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NEGLIGENCE-RIGHT TO RECOVER FOR PRE-NATAL INJURIE

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NEGLIGENCE—RIGHT TO RECOVER FOR PRE-NATAL INJURIES—The plaintiff-infant by his guardian ad litem brought an action against the defendant alleging that while he was *en ventre sa mere* during the ninth month of his mother's pregnancy, he sustained, through the defendant's negligence, such serious injuries that he was born permanently maimed and disabled. The trial court dismissed the complaint for failure to state a cause of action. The appellate division affirmed.[1] On appeal, *held*, reversed, two judges dissenting. A complaint alleging pre-natal injuries tortiously inflicted on a nine month foetus viable at the time and actually born later states a good cause of action. *Woods v. Lancet*, 303 N.Y. 349, 102 N.E. (2d) 691 (1951).

Where recovery has been sought by an infant for injuries negligently inflicted upon him while *en ventre sa mere*, the existence of a right of action has generally been denied.[2] However, some recent cases, including the principal case, have recognized that an unborn child has a legally protected right to be free from tortious injury.[3] These have indicated that the

[1] Woods v. Lancet, 278 App. Div. 913, 105 N.Y.S. (2d) 417 (1951), following Drobner v. Peters, 232 N.Y. 220, 133 N.E. 567 (1921), heretofore a leading authority denying recovery for pre-natal injuries. The principal case overrules the Drobner case.

[2] 10 A.L.R. (2d) 1059 (1950) (for collection of all cases dealing with this problem in the United States). See also Muse and Spinella, "Right of Infant to Recover for Prenatal Injury," 36 VA. L. REV. 611 (1950).

[3] The New York court in overruling prior authority did what the Massachusetts court expressly refused to do in Bliss v. Passanesi, 326 Mass. 461, 95 N.E. (2d) 206 (1950). A note criticising the Massachusetts case and developing the reasons for allowing recovery to the unborn child appears in 50 MICH. L. REV. 166 (1951). Cases allowing recovery subsequent to that note are Damasiewicz v. Gorsuch, (Md. 1951) 79 A. (2d) 550; Tucker v. Howard L. Carmichael & Sons, Inc., 208 Ga. 201, 65 S.E. (2d) 909 (1951); *Contra*, Amann v. Faidy, (Ill. App. 1952) 107 N.E. (2d) 868.

action will be restricted to situations in which the injury is to a "viable"[4] foetus,[5] and the child survives birth.[6] The viability requirement is apparently due to the influence of the cases that traditionally have denied recovery altogether on the theory that the unborn child has no separate existence until it is severed from the mother.[7] In light of the recognition by medical science that the embryo is *in esse* from conception,[8] there appears to be no justification for saying that a foetus is part of the mother until viable. Apart from the fact that the viability rule is impossible of practical application,[9] it is unjust in that it arbitrarily distinguishes between children bearing similar injuries and equally entitled to recompense. It is true that causal connection is more difficult to establish in the earlier stages of the child's pre-natal development;[10] nevertheless the relation between the negligence and the injury to the non-viable infant can be established.[11] Competent medical evidence should be required, but a legal right should not be denied merely because of difficulty of proof. So long as courts are preoccupied by the viability requirement, the formulation of a rational delimitation of the action based on the ordinary duty concepts cannot be perfected. It appears, as a matter of coincidence, that the results reached under the viability rule will approximate the limits of the defendant's duty in those states following the majority opinion in the *Palsgraf*[12] case. The duty to exercise due care is imposed only when the defendant could reasonably foresee an undue risk of injury to the infant; unless he knew or should have known of the existence of the infant, he could foresee no injury to it. Ordinarily a stranger has no way of knowing of the mother's pregnancy until her condition becomes

[4] A viable foetus is ". . . alive and capable of being delivered and of remaining alive, separate from its mother." Principal case at 695. See also DORLAND, AMER. ILLUS. MEDICAL DICT., 21st ed., 1616 (1947). In Damasiewicz v. Gorsuch, supra note 3, the court adopted a limitation similar to the criminal law concept of "quickening." The child is "quick" when its first motion in the womb is felt by the mother, occurring usually about the middle of pregnancy. BLACK, LAW DICTIONARY, 4th ed., 1415 (1951).

[5] No recent case has been decided involving the right of the non-viable infant to recover, the expression of the viability rule being confined to obiter dicta. Cf. Lipps v. Milwaukee Electric R. & Light Co., 164 Wis. 272, 159 N.W. 916 (1916) (denying recovery for injuries to a non-viable foetus but indicating that a different result would have been reached if the foetus had been viable).

[6] Drabbels v. Skelly Oil Co., 155 Neb. 17, 50 N.W. (2d) 229 (1951); cf. Verkennes v. Corniea, 229 Minn. 365, 38 N.W. (2d) 838 (1949) (recovery by administrator for pre-natal injuries allowed under the wrongful death statute).

[7] The reasoning was first adopted by Holmes, C.J., in Dietrich v. Inhabitants of Northampton, 138 Mass. 14 (1884), and has had a profound effect on the development of the law in this field. For later cases see 10 A.L.R. (2d) 1059 (1950).

[8] GRIESHEIMER, PHYSIOLOGY AND ANATOMY, 5th ed., 738 (1945); PATTEN, HUMAN EMBRYOLOGY 181 (1946).

[9] EMERSON, LEGAL MEDICINE AND TOXICOLOGY 173-174 (1909). That the age of viability varies is apparent in the table set out in 3 WHARTON & STILLES, MEDICAL JURISPRUDENCE, 5th ed., 38 (1905).

[10] See Winfield, "The Unborn Child," 4 TORONTO L.J. 278 at 293 (1942).

[11] MALOY, LEGAL ANATOMY AND SURGERY 685, 686 (1930).

[12] Palsgraf v. Long Island R.R. Co., 248 N.Y. 339, 162 N.E. 99 (1928).

obvious,[13] which closely approximates the time that viability occurs. However, in those jurisdictions adopting the minority view in the *Palsgraf* case[14] the result could be quite different. The defendant's negligent conduct would entail liability for all harmful consequences of which it is the proximate cause. Under this view there would be no logical basis for denying recovery if the defendant has acted in such a way as to subject anyone to unreasonable risk of harm and the child is in fact injured thereby. The most serious limitation[15] on the action would then become one of proximate cause which, practically speaking, could seldom be established when the injury is to a non-viable infant. It is submitted that the arbitrary requirement of viability should be discarded, and that the right of the infant injured while *en ventre sa mere* should be made coextensive with whatever concept of duty the court may adopt in its usual negligence case.[16]

In the principal case the court indicates that only if the child is born alive will recovery be allowed. Logically it would seem that, if the child would have had an action if it had lived, its administrator should be able to recover under the wrongful death statutes.[17] However, in a recent Nebraska case[18] such an action was denied, the court refusing to express an opinion as to whether the child would have had an action had it lived. It was reasoned that since the child was stillborn, it never came into existence as a person within the contemplation of the law of torts. If this is so, then the court would have had some difficulty in allowing the child recovery had it lived, for clearly there is no duty owing to a non-existent person. It has been suggested that a distinction may be justified by defining the child's right as the right to begin life with a sound body, free from the effects of the defendant's negligence.[19] It is submitted, however, that an unborn child should have an equal right to be free from death caused by the defendant's negligence. If it is recognized that the child has separate existence before birth, then any

[13] If the defendant did in fact know of the mother's condition, the duty of exercising due care ought to arise. Stemmer v. Kline, 19 N.J. Misc. 15, 17 A. (2d) 58 (1940) (defendant was the mother's doctor), overruled by 128 N.J.L. 455, 26 A. (2d) 489 (1942) (five judges dissenting).

[14] See Cowan, "The Riddle of the Palsgraf Case," 23 MINN. L. REV. 46 (1938).

[15] Other possible limitations of the action may be imagined. The contributory negligence of the mother might be imputed to the child, thus denying him any action. However, many jurisdictions do not recognize the imputed negligence doctrine, and in those states it would be no obstacle. See 35 VA. L. REV. 618 (1949). It is interesting to speculate as to whether recovery will be restricted to the personal injury actions or perhaps extended to include other torts such as the defamatory actions.

[16] If the tort is intentionally inflicted upon the person of the mother, it would seem that the doctrine of transferred intent should allow the plaintiff to maintain an action in battery.

[17] Verkennes v. Corniea, supra note 6.

[18] Drabbels v. Skelly Oil Co., supra note 6.

[19] 63 HARV. L. REV. 173 (1949).

breach of duty toward that child should be actionable, either by him, or, if he is born dead, by his administrator under the wrongful death statutes.

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