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New Theory in Prenatal Injuries: The Biological Approach

Undoubtedly constitutional tests of anti-discrimination legislation will soon be forthcoming. Although individual statutes may be set aside because poorly formulated or unfairly applied, it is submitted that the power of the state to regulate private property rights for the purpose of eliminating discrimination will be upheld.

A NEW THEORY IN PRENATAL INJURIES: THE BIOLOGICAL APPROACH

Prior to 1946, the common law denied a child the right to recover for prenatal injuries. A majority of jurisdictions have since recognized a surviving child's right to recover for injuries inflicted upon a foetus capable of extra-uterine existence. And recently, two cases extended the right to recover for injuries suffered at any time after conception.[1]

DEVELOPMENT OF THE LAW

The first reported case on the problem is *Dietrich v. Northampton*,[2] decided by the Supreme Court of Massachusetts in 1884. The mother, more than four months pregnant, fell and suffered a miscarriage as a result of defendant's negligence. There were some indications of life in the child for about fifteen minutes. In the action brought by an administrator under a wrongful death statute the court held that the child was not at the time of the injury a "person" within the meaning of the statute; that the unborn child, *en ventre sa mere*, was part of the mother; and therefore refused any recovery.

Notwithstanding that the case was concerned solely with the construction of a wrongful death statute, it was later taken as authority for holding that no cause of action at all could be maintained by the surviving child for prenatal injury. Thus, an Illinois court denied recovery to a child born crippled as a result of an injury.[3] Despite the fact that the mother was about to be delivered of the child when the negligent act occurred, and although the causal relationship was quite apparent, the court reaffirmed the *Dietrich* reasoning that the child was in the view of the common law a part of the mother and hence no duty was owing to it.

Other courts found additional reasons for denying recovery. One court held that the defendant, a common carrier, had no contractual relationship with the "non-existent" child and therefore owed a duty of care only to the mother.[4] Another expressed the fear that if such an action could be maintained, an infant might sue its own mother for injury occasioned by her negligence while pregnant.[5] But perhaps the most cogent argument advanced for the denial of recovery stemmed from the practical consideration that there was an inherent

1. See Annot. 10 A.L.R.2d 1059 (1950); Annot. 27 A.L.R.2d 1256 (1953).

2. 138 Mass. 14 (1884).

3. Allaire v. St. Luke's Hospital, 184 Ill. 359, 56 N.E. 638 (1900).

4. Nugent v. Brooklyn Heights R.R., 154 App. Div. 667, 139 N.Y. Supp. 367 (2d Dep't), appeal dismissed, 209 N.Y. 515, 102 N.E. 1107 (1913).

5. Stanford v. St. Louis-S.F. Ry., 214 Ala. 611, 108 So. 566 (1926).

difficulty in the proof of causation, and consequently a flood of fictitious claims might result.[6]

While the law protected unborn children especially in will construction cases,[7] in the rules of descent and distribution[8] and in criminal cases,[9] it continued to refuse protection in negligence.[10]

After the Supreme Court of Canada, in 1933, recognized the child's cause of action for prenatal injuries[11] and the California legislature, in 1939, abrogated the common-law no-liability rule,[12] the courts in the United States began to take cognizance of the medical fact that at some time during the period of gestation, the infant, yet unborn, reaches a state of development where it can live outside the mother;[13] that to deny a separate existence to such a foetus is to deny a a fact; that to deny such a fact "is to do reverence to an outmoded, timeworn fiction not founded on fact and within common knowledge untrue and unjustified";[14] that if the law of property and the law of crimes do not look on the unborn child as "part of the mother" the law of torts should not either.[15] The arguments against recovery which were founded on difficulty of proof of causation and a fear of a flood of fictitious claims were also repudiated. It was said that the courts should not refuse to entertain suits for the redress of wrongs because a plaintiff would have difficulty in proving his case or because an afforded remedy may at times give rise to fraudulent claims.[16] "The right to bring an action is clearly distinguishable from the ability to prove facts. The first cannot be denied because the second may not exist . . . . Fraud can be dealt with in this class of cases, just as in others, and the detection and the elimination of faked contentions present no novel question to judicial bodies."[17]

6. Drobner v. Peters, 232 N.Y. 220, 133 N.E. 567 (1921); Magnolia Coca-Cola Bottling Co. v. Jordan, 124 Tex. 347, 78 S.W.2d 944 (1935).

7. The word "children" or "issue", as used in a bequest or devise, may include a child en ventre sa mere. 57 Am. Jur., Wills §§ 154, 1384 (1948).

8. With respect to the rights of inheritance, posthumous children are regarded as in esse from the time of conception. 16 Am. Jur., Descent and Distribution § 80 (1938).

9. One who feloniously inflicts injuries upon an unborn child, which is born alive but subsequently dies from the injuries, is chargeable with homicide as in the case of the killing of any human being. 26 Am. Jur., Homicide § 32 (1940).

10. Restatement, Torts § 869 (1939) reads: "A person who negligently causes harm to an unborn child is not liable to such child for the harm." In a caveat following, the Institute cautions that it takes no stand as to liability where the injury is inflicted by intentional or reckless conduct without excuse.

11. Montreal Tramways Co. v. Le Véillé, [1933] Can. Sup. Ct. 456, 4 D.L.R. 337.

12. Cal. Civ. Code § 29 (Deering 1949).

13. Amann v. Faidy, 415 Ill. 422, 114 N.E.2d 412 (1953), overruling Allaire v. St. Luke's Hospital, 184 Ill. 359, 56 N.E. 638 (1900).

14. Woods v. Lancet, 303 N.Y. 349, 357, 102 N.E.2d 691, 695 (1951), overruling Drobner v. Peters, 232 N.Y. 220, 133 N.E. 567 (1921).

15. Bonbrest v. Kotz, 65 F. Supp. 138 (D.D.C. 1946).

16. Scott v. McPheeters, 33 Cal. App. 2d 629, 92 P.2d 678 (1939); Verkennes v. Corneica, 229 Minn. 365, 38 N.W.2d 838 (1949); Steggal v. Morris, 363 Mo. 1244, 258 S.W.2d 577 (1953).

17. Damasiewicz v. Gorsuch, 197 Md. 417, 425, 79 A.2d 550, 559 (1951).

A New York court, in overruling its earlier holding and recognizing the child's action, said that the question of causation, reasonable certainty and the like which arise in prenatal injury cases are no different, in kind, from the ones which were resolved in thousands of other negligence cases.[18]

Thus, what had been an inflexible rule of law for over six decades progressively deteriorated and was ultimately destroyed. Once the judiciary accepted the medical fact that the infant does exist separately before birth, it was then faced with the problem of fixing the point of time at which the existence legally began.

VIABILITY THEORY

As early as 1900, Justice Boggs in his dissenting opinion in *Allaire v. St. Luke's Hospital*[19] pointed out that when an infant reaches that stage in its development known as "viability"—when it thereafter could be severed from the mother prematurely and still live—it is as much alive as it would be at the time of normal birth. Therefore, from the time it is viable, the child should be regarded as a legal person.[20] This viability theory was used to permit a child, born alive, recovery. In *Williams v. Marion Rapid Transit, Inc.*[21] the court stated that the viable child *en ventre sa mere* at the time it sustained injury was a "person" within the constitutional provision allowing every person a remedy for injury done to his person. The *Williams* case was followed by a majority of jurisdictions.[22]

It should be noted that most courts adhere to the requirement that the infant must have been born alive, or, in an action for wrongful death, that the infant must have died after birth as a result of the prenatal injuries. Three jurisdictions, however, have allowed recovery for wrongful death where the infant was born dead but had reached a viable stage at the time of the injury causing the death of the infant while in its mother's womb.[23]

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18. Woods v. Lancet, 303 N.Y. 349, 356, 102 N.E.2d 691, 695 (1951).

19. 184 Ill. 359, 56 N.E. 638 (1900).

20. Justice Boggs said: "A foetus in the womb of the mother may well be regarded as but a part of the bowels of the mother during a portion of the period of gestation; but if, while in the womb, it reaches that prenatal age of viability when the destruction of the life of the mother does not necessarily end its existence also, and when, if separated prematurely, and by artificial means, from the mother, it would be so far a matured human being as that it would live and grow, mentally and physically, as other children generally, it is but to deny a palpable fact to argue there is but one life, and that the life of the mother." Id. at 364, 56 N.E. at 641.

21. 152 Ohio St. 114, 87 N.E.2d 334 (1949).

22. Tursi v. New England Windsor Co., 19 Conn. Supp. 242, 111 A.2d 14 (Super. Ct. 1955); Prates v. Sears, Roebuck & Co., 19 Conn. Supp. 487, 118 A.2d 633 (Super. Ct. 1955); Tucker v. Howard L. Carmichael & Sons, Inc., 208 Ga. 201, 65 S.E.2d 909 (1951); Amann v. Faidy, 415 Ill. 422, 114 N.E.2d 412 (1953); Damasiewicz v. Gorsuch, 197 Md. 417, 79 A.2d 550 (1951); Steggal v. Morris, 363 Mo. 1224, 258 S.W.2d 577 (1953); Poliquin v. Macdonald, — N.H. —, 135 A.2d 249 (1957); Woods v. Lancet, 303 N.Y. 349, 102 N.E.2d 691 (1951); Jasinsky v. Potts, 153 Ohio St. 529, 92 N.E.2d 809 (1950); Mallison v. Pomeroy, 205 Ore. 690, 291 P.2d 225 (1955).

23. Mitchel v. Couch, 285 S.W.2d 901 (Ky. 1955); Verkennes v. Corneica, 229 Minn. 365, 38 N.W.2d 838 (1949); Rainey v. Horn, 221 Miss. 269, 72 So. 2d 434 (1954).

New Minority's Extension of Liability and Rejection of the Viability Theory

A California enactment[24] and recent decisions indicate that the law is moving towards an acceptance of the biological fact that a human life comes into existence at the time of conception. This was the rationale of *Kelly v. Gregory*,[25] a 1953 decision of a New York intermediate appellate court which rejected the limitations of the viability theory and held that an infant born alive may recover for injuries sustained at *any* period of its prenatal life if it can prove that they were sustained as a result of a tort. The court said: "we ought to be safe . . . in saying that legal separability should begin where there is biological separability. We know something more of the actual process of conception and foetal development now than when some of the common law cases were decided; and what we know makes it possible to demonstrate clearly that separability begins at conception."[26]

In 1957 the Georgia Supreme Court in *Hornbuckle v. Plantation Pipe Line Co.*[27] became the first court of last resort to adopt this thinking. It expressly held the particular moment of the prenatal injury to be immaterial.[28] It is safe to predict that the viability theory will, sooner or later, yield to this reasoning, once the concept of separability of the unborn infant from the mother has been legally recognized and the "difficult-to-prove" argument is more uniformly repudiated. The present minority position gathers respect in logic and reasonableness when the viability theory, which it rejects, is subjected to both a theoretical and a factual analysis.

Criticism of the Viability Theory

There is a *theoretical* fallacy in the idea that a viable child is in all respects as complete a personality before birth as any other person after birth, and that it therefore should possess a status of a natural, legal person. This idea was carried by some courts to its logical conclusion that there is a cause of action for wrongful death of a viable infant, a foetus that died in the mother's womb as a result of the injury.[29] It is doubtful whether such a view can be accepted without substantially changing the convenient and fundamental rule that fixes

24. In California, the legislature has incorporated into its wrongful death statute a provision 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." Cal. Civ. Code § 29 (Deering 1949). The "interests" referred to have been held to include not only inheritance and property rights, but also the right to compensation for personal injuries inflicted any time after conception. Scott v. McPheeters, 33 Cal. App. 2d 629, 92 P.2d 678 (1939). This right of recovery does not include a child that was never born alive, because the statutory right is created only in event of the child's subsequent birth. Norman v. Murphy, 124 Cal. App. 2d 95, 268 P.2d 178 (1954).

25. 282 App. Div. 542, 125 N.Y.S.2d 696 (3d Dep't 1953).

26. Id. at 543-44, 125 N.Y.S.2d at 697. The decision extended Woods v. Lancet, 303 N.Y. 349, 102 N.E.2d 691, in which the recovery was confined to a viable infant.

27. 212 Ga. 504, 93 S.E.2d 727 (1956).

28. Id. at 505, 93 S.E.2d at 728.

29. See note 23 supra.

birth as the precise point at which the existence of a natural (legal) person begins. A foetus not born alive has never been treated as a legal person, that is, as a person capable of having and acquiring rights. The law does not provide for administration in case of a miscarriage or dead-born foetus, whether the foetus was viable or not. An unborn infant cannot presently acquire property, cannot sue or be sued. He who is not born alive never exists as a legal person. Other courts applying the viability theory, however, require that the infant be born alive as a condition for granting of a remedy either to the living child or under a wrongful death statute.[30] Then the viability theory, used as such, seems to contradict itself. The theory thus lends the viable child a status of a legal person for limited purpose only. That is to say, it imposes a legal fiction, similar to the protection afforded in property law to an unborn child subject to his being born alive. While the legal fiction fits the peculiar character of property law without disturbing any legal concept, it does not, however, fit to the law of negligence. While property rights can be preserved for a person not yet in existence through the ingenious means of legal fiction, one cannot create a personal wrong and consequently a tortfeasor by legal fiction. Thus we cannot, without theoretical objection, import legal fiction from the law of property and use it as a basis for creating a tortious liability for prenatal injury.

If then there should be a remedy either to a living child for its prenatal injury, or a remedy under a wrongful death statute where the infant died after birth as the result of the prenatal injury, it must be on some other theory.

The viability theory is equally *unrealistic*. It draws an arbitrary line between liability and non-liability. It fails to recognize the biological fact that even before the stage of viability there is a living human being. The viability theory seeks to eliminate injustice by being half just. While the acceptance of the viability theory by the majority of courts was generated by the desire to do justice and reference was made to the legal protection of unborn children in property law, the fact is that in the law of property legal protection is afforded unborn children from the time of conception and not from the time of viability.[31] The claim of the living child injured before viability is no less meritorious than that of the child injured during the viable stage even though the problem of proof would increase as the injury occurs earlier in the term of gestation.

Biological Theory

The more logical view was taken in the *Kelly* and *Hornbuckle* cases. They recognized that a legal separability begins with the biological separability, that is, at conception. Neither of these cases seems to regard unborn infants (whether viable or not) as legal persons, but rather as separate entities or human beings in the biological sense from the time of conception with a potentiality of personality which is not realized until birth. A prenatal injury to that separate entity, a human being in the biological sense, would impose a conditional liability on the tortfeasor. When the separate entity becomes at birth a legal person the liability would be complete. If personality was never achieved there would be

30. See note 22 supra.

31. See note 8 supra.