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# TORTS-BREACH OF DUTY-RIGHT TO RECOVER FOR PRENATAL INJURIES

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TORTS—BREACH OF DUTY—RIGHT TO RECOVER FOR PRENATAL INJURIES—Plaintiff, as administrator, brought an action to recover for the death and conscious suffering of plaintiff's intestate, allegedly injured, while a viable child within her mother's womb, by the tortious act of the defendant. Defendant's demurrer to the declaration was sustained. On appeal, *held,* affirmed. Neither the infant nor its personal representative has a cause of action for prenatal personal injuries. *Bliss v. Passanesi,* (Mass. 1950) 95 N.E. (2d) 206.

The degree to which the law recognizes an infant *en ventre sa mère* as a separate human entity depends upon the nature of the action which is brought. It is well settled that an unborn child may take property by will or by descent, if it is afterwards born, and if the acquisition is for the direct benefit of the child.[1] In criminal matters such a child has long been considered a person for many purposes, both at common law and by statute.[2] Thus, if a child is born alive but dies because of an unlawful beating of the mother before his birth, the act constitutes culpable homicide.[3] Moreover, numerous cases have held under wrongful death statutes that a child, though unborn at the time of the tortious act, may recover for the wrongful death of his parent.[4] However, where recovery has been sought for personal injuries sustained by an infant before birth, the existence of a right of action has generally been denied.[5] In spite of the fact that this result has been severely criticized,[6] and that medical authorities have long recognized that independent existence begins before birth and even

[1] Barnett v. Pinkston, 238 Ala. 327, 191 S. 371 (1939); Deal v. Sexton, 144 N.C. 157, 56 S.E. 691 (1907); In re Wells' Will, 129 Misc, 447, 221 N.Y.S. 714 (1927); 57 AM. JUR., Wills §§154, 1367, 1384 (1948); 16 AM. JUR., Descent and Distribution §80 (1938).

[2] Winfield, "The Unborn Child," 4 TORONTO L.J. 278 (1942), reprinted in 8 CAMB. L.J. 76 (1942); Clarke v. State, 117 Ala. 1, 23 S. 671 (1898); State v. Walters, 199 Wis. 68, 225 N.W. 167 (1929).

[3] Morgan v. State, 148 Tenn. 417, 256 S.W. 433 (1923); Clarke v. State, supra note 2.

[4] The George and Richard, 3 Adm. and Eccl. 466 (1871); Bonnarens v. Lead Belt Ry. Co., 309 Mo. 65, 273 S.W. 1043 (1925); Herndon v. St. Louis and San Francisco R. Co., 37 Okla. 256, 128 P. 727 (1912).

[5] 4 TORTS RESTATEMENT §869 (1939). Dietrich v. Northampton, 138 Mass. 14 (1884) appears to be the first case in which the problem was presented in an English or American court. See Drobner v. Peters, 232 N.Y. 220, 133 N.E. 567 (1921). The cases are collected in 10 A.L.R. (2d) 1059 (1950). The rule bars recovery by the child himself; Allaire v. St. Luke's Hospital, 184 Ill. 359, 56 N.E. 638 (1900); Berlin v. J. C. Penney Co., 339 Pa. 547, 16 A. (2d) 28 (1940). It also bars recovery by the personal representative or statutory beneficiary under a survival or wrongful death act, since either expressly or by implication a condition of recovery under such statutes is that the decedent must have had a cause of action had he lived. PROSSER, TORTS 949 (1941), 16 AM. JUR., Death §75 (1938); Newman v. Detroit, 281 Mich. 60, 274 N.W. 710 (1937); Gorman v. Budlong, 23 R.I. 169, 49 A. 704 (1901).

[6] PROSSER, TORTS 184 (1941); Frey, "Injuries to Infants en Ventre Sa Mère," 12 ST. LOUIS L. REV. 85 (1927); Muse and Spinella, "Right of Infant to Recover for Prenatal Injury," 36 VA. L. REV. 611 (1950). See also the often-cited dissenting opinion of Boggs, J., in Allaire v. St. Luke's Hospital, supra note 5.

at conception,[7] prior to 1949 no American court of last resort had permitted recovery, in the absence of statute.[8] When the Supreme Courts of Minnesota and Ohio in that year determined that the action would lie, at least where the injury occurred when the child was viable, it seemed probable that the course of decision would change.[9] However, in the principal case the Massachusetts court, originator of the doctrine in *Dietrich v. Northampton*,[10] unfortunately reaffirms its earlier position and extends the rule beyond the *Dietrich* case, since in that case the child was not viable at the time the injury was sustained. The various reasons that have been used to support the majority doctrine are in three classes: (1) That the child is part of the mother, therefore not a person to whom a duty is owed, (2) That prior cases have denied recovery, and (3) That the causal connection between the tort and the subsequent affliction cannot be adequately established, and hence recognition of the right of action would offer opportunity for fictitious claims. It is submitted that the first and second of these reasons should be of little significance. To deny personality to the child is to ignore biologic fact and the law of property and crimes, and the principle of stare decisis or the weight of precedent should not prevent the law's keeping pace with scientific advances.[11] The difficulty of proving the causal connection between the tortious act and the subsequent physical defect is a serious obstacle, and has probably been unduly minimized by advocates of the minority rule. However, it would not appear to justify complete denial of the right of action, since in many instances the connection may be established beyond question.[12] On the other hand, if the right of action is recognized, the

[7] PATTEN, HUMAN EMBRYOLOGY 181 (1946); GREISHEIMER, PHYSIOLOGY AND ANATOMY, 6th ed., 734 (1950).

[8] Statutes were in large measure the basis of recovery in Cooper v. Blanck, (La. App. 1923) 39 S. (2d) 352 and Scott v. McPheeters, 23 Cal. App. (2d) 629, 92 P. (2d) 678 (1939).

[9] In Williams v. Marion Rapid Transit, Inc., 152 Ohio St. 114, 87 N.E. (2d) 334 (1949) the court held that the word "person" in Art. I, §16, Ohio Constitution (1912), guaranteeing a remedy to every person injured through the fault of another, included an unborn child and on that basis reversed the order sustaining a demurrer to plaintiff's complaint. Plaintiff was viable at the time of the accident and was born with physical defects. As noted in 48 MICH. L. REV. 539 (1950) this constitutional point is not sufficient to distinguish the case from prior decisions. See also Jasinsky v. Potts, 153 Ohio St. 529, 92 N.E. (2d) 809 (1950). In Verkennes v. Corniea, 229 Minn. 365, 38 N.W. (2d) 838 (1949) it was held that the administrator of the estate of an unborn viable child which died before birth could maintain an action for its wrongful death. See 10 A.L.R. (2d) 639 (1950). See also Bonbrest v. Kotz, (D.C. D.C. 1946) 65 F. Supp. 138.

[10] 138 Mass. 14 (1884).

[11] Bonbrest v. Kotz, supra note 9, at 140; Barry, "The Child en Ventre Sa Mère," 14 AUST. L.J. 351 (1941); Winfield, "The Unborn Child," 4 TORONTO L.J. 278 (1942), reprinted in 8 CAMB. L.J. 76 (1942).

[12] See Montreal Tramways v. Leveille, [1933] 4 D.L.R. 337, one of the few cases of those recognizing the cause of action in which the issue of proof was presented after trial rather than by demurrer. Many writers have tended to dispose of the difficulty summarily;

effect of the mother's contributory negligence, and the degree to which compensation for torts other than those involving physical injury should be available, are serious problems yet to be determined.[13] Moreover, the viability rule does not seem completely satisfactory, since the age of viability is by no means fixed.[14] Despite these difficulties, however, on principles of natural justice the rule of the Ohio and Minnesota courts seems far preferable to that followed in the principal case.

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PROSSER, TORTS 189 (1941); Frey, "Injuries to Infants en Ventre Sa Mère," 12 ST. LOUIS L. REV. 85 (1927). Winfield notes, referring to cases where injury precedes birth by a substantial period of time: "As I have indicated, such members of the medical profession as I have sounded on the question were of opinion that in general no one can positively and truthfully assert in such a case that there is a pathological connexion between the prenatal injury and postnatal affliction." Winfield, "The Unborn Child," 4 TORONTO L.J. 278 at 293 (1942), reprinted in 8 CAMB. L. J. 76 (1942). But see MALOY, LEGAL ANATOMY AND SURGERY 685, 686 (1930); the author clearly indicates that the connection may be established.

[13] These and other problems are discussed in 35 VA. L. REV. 618 (1949); Anderson, "Rights of Action of an Unborn Child," 14 TENN. L. REV. 151 (1936). The principal case is noted in 31 BOST. UNIV. L. REV. 104 (1951).

[14] A viable foetus is one sufficiently developed for extra-uterine existence; DORLAND, AMER. ILLUS. MEDICAL DICTIONARY, 21st ed., 1616 (1947). That the age of viability is uncertain appears from the table in 3 WHARTON AND STILLES', MEDICAL JURISPRUDENCE, 5th ed., 38 (1905); see ANGELES, LEGAL MEDICINE 463-465 (1934). In addition, the viability limitation, apparently a remnant of the "no separate existence" philosophy, may in many cases be unjust. See editorial comment in 10 A.L.R. (2d) 1059; Muse and Spinella, "Right of Infant to Recover for Prenatal Injury," 36 VA. L. REV. 611 (1950). Compare Lipps v. Milwaukee Electric Ry. and Light Co., 164 Wis. 272, 159 N.W. 916 (1916). Allowing recovery under a wrongful death act where the child is stillborn, the result in Verkennes v. Corniea, supra note 9, is criticized in 63 HARV. L. REV. 173 (1949) but would appear to be within the philosophy of the wrongful death statutes; see PROSSER, TORTS 961 (1941).