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TORTS - PRENATAL INJURIES TO INFANTS

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TORTS — PRENATAL INJURIES TO INFANTS — This was an action by the administrator under the survival act.[1] Decedent's mother while a passenger on the defendant's street-car was injured through negligence of an employee. Decedent thus suffered prenatal injuries to his skull from which he died three months after birth. The birth occurred 22 days after the accident and after a normal period of gestation. *Held*, there is no liability to an infant for prenatal injuries and therefore no cause of action existed in the child or survives to the administrator. *Newman v. City of Detroit*, 281 Mich. 60, 274 N. W. 710 (1937).

In the law of property, the principle is well established that a child may be considered in existence during the period of gestation if so to consider him is necessary to protect his rights.[2] This principle rests not merely on construction of the language of a statute of distribution or a will,[3] but rather upon a fictitious relation back of his existence. It may be carried so far as to give the unborn child through his guardian the right to enjoin waste [4] or to take the benefit of a workmen's compensation proceeding.[5] In criminal law similarly protection

[1] 3 Mich. Comp. Laws (1929), § 14040. Note that the Death Act, 3 Mich. Comp. Laws (1929), §§ 14061-14062, contains a prerequisite with the same ultimate effect, that the deceased must have had a right of action. While the early case of Dietrich v. Northampton, 138 Mass. 14 (1884), stressed the effect of the statute, and whether the infant was a person within its meaning, the later cases go to the more basic question of the right of action of the infant.

[2] For descent and distribution, see the express statutory enactment. 3 Mich. Comp. Laws (1929), § 13452. See also 20 HARV. L. REV. 651 (1907) and 16 HARV. L. REV. 601 (1903).

[3] See 26 HARV. L. REV. 638 (1913), stressing this basis. 3 Mich. Comp. Laws (1929), §§ 12950-12951, requires this interpretation in the construction of language creating remainders. McLain v. Howald, 120 Mich. 274, 79 N. W. 182 (1899), covers an analogous situation.

[4] Musgrave v. Parry, 2 Vern. 710, 23 Eng. Rep. 1067 (1715).

[5] King v. Peninsular Portland Cement Co., 216 Mich. 335, 185 N. W. 858 (1921). Cases are collected in 100 A. L. R. 1085 at 1090 (1936) and previous annotations.

is given to the child *en ventre sa mère* to the extent that homicide charges may be based upon prenatal injuries.[6] In tort law, however, the Michigan court has added its ratification to an almost unanimous line of authority in denying any tort liability for prenatal injuries.[7] Despite suggestions that the child should have an action for injuries sustained while it is capable of a separate existence [8] or at any time during the period of gestation,[9] the law has denied that any duty is owed prior to actual existence.[10] Contrast of the tort result with the rules mentioned above leads to the paradoxes that the child's property is protected while his bodily integrity is not and that an injury to him may be a murder

[6] The common law required that the child be born alive. 1 WHARTON, CRIMINAL LAW, 12th ed., § 573 (1932); 13 HARV. L. REV. 521 (1900). In the Michigan criminal code the requirement that the child be born alive is evidently removed. Injuries are limited to those inflicted after the child is quick. Mich. Comp. Laws (Mason's Supp. 1935), §§ 17115-322, 17115-323, superseding 3 Mich. Comp. Laws (1929), §§ 16739-16740. At common law abortion was limited to the destruction of a quick child. People v. McDowell, 63 Mich. 229, 30 N. W. 68 (1886). The present statute has removed this limitation. Mich. Comp. Laws (Mason's Supp. 1935), § 17115-14, superseding 3 Mich. Comp. Laws (1929), § 16741. People v. Abbott, 116 Mich. 263, 74 N. W. 529 (1898).

[7] Some of the cases based on similar facts have gone off on the narrower ground that no relation of carrier and passenger existed between the defendant and the child. Nugent v. Brooklyn Heights R. R., 154 App. Div. 667, 139 N. Y. S. 367 (1913), following Walker v. Great Northern R. R., 28 Ir. L. R. (Q. B.) 69 (1891). Cases discussed in 11 MICH. L. REV. 528 (1912) and 1 BEVEN, NEGLIGENCE, 4th ed., 73-76 (1928).

[8] The argument put forth in the dissenting opinion of Boggs, J., in Allaire v. St. Lukes Hospital, 184 Ill. 359, 56 N. E. 638 (1900), has been frequently cited. Note how this distinction is embodied in the Michigan criminal code, note 6 supra.

[9] Anderson, "Rights of Action of an Unborn Child," 14 TENN. L. REV. 151 (1936). The civil law holds in accordance with this suggestion. Montreal Tramways Co. v. Léveillé, [1933] Can. L. Rep. (S. Ct.) 456. The case is similar to the principal case in discussing the general tort duty rather than the carrier-passenger relation referred to in note 7, supra.

The only case to be found at common law in accordance is Kine v. Zuckerman, 4 Pa. D. & C. 227 (1924). A decision of the New York lower courts in accord, Drobner v. Peters, (Sup. Ct. 1920) 184 N. Y. S. 337, 194 App. Div. 696, 186 N. Y. S. 278 (1921), was reversed on appeal in 232 N. Y. 220, 133 N. E. 567 (1921), Cardozo, J., dissenting without opinion. As an alternative to the fictitious existence theory of property law, the theory used for this result is based on identifying the completed tort with the moment of birth. The right to a sound body at birth is postulated [15 HARV. L. REV. 313 (1901)] and the fact that the train of action was started some time earlier need not deny the causal relation. The logic of this theory is tested in 34 HARV. L. REV. 549 at 551 (1921) by the suggestion that the act might be an injury to the mother prior to conception which results in a deformed child. The writer suggests that causation is too remote. The cases deny recovery on the basis of no duty.

[10] The subject of this note is discussed in 44 YALE L. J. 1468 (1935); 19 MICH. L. REV. 753 (1921); and 1 MICH. L. REV. 138 (1902). See also cases collected in 97 A. L. R. 1513 at 1524 (1935), 20 A. L. R. 1503 at 1505 (1922) and earlier annotations.

but not a private wrong. The reason for this apparent contradiction rests in a sound consideration of administrative justice. The law refuses to allow the action because the medical evidence of connection of the injury to the act is so speculative that fraud and perjury would be used to manufacture cases.[11] Despite criticism of the doctrine, therefore, which stresses the uncompensated wrong, the doctrine seems well-established and likely so to remain until medical science and embryology surpass in certainty anything known at present. Meanwhile some recovery is allowed through the mother's right of action for injury to the child as a part of her body.[12] Damages so far as they reflect mental anguish [13] remain difficult of satisfactory proof; yet inasmuch as they are only one item incidental to the recovery, the whole cause of action does not, as in the principal case, rest upon a speculative assertion of causal connection.[14]

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[11] This reason is discussed in the leading case of Walker v. Great Northern R. R., 28 Ir. L. R. (Q. B.) 69 (1891), and 44 YALE L. J. 1468 (1935), suggesting the impossibility of proving the cause of epileptic fits. Note that this element is not present at all in the property law. In criminal law public prosecution must be depended upon to reject trumped-up charges.

[12] Prescott v. Robinson, 74 N. H. 460, 69 A. 522 (1908), and the cases collected in the annotation 17 L. R. A. (N. S.) 594 (1909), fully discuss the elements of the mother's recovery.

[13] Worry to be recoverable must be reasonable. See 21 MICH. L. REV. 464 (1923). Nevala v. Ironwood, 232 Mich. 316, 205 N. W. 93 (1925), rejected damages for fear of miscarriage or of a deformed child when the injury to the mother was a broken leg. Such a decision does not seem to deny all recovery but only to hold that this worry was unreasonable under the circumstances.

[14] See the cases on fright for an analogous situation in which damages for this element may be an incident in recovery after a negligent "impact" but standing alone will not be the basis for a cause of action. Nelson v. Crawford, 122 Mich. 466, 81 N. W. 335 (1899). See generally, Goodrich, "Emotional Disturbance as Legal Damage," 20 MICH. L. REV. 497 (1922), especially at p. 504, for a discussion of the dangers of proof.