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## TORTS-RIGHT OF INFANT TO RECOVER FOR PRE-NATAL INJURIES

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TORTS—RIGHT OF INFANT TO RECOVER FOR PRE-NATAL INJURIES—Plaintiff's mother, while pregnant with plaintiff, a viable child, was fatally injured in a fall from the steps of defendant's bus. Plaintiff was seriously injured by the fall and was born prematurely. On demurrer to plaintiff's petition, *held*, plaintiff had a remedy under the Constitution of Ohio<sup>1</sup> for pre-natal injuries negligently inflicted. *Williams v. The Marion Rapid Transit, Inc.*, 152 Ohio St. 114, 87 N.E. (2d) 334 (1949).

Generally, the law considers unborn children to be legal persons for purposes beneficial to them, provided they are subsequently born alive.<sup>2</sup> However, in the

<sup>1</sup> Ohio Const. (1851), Art. I, §16.

<sup>2</sup> Winfield, "The Unborn Child," 8 *CAMB. L.J.* 76 (1942); *Drobner v. Peters*, 186 N.Y.S. 278, 194 A.D. 696 (1921); Principal case at 336. This was characterized a legal fiction in *Drobner v. Peters*, 232 N.Y. 220, 133 N.E. 567 (1921); 52 *AM. JUR.*, Torts §98.

absence of statute, most courts deny an action to infants for negligent pre-natal injuries.<sup>3</sup> The reason usually given is that the child does not exist until birth; therefore, no duty is owed to a non-existent person. But medical science has long recognized that embryos have an independent existence from the moment of conception,<sup>4</sup> and property law and criminal law generally regard the child as a human being at that time.<sup>5</sup> Clearly, denial of an action on the ground that the unborn child does not exist until birth is unrealistic as well as inconsistent. Because of this, some recent cases, including the principal case, have held that an unborn child has a legally protected right to be free from tortious injuries, but only after the time when it becomes viable.<sup>6</sup> An obvious disadvantage of this result would seem to be the practical difficulty of determining just when the change in status from embryo to viable fetus occurs.<sup>7</sup> Nor do these decisions harmonize the differing theories of tort law, criminal law, and property law concerning when legal rights are imputed to the unborn child, except perhaps by equating viability to the old concept of "quickening" of the criminal law.<sup>8</sup> However, the viability rule can be explained by granting that the child exists legally from conception, but at the same time holding that any risk to the child is not unreasonable until it becomes viable; that no duty to use due care owing to the child arises until that time. It seems quite probable, in fact, that the ordinary reasonable man is doubly careful toward a woman who is obviously pregnant.<sup>9</sup>

<sup>3</sup> 52 AM. JUR., Torts §98; PROSSER, Torts 188-190 (1941); 4 TORTS RESTATEMENT §869 (1939); *Dietrich v. Northampton*, 138 Mass. 14 (1884); *Drobner v. Peters*, supra, note 2, 20 A.L.R. 1505 (1921).

<sup>4</sup> *Bonbrest v. Kotz*, (D.C. D.C. 1946) 65 F. Supp. 138 at 140; PATTEN, HUMAN EMBRYOLOGY 181 (1946); GREISHHEIMER, PHYSIOLOGY AND ANATOMY, 5th ed., 738 (1945).

<sup>5</sup> *Bonbrest v. Kotz*, supra, note 4, at 140. See also 27 AM. JUR., Infants §3; *Drobner v. Peters*, supra, note 3. But under Texas criminal statutes a child has no independent existence until birth. See *Magnolia Coca Cola Bottling Co. v. Jordan*, 124 Tex. 347, 78 S.W. (2d) 944, 97 A.L.R. 1512 (1935).

<sup>6</sup> *Bonbrest v. Kotz*, supra, note 4; *Verkennes v. Corniea*, (Minn. 1949) 38 N.W. (2d) 838. "Viable" here means, "capable of living; physically fitted to live; a fetus having reached a stage of development to permit continued existence, under normal conditions, outside the womb." Principal case at 117. See also, DORLAND, AMERICAN ILLUSTRATED MEDICAL DICTIONARY, 20th ed., 1625 (1944). Statutes, however, begin the legal existence of the child at conception, as in *Cooper v. Blanck*, (La. 1923, published 1949) 39 S. (2d) 352; and *Scott v. McPheeters*, 33 Cal. App. (2d) 629, 92 P. (2d) 678 (1939), hearing den. 93 P. (2d) 562 (1939).

<sup>7</sup> See ANGELES, LEGAL MEDICINE 463-465 (1934); EMERSON, LEGAL MEDICINE AND TOXICOLOGY 173-174 (1909). Usually this problem of proof does not face the courts because the cases are decided on demurrer to the complaint. *Magnolia Coca Cola Bottling Co. v. Jordan*, supra, note 5, suggests this difficulty as one factor in denying an action to the infant.

<sup>8</sup> See Barry, "The Child en Ventre à Mere," 14 AUST. L.J. 351 (1941).

<sup>9</sup> Ordinarily, the pregnancy would be obvious since viability seldom occurs very long before the seventh month of pregnancy. See ANGELES, LEGAL MEDICINE 464 (1934). But actual knowledge of the existence of the plaintiff is not essential to fix the defendant with liability for his negligence. Barry, "The Child en Ventre à Mere," 14 AUST. L.J. 351 (1941). Nonetheless, one court thought that the conscious care of a reasonable man is only toward the pregnant mother. See *Magnolia v. Coca Cola Bottling Co. v. Jordan*, supra, note 5.

A legal standard requiring this degree of care is neither irrational nor unjust. Nor is the scope of the "duty" concept so sacrosanct as to preclude this judicial policy.<sup>10</sup> The court in the principal case deals with the problem in terms of the "right of action" of the infant, but the ultimate inquiry, nonetheless, is whether the unborn child has an interest which the law will protect; in this situation the terminology of "duty" or "right of action" merely phrases the conclusion in different terms. The principal case is decided on the narrow ground that a viable child *en ventre sa mere* is a "person" within the meaning of the Constitution of Ohio which guarantees a remedy for personal injuries to every person.<sup>11</sup> However, the existence of the constitutional provision does not distinguish this case from previous decisions which have reached the opposite result.<sup>12</sup> Nor should the reasoning obscure the important fact that the court is actually deciding that a negligent physical injury to this "person" is a wrong which the law will recognize.<sup>13</sup> The court rejects a reason heavily relied on in earlier decisions, that difficulty of proof of the cause of pre-natal injury may lead to fraudulent claims, by suggesting that modern advances in medical science have reduced the importance of this hazard.<sup>14</sup> Moreover, the law can cope adequately with uncertainties of proof, as it has in similar instances, through procedural requirements.<sup>15</sup> Statutes have aided some courts in reaching the same result as the principal case,<sup>16</sup> but widespread legislative solution to this problem seems unlikely. It is probable that other courts will follow the lead of the principal case without the aid of statutes.<sup>17</sup>

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<sup>10</sup> See PROSSER, TORTS 180 (1941).

<sup>11</sup> Ohio Const. (1851) Art. I, §16: ". . . 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. . . ."

<sup>12</sup> Cf. Mass. Const. (1780) Art. 11; Ill. Const. (1870) Art. 2, §19; N.Y. Civil Rights Law (McKinney, 1948) §10. See also the Fourteenth Amendment and 8 U.S.C. (1946) §41.

<sup>13</sup> The principal case is the first decision by a court of last resort allowing this action in the absence of statute.

<sup>14</sup> Principal case at 126. It seems unfair to deny plaintiff the opportunity to try to prove his case because it will be difficult to do so. See *Scott v. McPheeters*, supra, note 6.

<sup>15</sup> See PROSSER, TORTS 189 (1941); *Kine v. Zuckerman*, 4 Pa. D. & C. 227 at 229 (1924).

<sup>16</sup> See note 6, supra. See also *Montreal Tramways v. LeVeille*, (S.Ct. Can., 1933) 4 D.L.R. 337.

<sup>17</sup> The Minnesota court reached the same result in an action for wrongful death, even though the child died undelivered, apparently abrogating the general requirement that the child be born alive before any rights vest. *Verkennes v. Cornica*, supra, note 6. This result is justified under the basic assumption of the viability theory that the infant becomes a human individual, in fact, before its separation from the mother. Furthermore, many injuries occur during delivery of the child and it would seem unduly arbitrary to hinge a right of action on whether the child dies before or after delivery is completed. But cf. 63 HARV. L. REV. 173 (1949).