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Torts - Extension of Prenatal Injury Doctrine to Nonviable Infants - Daley v. Meier, 33 Ill. App.2d 218, 178 N.E.2d 691 (1961)

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for treatment, and a wrongful denial of its service could well be a substantial injury to an injured or sick person. Third, existence and knowledge of the emergency room is the basis on which the community relies on its facilities in time of emergency and for the arbitrary denial of its services which results in injury the private hospital should not escape liability. The imposition of liability on the private hospital for its refusal to render treatment or admission in any emergency may well be a manifestation by the courts of "their vitality and consecration to the proposition that the purpose of law in society is to aid in the solution of the multiple problems of that society."[34]

[34] Dooley, *Ten Years of Developments in the Law of Negligent Torts*, 10 DE PAUL L. REV. 503, 537 (1961).

TORTS–EXTENSION OF PRENATAL INJURY DOCTRINE TO NONVIABLE INFANTS

Action was brought on behalf of a child born with subnormal mental faculties who was also hampered by substandard development requiring special medical attention. It was alleged that the defendant's negligent operation of her automobile resulted in an accident involving the mother of the injured child. It was further alleged that the aforementioned negligence of the defendant resulted in injury to the child who was then in the mother's womb. At the time of the incident, the child's mother was approximately one month pregnant. The trial court dismissed the action on the basis that the child was not a viable[1] foetus, capable of extra-uterine survival, at the time of the accident and therefore the infant had no identity apart from the mother. In reversing the trial court's decision, the Appellate Court of Illinois held that an infant, who was born alive and survives, can maintain an action to recover for prenatal injuries, medically provable as resulting from the negligence of another, even if it had not reached the state of a viable foetus at the time of the injury. *Daley v. Meier*, 33 Ill. App.2d 218, 178 N.E.2d 691 (1961).

In allowing a cause of action for injuries sustained while a nonviable infant, Illinois becomes one of a handful of jurisdictions which have recently extended the area of recovery for prenatal injuries to any injury, occurring prior to birth, which can be proved as resulting from the negligence of another. Relief for prenatal injuries had previously been re-

[1] "Viable. Not born dead. Capable of living, said of a fetus that can live outside of the uterus." MALOY, MEDICAL DICTIONARY FOR LAWYERS 567 (2d ed. 1951). "Viable. Livable, having the appearance of being able to live." BLACK, LAW DICTIONARY 1737 (4th ed. 1951).

stricted only to cases where the injury was to a viable infant. Permitting a cause of action for prenatal injuries is in itself a comparatively new doctrine which has evolved in recent years, overturning what had previously been considered a well-established principle that no recovery would be allowed a child for prenatal injuries caused by another's negligence.

In *Dietrich v. Inhabitants of Northampton*,[2] probably the first recorded case wherein recovery for injuries sustained before birth was sought, the Supreme Judicial Court of Massachusetts held that no remedy could be granted. Justice Holmes, in rendering the opinion, based the decision on (1) the lack of precedent; and (2) the child's lack of an existence separate and distinct from the mother.

Where the question of prenatal injuries arose elsewhere, the precedent set by the *Dietrich* case was followed,[3] and the courts set forth additional reasons for denying recovery.[4] Some of the reasons advanced were: (1) causation was difficult to prove;[5] (2) conjecture or speculation would be the basis of recovery;[6] (3) allowing recovery is a matter for legislative consideration;[7] and (4) permitting a cause of action for prenatal injuries would give rise to fictitious claims.[8]

Prior to 1946[9] the states of Alabama,[10] Illinois,[11] Massachusetts,[12] Mich-

[2] 138 Mass. 14, 52 Am. Rep. 242 (1884).

[3] *E.g.*, Cavanaugh v. First National Stores, 329 Mass. 179, 107 N.E.2d 307 (1952); Bliss v. Passanesi, 326 Mass. 461, 95 N.E.2d 206 (1950); Ryan v. Public Service Coordinated Transport, 18 N.J. Misc. 429, 14 A.2d 52 (1940); Newman v. City of Detroit, 281 Mich. 60, 274 N.W. 710 (1937); Magnolia Coca Cola Bottling Co. v. Jordan, 124 Tex. 347, 78 S.W.2d 944 (1935). In Walker v. Great Northern Ry., 28 L.R. (Ire.) 69 (1891), a cause of action was not recognized for prenatal injuries, but no mention was made of the Dietrich case.

[4] For a detailed analysis of the development of the prenatal injury doctrine, see 3 DePaul L. Rev. 257 (1959).

[5] Bliss v. Passanesi, 326 Mass. 461, 95 N.E.2d 206 (1950); Stanford v. St. Louis-San Francisco Ry., 214 Ala. 611, 108 So. 566 (1926).

[6] Magnolia Coca Cola Bottling Co. v. Jordan, 124 Tex. 347, 78 S.W.2d 944 (1935); Stanford v. St. Louis-San Francisco Ry., 214 Ala. 611, 108 So. 566 (1926).

[7] Cavanaugh v. First National Stores, 329 Mass. 179, 107 N.E.2d 307 (1952); Ryan v. Public Service Coordinated Transport, 18 N.J. Misc. 429, 14 A.2d 52 (1940); Newman v. City of Detroit, 281 Mich. 60, 274 N.W. 710 (1937); Allaire v. St. Luke's Hospital, 184 Ill. 359, 56 N.E. 638 (1900); Smith v. Luckhardt, 299 Ill. App. 100, 19 N.E.2d 446 (1939).

[8] Magnolia Coca Cola Bottling Co. v. Jordan, 124 Tex. 347, 78 S.W.2d 944 (1935).

[9] In 1946 a cause of action for prenatal injuries was recognized in Bonbrest v. Kotz, 65 F. Supp. 138 (D.D.C. 1946).

[10] Stanford v. St. Louis-San Francisco Ry., 214 Ala. 611, 108 So. 566 (1926) (wrongful death action denied).

[11] Allaire v. St. Luke's Hospital, 184 Ill. 359, 56 N.E. 638 (1900); Smith v. Luckhardt, 299 Ill. App. 100, 19 N.E.2d 446 (1939) (recovery for personal injuries denied).

[12] Dietrich v. Inhabitants of Northampton, 138 Mass. 14, 52 Am. Rep. 242 (1884) (wrongful death action not allowed).

igan,[13] Missouri,[14] New Jersey,[15] New York,[16] Ohio,[17] Pennsylvania,[18] Rhode Island,[19] Texas[20] and Wisconsin[21] had decided upon the question of prenatal injuries and had refused to recognize a cause of action.[22]

The infant's mother was awaiting the birth of the child at defendant hospital in *Allaire v. St. Luke's Hospital*[23] wherein the defendant's negligence was alleged as the cause of the injury to the child. The court refused to recognize a cause of action. However, a dissenting opinion by Justice Boggs in the *Allaire* case was an influencing factor in subsequent decisions which allowed recovery to a viable infant. Boggs contended:

> A foetus . . . 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.[24]

The argument that an unborn child lacks existence separate from the mother and therefore can not be considered a person in being for legal purposes has been weakened by the fact that other areas, such as criminal

[13] Newman v. City of Detroit, 281 Mich. 60, 274 N.W. 710 (1937) (personal injury action denied).

[14] Buel v. United Ry., 248 Mo. 126, 154 S.W. 71 (1913) (wrongful death action denied).

[15] Stemmer v. Kline, 128 N.J.L. 455, 26 A.2d 489 (1942); Ryan v. Public Service Coordinated Transport, 18 N.J. Misc. 429, 14 A.2d 52 (1940) (denied personal injury action).

[16] Drobner v. Peters, 232 N.Y. 220, 133 N.E. 567 (1921); Nugent v. Brooklyn Hts. Ry., 154 App. Div. 667, 139 N.Y.S. 367 (1913), *appeal dismissed*, 209 N.Y. 515, 102 N.E. 1107 (1913) (personal injury action denied).

[17] Mays v. Weingarten, 82 N.E.2d 421 (Ohio App. 1943) (recovery for prenatal injuries denied).

[18] Berlin v. J. C. Penney Co., 339 Pa. 547, 16 A.2d 28 (1940) (recovery for personal prenatal injuries denied).

[19] Gorman v. Budlong, 23 R.I. 169, 49 Atl. 704 (1901) (wrongful death action denied).

[20] Magnolia Coca Cola Bottling Co. v. Jordan, 124 Tex. 347, 78 S.W.2d 944 (1935) (denied wrongful death action).

[21] Lipps v. Milwaukee Electric Ry. & Light Co., 164 Wis. 272, 159 N.W. 916 (1916) (personal injury action denied).

[22] Cooper v. Blanck, 39 So.2d 352 (La. App. 1923) (recovery allowed on basis of Louisiana's civil law background) (case furnished by the court for publication in 1949). Scott v. McPheeters, 33 Cal. App.2d 629, 92 P.2d 678 (1939) (California granted relief on the basis of a state statute providing that a child conceived, not yet born, would be considered an existing person).

[23] 184 Ill. 359, 56 N.E. 638 (1900).

[24] *Id.* at 370, 56 N.E. at 641.

law and property law, have long recognized the legal existence of a child not yet born.[25]

Law which is unchanging is like a stagnant pool. As knowledge in other fields is expanded, courts must adopt their decisions so as to fill the gap between outdated precedent and modern realizations. "When these ghosts of the past stand in the path of justice clanking their mediaeval chains the proper course for the judge is to pass through them undeterred."[26]

In *Bonbrest v. Kotz*[27] the court recognized a cause of action in a suit alleging medical malpractice for a direct injury to a viable child, "capable . . . of extra-uterine life,"[28] where it was alleged that the defendant negligently attempted to take the child from his mother's womb. The *Bonbrest* case, the turning point in allowing recovery for prenatal injuries in this country,[29] has been followed by a reversal of the holdings denying recovery for prenatal injuries in the states of Illinois,[30] Missouri,[31] New Jersey,[32] New York,[33] Ohio[34] and Pennsylvania.[35] Other jurisdictions which previously denied recovery have either indicated a possible reversal in the future,[36] or, while expressly denying the need to reverse a prior hold-

[25] "Although they might not be exactly parallel situations we find it difficult to see the logic which would recognize a child's legal existence while *en ventre sa mere* with respect to property rights and rights of inheritance and so also in the field of criminal law and yet would deny it recognition so as to afford it protection against the torts of others." Bennett v. Hymers, 101 N.H. 483, 147 A.2d 108, 110 (1958).

[26] Lord Atkin in United Australia, Ltd. v. Barclays Bank, Ltd. [1941] A.C. 1, 29.

[27] 65 F. Supp. 138 (D.D.C. 1946).

[28] *Id.* at 140.

[29] In Montreal Tramways v. Leveille [1933] 4 D.L.R. 337, the Supreme Court of Canada allowed recovery for a child born with club feet, but the decision was influenced by Canada's civil law background.

[30] Amann v. Faidy, 415 Ill. 422, 114 N.E.2d 412 (1953); Rodriquez v. Patti, 415 Ill. 496, 114 N.E.2d 721 (1953), *reversing* Allaire v. St. Luke's Hospital, 184 Ill. 359, 56 N.E. 638 (1900).

[31] Steggall v. Morris, 363 Mo. 1224, 258 S.W.2d 577 (1953), *reversing* Buel v. United Ry., 248 Mo. 126, 154 S.W. 71 (1913).

[32] Smith v. Brennan, 31 N.J. 353, 157 A.2d 497 (1960) (recovery allowed without an allegation that the child was viable), *reversing* Stemmer v. Kline, 128 N.J.L. 455, 26 A.2d 489 (1942).

[33] Woods v. Lancet, 303 N.Y. 349, 102 N.E.2d 691 (1951) [noted: 2 DePaul L. Rev. 97 (1952)], *reversing* Drobner v. Peters, 232 N.Y. 220, 133 N.E. 567 (1921).

[34] Williams v. Marion Rapid Transit, 152 Ohio St. 114, 87 N.E.2d 334 (1949), *reversing* Mays v. Weingarten, 82 N.E.2d 421 (Ohio App. 1943).

[35] Sinkler v. Kneale, 401 Pa. 267, 164 A.2d 93 (1960) (infant nonviable at the time of injury), *reversing* Berlin v. J. C. Penney Co., 339 Pa. 547, 16 A.2d 28 (1940).

[36] LaBlue v. Specker, 358 Mich. 558, 100 N.W.2d 445 (1960); Puhl v. Milwaukee Auto Ins., 8 Wis.2d 343, 99 N.W.2d 163 (1959).

ing, allowed recovery in view of modern precedent.[37] A cause of action has also been recognized for prenatal injuries to a viable infant in the states of Connecticut,[38] Delaware,[39] Georgia,[40] Iowa,[41] Kentucky,[42] Maryland,[43] Minnesota,[44] Mississippi,[45] New Hampshire,[46] Oregon[47] and South Carolina.[48] Recovery has usually been allowed only where the child has been born alive.[49]

No longer is the precedent lacking for recognizing the legal existence of a child in allowing recovery for injuries sustained prior to birth.[50] Courts, in recognizing a cause of action, have been swayed by the injustice which had evolved through the denial of recovery where a wrong had been committed. They have not only rejected the false theory that a cause of action should not exist because of the difficulty of proving a causal relation between the injury and the wrongful act, but they have also disclaimed any merit in the contention that there may be the possibility of fictitious claims. The law should neither deny relief where a wrong has been done nor block an attempt to prove the causal relationship, particularly in light of modern medical science, merely because the causal connection may be difficult to prove. If the plaintiff is not able to prove his case, he will not prevail.[51] The evidence must meet the usual tests required in tort cases.[52]

[37] Keyes v. Construction Service, Inc., 340 Mass. 633, 165 N.E.2d 912 (1960).

[38] Tursi v. New England Windsor Co., 19 Conn. Sup. 242, 111 A.2d 14 (1955). *Also see* Prates v. Sears, Roebuck & Co., 19 Conn. Sup. 487, 118 A.2d 633 (1955).

[39] Worgan v. Greggo & Ferrara, Inc., 50 Del. 258, 128 A.2d 557 (1956).

[40] Tucker v. Howard L. Carmichael & Sons, 208 Ga. 201, 65 S.E.2d 909 (1951).

[41] Wendt v. Lillo, 182 F. Supp. 56 (N.D. Iowa 1960).

[42] Mitchell v. Couch, 285 S.W.2d 901 (Ky. Ct. App. 1955).

[43] Damasiewicz v. Gorsuch, 197 Md. 417, 79 A.2d 550 (1951).

[44] Verkennes v. Corniea, 229 Minn. 365, 38 N.W.2d 838 (1949).

[45] Rainey v. Horn, 221 Miss. 269, 72 So.2d 434 (1954).

[46] Poliquin v. MacDonald, 101 N.H. 104, 135 A.2d 249 (1957).

[47] Mallison v. Pomeroy, 205 Ore. 690, 291 P.2d 225 (1955).

[48] Hall v. Murphy, 236 S.C. 257, 113 S.E.2d 790 (1960).

[49] *Contra,* Wendt v. Lillo, 182 F. Supp. 56 (N.D. Iowa 1960); Poliquin v. MacDonald, 101 N.H. 104, 135 A.2d 249 (1957); Mitchell v. Couch, 285 S.W.2d 901 (Ky. Ct. App. 1955); Rainey v. Horn, 221 Miss. 269, 72 So.2d 434 (1954); Verkennes v. Corniea, 229 Minn. 365, 38 N.W.2d 838 (1949) (recovery under wrongful death statutes allowed where child was born dead except in Wendt v. Lillo where a cause of action was allowed under a survival statute).

[50] "If inability 'to find any precedent at common law' were a good reason to deny an injured person a remedy, then, indeed, the common law would never have reached the embryo stage." Steggal v. Morris, 363 Mo. 1224, 1230, 258 S.W.2d 577, 579 (1953).

[51] Steggall v. Morris, 363 Mo. 1224, 258 S.W.2d 577 (1953).

[52] Bennett v. Hymers, 101 N.H. 483, 147 A.2d 108 (1958).

Recent cases have allowed recovery where there was injury to a child which had at least reached the stage of viability. Although the child is not strictly separate from the mother, neither is it strictly a part of the mother in that while the child depends for its development upon sustenance from the mother, it is not considered a "part" of the mother "in the sense of a constituent element."[53]

Liability for injury to a nonviable infant was first recognized as a further extension of the doctrine of allowing recovery for prenatal injuries in *Kelly v. Gregory*,[54] and subsequently five jurisdictions which have considered the question have also allowed recovery to a nonviable infant.[55]

The infant in the *Kelly* case was allegedly injured by the defendant's negligent operation of an automobile while the child's mother was in the third month of pregnancy. The court, in recognizing a cause of action, emphasized that legal separability should begin where there is biological separability, which latter separability begins at conception. The biological contribution of the mother, beginning with conception, is to nourish and protect. The foetus has already become a separate organism. This characteristic of being separate will not be destroyed, even though the child may not live if deprived of protection and nourishment prior to reaching the viable stage of its development.[56]

The particular moment after conception, or the particular period of prenatal existence of the child, when the injury was inflicted has been held to be not controlling.[57] Courts have deemed it an injustice to deny a child born alive a right of recovery for injuries which he might bear for the remainder of his life because of the tortious conduct of another—regardless of viability or nonviability.[58]

There was no allegation as to whether the child, born subsequent to the alleged wrongful act with deformities of legs and feet, was viable or nonviable at the time of the injury in *Smith v. Brennan*.[59] A distinction between whether the child was viable or nonviable at the time of the injury was not required. The court assented to a cause of action without such

[53] Bonbrest v. Kotz, 65 F. Supp. 138, 140 (D.D.C. 1946).

[54] 282 App. Div. 542, 125 N.Y.S.2d 696 (1953).

[55] Daley v. Meier, 33 Ill. App.2d 218, 178 N.E.2d 691 (1961); Sinkler v. Kneale, 401 Pa. 267, 164 A.2d 93 (1960); Smith v. Brennan, 31 N.J. 353, 157 A.2d 497 (1960); Bennett v. Hymers, 101 N.H. 483, 147 A.2d 108 (1958); Hornbuckle v. Plantation Pipe Line Co., 212 Ga. 504, 93 S.E.2d 727 (1956).

[56] Kelly v. Gregory, 282 App. Div. 542, 125 N.Y.S.2d 696 (1953).

[57] Hornbuckle v. Plantation Pipe Line Co., 212 Ga. 504, 93 S.E.2d 727 (1956).

[58] Bennett v. Hymers, 101 N.H. 483, 147 A.2d 108 (1958).

[59] 31 N.J. 353, 157 A.2d 497 (1960).

distinction. It has been recognized by medical authorities that a child is not merely a part of its mother's body but rather is in existence from the moment of conception.[60]

It should be immaterial whether an unborn child is considered a person at the time of the injury before recovery will be allowed. A person will be produced if the biological processes set in motion by conception are left undisturbed. Where injuries caused by disruption of biological processes became apparent after birth, it is immaterial whether the infant is deemed a person prior to birth. Justice requires that a child have a legal right to begin life with a sound mind and body. If there is interference with that right by the wrongful conduct of another, and competent proof can establish the causal connection between the wrongful interference and the harm suffered by the child, the infant should recover damages for such harm.[61]

The exact point of time at which the child becomes viable is practically impossible to determine in a border-line case unless the child is born immediately after the injury, so it would seem that the "viability theory" would therefore lack practical application as a test of liability. Serious doubt is therefore raised as to whether the age of the infant at the time of the wrongful act should ever be given controlling consideration in allowing recovery. This doubt is evident from the following words of the Supreme Court of New Jersey:

> Whether 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.[62]

Recent decisions have, almost without exception, allowed a cause of action for prenatal injuries, notwithstanding the fact that the child had not yet attained the stage of viability at the time of the injury.[63] Some courts have expressly withheld an opinion regarding nonviable infants while allowing a cause of action to exist where the child was clearly viable.[64]

If it can be proven that the wrongful conduct of another was the cause of an injury to an unborn child later born alive, recovery should be allowed. To deny a cause of action would result in a remediless wrong. The

[60] *Ibid.* [61] *Ibid.* [62] *Id.* at 367, 157 A.2d at 504.

[63] Daley v. Meier, 33 Ill. App.2d 218, 178 N.E.2d 691 (1961); Sinkler v. Kneale, 401 Pa. 267, 164 A.2d 93 (1960); Smith v. Brennan, 31 N.J. 353, 157 A.2d 497 (1960); Bennett v. Hymers, 101 N.H. 483, 147 A.2d 108 (1958); Hornbuckle v. Plantation Pipe Line Co., 212 Ga. 504, 93 S.E.2d 727 (1956); Kelly v. Gregory, 282 App. Div. 542, 125 N.Y.S.2d 696 (1953).

[64] Hall v. Murphy, 236 S.C. 257, 113 S.E.2d 790 (1960); Rainey v. Horn, 221 Miss. 269, 72 So.2d 434 (1954).

extension of the doctrine of recovery for prenatal injuries to nonviable infants has gained notable support in the past few years, and is an indication that courts may now overlook the frequently utilized "viability theory" in favor of the newer "conception theory." The "conception theory" as set forth in the instant case has risen in popularity in a relatively short period of time. This novel doctrine should see adoption in more jurisdictions in the future. Such a selection would be in the interest of justice.

TORTS–IN PERSONAM JURISDICTION OVER FOREIGN CORPORATION AND DUE PROCESS–A NEW FRONTIER

Gray, an Illinois resident, brought an action against American Radiator and Standard Sanitary Corporation and the Titan Valve Manufacturing Company for injuries suffered when a water heater allegedly exploded. The complaint charged, *inter alia*, that plaintiff's injuries were proximately caused by the negligent manufacture of the safety valve by the Titan Company, a foreign corporation. Titan manufactured the valve in Ohio and sold it outside of Illinois to American Radiator, who incorporated it into the water heater in Pennsylvania and sold heater and valve to plaintiff through a distributor in Illinois. Jurisdiction was predicated upon section 17(1)(b) of the Civil Practice Act[1] with summons personally served upon Titan's registered agent in Ohio, as provided for in the Act.[2]

Titan appeared specially and moved to quash the service, contending that it had committed no "tortious act" in Illinois, in that it did no business in Illinois, had no agent physically present in Illinois, and that it sold the valve to defendant American Radiator outside of Illinois. The circuit court of Cook County granted Titan's motion and dismissed the complaint.

Plaintiff appealed directly to the Illinois Supreme Court because a constitutional question was involved.[3] The Court held that defendant Titan

[1] ILL. REV. STAT. ch. 110, § 17(1)(1961). Section 17(1) provides: "Any person, whether or not a citizen or resident of this State, who in person or through an agent does any of the acts hereinafter enumerated, thereby submits said person, and, if an individual, his personal representative, to the jurisdiction of the courts of this State as to any cause of action arising from the doing of any of said acts: ...

"(b) The commission of a tortious act within this State;"

[2] ILL. REV. STAT. ch. 110, § 16 (1961). Section 16 provides that personal service of summons outside of the state, upon a person who has submitted to the jurisdiction of the courts of the state, shall have the force and effect of personal service of summons within the state.

[3] ILL. REV. STAT. ch. 110, § 75(1)(a)(1961).