
Prenatal Injuries and the Nonviable Infant

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new case presents a problem which must be decided on its own merits and equities.

Exhumation is an area in which deep human emotions are involved. Thus, there would be much difficulty and hardship if the court were to apply strictly objective standards in reaching its decisions.

Because of the nature of disinterment, there has not been a great deal of litigation in this field. It is probable, however, that the litigation will increase greatly in the future. Cemeteries are growing older and some are commensurately more decrepit. In all likelihood many people will ultimately desire to remove their loved ones from their present places of repose.

If the courts could decide on a set of more objective standards for universal use in determining disinterment cases, much confusion, uncertainty, and litigation would be eliminated in this particular phase of the law. At this writing, however, the probability seems to be that the status of the law as to disinterment will unfortunately remain unchanged until farsighted administrators, legislators, and attorneys take positive steps forward, even as they have done in other phases of the law.

PRENATAL INJURIES AND THE NONVIABLE INFANT

In recent years, American courts have been repudiating a long entrenched doctrine whereby infants *en ventre sa mere*,¹ both viable and nonviable,² are denied a cause of action and right of recovery against those who wrongfully inflict prenatal injuries.³ The modern trend has

¹ "A child is said to be *en ventre sa mere* before it is born; while it is a foetus." Black's Law Dictionary (4th ed., 1951).

² "Viability—Livable, having the appearance of being able to live . . . capable of life. This term is applied to a newly-born infant, and especially to one prematurely born, which is not only born alive, but in such a state of organic development as to make possible the continuance of its life." Black's Law Dictionary, (4th ed., 1951); "Viable—Capable of living; born alive and with such form and development of organs as to be normally capable of living. . . ." Webster's New International Dictionary (2d ed., unabridged, 1951); "It is to be noted that there is a medical distinction between the term 'embryo' and a 'viable foetus.' The embryo is the foetus in its earliest stages of development, especially before the end of the third month, but the term 'viable' means that the foetus has reached such a stage of development that it can live outside the uterus. American Illustrated Medical Dictionary, 19 Ed. Dorland, pp. 483, 1605." *Bonbrest v. Kotz*, 65 F. Supp. 138, 140 n. 8 (D.C. D.C., 1946); "A viable foetus has been defined as one sufficiently developed for extra-uterine survival, normally a foetus of seven months or older. (Stedman, Medical Dictionary, 1234 (16th Ed. Taylor, 1946).) 'All authorities agree that at some time during the period of gestation, the infant, yet unborn, reaches a stage of development where it can live outside of the mother.' Taylor, Principles and Practice of Medical Jurisprudence, 34 (10th Ed.). See: Dorland, The American Illustrated Medical Dictionary, 1625 (20th Ed. 1945)." *Amann v. Faigy*, 415 Ill. 422, 427, 114 N.E. 2d 412, 417 (1953).

³ ". . . that in the absence of a statutory provision requiring a different result, a pre-natal injury affords no basis for an action in damages in favor of the child. The

been to accept the arguments of the early dissenters to the doctrine, and allow the viable foetus a cause of action. Illinois has just recently joined this trend.⁴ Emphasis in both the old and the modern cases has been on the viable foetus, with little or nothing being said concerning the rights of the nonviable foetus. Whether the day is not far off when a nonviable foetus can maintain a tort action and recover for prenatal injuries, is best determined by close examination of the reasoning and arguments of cases dealing with the problem.

BIRTH OF A DOCTRINE: THREE FOUNDATION CASES

For many years, courts and legal writers have reiterated that the decision in *Dietrich v. Inhabitants of Northampton*,⁵ was the foundation for the doctrine that a viable infant *en ventre sa mere* could not recover for wrongfully inflicted prenatal injury. Actually, this case was only one of three cases wherein the doctrine was born.⁶ Each of the members of this triumvirate contributed an essential ingredient to the doctrine, either through decision, dicta or application of the preceding case. In order to realize how this occurred, it is necessary to make a careful analysis of each case.

In the *Dietrich* case, suit was brought by an administrator under the Massachusetts Wrongful Death Statute, on behalf of a deceased infant. The mother of the deceased slipped and fell upon a defect in the highway of the defendant town. As stated by the court:

At the time, she was between four and five months advanced in pregnancy, the fall brought on a miscarriage, and the child, although not directly injured, unless by a communication of the shock to the mother, was too little advanced in foetal life to survive its premature birth.⁷

There was some "testimony" that the child moved its limbs 5 or 10 minutes after birth. The lower court ruled that the action could not be maintained. The Massachusetts Supreme Court affirmed this decision in an opinion delivered by Justice Holmes. He first rejected analogies between

doctrine of the civil law and the ecclesiastical and admiralty courts that an unborn child may be considered as in esse for some purposes, when for its benefit, has been characterized as a legal fiction not indulged in the courts to the extent of allowing an action for injuries occasioned before its birth." 52 Am. Jur., Unborn Children § 98 (1944); "A person who negligently causes harm to an unborn child is not liable to such child for the harm." Rest., Torts § 869 (1939).

⁴ *Amann v. Faigy*, 415 Ill. 422, 114 N.E. 2d 412 (1953) expressly overrules *Allaire v. St. Lukes Hospital*, 184 Ill. 359, 56 N.E. 638 (1900).

⁵ 138 Mass. 14 (1884).

⁶ The other two cases are *Walker v. Great Northern Railway Co.*, 28 L.R. (Ire.) 69 (1891) and *Allaire v. St. Lukes Hospital*, 184 Ill. 359, 56 N.E. 638 (1900).

⁷ *Dietrich v. Inhabitants of Northampton*, 138 Mass. 14, 15 (1884).

the case in issue and those wherein an unborn infant was recognized at common law as an existing person, for the purposes of the criminal law, and as a person with legally enforceable rights to real and personal property on the civil side. He also noted the lack of precedent for the action:

. . . no case, so far as we know, has ever decided that, if the infant survived, it could maintain an action for injuries received by it while in its mother's womb.⁸

Holmes then made a statement that has been repeated in almost every subsequent case on prenatal injuries:

. . . that, as the unborn child was a part of the mother at the time of the injury, any damage to it which was not too remote to be recovered for at all was recoverable by her.⁹

The facts of the *Dietrich* case make it evident that the deceased infant was nonviable when the injury occurred.¹⁰ Thus, Holmes was referring to a nonviable foetus when he said the unborn child was a part of the mother. Nowhere in the opinion does he expressly state that this thinking should be applicable to viable infants.¹¹ However, the language used by Holmes is very broad and subject to the interpretation that it is applicable to all unborn infants. Many subsequent cases have noted that the infant in the *Dietrich* case was nonviable.¹² It has been said that the *Dietrich* case was a misapplication of the doctrine of *stare decisis*, and that "Much of the opinion in that case is sheer dicta."¹³

The second of the foundation cases was *Walker v. Great Northern Railway Co.*¹⁴ The action was brought by an infant plaintiff for prenatal injuries sustained when her mother, a passenger on a train, was injured through the alleged negligence of the defendant carrier. The child was viable when the injury occurred, and was born, crippled and deformed, after a normal period of gestation. The lower court sustained defendant's

⁸ *Ibid.*, at 15.

⁹ *Ibid.*, at 17.

¹⁰ It does not appear conclusively from the facts stated that the child actually survived its birth. We are only told that there was some testimony that the child moved its limbs 5 or 10 minutes after birth. There is no stated evidence that the child's respiratory system ever functioned.

¹¹ It must be noted that Holmes did not point out any differences between the viable and nonviable foetus, nor did he make any other distinctions between them.

¹² Justice Boggs' dissent in *Allaire v. St. Lukes Hospital*, 184 Ill. 359, 56 N.E. 638 (1900); Chief Justice Brogan's dissent in *Stemmer v. Kline*, 128 N.J.L. 455, 26 A. 2d 489 (S. Ct., 1942), at 459 and 685; *Williams v. Marion Rapid Transit, Inc.*, 152 Ohio St. 114, 87 N.E. 2d 334 (1949); *Bonbrest v. Kotz*, 65 F. Supp. 138 (D.C. D.C., 1946); *Woods v. Lancet*, 303 N.Y. 349, 102 N.E. 2d 691 (1951); *Amann v. Faidy*, 415 Ill. 422, 114 N.E. 2d 412 (1953).

¹³ *Stemmer v. Kline*, 128 N.J.L. 455, 26 A. 2d 489 (S. Ct., 1942), dissent at 459, 469, and 685, 687.

¹⁴ 28 L.R. (Ire.) 69 (1891).

demurrer to the complaint and the plaintiff appealed. Plaintiff's appellate brief cited Blackstone:

Life [is the immediate gift of God, a right inherent by nature in every individual; and it] begins in contemplation of Law, as soon as the infant is able to stir in its mother's womb.¹⁵

The plaintiff also argued that an unborn infant had legal rights in the criminal and civil law; that it was immaterial that there was no contract of carriage between defendant and the child, since the defendant had consented to the infant's presence. The defendant's brief argued that the infant-plaintiff was, in "*rerum naturae*," not a *person* at the time of the accident and therefore could not sustain the action; that the defendant had contracted only to carry the child's mother; that there was no precedent for this action. Neither brief cited the *Dietrich* case. The upper court affirmed the defendant's demurrer.

Each of the four judges wrote a separate opinion. Chief Justice O'Brien discussed at great length the rights of unborn infants in other branches of the law. He refused to decide if the child had a right to recover for prenatal injury and concluded:

I decide the present case upon a single ground, namely, that there are no facts set out in the statement of claim which fix the defendants with liability for breach of duty as carriers of passengers.¹⁶

Justice Harrison also based his decision solely on the fact that the defendant had not contracted to carry the child as a passenger and hence owed it no duty. The third judge, Justice O'Brien,¹⁷ seemed struck with the novelty of the action and the fact that there was no precedent. He expressly stated that he favored a cause of action for the child, "in the abstract," but that impossibility of proof barred the action.¹⁸ Many later decisions have quoted verbatim his argument that the legislature, 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

¹⁵ *Ibid.*, at 71. The bracketed portion of this quotation has been inserted to make the material conform to the verbatim quotation from 1 Bl. Comm. 116.

¹⁶ *Ibid.*, at 78.

¹⁷ The opinion shows there were two Justices named O'Brien. The first opinion was written by the Chief Justice.

¹⁸ "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—could profess to reveal the causes and things that are hidden there— . . ." *Walker v. Great Northern Railway Co.*, 28 L.R. (Ire.) 69, 81 (1891).

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.¹⁹

Justice Johnson also gave voice to arguments many courts were later to repeat. He first noted that there was no contractual liability between the infant and defendant. He then said:

If it [liability] did not spring out of the contract it must, I apprehend, have arisen (if at all) from the relative situation and circumstances of the defendants and plaintiff at the time of the occurrence of the act of negligence. But at that time the plaintiff had no actual existence; was not a human being; and was not a passenger—in fact, as Lord Coke says, the plaintiff was then *pars viscerum matris*, and we have not been referred to any authority or principle to show that a legal duty has ever been held to arise toward that which is not in esse in fact and has only a fictitious existence in law, so as to render a negligent act a breach of that duty.²⁰

The third foundation case was *Allaire v. St. Lukes Hospital*.²¹ The action was commenced in the Superior Court of Cook County, Illinois, and was brought by the next friend of a living infant who was born with a shrunken and shriveled left side, foot and hand. The defendant was a hospital to which the infant's mother had been admitted about ten days before the expected birth of the child. The mother was injured by a fall in an elevator of the hospital, and the deformed infant was born four days later. The Superior Court sustained defendant's demurrer to the complaint; the plaintiff appealed and the case was taken to the Illinois Appellate Court.²² The plaintiffs in their appellate brief advanced the same arguments as the plaintiffs in the *Walker* case. The defendant's brief cited the *Dietrich* and *Walker* decisions and emphasized that the action was impossible as a matter of proof, citing various medical sources. The majority of the Appellate Court affirmed the Superior Court's decision, citing Justice Holmes' idea that the unborn child was a part of the mother. This opinion approved and cited Justice O'Brien's statement from the *Walker* case that the legislature should act, not the courts, stating, "In this we fully concur." The judges maintained that it was a legal fiction to say that the child was in esse, approving Justice Johnson's reasoning in the *Walker* case.

Thus, it can be seen that the *Dietrich* and *Walker* decisions strongly influenced this court, although all three cases are clearly distinguishable on their facts. In the *Allaire* case the child was viable when the alleged injury occurred, and living when the action was commenced; the defendant was a hospital that not only knew of the infant's presence, but in fact contracted with the mother to assist her maternity. This is a far cry from the deceased nonviable infant in the *Dietrich* case, and the carrier who did not know of the child's presence in the *Walker* case.

¹⁹ *Ibid.*, at 82.

²⁰ *Ibid.*, at 88.

²¹ 184 Ill. 359, 56 N.E. 638 (1900).

²² *Allaire v. St. Lukes Hospital*, 76 Ill. App. 441 (1898).

Justice Windes of the Appellate Court wrote a strong and well reasoned dissent. He distinguished the *Dietrich* and *Walker* cases and stated that they are not precedent but mere argument. More significantly, he attacked Holmes' statement, that the child is part of its mother as illogical when applied to a viable infant that is capable of living independently of its mother. He maintained the mother and viable child are two distinct persons, making an analogy to Chang and Eng, the celebrated Siamese twins.

Allaire v. St. Lukes Hospital was appealed to the Illinois Supreme Court, where the Appellate Court decision was affirmed. The majority of the Supreme Court seemed to think that exactly the same questions were involved as were decided in the *Dietrich* and *Walker* cases.²³ The majority Supreme Court opinion merely quoted, for the most part, portions of the majority Appellate Court opinion. Justice Boggs dissented in an opinion that has been widely quoted wherein he makes virtually the same observations as Justice Windes. Justice Boggs felt a cause of action should lie for a viable foetus, but seemed to imply that a nonviable foetus could not recover:

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. . . .²⁴

Justice Boggs advanced no reason why this distinction should exist, or why a foetus should be regarded as a portion of the bowels of the mother. He then stated that a foetus is an independent person if it can live independently should the mother die. He also felt a lack of precedent was no reason for the courts to wait for the legislature to grant a cause of action, and that he believed that mere difficulty of proof should not leave a wrong to be without a remedy. Like Windes, he also distinguished the *Dietrich* and *Walker* cases.²⁵ Ultimately, and very recently, Justice Boggs' dissent became the law in Illinois.²⁶

²³ "Appellant's counsel has argued the case learnedly and with not a little industry, but has cited only two cases in which it was attempted to maintain actions involving the question presented here." *Allaire v. St. Lukes Hospital*, 184 Ill. 359, 365, 56 N.E. 638, 639 (1900). The cases cited by the appellant-infant were the *Dietrich* and *Walker* cases.

²⁴ *Ibid.*, at 370 and 641.

²⁵ "This case can have little application here, for the reason in the case at bar it appears from the declaration the child had reached that stage of foetal life when it was capable of continued existence independent of the mother; that its person was injured within itself, and it was afterwards born alive and with sufficient strength and maturity to maintain independent existence, and still lives. It does not follow from the *Dietrich* case the plaintiff in this cause should not be recognized as capable of having a *locus standi* in court to recover damages for injuries to his person, or that the Supreme Court of Massachusetts would have so held." *Allaire v. St. Lukes Hospital*, 184 Ill. 359, 372, 56 N.E. 638, 642 (1900).

²⁶ *Amann v. Faigy*, 415 Ill. 422, 114 N.E. 2d 412 (1953).

THE PRESENT STATE OF THE LAW

All reasons for allowing or denying recovery to an unborn infant in a tort action for prenatal injuries, were first presented in the three foundation cases. In summary form, the reasons for denying recovery are as follows:

- 1) Lack of precedent.
- 2) The extreme difficulty or impossibility of proving causal relation between the trauma to the mother and the prenatal injury or death of the child.
- 3) The possibility of fictitious claims should a cause of action be allowed.
- 4) That if a cause of action is to be created on behalf of an unborn infant, it is for the legislature to create it,—not the courts.
- 5) That the unborn infant is not a person in esse, but rather a part of its mother, and therefore, having no separate existence, is not a person within the meaning of the law of torts.

The reasons for allowing a cause of action may be stated:

- 1) An unborn infant is regarded as a person in existence in the common law of real and personal property, the criminal law and the civil law.
- 2) Mere difficulty of proof does not allow a wrong to be without a remedy. The proof required in these cases is no more difficult than the proof required in other negligence actions.
- 3) The possibility of fictitious claims is always present in the law and does not prevent the granting of remedies.
- 4) Lack of precedent does not prevent the courts from granting a cause of action where a wrong has been committed; there is no need to wait for the legislature to act.
- 5) A viable unborn infant is a person, and has a separate existence apart from its mother since it could continue to live independently should it be separated from her.

The later cases added no new ideas to those already developed in the foundation cases. Arguments were either accepted or rejected, although the courts often emphasized one point over another, or else made slight modifications in language without changing the basic reasons for allowing or denying recovery. For a long time after the *Allaire* decision, the cases consistently denied recovery and this view soon became the weight of authority.²⁷ Reaction to this position developed, slowly at first, but very rapidly in recent years. Legal writers criticized the majority view and advocated recovery for a viable foetus.²⁸ Court decisions soon developed a

²⁷ Authorities cited note 3 supra.

²⁸ Prosser, Torts § 31 (1941); Morris, Injuries to Infants En Ventre Sa Mere, 58 Cent. L.J. 143 (1904); Albertsworth, Recognition of New Interests in Law of Torts, 10 Calif. L. Rev. 461 (1922); Frey, Injuries to Infants En Ventre Sa Mere, 12 St. Louis

modern trend for allowing recovery. Today, there is almost an even division of jurisdictions between the two positions.²⁹

A viable foetus is denied a cause of action for prenatal personal injury, and his representatives are denied a cause of action under the Wrongful Death Statutes in the following jurisdictions: Rhode Island,³⁰ Alabama,³¹ Texas,³² Michigan,³³ Pennsylvania,³⁴ New Jersey,³⁵ and Nebraska.³⁶ The *Dietrich* case has been upheld as the law in Massachusetts.³⁷

Those jurisdictions allowing a cause of action are: Missouri,³⁸ Louis-

L. Rev. 85 (1927); Gaines, *The Infant's Right of Action for Pre-Natal Injuries*, [1951] Wis. L. Rev. 518; James, *Scope of Duty in Negligence Cases*, 47 N.W. Law Review 778 (1953); 2 De Paul Law Rev. 97 (1952), noting *Woods v. Lancet*, 303 N.Y. 349, 102 N.E. 2d 691 (1951).

²⁹ Ten jurisdictions, including Ireland, denied recovery. Eleven jurisdictions, including Canada, allow recovery.

³⁰ *Gorman v. Budlong*, 23 R.I. 169, 49 Atl. 704 (1901). Recovery was denied in a wrongful death action where a viable foetus had been prematurely born alive but died three days later.

³¹ *Stanford v. St. Louis-San Francisco Ry. Co.*, 214 Ala. 611, 108 So. 566 (1926). Wrongful death recovery denied for death of viable foetus.

³² *Magnolia Coca-Cola Bottling Co. v. Jordan*, 124 Tex. 347, 78 S.W. 2d 944 (1935). Cause of action denied for wrongful death of viable foetus.

³³ *Newman v. City of Detroit*, 281 Mich. 60, 274 N.W. 710 (1937). Court cited the great weight of authority in denying recovery for wrongful death of viable foetus.

³⁴ *Berlin v. J. C. Penney Co.*, 339 Pa. 547, 16 A. 2d 28 (1940). Personal injury action was denied to a viable foetus. This case, in effect, overruled a lower court decision in *Kine v. Zuckerman*, 4 Pa. D. & C. 227 (1924), where recovery had been allowed.

³⁵ *Stemmer v. Kline*, 128 N.J.L. 455, 26 A. 2d 489 (S. Ct., 1942), dissent at 459 and 685. Denied cause of action for prenatal personal injury to a viable foetus by a vote of ten to five. The decision upheld an earlier lower court decision in *Ryan v. Public Service Co-ordinated Transport*, 18 N.J. Misc. 429, 14 A. 2d 52 (1940).

³⁶ *Drabbels v. Skelly Oil Co.*, 155 Neb. 17, 50 N.W. 2d 229 (1951). Viable foetus denied wrongful death recovery.

³⁷ *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). This court refused to overrule the *Dietrich* case, but implied that if the question was before the court for the first time, it might allow recovery. It must be noted that the foetus involved in this case was viable, unlike the nonviable foetus of the *Dietrich* case.

³⁸ *Buel v. United Railways Co.*, 248 Mo. 126, 154 S.W. 71 (1913). Denied recovery in a wrongful death action for the death of a viable foetus. The court cited *Kirk v. Middlebrook*, 201 Mo. 245, 100 S.W. 450 (1907) where the problem had first come up but had not been decided because both parties assumed the injuries received by the child were really injuries to the mother. The *Buel* case was expressly overruled and a viable foetus granted a cause of action for wrongful death in *Steggall v. Morris*, 258 S.W. 2d 577 (Mo., 1953).

iana,³⁹ Canada,⁴⁰ District of Columbia,⁴¹ California,⁴² Ohio,⁴³ Minnesota,⁴⁴ Maryland,⁴⁵ and Georgia.⁴⁶ New York formerly denied recovery,⁴⁷ but a recent case reversed that position and allowed the unborn infant a cause of action.⁴⁸ The *Allaire* case was first upheld as the law in Illinois,⁴⁹ but, in 1953, it was expressly overruled and wrongful death recovery allowed.⁵⁰ A few months later, Illinois allowed a cause of action to a viable foetus for prenatal personal injury.⁵¹

³⁹ *Cooper v. Blanck*, 39 So. 2d 352 (La. App., 1923). This was probably the first case to allow a viable foetus a cause of action for wrongful death. The decision was based on the civil law background of Louisiana and interpretation of a statute. Although decided in 1923, the case was not furnished for publication until 1949.

⁴⁰ *Montreal Tramways v. Leveille*, [1933] 4 D.L.R. 337. The Supreme Court of Canada granted a cause of action to a child who had been born with club feet through the alleged negligence of the defendant in causing injury while the child was a viable foetus in its mother's womb. The court relied on natural justice in granting a cause of action stating that to do otherwise would compel the child to go through life "carrying the seal of another's fault, and bearing a very heavy burden of infirmity and inconvenience, without any compensation therefor."

⁴¹ *Bonbrest v. Kotz*, 65 F. Supp. 138 (D.C. D.C., 1946). Court allowed recovery for prenatal personal injury to a viable foetus, and strongly implied that a cause of action to a nonviable foetus would also be allowed.

⁴² *Scott v. McPheeters*, 33 Cal. App. 2d 629, 92 P. 2d 678 (1939). The court granted recovery to a viable foetus for prenatal personal injury. The court reached this decision by interpreting the Cal. Civil Code (1949) Div. 1, Pt. 1, § 29, which provided: "A child conceived, but not yet born, is to be deemed an existing person, so far as it may be necessary for its interests in the event of its subsequent birth."

⁴³ *Williams v. Marion Rapid Transit, Inc.*, 152 Ohio St. 114, 87 N.E. 2d 334 (1949). The court allowed recovery to a viable foetus in a personal injury action. *Jasinsky v. Potts*, 153 Ohio St. 529, 92 N.E. 2d 809 (1950) extended recovery to wrongful death cases.

⁴⁴ *Verkennes v. Corniea*, 229 Minn. 365, 38 N.W. 2d 839 (1949). Court allowed recovery for wrongful death of viable foetus.

⁴⁵ *Damasiewicz v. Gorsuch*, 197 Md. 417, 79 A. 2d 550 (1950). A cause of action was granted to a viable foetus for prenatal personal injuries. The opinion contains an excellent and exhaustive survey of the law on prenatal injuries.

⁴⁶ *Tucker v. Carmichael and Sons*, 208 Ga. 201, 65 S.E. 2d 909 (1951). Recovery allowed for prenatal personal injury to a viable foetus.

⁴⁷ *Nugent v. Brooklyn Heights R. Co.*, 154 App. Div. 667, 139 N.Y. Supp. 367 (1913). Recovery denied a viable foetus for prenatal personal injury. The defendant in this case was a common carrier and the court relied heavily on the *Walker* case. In *Drobner v. Peters*, 232 N.Y. 220, 133 N.E. 567 (1921), recovery was denied a viable foetus for prenatal personal injury by the Court of Appeals in an opinion by Justice Pound. Justice Cardozo dissented without opinion.

⁴⁸ *Woods v. Lancet*, 303 N.Y. 349, 102 N.E. 2d 691 (1951), overruled *Drobner v. Peters*, 232 N.Y. 220, 133 N.E. 567 (1921).

⁴⁹ *Smith v. Luckhardt*, 299 Ill. App. 100, 19 N.E. 2d 446 (1939).

⁵⁰ *Amann v. Faidy*, 415 Ill. 422, 114 N.E. 2d 412 (1953).

⁵¹ *Rodriguez v. Patti*, 415 Ill. 496, 114 N.E. 2d 721 (1953). This writer has obtained information from the plaintiff's attorney that the infant in this case was in the seventh month of gestation when the injury occurred, and was viable.

An unusual decision was rendered in *Lipps v. Milwaukee Electric Railway & Light Co.*⁵² This was a personal injury action for prenatal injuries to a *nonviable* foetus. The infant was in the fifth month of gestation when the injury occurred, and was living at the time the action was commenced. The Wisconsin Supreme Court, after citing previous decisions denying recovery to viable infants, denied recovery and said:

All, however, so far as expression is found therein, agree that no cause of action accrues to an infant for injuries received before it could be born viable. Such is the present case. The complaint alleges the child could not have been born viable. Since a non-viable child cannot exist separate from its mother, it must in the law of torts be regarded as part of its mother, and hence, being incapable of separate existence, it is not an independent person or being to whom separate rights can accrue.⁵³

The court implied it would grant recovery to a viable foetus,⁵⁴ and then continued:

Neither does the medical or scientific recognitions of the separate entity of an unborn child aid in determining its legal rights. The law cannot always be scientific or technically correct. It must often content itself with being merely practical.⁵⁵

Thus, the *Lipps* case denied recovery to the nonviable foetus on two grounds: 1) the foetus was not a separate person because it could not live independently of its mother, 2) practical difficulty of proof. The *Lipps* case and the *Dietrich* case are the only two cases expressly denying recovery to a nonviable foetus. Virtually every other prenatal injury case has implied that the nonviable foetus could not recover. This is an implication to be expected from the cases denying recovery to the viable foetus, but even those cases that allow recovery for the viable foetus imply that they will not extend a cause of action to the nonviable foetus.

CONCLUSIONS

The early dissents to the decisions denying recovery for prenatal injuries undoubtedly encouraged the bringing of actions on behalf of viable infant-plaintiffs. These actions continued even after a great number of cases had denied recovery, until reaction set in and the courts began to allow a cause of action. It appears that this modern trend will eventually become the weight of authority. But this will not aid the nonviable infant.

⁵² 164 Wis. 272, 159 N.W. 916 (1916).

⁵³ *Ibid.*, at 275 and 917.

⁵⁴ "Very cogent reasons may be urged for a contrary rule where the infant is viable. . . . As to such cases we express no opinion." *Ibid.*, at 276 and 917.

⁵⁵ *Ibid.*

Consequently, actions can be expected to be instituted on behalf of non-viable infants in an effort to obtain a cause of action in the same manner as was done for the viable infant. In order to obtain this recovery, two big hurdles will have to be cleared. These are the arguments that the non-viable foetus is not a person because incapable of independent existence, and practical difficulty of proof of causal relation. The first argument is the most important, and is really a ramification of a far greater problem—When does life begin? Those courts denying recovery to all unborn infants hold, in effect, that life begins at the moment of birth. Those courts allowing recovery for the viable foetus hold, in effect, that life begins at the moment of viability which is about the sixth month of gestation. In the civil law and the property and criminal fields of the common law, it is held that life begins at the moment of conception. These contradictions lead one to inquire: Why is there so little uniformity on this point, and which view is the correct one? It is submitted that the view that life begins at the moment of conception is the more logical position. It is based on reality, and should be adopted in the field of torts. On the purely physical level, in accord with the law of nature and as demonstrated by science, human life commences from the moment of conception.⁵⁶ Certainly, it would be absurd to deny the physical reality of the presence of the nonviable foetus until the sixth month of gestation. 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. To say that the nonviable foetus is a part of its mother or that it could not live independently of its mother in support of the idea that the nonviable foetus is not a person, as was done in the *Dietrich* and *Lipps* cases, is to take an untenable position; for in so saying, these courts, in effect, recognize the physical existence of the foetus in the world, but relegate that existence to a lower order of life—perhaps animal or vegetable, but certainly not human. To recognize the physical existence of the nonviable foetus means one must recognize it as a human being: its essence is human, its species is human, and it has an immutable potential to be born if left undisturbed in the inexorable process of maturation.

Caution is indicated at this point, for even if it be conceded that the nonviable foetus is a person in esse—a human being—then the second ground for denying recovery must still be answered. This is the practical difficulty of proof of causal relation as indicated by the *Lipps* decision.

⁵⁶ "The foetus is certainly, if we speak physiologically, as much a living being immediately after conception as at any other time before delivery; and its future progress is but the development and increase of those constituent principles which it then received." Beck's Elements of Medical Jurisprudence (10th Ed.) vol. 1, p. 227." *Magnolia Coca-Cola Bottling Co. v. Jordan*, 124 Tex. 347, 358, 78 S.W. 2d 944, 949 (1935).

Proof certainly would seem impossible in cases involving a foetus in the very early stages of gestation, but there seems to be no greater medical difficulty of proof in cases concerning a five month old foetus than in cases concerning a six month viable foetus. As to those cases involving the infant in the very early stages of gestation, reality must be faced, and if proof be impossible, then the courts must deny a cause of action. But if a five month nonviable foetus be born deformed, or should die through the wrongful actions of another in inflicting trauma to its mother, and if such deformity or death could be proved (as it can) by medical science to have been caused by these wrongful acts, and the courts forbid a cause of action and recovery, then surely here is a flagrant wrong without a remedy. One court has recognized this concept and allowed a cause of action for personal injury inflicted when the infant was in the third month of gestation. This case is *Kelly v. Gregory*,⁵⁷ where the New York Supreme Court, Appellate Division, stated that the problem in prenatal injury cases is determining the point of legal separability from the mother. The court expressly held that separability begins at conception because the mother's biological contribution is merely one of nourishment and protection. After concluding that the foetus is a separate organism and remains so throughout its life, the court stated that the fact that the infant may not live if its protection and nourishment are cut off earlier than the viable stage of its development does not destroy its separability, but rather describes conditions under which life will not continue. The court then pointed out that succeeding conditions exist that have that result at every stage of life, postnatal as well as prenatal. The court was not troubled about difficulty of proof, and held:

If the child born after an injury sustained at any period of his pre-natal life can prove the effect on him of the tort, as for the purpose of this appeal and on the face of the complaint before us we must assume plaintiff will be able to do, we hold he makes out a right to recover.⁵⁸

In holding that life begins at the moment of conception, the court relied on biological principles. The concepts of natural law, morality and philosophy were not discussed by this court, nor have they been mentioned in preceding cases, but this is basically a moral problem and these fundamental notions have undoubtedly been the ultimate determinants of the issue. It is well to note that the changing positive law on this subject marks a return to those immutable natural and moral law principles from which the earlier cases departed.

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

⁵⁸ *Ibid.*, at 543 and 698.