaint. The District Court judgment was affirmed, but modified by striking the words "upon the merits" from the judgment.

However, the Montana Code[47] contains a provision identical to the California statute cited above, declaring an unborn child to be an existing person, so far as necessary for its interests in the event of its subsequent birth. This statute has never been construed by the Montana Court. But in view of the present day decisions on this problem, and the construction placed on the identical provision by the California Court, it is likely that the question will be decided in favor of recovery when it arises in Montana.

ROBERT BENSON

PERIODICAL ALIMONY OR SUPPORT DECREES AS LIENS PER SE ON REALTY

This comment considers the effect in Montana of a properly docketed decree for permanent periodic alimony or support payments automatically becoming a lien on real property of the husband. Alimony payments in gross, temporary alimony payments, and decrees providing in themselves for the imposition of a lien as security, are not included within this discussion.

The rule expressed in most states is that, although the court may create a lien on the defendants' real estate as part of the

[45]39 Mont. 310, 102 P 568 (1909).
[46]10 A.L.R. (2d) *Death* § 2, p. 640.
[47]R.C.M. 1947, § 64-103.