TORTS

CHILD'S RIGHT OF ACTION FOR PRENATAL INJURIES

Williams, an infant, brought an action by her next friend against the Marion Rapid Transit Company to recover damages for prenatal injuries suffered by her while a viable child (one sufficiently developed that it might live separate from its mother). She alleged her mother fell from the steps of a bus negligently operated by the transit company. The trial court sustained a demurrer by the transit company to the petition and rendered judgment in its favor. On appeal the court of appeals reversed.[1] Since this judgment conflicted with that of another court of appeals,[2] the record was certified to the Supreme Court of Ohio, which affirmed the recognition of a cause of action. *Williams v. Marion Rapid Transit, Inc.*, 87 N. E.2d 334 (Ohio 1949).

Actions for the recovery of damages resulting from prenatal injuries have arisen in two ways: Where the child after birth brought an action by his next friend as in the *Williams* case; and where the parents brought an action under the wrongful death statutes.[3] Under the death statutes the parents have no action unless the child could have maintained an action had he lived.[4] Thus, the problem is basically the same in both: Can a child maintain an action to recover damages for prenatal injuries? Though the great weight of authority has denied a cause of action for prenatal injuries,[5] two recent cases are in accord with the *Williams* case in allowing an action where the child was viable at the time the injury was inflicted.[6]

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1. Williams v. Marion Rapid Transit, Inc., 82 N. E.2d 423 (Ohio 1949).
2. Mays v. Weingarten, 82 N. E.2d 421 (Ohio 1949).
3. *See* Newman v. Detroit, 281 Mich. 60, 274 N. W. 710 (1937); Verkennes v. Corniea, 38 N. W.2d 838 (Minn. 1949); Gorman v. Budlong, 23 R. I. 169, 49 Atl. 704 (1901).
4. On this point, most statutes are similar to the Indiana death statute. IND. STAT. ANN. (Burns 1933) § 2-404:

> When the death of one is caused by the wrongful act or omission of another, the personal representative of the former may maintain an action therefor against the latter, if the former might have maintained an action had he or she (as the case may be) lived, against the latter for an injury for the same act or omission.

5. Against recovery: Stanford v. St. Louis S. F. Ry. Co., 214 Ala. 611, 108 So. 566 (1926); Smith v. Luckhardt, 299 Ill. App. 100, 19 N. E.2d 446 (1939); Alliance v. St. Lukes Hosp., 184 Ill. 359, 56 N. E. 638 (1900); Dietrich v. Northhampton, 138 Mass. 14 (1884); Newman v. Detroit, 281 Mich. 20, 274 N. W. 710 (1937); Buel v. United Ry. Co., 248 Mo. 126, 15 S. W. 71 (1913); Stemmer v. Kline, 128 N. J. L. 455, 26 A.2d 489 (1942); Ryan v. P. S. C. T., 18 N. J. Misc. 429 (1940); In re Roberts' Estate, 158 Misc. 698, 286 N. Y. S. 476 (1936); Nugent v. Brooklyn Heights R. Co., 154 N. Y. App. Div. 667, 139 N. Y. S. 367 (1913); Berlin v. J. C. Penney Co., 339 Pa. 547, 16 A.2d 28 (1940); Gorman v. Budlong, 23 R. I. 169, 49 Atl. 704 (1901); Lewis v. Steves Sash & Door Co., 177 S. W.2d 350 (Tex. 1943); Magnolia Coca Cola Bottling Co. v. Jordan, 124 Tex. 347, 78 S. W.2d 944 (1935); Lipps v. Milwaukee Ry. & Light, 164 Wis. 272, 159 N. W. 916 (1916).
6. Bonbrest v. Kotz, 65 F. Supp. 138 (D. C. 1946) (Action by child by next friend); Verkennes v. Corniea, 38 N. W.2d 838 (Minn. 1949); (Action under wrongful death statute. Here the child died before it was born.)

In most of the cases involving prenatal injuries, it has been advocated that the tort law, by analogy to criminal law and property law, should recognize an unborn child as a person in being.[7] The courts formerly rejected this argument, saying that in order to protect social and property interests a "fiction" has arisen that an unborn child is in being but that this "fiction" should not be invoked to protect personal security.[8] The recent cases have found the protection of an unborn child's personal security to be equally important as the protection of social and property interests,[9] but have impliedly limited the protection to the personal interests of a viable child.[10] This restriction seems

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7. *See* Alliance v. St. Lukes Hosp., 184 Ill. 359, 56 N. E. 638 (1900); Dietrich v. Northhampton, 138 Mass. 14 (1884); Ryan v. P. S. C. T., 18 N. J. Misc. 429 (1940); Nugent v. Brooklyn Heights R. Co., 154 N. Y. App. Div. 667, 139 N. Y. S. 367 (1913); Gorman v. Budlong, 23 R. I. 169, 49 Atl. 704 (1901).

In criminal law one who inflicts an injury on a child "in utero" causing the child to die after it is born alive, is guilty of homicide. Clark v. State, 117 Ala. 1, 23 So. 671 (1898); The Queen v. West, 2 Car. & K. 784, 175 Eng. Rep. 329 (1848); Rex v. Senior, 1 Mood 346, 168 Eng. Rep. 1298 (1832).

In property law a child before birth may be considered in being for the purposes of: Taking by will. In re Wells' will, 129 Misc. 447, 221 N. Y. S. 714 (1927). Taking by descent. Barnett v. Pinkston, 238 Ala. 327, 191 So. 371 (1939); Seal v. Sexton, 144 N. C. 157, 56 S. E. 691 (1907). Taking by statute of distribution, Wallis v. Hodson, 2 Atk. 114, 26 Eng. Rep. 472 (1740). Being granted an injunction to restrain waste. Thelluson v. Woodford, 4 Ves. Jr. 227, 322, 31 Eng. Rep. 117, 163 (1799). Also a child *en ventre sa mere* at the testator's death is a "life in being" within the statute against perpetuities, and a trust estate may be created, and the absolute ownership of the property suspended, until such child attains the age of 21. Cooper v. Heatherton, 65 N. Y. App. 561, 73 N. Y. S. 14 (1901).

8. *See* Alliance v. St. Lukes Hosp., 184 Ill. 359, 56 N. E. 638 (1900); Ryan v. P. S. C. T., 18 N. J. Misc. 429, 433 (1940); Gorman v. Budlong, 23 R. I. 169, 173, 49 Atl. 704, 705 (1901).

9. Thomas, J., in Nugent v. Brooklyn Heights R. Co., 154 N. Y. App. Div. 667, 139 N. Y. S. 367 (1913), said:

> It is to this conclusion that an unborn child is not in existence so as to be entitled to the protection of his person as well as his property that I dissent. It is not helpful to characterize its existence as fictitious as to property rights. The rights are accorded to it. The indisputable fact is that one is answerable to the criminal law for killing an unborn child who to that end is regarded as in esse, and the further fact is that the unborn child, so far as the property interests are concerned, is regarded as an entity, a human being with the remedies usually accorded to an owner. But the argument then proceeds that one must respect the rights of ownership, and, so far as a civil remedy is concerned, disregard the safety of the owner. In such argument there is not true sense of proportion in the protection of rights. The greater is denied; the one lesser and dependent on the very existence of a person in esse and entitled to protection is respected.

See note 6 *supra*.

10. *See* Bonbrest v. Kotz, 65 F. Supp. 138, 140 (D. C. 1946); Verkennes v. Corniea, 38 N. W.2d 838, 841 (Minn. 1949); Williams v. Marion Rapid Transit, 87 N. E.2d 334, 339 (Ohio 1949). This distinction between viable and non-viable children seems to stem from the first case dealing with prenatal injuries in this country. Dietrich v. Northhampton, 138 Mass. 14 (1884). In that case the court refused recovery for prenatal injuries sustained by a non-viable child, saying that until a child has reached a stage in which he is capable of being born alive and existing apart from the mother he is not a

inappropriate since no such distinction exists in criminal and property law.[11]

Along with the legal technicalities involved in determining an unborn child to be a person in being, there were also practical difficulties in proving the cause of prenatal injuries, which, it was thought, might result in actions being brought in bad faith.[12] This consideration may have had some merit at a time when, as to the probable cause of prenatal injuries, the opinion of a physician was hardly more authoritative than that of a layman.[13] But medical science has greatly advanced[14] and the courts have relaxed the restrictions on the submission of medical testimony to the jury.[15] Accordingly, as the recent cases recognize, difficulty of proof should no longer be a reason for denying a cause of action for prenatal injuries. Furthermore, it never should have been since only upon trial of a cause of action can it be determined whether competent medical testimony has been submitted to sustain a jury's finding that there was a causal connection between the act of the defendant and the child's injury.[16]

As the bases underlying the earlier decisions apparently no longer have a valid application, it is likely that the recent decisions have pointed the way for

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separate being to whom a duty of care is owed. *Ibid.* at 16. This proposition would seem to imply that a child which has developed so that he is capable of being born alive may recover for prenatal injuries. But, until the three recent cases, the subsequent cases made no such distinction. They held that even though a child is viable he is not a separate being to whom a duty of care is owed. See cases cited in note 5 *supra*. Therefore, until the recent cases, there could be no recovery for prenatal injuries whether the child was viable or not.

11. In Bonbrest v. Kotz, 65 F. Supp. 139, 140 (D. C. 1946) the court stated: "From the viewpoint of the civil law and the law of property, a child *en ventre sa mere* is not only regarded as a human being, but as such from the moment of conception—which it is in fact." (emphasis added) This was quoted with approval in Verkennes v. Corniea, 38 N. W.2d 838, 840 (Minn. 1949). Also, Williams v. Marion Rapid Transit, 87 N. E.2d 334, 339 (Ohio 1949), quoting from PROSSER, TORTS, 189 (1941) stated:

> So far as duty is concerned, if existence at the time is necessary, medical authority has recognized long since that the child is in existence from the *moment of conception*, and for many purposes its existence is recognized by the law. The criminal law regards it as a separate entity, and the law of property considers it in being for all purposes which are to its benefit, such as taking by will or descent. (italics added)

12. *See* Newman v. 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).

13. See Stephens, *Medico-Legal Aspects of Compromise Settlements*, 30 MINN. L. REV. 505 (1946).

14. See note 13 *supra*.

15. An X-ray picture and the interpretation of the picture by an expert is admissible. Chesapeake & O. Ry. Co. v. Kornhoff, 167 Ky. 353, 180 S. W. 523 (1915); Doyle v. Singer Sewing Machine Co., 220 Mass. 327, 107 N. E. 949 (1915). Professional or expert witness may properly be permitted to express his opinion as to whether pain complained of by one whom he has attended or examined is real or feigned. *See* 28 A. L. R. 362, 97 A. L. R. 1248. *See* Bonbrest v. Kotz, 65 F. Supp. 138, 141 (D. C. 1946).

16. See PROSSER, TORTS 189 (1941).

a cause of action which will be recognized in the future.[17] And although these cases allowed recovery only for injuries to a viable child, it is probable that the considerations underlying the decisions will result in recovery for injuries to a non-viable child.[18]

Such a change in theory will impel the defendant to alter his tactics in pleading and proof. To avoid liability he must show that he did not negligently cause the injury, or prove an affirmative defense. As an affirmative defense, contributory negligence will be unavailable since an unborn child cannot act under its own volition. However, it might be argued, that a mother's contributory negligence should be imputed to the child. Though there is no precedent for this problem,[19] an analogous situation involves the negligent injury of a child of tender years, while with his parent. The majority of jurisdictions hold that the contributory negligence of the parent cannot be imputed to the child.[20] The propriety of this view is immaterial to the present prob-

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17. In recognizing a cause of action for prenatal injuries, the courts must diverge from the great weight of authority. This should not be a difficult matter in jurisdictions where the problem has never been presented; and even in states where the problem has been previously litigated the doctrine of *stare decisis* is not inflexible. As to whether courts should disregard well established precedent, Crane, J., in Oppenheim v. Kridel, 236 N. Y. 156, 164, 140 N. E. 227, 230 (1923) said:

> The common law is not rigid and inflexible, a thing dead to all surrounding and changing conditions, it does expand with reason. The common law is not a compendium of mechanical rules, written in fixed and indelible characters, but a living organism which grows and moves in responses to the larger and fuller development of the nation.

18. If the policy judgment was that an unborn child's personal rights deserve as much protection as criminal and property rights, then the logical conclusion would be that a non-viable child's personal rights will be protected. See note 12 *supra*.

19. Since the courts have not, until the recent cases, allowed a cause of action for prenatal injuries, the defendants have been demurring to the complaint. Therefore, the question of imputing the negligence of the mother to the child has never been placed before the court.

20. Trust Co. of Chicago v. Baltimore & O. Ry. Co., 315 Ill. App. 209, 42 N. E.2d 883 (1942); Godblott Bros., Inc. v. Parrish, 110 Ind. App. 868, 33 N. E.2d 835 (1941); Terre Haute, I. & E. Traction Co. v. Stevenson, 72 Ind. App. 435, 126 N. E. 34 (1920); J. F. Darmody v. Reed, 60 Ind. App. 662, 111 N. E. 317 (1916); Indianapolis Street R. Co. v. Bordenchecker, 33 Ind. App. 138, 70 N. E. 995 (1903); Ruffo v. Randall, 72 Ohio App. 50, 170 Atl. 871 (1934). These courts have been confronted with two conflicting interests. First, the interest of the child who, having exercised all the care he is presumably capable of exercising, has been injured by the negligence of a third party. Second, the interest of the third party who, although negligent, is required to pay all the damages even though the parent's negligence in caring for the child contributed to its injuries. The majority holds that the first interest outweighs the second.

Contra, Brown v. Schendelman, 34 Del. 50, 143 Atl. 42 (1928); Tibbetts v. Rorbach, 135 Me. 397, 198 Atl. 610 (1938); County Comm'rs of Caroline County v. Beulah, 153 Md. 221, 138 Atl. 25 (1927): Tucher v. Ryan, 298 Mass. 282, 10 N. E.2d 73 (1937); Milliken v. Weybosset Pure Food Market, 71 R. I. 312, 44 A.2d 723 (1945). These courts reason that the law does not require an infant of tender years to exercise discretion, but the law imposes upon parents the duty of using reasonable care to protect those incapable of protecting themselves. So if the parents fail to exercise such care, and the infant is thereby brought into danger and suffers injury from the negligent act of another, the parents' negligence is imputed to the infant.

lem. The real issue is whether an unborn child should be treated as a very young child under the doctrine of imputed negligence. There is a physical difference in that the former is always completely controlled by the acts of the mother, whereas the latter is not. And while in the cases involving a child of tender years, the minority of jurisdictions allowing imputation of negligence from the parent have been influenced by the degree of the parent's control over the child, the majority view bas refused to impute negligence to the child even where its protection was completely dependent upon the due care of the parent.[21] It appears, then, that the success of the defense of imputed negligence will depend upon the willingness of the particular jurisdiction to impute a parent's negligence to a *born* child.

So a defendant in a prenatal injuries case should anticipate the likelihood that courts, after classifying an unborn child as a person in being for purposes of allowing a cause of action, will further treat the unborn child as a child of tender years in determining the validity of any defense.

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21. Illustrations of this are: Child riding in automobile driven by the parent: Carpenter v. Gibson, 80 Cal. App.2d 269, 181 P.2d 953 (1947); Covington v. Seaboard Air Line Ry. Co., 99 Fla. 1102, 128 So. 426 (1930); Franks v. The Baltimore & O. S. E. Ry. Co., 269 Ill. App. 129 (1933); Gorman v. Mainzer, 149 Atl. 122 (N. J. 1930). Mother and child riding together in the car of defendant railway company: Kelly v. Texas & P. R. Co., 149 S. W. 349 (Tex. 1912). Mother and child walking together along railroad tracks: Missouri Pac. R. Co. v. Moore, 209 Ark. 1037, 193 S. W.2d 657 (1946).