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Article 17

Torts--Recovery for Prenatal Injury (Woods v. Lancet, 303 N.Y. 349 (1951))

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It is submitted that it is. Certainly, "[s]ilence under such circumstances is not tantamount to creating an exception in a field otherwise pre-empted by the Congress." [27] Moreover, an interpretation of the Labor Act provision favoring maximum assumption of jurisdiction by the federal tribunals would have the socially desirable effect of developing uniform nation-wide standards of permissible behavior.

TORTS—RECOVERY FOR PRENATAL INJURY.—Plaintiff, born alive despite negligent injuries sustained during his ninth month *en ventre sa mere,* sued for damages.[1] Defendant moved to dismiss the complaint for failure to state a cause of action. Special Term granted defendant's motion; the Appellate Division affirmed by a divided court.[2] *Held,* reversed. When a viable fetus,[3] later born alive, has been negligently injured, a suit for damages will lie.[4] *Woods v. Lancet,* 303 N. Y. 349, 102 N. E. 2d 691 (1951).[5]

Recovery of damages for prenatal injuries was not one of the common law tort actions.[6] It was denied because of the lack of

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[27] Goodwins, Inc. v. Hagedorn, 303 N. Y. 300, 309, 101 N. E. 2d 697, 702 (1951) (dissenting opinion of Dye, J.). For further discussion of the principal case, see Petro, *The Developing Law,* 2 CCH LABOR L. J. 8 (Dec. 1951) (approving the result). *But cf.* Wilkes Sportswear, Inc. v. International Ladies Garment Workers Union, 29 L. R. R. M. 2300 (1952). See also Sandler, *Minority Picketing for Recognition in New York State,* 127 N. Y. L. J. 1094, col. 3 (Mar. 19, 1952).

[1] The suit was brought in the infant's name by its guardian *ad litem.*

[2] The dissent refused ". . . to do reverence to an outmoded, timeworn fiction not founded on fact and within common knowledge untrue and unjustified." 278 App. Div. 913, 914, 105 N. Y. S. 2d 417, 418 (1st Dep't 1951).

[3] ". . . we confine our holding in this case to prepartum injuries to such viable children. . . . This child, when injured, was in fact, alive and capable of being delivered and of remaining alive, separate from its mother." 303 N. Y. 349, 357, 102 N. E. 2d 691, 695 (1951).

[4] Judge Lewis dissented, Judge Conway joining, on the ground that this remedy, if granted, should come from the legislature, not from the courts.

[5] This writer believes that the Court of Appeals' opinion in the instant case is so complete that a protracted study of the previous law regarding prenatal injuries is unnecessary. The arguments for denying recovery, based on lack of precedent and on the difficulty of proof, are also covered by the Court. But the Court expressly refused to deal with the "purely theoretical" objection that an unborn infant has no existence separate from its mother. "We need not deal here with so large a subject." This writer believes that the separate identity of the embryo and fetus should be the *only* ground for granting recovery; for that separate entity is a person, and as such should be accorded the protection of tort law.

[6] *Accord,* Dietrich v. Inhabitants of Northampton, 138 Mass. 14 (1884); *cf.* Allaire v. St. Luke's Hospital, 184 Ill. 359, 56 N. E. 638 (1900); Butler v. Manhattan Ry., 143 N. Y. 417, 38 N. E. 454 (1894); see 4 RESTATEMENT, TORTS § 869 (1939); Note, 10 A. L. R. 2d 1059, 1060 (1950).

precedent favoring the suit,[7] the almost impossible task of proving causation,[8] and the refusal of the law to recognize the unborn child as a being separate from its mother.[9] Recently, however, a number of jurisdictions have deviated from prior law, and have allowed the action.[10]

Absence of precedent is a lame excuse for not redressing an injury;[11] and what injury is greater than interference with one's life and limbs?[12] The law is not static:[13] what the courts have de-

[7] *Ibid.;* see Note, [1951] WASH. U. L. Q. 408, 412. Absence of a statute authorizing recovery has been the reason for numerous decisions. See Scott v. McPheeters, 33 Cal. App. 2d 629, 92 P. 2d 678, *hearing denied,* 33 Cal. App. 2d 629, 93 P. 2d 562 (1939); Berlin v. J. C. Penney Co., 339 Pa. 547, 16 A. 2d 28 (1940); Bonbrest v. Kotz, 65 F. Supp. 138 (D. D. C. 1946); 43 C. J. S., Infants § 104 (1945).

[8] *Accord,* Drobner v. Peters, 232 N. Y. 220, 133 N. E. 567 (1921); see PROSSER, HANDBOOK OF THE LAW OF TORTS 189 (1941); Note, 10 A. L. R. 2d 1059, 1062 (1950); Note, [1951] WASH. U. L. Q. 408, 410.

[9] "In the mother's womb he had no separate existence of his own. When born he became a person. . . . His full rights as a human being sprang into existence with his birth." Drobner v. Peters, 232 N. Y. 220, 223, 133 N. E. 567, 568 (1921); *accord, In re* Roberts' Estate, 158 Misc. 698, 286 N. Y. Supp. 476 (Surr. Ct. 1936); *cf.* Witrak v. Nassau Electric R. R., 52 App. Div. 234, 65 N. Y. Supp. 257 (2d Dep't 1900); Scott v. McPheeters, 33 Cal. App. 2d 629, 92 P. 2d 678, 680, *hearing denied,* 33 Cal. App. 2d 629, 93 P. 2d 562 (1939); Williams v. Marion Rapid Transit, Inc., 152 Ohio St. 114, 87 N. E. 2d 334 (1949); Nugent v. Brooklyn Heights R. R., 154 App. Div. 667, 672, 139 N. Y. Supp. 367, 370 (2d Dep't 1913); see Collins, *May Parents Maintain an Action for the Wrongful Death of an Unborn Child in Missouri —the Case Against the Right of Action,* 15 Mo. L. REV. 230, 232 *et seq.* (1950); 15 HARV. L. REV. 344, 345 (1932) ("Such a theory seems preferable as it eliminates any fiction of according an embryo personality and avoids the medico-metaphysical controversy as to when a child is *in esse.*"). According to a philosophical concept prevalent during the twelfth to fifteenth centuries, the human substantial form is infused into the embryo at some time between conception and birth. O'MALLEY, THE ETHICS OF MEDICAL HOMICIDE AND MUTILATION 35 (1922). Contemporary medicine considered the mother and her unborn infant as one being. It is quite probable that the judges who formulated the early common law were influenced by these theories, with the legal effect that they fixed birth as the arbitrary moment at which to confer on the child the protection of the law. But see note 32 *infra.*

[10] See Scott v. McPheeters, *supra* note 9; Tucker v. Howard L. Carmichael & Sons, 208 Ga. 201, 65 S. E. 2d 909 (1951); Damasiewicz v. Gorsuch, 79 A. 2d 550 (Md. 1951); Verkennes v. Corniea, 229 Minn. 365, 38 N. W. 2d 838 (1949); Williams v. Marion Rapid Transit, Inc., *supra* note 9; Bonbrest v. Kotz, 65 F. Supp. 138 (D. D. C. 1946); Montreal Tramways v. Leveille, [1933] 4 D. L. R. 337.

[11] "The argument from lack of precedent is obviously the least substantial. The common law does not go on the theory that a case of first impression presents a problem of legislative as opposed to judicial power. This argument merits no further comment." 1935 REPORT, N. Y. LAW REVISION COMMISSION 449, 465; *cf.* Bonbrest v. Kotz, 65 F. Supp. 138, 142 (D. D. C. 1946); *see* Woods v. Lancet, 278 App. Div. 913, 914, 105 N. Y. S. 2d 417, 418 (1st Dep't 1951) (dissenting opinion) (". . . an adjudicated case is not indispensable to establish a right to recover under the rules of the common law.").

[12] Bonbrest v. Kotz, 65 F. Supp. 138, 142 (D. D. C. 1946); see Note, 10 A. L. R. 2d 1059, 1071 (1950).

[13] Woods v. Lancet, 278 App. Div. 913, 914, 105 N. Y. S. 2d 417, 418 (1st

creed as a rule, they can modify or abrogate.[14] Nor should the difficulty of proof serve to deny the action;[15] for the court sets the standard of proof, and the plaintiff must meet it, or fail.[16]

Perhaps the greatest hurdle to allowing recovery for prenatal injuries was the tort-law concept of the fetus as part of the mother—not a separate entity until after birth.[17] Both the criminal law and the law of property considered the unborn infant as distinct from the mother, so as to punish those who procured its destruction,[18] as well as to accord certain rights to it.[19] It would be anomalous if the law were protecting a nonentity from criminals but not from tortfeasors,[20]

Dep't 1951) (dissenting opinion); see 1935 REPORT, N. Y. LAW REVISION COMMISSION 449, 465.

[14] Funk v. United States, 290 U. S. 371 (1933); Klein v. Maravelas, 219 N. Y. 383, 114 N. E. 809 (1916); *cf.* Hagopian v. Samuelson, 236 App. Div. 491, 492, 260 N. Y. Supp. 24, 26 (1st Dep't 1932); see 1935 REPORT, N. Y. LAW REVISION COMMISSION 449, 465.

[15] "In my view, justice should not be turned aside and wrongs go without remedies because of apprehension of what may happen in jurisprudence if it be decided that an unborn child has some rights of the person." Nugent v. Brooklyn Heights R. R., 154 App. Div. 667, 672, 139 N. Y. Supp. 367, 371 (2d Dep't 1913); *cf.* Bonbrest v. Kotz, 65 F. Supp. 138, 142 (D. D. C. 1946); *see* Stemmer v. Kline, 128 N. J. L. 455, 26 A. 2d 489, 687 (1942) (dissenting opinion by Mr. Chief Justice Brogan); see 1935 REPORT, N. Y. LAW REVISION COMMISSION 449, 474; Note, [1951] WASH. U. L. Q. 408, 423, 426; 7 CORNELL L. Q. 275 (1922).

[16] "When the absence of other possible known causes is *affirmatively shown, then the fact that unknown causes* may be in operation should not preclude the judge from permitting the jury to find a causal connection." Note, [1951] WASH. U. L. Q. 408, 423; see 1935 REPORT, N. Y. LAW REVISION COMMISSION 449, 474; Note, 3 VAND. L. REV. 282, 292 (1950) ("There would seem to be no reason why substantial justice could not be done by the strict application of rules of evidence and scientifically enlightened control by the courts.").

[17] See note 9 *supra*. *But cf.* Scott v. McPheeters, 33 Cal. App. 2d 629, 92 P. 2d 678, *hearing denied*, 33 Cal. App. 2d 629, 93 P. 2d 562 (1939); Williams v. Marion Rapid Transit, Inc., 152 Ohio St. 114, 87 N. E. 2d 334 (1949); see 43 C. J. S. 747 (1945).

[18] "For if a woman is quick with child, and by a potion or otherwise killeth it in her womb; or if anyone beat her, whereby the child dieth in her body, and she is delivered of a dead child; this, though not murder, was by the ancient law homicide or manslaughter." 1 BL. COMM. *129. See N. Y. PENAL LAW §§ 80-82, 1050, 1052, 240, 482(2), 483, 492, 2461.

[19] "By a legal fiction or indulgence, a legal personality is imputed to an unborn child as a rule of property for all purposes beneficial to the infant after his birth. . . ." Drobner v. Peters, 232 N. Y. 220, 222, 133 N. E. 567, 568 (1921); see 1 BL. COMM. *130; 27 Am. Jur. 747 (1940).

[20] "It is quite difficult to reconcile the rule of recognition of a separate existence of a child in order to punish crime committed against it with complete rejection of such rule in a civil suit by the child to secure redress for a physical injury." Williams v. Marion Rapid Transit, Inc., 152 Ohio St. 114, 87 N. E. 2d 334, 336 (1949); *cf.* Bonbrest v. Kotz, 65 F. Supp. 138, 141 (D. D. C. 1946); *see* Stemmer v. Kline, 128 N. J. L. 455, 26 A. 2d 489, 686 (1942) (dissenting opinion) ("If such unborn child is to be regarded as a non-entity, actually or legally, why may it not at the common law be destroyed with impunity? Such unborn child has existence. The law does not concern itself with non-entities.").

or according rights to a fictitious being, so as to preserve those rights, without protecting their owner.[21]

Blackstone said that life begins legally when the fetus stirs;[22] and, following this reasoning, the minority rule today limits recovery for prenatal injury to cases wherein the fetus was viable at the time of the injury.[23] This is based on the hypothesis that the fetus is a separate entity when it is able to live outside its mother.[24] Such is not the medical fact, for a dependence of one upon another does not make the two one.[25] Medical authorities have long since described

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[21] "All that need be said here is that recognition of property rights in the unborn infant but a denial of the more substantial privilege of seeking to recover for injuries wrongfully inflicted, indicates a lack of a sense of proportion." 1935 REPORT, N. Y. LAW REVISION COMMISSION 449, 466; see Stemmer v. Kline, 128 N. J. L. 455, 26 A. 2d 489, 686 (1942) (dissenting opinion); Nugent v. Brooklyn Heights R. R., 154 App. Div. 667, 669, 139 N. Y. Supp. 367, 369, 370 (2d Dep't 1913). "The being that owns is the supreme consideration and has capacity for ownership. What is owned and the right to own are merely incidental to the living entity. . . . And yet shall the incidents be valued in legal cognizance and the owner not? . . . It is not helpful to characterize its existence as fictitious as to property rights. The rights are accorded to it." *Ibid.* See 72 U. OF PA. L. REV. 455, 456 (1924) ("To say that the child had a separate existence by a 'legal fiction' is to admit that he does not have an actual existence in *law*, and to assume that he does not have it in *fact*. This is nothing more nor less than judicial legislation in a somewhat veiled form."); Note, [1951] WASH. U. L. Q. 408, 416 ("Such a problem is not solved by adroit statements that the plaintiff was or was not a legal person. Such a statement is nothing more than a verbalization of an otherwise reached conclusion, *i.e.*, that plaintiff may not recover from defendant."); Note, 10 A. L. R. 2d 1059, 1071 (1950).

[22] "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 an infant is able to stir in the mother's womb." 1 BL. COMM. *129.

[23] "The law should, it seems to me, be that whenever a child in utero is so far advanced in 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 afterwards 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." Allaire v. St. Luke's Hospital, 184 Ill. 359, 56 N. E. 638, 642 (1900) (dissenting opinion); see Scott v. McPheeters, 33 Cal. App. 2d 629, 92 P. 2d 678, *hearing denied*, 33 Cal. App. 2d 629, 93 P. 2d 562 (1939); Williams v. Marion Rapid Transit, Inc., 152 Ohio St. 114, 87 N. E. 2d 334 (1949); Bonbrest v. Kotz, 65 F. Supp. 138 (D. D. C. 1946); Note, 10 A. L. R. 2d 1059, 1065 (1950); Cason, *May Parents Maintain an Action for the Wrongful Death of an Unborn Child in Missouri —The Case for the Right of Action*, 15 Mo. L. REV. 212, 218 (1950) (Fetus is generally deemed viable between sixth and seventh month of pregnancy.).

[24] *Ibid. But cf.* Bonbrest v. Kotz, 65 F. Supp. 138 (D. D. C. 1946). "Every human embryo is possessed of as effects within a cause of all of the sentient, vegetative and spiritual (the latter term used in opposition to the former) qualities of an adult, subject, of course, to the later influence of environment and education." *Id.* at 141, n. 13.

[25] No sane person would assert that a man and the tapeworm within him are one and the same being; yet that is exactly what is said of the mother and the embryo she bears. *See* Stemmer v. Kline, 128 N. J. L. 455, 26 A. 2d

the embryo as a separate entity from the time of its conception: [26] it moves about and grows in a very determined manner unregulated by the mother's desires on the subject.[27] The fact that it is attached to the mother does not make the embryo similar to her finger, since neither the parent's blood nor her nerves pass into or through the child [28]—indeed, the presence of maternal blood in the embryo is indicative of an abnormal condition.[29] Thus the prenatal infant cannot be said to be a part of the mother, although it is within, attached to and dependent upon her.[30] For courts to rule as a matter of law that separate existence begins either at birth or at viability is disregarding the facts,[31] and ". . . hanging a legal conclusion on an obviously incorrect statement of medical science." [32]

Once the embryo is deemed a person, the duty of care toward it follows as a conclusion.[33] It would not be unreasonable to require a greater degree of care towards a possibly-pregnant woman,[34] and

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489, 687 (1942) (dissenting opinion) ("While it is a fact that there is a close dependence by the unborn child on the organism of the mother, it is not disputed today that the mother and the child are two separate and distinct entities. . . ."); Cason, *supra* note 23, at 221 ("Dependency of one upon another for sustenance can hardly be said to make the one a part of the other.").

[26] 50 MICH. L. REV. 166 (1951); see 27 Am. Jur. 747 (1940); KEITH, HUMAN EMBRYOLOGY AND MORPHOLOGY 1-21 (1921).

[27] See I MANUAL OF HUMAN EMBRYOLOGY 21-42, 59-90 (Kiebel and Mall ed. 1910); KEITH, HUMAN EMBRYOLOGY AND MORPHOLOGY 1-21 (1921); AREY, DEVELOPMENTAL ANATOMY 90, 91 (4th rev. ed. 1940); BAILEY & MILLER, TEXT-BOOK OF EMBRYOLOGY 611 (5th rev. ed. 1929).

[28] KEITH, HUMAN EMBRYOLOGY AND MORPHOLOGY 23 *et seq.* (1921); BAILEY & MILLER, TEXT-BOOK OF EMBRYOLOGY 623 (5th rev. ed. 1929); SCHENFIELD, YOU AND HEREDITY 32, 33 (1939) (quoted in Cason, *supra* note 23, at 218).

[29] I MANUAL OF HUMAN EMBRYOLOGY 21 (Keibel and Mall ed. 1910); see AREY, DEVELOPMENTAL ANATOMY 306-8 (4th rev. ed. 1940).

[30] See note 25 *supra;* BAILEY & MILLER, TEXT-BOOK OF EMBRYOLOGY 607 (5th rev. ed. 1929); Cason, *supra* note 23, at 220.

[31] "From the very moment of conception, the infant develops its own personality. The fact is that the infant lives with its mother while in its prenatal state, rather than being a 'part of the mother,' as contended in the *Dietrich* case." Comment, [1951] WIS. L. REV. 518, 524; see 72 U. OF PA. L. REV. 455, 456 (1924).

[32] "To deny that an unborn child is a separate entity before birth is to deny a medical fact. Certainly no clarity can be introduced into the problem by hanging a legal conclusion on an obviously incorrect statement of medical science." 1935 REPORT, N. Y. LAW REVISION COMMISSION 449, 472. Modern philosophers argue that the human substantial form—that vital principle which distinguishes man as a distinct species—exists in the embryo from conception. O'MALLEY, *op. cit. supra* note 9, at 61, 62. Therefore, as both the medical and the philosophical backgrounds of the common law rule have changed, it is time that the law based on those ideas should be changed to conform to the true state of science and philosophy today—by granting an infant the rights of a person from conception.

[33] Cason, *supra* note 23, at 224.

[34] Note, [1951] WASH. U. L. Q. 408, 416, 417. *But see* Nugent v. Brooklyn Heights R. R., 154 App. Div. 667, 673, 139 N. Y. Supp. 367, 371 (2d Dep't 1913).

to include the unborn child within that group whose possible injury can be reasonably foreseen.[35]

Having granted the child redress for prenatal injuries, a cause of action for its wrongful death[36] would seem to follow, since the denial of that action was based on the denial of the child's recovery in its own name.[37] The instant case, however, did not concern a wrongful death action; but sufficiently justified its place in legal annals by overthrowing the throttling grip of precedent and affording partial justice to children negligently injured before birth.

TORTS—RIGHT OF UNEMANCIPATED MINOR TO SUE PARENT IN BUSINESS CAPACITY. — Plaintiff, an unemancipated minor, sought damages for personal injuries allegedly caused by the negligent maintenance of a gasoline pump. The defendant, a partnership composed of plaintiff's father and another, moved for judgment on the pleadings, contending that a minor child could not sue a firm in which his parent was a partner. *Held,* motion denied. An unemancipated infant can sue its parent in his business capacity for damages for personal injuries caused by negligence. *Signs v. Signs,* 156 Ohio St. 566, 103 N. E. 2d 743 (1952).

The common law rule, followed by the majority of American jurisdictions, denies the minor child a cause of action in tort against its parent.[1] The rationale is that allowing such suits will disrupt the family harmony,[2] impair parental discipline,[3] and deplete the family exchequer.[4]

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[35] See Ehret v. Village of Scarsdale, 269 N. Y. 198, 199 N. E. 56 (1935); Palsgraf v. Long Island R. R., 248 N. Y. 339, 162 N. E. 99 (1928).

[36] N. Y. DECEDENT ESTATE LAW § 130. But see Laws of N. Y. 1847, c. 450 (the 1847 statute refers to "person," while the present one applies to a "decedent").

[37] *In re* Roberts' Estate, 158 Misc. 698, 286 N. Y. Supp. 476 (Surr. Ct. 1936); see 16 Am. Jur. 56 (1938); 25 C. J. S. 1087, 1091, 1093 (1941). *But cf.* Cooper v. Blanck, 39 So. 2d 352 (La. 1933); Jasinsky v. Potts, 153 Ohio St. 529, 92 N. E. 2d 809 (1950); see 1935 REPORT, N. Y. LAW REVISION COMMISSION 449, 471, 473; Cason, *supra* note 23, at 212.

[1] *Accord,* Cannon v. Cannon, 287 N. Y. 425, 40 N. E. 2d 236 (1942); *see* Rozell v. Rozell, 281 N. Y. 106, 110, 22 N. E. 2d 254, 256 (1939); Cowgill v. Boock, 189 Ore. 282, 218 P. 2d 445, 453 (1950); Clasen v. Pruhs, 69 Neb. 278, 95 N. W. 640, 642 (1903); see MADDEN, HANDBOOK OF THE LAW OF PERSONS AND DOMESTIC RELATIONS 449 (1931).

[2] *Accord,* Krohngold v. Krohngold, 181 N. E. 910 (Ohio App. 1932); *see* Bulloch v. Bulloch, 45 Ga. App. 1, 163 S. E. 708, 710 (1932); Canen v. Kraft, 41 Ohio App. 120, 180 N. E. 277, 278 (1931).

[3] *See* Buchanan v. Buchanan, 170 Va. 458, 197 S. E. 426, 432 (1938); see PROSSER, LAW OF TORTS 906 (1941).

[4] *Accord,* Small v. Morrison, 185 N. C. 577, 118 S. E. 12, 15 (1923); Wick v. Wick, 192 Wis. 260, 212 N. W. 787 (1927); see McCurdy, *Torts Be-*