Prenatal Injuries: A Treatment and Prognosis of the Law

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ANY WRITER on prenatal injuries is confronted with age-old philosophical questions regarding life. When does life begin? Does it begin at the moment of birth? Does it begin at the moment of conception, or at the time that the fetal heart tones are first detected, or when the mother "feels life?" Does it begin "in contemplation of law as soon as an infant is able to stir in the mother's womb?" Medical answers range from the moment of conception to the moment of birth. But even the exact time of birth itself is debatable, since upon delivery a child may still remain for a few moments attached to the placenta by the umbilical cord.

Some authorities and courts have deemed the fetus a living being when the host-mother feels life; others demand that the fetal heart tones be audible. A number of courts believe that to be "born" the cord must be severed, for only then is the infant truly living alone. Still others have held a fetus to be a legal "person" when such a fetus would have a considerable chance for survival even though separated from the mother's womb. The reasons for these inconsistencies are patent. Medical history has recorded instances where fetuses weighing a pound have managed to survive after no longer than twenty-four weeks gestation. An excerpt from an authoritative medical textbook demonstrates the indefiniteness of the exact length of human gestation.

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1 COOLEY, COMMENTARIES ON THE LAWS OF ENGLAND BY SIR WILLIAM BLACKSTONE § 130, at 119 (4th ed. 1899).

2 DE LEE AND GREENHILL, PRINCIPLES AND PRACTICE OF OBSTETRICS 96 (8th ed. 1943).
Ovulation may occur at any time. Authorities disagree as to the relation of the discharge of the ova from the ovary to the time of menstruation, but ovulation generally takes place about fourteen days before the onset of the next menstrual flow. We do not know if an ovum is fertilizable when it leaves the graafian follicle or if it requires time, and if so, how much? We do not know how long it takes the spermatozoon to reach the ovum. Therefore, it is impossible to determine the time of conception even when the date of the fruitful coition is certain. Further, labor occurs often as the result of some trauma—physical or mental. Since the beginning and the end of pregnancy are indeterminable, we cannot estimate the exact length of . . . [gestation].

The law governing prenatal injuries and deaths has undergone such a marked transition that it is equivalent to almost a complete reversal in legalistic thinking. The basic problem involved in judicial review is whether an unborn child is a legal entity, thereby having standing to maintain an individual cause of action. Additional problems faced by the courts revolve around the difficulties extant in determining the relationship between an alleged trauma and the injury to the unborn child, and the proof of proximate cause.

In this article, I have addressed myself to the above problems from a medical perspective, approaching the subject by outlining the past legal history, discussing the present condition and trend of the law, with specific emphasis on Illinois treatment, discussing prenatal injuries in relation to wrongful death statutes, and presenting a prognosis as to the future development of prenatal litigation.

PAST HISTORY: FROM NO RECOVERY TO VIABILITY

Prior to the enlightened modern era of legalistic thinking, harm occurring to a child en ventre sa mere was held not actionable, and no right of recovery was recognized against one wrongfully inflicting prenatal injuries. Despite the well settled doctrines of property, wills and succession, and criminal law which considered a fetus as a distinct "person" able to inherit and own property or to be the victim of a crime, courts generally held that an unborn child was not a legal "person," and therefore, could have no standing to maintain an action individually or by a legal representative. An unbroken line of decisions denied recovery for prenatal injuries primarily because a fetus was

8 Id.

not considered to be a "person," and also because of the supposed impossibility of determining proximate cause and the strong likelihood of spurious claims.

_Dietrich v. Inhabitants of Northampton_ stands as the first recorded instance wherein recovery was sought for injuries sustained before birth. Suit was brought by an administrator under the Massachusetts Wrongful Death Statute on behalf of a deceased infant whose mother, at four to five months gestation, had fallen as a result of a defect in a sidewalk improperly maintained by the city. The child, although not directly injured, was not sufficiently developed to survive the premature birth which ensued. Justice Holmes, rejecting the analogy between the case in issue and those cases wherein unborn infants were recognized as existing persons for purposes of the laws of property, succession, and criminal law, held that the unborn child was a "part" of its mother and, having no separate existence, was not a person within the intendment of the law.

In the _Dietrich_ case, the infant was obviously not viable. Although the court did not expressly hold that a viable infant would likewise be denied a cause of action, it did, by way of dictum, indicate that no recovery would have been allowed even if the child had survived and an action brought for injuries. Thereafter, courts generally accepted Holmes' dictum as applicable to all tort actions brought on behalf of unborn infants.

Within a few years the second foundation case, _Walker v. Great Northern Railway Company of Ireland_, was adjudicated in Ireland.

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7 A premature delivery occurs where pregnancy is terminated after viability, but at least two weeks prior to the anticipated date of delivery. The exact time span of confinement being largely speculative, delivery of an infant two weeks before the anticipated date is considered to be almost normal.

8 Viability is the ability to live after birth. Both the medical and legal disciplines define the word identically: "capable of living, especially capable of living outside of the uterus; said of a fetus that has reached such a stage of development that it can live outside of the uterus," _Dorland's Illustrated Medical Dictionary_ 1689 (24th ed. 1965); "Capability of living. A term used to denote the power a new-born child possesses of continuing its independent existence," _Black's Law Dictionary_ 1737 (4th ed. 1951). It is generally accepted that a fetus is not capable of independent, extrauterine existence until the twenty-sixth week of gestation.

9 _Supra_ note 5, at 17, 52 Am. R. at 245.

10 28 L.R. Ir. 69 (1891).
An infant sued for prenatal injuries sustained when her mother, a train passenger, was injured through the alleged negligence of the carrier. Although the child was viable when the injury occurred and was born alive, albeit deformed, after a full term gestation, recovery was denied solely on the lack of an independent duty owed to the infant because the carrier, having no knowledge of the plaintiff child's presence, had contracted to transport only the infant's mother. The court favored the cause of action "in the abstract," but felt that the impossibility of proof barred the action. The court further rationalized that the legislature, and not the courts, should resolve the issue:

The law is in some respects a stream that gathers accretions with time from new relations and conditions. But it is also a landmark that forbids advance on defined rights and engagements, and if these are to be altered, if new rights and engagements are to be created, that is the province of legislation and not of decision.

Allaire v. St. Luke's Hospital, the third landmark case, became a guiding light by virtue of its strong dissent. An expectant mother was injured in the hospital elevator while being brought to the delivery room. The child, born a few days later with permanent crippling injuries, sued on those resultant injuries. Though there was no question of viability, the majority of the court denied recovery based on the Dietrich case, citing Justice Holmes' idea that the unborn child was part of the "bowels" of the mother. Justice Boggs' dissent called Holmes' statement illogical when applied to an infant who was viable and capable of living independently of its mother, but implied that a non-viable fetus would not recover and should "be regarded as but a part of the bowels of the mother during a portion of the period of gestation. . . ." The dissent became the basis for the first invasion upon the doctrine of no recovery for prenatal injuries in the United States. Justice Boggs declared:

It may be conceded that no case adjudicated at the common law can be found

11 "But there are instances in the law where rules of right are founded upon the inherent and inevitable difficulty or impossibility of proof. And it is easy to see on what a boundless sea of speculation in evidence this new idea would launch us. What a field would be opened to extravagance of testimony, already great enough—if Science could carry her lamp, not over certain in its light where people have their eyes, into the unseen laboratory of nature and could profess to reveal the causes and things that are hidden there. . . ."


12 Walker v. Great Northern R.R., supra note 10, at 82.

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

14 Id. at 370, 56 N.E. at 641.
wherein a plaintiff was awarded damages for injuries inflicted upon his person whilst in the womb of his mother. But an adjudicated case is not indispensable to establish a right to recover under the rule of the common law. If in delivering a child an attending physician, acting for compensation, should wantonly or by actionable negligence injure the limbs of the infant, and thereby cause the child, although born alive and living, to be maimed and crippled in body or members, it would be abhorrent to every impulse of justice or reason to deny such a child a right of action against such a physician to recover damages for the wrongs and injuries inflicted by such physician. The law should, it seems to me, be, that whenever a child in utero is so far advanced in a prenatal age as that, should parturition by natural or artificial means occur at such age, such child could and would live separable from the mother and grow into the ordinary activities of life, and is afterward born and becomes a living human being, such child has a right of action for any injuries wantonly or negligently inflicted upon his or her person at such age of viability, though then in the womb of the mother.

Justice Boggs thus believed a fetus was an independent person if it could live independently upon the mother’s death. While concurring with the Walker view that the legislature must take the initiative toward reform, Justice Boggs concluded that no reason existed for the courts to wait for legislative reform, and that mere difficulty of proof should not permit a right to be without a remedy. Nevertheless, the cases subsequent to the Allaire decision continued to deny recovery.

In the ensuing forty-five years, ten other jurisdictions adopted the no recovery rule, basing their arguments on Dietrich. However, legal writers criticized the Dietrich decision, and numerous minority opinions and obiter dicta laid the foundation for the more enlightened modern trend extending a cause of action to immature fetuses.

In 1916, the court in Lipps v. Milwaukee Electric Railway and Light Company denied recovery to an unborn non-viable fetus, but implied it would grant recovery to a viable fetus. By stating that “very cogent reasons may be urged for a contrary rule to that of denying recovery where the infant is viable,” the court suggested that a suit in the

15 Id. at 368, 373–74, 56 N.E. at 640, 642.


17 164 Wis. 272, 159 N.W. 916 (1916).

18 Id. at 276, 159 N.W. at 917.
name of a viable child could be sustained. This dictum added impetus to the recognition of an unborn child as being *in esse* and was the fore runner of the eventual change in the viability rule.

As late as 1951, the "non-separate, legal person rule" was followed by an American court in *Drabbels v. Skelly Oil Company,* wherein the court held that an unborn child, although viable, is part of the mother until birth, and in the realm of tort law, has no separate judicial existence.

**PRESENT HISTORY: FROM VIABILITY TO PRE-VIABILITY**

A precipitous shift in judicial attitude was initiated in 1946, when the federal district court in the District of Columbia allowed an action based on medical malpractice, wherein the negligence of an obstetrician caused direct injury to a viable child. For the first time without the benefit of a statute, an infant prevailed in an action to recover for prenatal injuries. The court denied the inseparability of the fetus, citing as an example the instances in which living children are taken by Caesarian section from dead mothers, and asserted that the law, not being "arid and sterile," must maintain the same progress as medical science.

Three years later the Ohio Supreme Court confronted the identical problem in *William v. Marion Rapid Transit* and upheld the right of a surviving child to bring suit, injured while *en ventre sa mere* by the tortious conduct of another. Seventeen other jurisdictions have subsequently recognized the capacity of the infant to sue, or in the event of death, the right of his legal representative to sue under the wrongful death statute of the particular state. Even Massachusetts, the bastion

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19 155 Neb. 17, 50 N.W.2d 229 (1951).
21 Prior to this time a few decisions allowed recovery based on specific statutes. But the cases barely caused a ripple in judicial or legislative thought denying recovery to an infant for prenatal injuries. See *Cooper v. Blanck*, 39 So.2d 352 (La. Ct. App. 1923); *Kline v. Zuckerman*, 4 Pa. D.&C. 227 (1924); *Scott v. McPheeters*, 33 Cal. App. 2d 629, 92 P.2d 678 (1939).
22 152 Ohio St. 114, 87 N.E.2d 334 (1949).
of the no recovery rule as enunciated in *Dietrich*, allowed recovery in *Keyes v. Construction Service, Inc.* for the death of a child caused by prenatal injuries.\textsuperscript{24}

As a further extension of the new doctrine, liability for injury to a non-viable infant was first recognized in *Kelly v. Gregory*.\textsuperscript{26} Subsequently, five more jurisdictions allowed recovery to a non-viable infant, including Illinois.\textsuperscript{26} The three month old fetus in the *Kelly* case was injured by the negligent operation of an automobile. The court abandoned the viability rule in favor of a biologic-separability theory, stating that separability commences at the time of conception when the fetus becomes a separate organism, which characteristic is not destroyed though the infant, if separated prior to reaching the viable stage of development, may not survive.

In *Smith v. Brennan and Gallbraiths*, the court, in allowing recovery to a non-viable child, stated that, "Medical authorities have long recognized that a child is in existence from the moment of conception, and not merely a part of its mother's body."\textsuperscript{27} Such phrases as "[i]f . . . [biological] processes can be disrupted resulting in harm to the child when born, it is immaterial whether before birth the child is considered a person in being\textsuperscript{28} and "[w]hether viable or not at the time of the injury, the child sustains the same harm after birth, and therefore should be given the same opportunity for redress\textsuperscript{29}" raised a

\textsuperscript{24} 340 Mass. 633, 165 N.E.2d 912 (1960). But interestingly the Court concluded: "There is no need to reverse the *Dietrich* decision which doubtless was right when rendered but we recognize that in view of modern precedent its application should be limited to cases where the facts are essentially the same." *Id.* at 637, 165 N.E.2d at 915.

\textsuperscript{26} 282 App. Div. 542, 125 N.Y.S.2d 696 (1953).

\textsuperscript{29} *Id.* at 367, 157 A.2d at 504.
further question as to whether the age of the infant at the time of the wrongful act should ever be given controlling consideration in allowing recovery.30

Relying on the Smith case, the court in Sinkler v. Kneale stated:

As for the notion that the child must have been viable when the injuries were received, which has claimed the attention of several of the states, we regard it as having little to do with the basic right to recover, when the foetus is regarded as having existence as a separate creature from the moment of conception.31

As supporting arguments, the above cited courts claimed that improved medical care lengthened the period during which the fetus could survive separated from its mother, although in fact the time is by no means more susceptible of medical proof. The courts further felt that the grave injustice of denying recovery applied whether the injury occurred in the third or eighth month of pregnancy.

THE DEVELOPMENT OF PRENATAL RECOVERY IN ILLINOIS

Allaire v. St. Luke's Hospital32 remained the law in Illinois and in 1939 was reaffirmed in Smith v. Luckhardt, wherein the court refused to take action on the ground that legislative reform was the only instrument of change in this area.33

In 1952, two appellate court decisions again upheld the Allaire doctrine. The first case involved a negligence action brought on behalf of an infant who allegedly died as a result of injuries sustained in an auto accident caused by defendant's negligence;34 the other case was

30 The court remarked: “We see no reason for denying recovery for a prenatal injury because it occurred before the infant was capable of separate existence. In the first place, age is not the sole measure of viability, and there is no real way of determining in a borderline case whether or not a fetus was viable at the time of injury, unless it was immediately born.” Id. On the issue of age, see Note, Extension of Prenatal Injury Doctrine to Nonviable Infants, 11 DePAUL L. REV. 361 (1962).


32 Supra note 13.

33 299 Ill. App. 100, 112, 19 N.E.2d 446, 451 (1939). Plaintiff's brief in Smith stated its contention well: “The fundamental rights of personal security and the pursuit of happiness, out-weigh in importance the transient rights of property, and that an unborn child, especially after it becomes quick, viable and alive, and when the destruction of the life of the mother does not necessarily end its existence, and at an age when if separated prematurely from her mother, by artificial means, it would be so far matured that it would live and grow naturally, such a child has a right to recover for injuries sustained by negligence and malpractice.” Id. at 102, 19 N.E.2d at 447.

a negligence action for injuries sustained in a fall by an unborn infant's mother. However, the Illinois Supreme Court reversed both cases, thereby changing the law in Illinois which had existed since 1900 to conform with Justice Boggs' dissent enunciated in Allaire, which allowed recovery if viability existed.

Eight years later in Daley v. Meier, Illinois adopted the holding of Kelly v. Gregory, thereby joining four other jurisdictions in expanding liability for injuries to pre-viable, unborn persons. Action was brought on behalf of a child born mentally retarded and physically underdeveloped. Plaintiff alleged that defendant's negligent operation of her automobile caused injury to the child, then only in the first month of gestation. The appellate court reversed the trial court's dismissal of the action, holding that an infant who survives birth can maintain an action to recover for prenatal injuries, medically provable as resulting from the negligence of another, even if the child has not reached the state of a viable fetus at the time of the injury. One year later in Sana v. Brown, the Illinois Supreme Court affirmed Daley v. Meier by holding improper the dismissal of an automobile personal injury complaint as to a child-plaintiff born four and one-half months after the accident, on the ground that plaintiff was not viable at the time of the accident.

The most recent Illinois case to date, Zepeda v. Zepeda, involved a most unusual action wherein an “adulterine bastard” attempted the creation of a new tort by seeking damages from his putative father. Plaintiff's theory was that as an illegitimate child he was deprived of a normal home and of equality with legitimate children. Although recognizing the plaintiff's right to preserve family life and his right to protect that interest against outside disturbances, the court refused to recognize such a “new tort” involving a “cause of action for wrongful life.” But the court did affirm the more recent thinking regarding

37 Supra note 25.
38 Supra note 25.
39 Supra note 26.
41 41 Ill. App. 2d 240, 190 N.E.2d 849 (1963).
42 Id. at 259, 190 N.E.2d at 858.
torts to unborn children and the non-viable child. The court reasoned:

The law of torts has been hesitant in recognizing what medical science has long known, that life begins at the moment of conception, and what theology has longer taught, that from the moment of conception every human being has rights of a human person... The case at bar seems to be the natural result of the present course of the law permitting actions for physical injury ever closer to the moment of conception. In point of time it goes just a little further. The significance of this course to us is this: if recovery is to be permitted an infant injured one month after conception, why not if injured one week after, one minute after, or at the moment of conception? It is inevitable that the date will be further retrogressed. How can the law distinguish the day to day development of life? If there is human life, proved by subsequent birth, then that human life has the same rights at the time of conception as it has at any time thereafter. There cannot be absolutes in the minute to minute progress of life from sperm and ovum to cell, to embryo to foetus, to child.

The court then embarked upon a dissertation of the possibilities that could ensue. It asked: could a cause of action exist if the wrongful conduct took place before conception, or could the defendant be held accountable if the tortious act was completed before the plaintiff was conceived? The court answered in the affirmative, drawing from Justice Holmes’ statement in the Dietrich case that there can be “a conditional prospective liability in tort to one not yet in being.” It then recited three examples in which such a situation could occur: first, a manufacturer’s liability for burns sustained by an infant after birth caused by an improperly functioning space heater produced before the infant was conceived; second, the liability of a drug manufacturer for an inadequately tested drug, which though beneficial for the purpose intended, was harmful when taken by a woman in early stages of pregnancy, thereby causing anomalies and developmental fetal defects; and third, where the wrongful act takes place before conception, but the injury attaches at conception, thermonuclear radiation with its effect on prospective future parents could cause mutations and other physical and mental defects. Specifically, the court asked:

If a child is born malformed or an imbecile because of the genetic effect on his father and mother of a negligently or intentionally caused atomic explosion, will he be denied recovery because he was not in being at the time of explosion?

43 Id. at 248, 190 N.E.2d at 852.
44 Id. at 249, 190 N.E.2d at 853.
45 Id. at 250, 190 N.E.2d at 853.
46 Id. at 251, 190 N.E.2d at 854.
The court further concluded that an injury resulting from a wrong committed before conception need not be physical. Thus, in effect, the *Zepeda* case established strong precedent for future fetal-infant negligence actions, clearly set forth present Illinois law on the matter, and will most likely give rise to subsequent litigation on the hypotheticals it presented.

**Prenatal Injuries and Wrongful Death**

At common law, no action existed for wrongful death. Early courts considered the action a personal one; and upon the death of the decedent the action terminated and did not survive to the decedent's heirs or representatives. Today, all states, including Illinois, have statutes allowing certain survivors to bring an action for wrongful death. Until recently, these statutes were not construed to allow an action for the wrongful death of an unborn child because the child was not considered a valid legal, separate, and existing individual. Although some jurisdictions have apparently receded from this position, there is little unanimity in this area of prenatal injuries, because of the divergent language employed in the various wrongful death and survival statutes, and because recovery by a stillborn is determined by the construction of these statutes in the various jurisdictions.

It is universally accepted that if an action for wrongful death is to be maintained, the act must be of such character as would have supported an action by the deceased for his injuries had he survived. This proviso is explicit in most wrongful death statutes; if the deceased never had a cause of action, none would accrue under a statute containing such a condition. Except for a few jurisdictions, the courts have limited recovery for prenatal injuries resulting in death to those infants *born alive*. Many of these courts have clung to the anachronistic viability rule often coupled with the newer survival or live birth requirement.

In *Drabbels v. Skelly Oil Company*, the Nebraska Supreme Court

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49 Norman v. Murphy, 124 Cal. App. 2d 95, 268 P.2d 178 (1954); Drabbels v. Skelly Oil Co., 155 Neb. 17, 50 N.W.2d 229 (1951); Graf v. Taggart, 43 N.J. 303, 204 A. 140 (1964); *In Re Logan's Estate*, 3 N.Y. 2d 800, 144 N.E.2d 644 (1957); Gay v. Thompson, 266 N.C. 394, 146 S.E.2d 425 (1966); Hall v. Murphy, 236 S.C. 257, 113 S.E.2d 790 (1960); Hogan v. McDaniel, 204 Tenn. 235, 319 S.W.2d 221 (1958).
adhered to the questionable judicial rationale that an unborn child is part of the mother until birth. As such, the fetus had no judicial existence, and therefore, could not maintain an action at common law for injuries sustained while in the womb. The court refused to support the proposition that a child born dead was a "person" insofar as the law of torts was concerned. Since no cause of action accrued to the stillborn for injuries received before birth, none survived under the wrongful death statute. Similarly, the court in *Hogan v. McDaniel* asserted that the Tennessee Legislature had not intended the unborn child to be considered a person. This tribunal concluded that, "The biological fact that life begins at the moment of conception . . . is a pure fiction of the law . . . and does not create a right of action at law." In *Norman v. Murphy*, a California court concluded that the action was not maintainable because an unborn minor child was held not to be a minor person within the meaning of the statute, which allowed an action for the wrongful death of a non-minor person or of a person who leaves surviving him either a spouse or children or parents.

While the Massachusetts court in *Keyes v. Construction Service, Inc.* "effectively" reversed the *Dietrich* decision, allowing recovery for prenatal injuries, an implied condition of survival was engrafted on the recovery in death actions. The *Keyes* court stated that the law of Massachusetts should harmonize with that of the growing body of law of other states which have in principle adopted the rule that when an unborn child who has become a separable living entity is injured by the wanton or negligent act of another liability attaches after a fulfillment of the implied condition that the child be born alive.

In a New Jersey and a North Carolina decision, the struggle to prevent the maintenance of wrongful death actions for infants not born alive is demonstrated in the first impression determinations rendered by the two separate courts. Both courts argued that it is impossible to predict the pecuniary benefit to the survivors of an unborn

50 155 Neb. 17, 50 N.W.2d 229 (1951).
51 204 Tenn. 235, 319 S.W.2d 221 (1958).
52 Id. at 243, 319 S.W.2d at 224.
54 Supra note 24.
55 Graf v. Taggart, supra note 49.
56 Gay v. Thompson, supra note 49.
child within the meaning of the statutes, in the absence of evidence as to the child's capabilities and potentialities. The recent North Carolina case of Stetson v. Easterling upheld the law denying recovery in that jurisdiction.\(^\text{67}\) An action was brought for an infant's death from brain damage caused by the alleged negligence of a physician in delivering the child. The court held that under that state's death statute negligence alone, without pecuniary loss resulting from death, would not create a cause of action. The administrator failed to show that, had the child lived, he would have had earning capacity; and the court refused to estimate or predict what the child could have earned. In addition, the Michigan Appellate Court, while noting recent decisions to the contrary in other jurisdictions, nevertheless ruled the state's wrongful death act inapplicable to a stillborn child.\(^\text{68}\)

Precedent was reversed when Minnesota, in Verkennes v. Corniea,\(^\text{69}\) became the first state to allow a wrongful death proceeding for a stillborn infant. After noting that no issue of viability was involved because the infant died during delivery, the court concluded:

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[A]\text{ cause of action arises when death is caused by the wrongful act or omission of another, and the personal representative of the decedent may maintain such action on behalf of the next of kin of decedent. It seems too plain for argument that where independent existence is possible and life is destroyed through a wrongful act a cause of action arises under the statutes cited.}^{69}
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Subsequently, other jurisdictions authorized such actions.\(^\text{61}\)

Seven years later, a viable child killed in an automobile accident was deemed a person within the meaning of the wrongful death statute in Kentucky.\(^\text{62}\) An Iowa Federal District Court\(^\text{63}\) in 1960 allowed recovery, holding that in view of the overwhelming trend since the early 1950's toward allowing recovery for prenatal injuries to viable infants,

\(^{67}\) 274 N.C. 152, 161 S.E.2d 531 (1968).


\(^{69}\) 229 Minn. 365, 38 N.W.2d 838 (1949).

\(^{60}\) Id. at 370, 38 N.W.2d at 841.


\(^{62}\) Mitchell v. Couch, supra note 61.

\(^{63}\) Wendt v. Lillo, supra note 61.
the Iowa Supreme Court, if presented with the question, would hold that plaintiffs could maintain the instant action.

The Ohio Supreme Court in 1959 decided that a viable unborn child is a person and though stillborn possesses as valid a cause of action as one born alive and dying subsequently. The court concluded it was unable to reconcile the proposition that if death occurred after birth, a cause of action existed, but that if death occurred before birth, no cause of action existed. "[L]ogic requires recognition of causes of action for the deaths of both, or for neither."

The Connecticut Supreme Court, in 1962 and in 1966, adopted the same holding and rationale. The court concluded that to deny such an action for injuries to a viable fetus was both harsh and illogical, that medical science obviated much of the difficulty of causation, and that fraudulent claims are much less probable than they once were. Later it will be evident that medical science falls short of the omnipotence so bestowed upon it by the Connecticut court.

In 1964, Todd v. Sandedge Construction Company established the logical rationale that a death action should not be barred where a child died before birth, because such a distinction would be arbitrary and unjust; for the greater the harm, the better the chance of immunity, and thus the tortfeasor could foreclose his own liability. Once a viable fetus is accorded the status of a person in esse, a cause of action automatically arises, for if death had not ensued, the child would have been entitled to maintain an action to recover damages.

The viability rule remains very much an issue in wrongful death actions. Even in jurisdictions allowing proceedings on behalf of stillborn infants the viability necessity still applies and requires, as an indispensable prerequisite to the suit, that the fetus be viable when the injury causing fetal death or initiating the pathology ultimately causing fetal death occurs. No cases have been recorded awarding damages

65 Id. at 434, 167 N.E.2d at 108.
66 Gorke v. LeClerc, supra note 61.
68 341 F.2d 75 (2nd Cir. 1964). Another federal decision, Gullborg v. Rizzo, 331 F.2d 557 (3rd Cir. 1964), rejected the "live birth" doctrine and allowed recovery for a stillbirth.
69 "In being. Actually existing. Distinguished from in posse, which means "That which is not, but may be." BLACK'S LAW DICTIONARY 894 (4th ed. 1951).
against a tortfeasor for causing the death before birth of a non-viable fetus.

PROGNOSIS

A clinician in the determination of an accurate medical prognosis must amass all the pertinent medical facts available in the past and present history, add to it the objective physical findings and laboratory data, sift this information through a mental process honed by exhaustive hours of scientific training and current readings, and conclude with a diagnosis. Correspondingly, a determination of what may transpire in the future, judicially, must also undergo a similarly complicated process.

Although it may appear that changes in the law of prenatal injuries have proceeded at a snail's pace, especially considering the lack of consistency and conformity in the philosophical, moral, and natural laws concerning the meaning of life itself, it is fortunate indeed that any advancements have been wrought at all by the constant struggle of the courts in their attempts to provide a remedy for every wrong. For many years following the foundation cases of Dietrich,70 Walker,71 and Allaire,72 the courts wrestled with the questions initially proposed: What is life? When does life begin? At first, denying the concepts of natural law, morality, and philosophy, the courts were leery to cause a change, not so much for the philosophical reasons enunciated, but actually because of the practical difficulty in proving such a claim. Then began a tortuous but steady return to the immutable natural law and moral principle from which the early cases had departed, that:

The viable foetus does not materialize out of inanimate matter at the moment of viability any more than the living infant materialized out of cosmic dust at the moment of birth.73

Initially, as a matter of convenience, a child in the womb was dealt with as part of the mother, and the law was settled against the benificence of what was construed to be an artificial rule of liability for prenatal injuries. Courts considered rights allowed to and for unborn

71 Walker v. Great Northern Ry., 28 L.R. Ir. 69 (1881).
persons as being mere legal fictions, since there was no scientific proof that such persons were living things. Then, ostensibly in the light of scientific advancements, but more likely in order to bring tort law into harmony with other branches of the law, courts allowed causes of action brought on behalf of viable fetuses. Adhering to the legal axiom that the law will be what the law should be, the viability rule met increasing resistance, not only because of the recognition by medical authorities that an unborn child is a distinct biological entity from the time of conception, but in large measure because of the inability of science to provide practical answers.

Medicine has not reached a stage, as some courts have concluded, where all the answers to legal fact issues are available. Several examples will suffice to point up medical science's inability to be omniscient.

Insofar as the issue of viability is concerned, the exact date of conception and the exact age of the fetus are medically impossible to determine. Furthermore, the age of a fetus is not the sole measure of its viability. Older fetuses may die, while younger fetuses may survive. Certainty of viability could only be achieved if the infant is born shortly after the injury. It is more than likely that the viability rule will be abandoned and that ultimately a plaintiff need merely prove the existence of pregnancy to prosecute a claim for fetal injuries. Even then, problems of medical proof will continue to plague judiciaries in the future when adjudicating prenatal litigation.

To the laity, the diagnosis of pregnancy is routine, yet physicians are often perplexed in attempting to confirm such condition. Many women do not menstruate regularly, and thus their days of actual fertility cannot be pinpointed. No physician can clinically diagnose pregnancy with any degree of certainty until the sixth week following conception. Laboratory tests do not become positive until two weeks after the first missed menstrual period, and even then there is significantly less than one hundred per cent accuracy. These uncertain diagnoses raise grave problems as to matters of proof in prenatal personal injury and wrongful death actions. Where, in a wrongful death proceeding, a woman delayed in her cycle suffers an injury causing

74 See supra note 2.
75 Courts have taken judicial notice of this medical fact. See Smith v. Brennan, supra notes 27 & 30.
excessive bleeding, the submission of the decidual tissue passed would be the only absolute proof of pregnancy.

The proof of the necessary causal connection between the misconduct alleged and the resultant injury is crucial, but may be virtually impossible to establish. Yet, mere difficulty in proving facts is an unsound reason for halting attempts at proof. Faced with a hypothetical question of whether a trauma, no matter how slight, caused an injury, a medical witness could not in all candor deny that the trauma might or could have such an effect. Yet, there is very little medical authority to support claims that trauma to the mother will cause injury to the fetus other than its premature abortion (or birth). Because of nature's protective barrier, the bag of waters, only catastrophic outside forces can affect the fetus. Further, if trauma-caused damage is to occur, it must take place in the first trimester of pregnancy while the fetus is in its formative stage. In addition, what a doctor may consider a medically "proximate cause" may not in legal theory be an actionable "cause of action." However, advances in medical science have demonstrated that experienced physicians can reliably relate many prenatal conditions to later development. It has become well recognized that a fetus deprived of oxygen, whether due to uterine bleeding or circulatory arrest resulting from trauma, shock, or chemical interference, has a strong possibility of emerging with abnormality. In another area, the relation between X-rays and prenatal defects has long been acknowledged, as has maternal exposure to certain viral diseases such as rubella (German measles) and varicella (chicken pox). Again, the noxious influences, if they are to cause fetal damage, must come into contact with the embryo early to arrest whatever formative phase of development is then in progress. The periods of active differentiation of the sensory organs occur at different times in embryonic development. The eye differentiates between the fifth and eighth week of development, and the cochlea, or organ for hearing, between the

77 "Modern embryology has shown that the disturbances of normal growth responsible for abnormalities must have occurred in the early stages of embryonic development. . . . Similar chronological considerations dispose of all but a minute fraction of cases where physical trauma to the pregnant woman has been alleged to produce foetal abnormalities." MORRISON, FOETAL AND NEO-FOETAL PATHOLOGY 15 (2nd ed. 1963).

78 Recently a substantial settlement was negotiated in Illinois on behalf of a child born with severe and permanent brain damage incurred as a result of cerebral anoxia caused by a cardiac arrest in the mother during labor following an allegedly negligent administration of caudal block anesthesia. Circuit Court, Cook County, No. 66L67.

79 MORRISON, supra note 77, at 21.
seventh and tenth week. In the cataract following rubella, the mean period of maternal infection corresponds to a fetal age of 1.17 months, and in deafness 2.17 months. The developmental age at which a disturbed embryological process could produce the anomaly discovered should agree with the actual time of operation of the alleged environmental disturbance.

Causation will be a particularly perplexing issue in drug-caused prenatal injuries. There are thousands of therapeutic medicines commonly used and prescribed in the ethical medical world that, according to the PDR, are contra-indicated during pregnancy. Should a woman bearing a malformed child as a result of using such drugs, when she was not known to be pregnant at the time of the purchase, be allowed a cause of action against the prescriber, or a product liability suit against the manufacturer? Should the prescriber, or vendor of the drug, be impressed with the duty either to inquire or establish the existence of pregnancy before such a drug is prescribed or sold?

It appears relatively certain that efforts to prove the causal relation of the drug Thalidomide to congenital malformation will be upheld in the "Thalidomide" trials in West Germany. This will be a great victory for proponents arguing the necessity for greater clinical and therapeutic research before putting drugs on the common market. An unusually large number of limb deformities, heretofore rare, have been reported following the use of the hypnotic drug by mothers between the fourth and eighth week of pregnancy.

As a final problem, expanding medical science will in the future give rise to first impression prenatal litigation in two particular areas. Research scientists have been successful in determining, prior to birth, both the sex of an infant and certain genetic disorders and blood incompatibilities by tapping and examining the amniotic fluid through a procedure known as amniocentesis. Such a procedure could initiate

80 Morrison, supra note 77, at 21.

81 Physicians are supplied with an up to date compendium of all drugs produced and manufactured called the PDR (Physician's Desk Reference), which designates the chemical nature of drugs, their actions, indications, contra-indications, and therapeutic dosages.


83 Morrison, supra note 77, at 23, 400.

84 The amnion is the bag of waters: "the sac that encloses the fetus and forms the innermost fetal membrane, forming a sheath for the umbilical cord." Dorland's Illustrated Medical Dictionary 69 (24th ed. 1965).
a process resulting in a malformation of a fetus from an infection negligently introduced into the bag of waters. Secondly, medical technology has gone beyond artificial insemination, which has already led to legal complications, and, in investigating the DNA molecule, is gradually nearing the day when human life will be artificially synthesized.

Eventually all jurisdictions will allow recovery for prenatal injuries, eliminating forever the viability requirement. And though the change may not be as immediate, the wrongful death statutes will be construed to likewise sustain a cause of action for deaths occurring as a result of prenatal injuries, abrogating the viability rule and eliminating the necessity for live birth.

As medical science discovers new causal relationships or negates those previously accepted, litigation may be expected to incorporate these advances. Not far off is the possibility of establishing a medico-legal tie between maternal emotional distress and prenatal disability. These cases and those to come will demonstrate the willingness and the ability of the law to adapt to life situations and to scientific realities. Principles must be derived which are rational in relation to present medical knowledge and which will remain so with further advances in medical science. But should the courts be reluctant to translate the medical realities into legal principles we shall again tragically witness a medical jurisprudence falling decades behind its scientific counterpart.