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Torts--Negligence--Wrongful Death Actions for Prenatal Injury

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TORTS—NEGLIGENCE—WRONGFUL DEATH ACTIONS FOR PRENATAL INJURY—Plaintiff brought this action as administrator of the estate of his deceased infant, alleged to have died *en ventre sa mere* as a direct result of injuries negligently inflicted by defendant during the last stages of gestation. Plaintiff was driving with his wife in a truck when defendant negligently forced them from the road, causing the wife and her unborn child to be so injured that the child was born dead. The lower court dismissed the complaint on the ground that Kentucky statutes made no provision for a recovery based upon the wrongful death of an unborn child. Plaintiff appealed. 

*Held:* Reversed. Section 241 of the Constitution of Kentucky and KRS 411.180, enacted pursuant thereto, provide that whenever the death of a person results from an injury inflicted by the negligence of another, damages may be recovered by the personal representative of the deceased. An unborn child, if viable, is a person within the meaning of these two provisions. Mitchell v. Couch, 285 S.W. 2d 901 (Ky. 1955).

At common law, prenatal injury afforded no right of action, either to the injured child or to his parents. It was asserted by the courts, both here and in England, that an unborn child has no identity separate from that of his mother, and that the foetus, not being a presently existing human being, is not entitled to an action for personal injury. A second objection to allowing such an action was that causation is too difficult of proof.

The situation remained static until the beginning of this century when legal writers began to attack the position of the courts. Concurrently, a new judicial attitude began to make itself felt in the form of dicta and dissenting opinions. This attitude first took the form of holding in 1923, when the Louisiana court allowed recovery in a case where the injured foetus died three days after birth.

This case represented a much-needed breach in the wall of stare decisis, but the better part of two decades passed before this decision was supplemented by a similar decision in California in 1939. Still, the writers kept criticizing the position of the majority of states, and in 1946 a decision in the District of Columbia precipitated a relatively

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2 Prosser, Torts 174 (2d ed. 1955).
5 Cooper v. Blanck, 39 So. 2d 352 (La. 1923).
large group of decisions, occurring within a ten year period, which supported the right of a child injured *en ventre sa mere* to recover from the wrongdoer. The writer uses the word "precipitated" advisedly; the state courts since 1946 have been consistent in using the District of Columbia case as authority, and it is probable that the prestige of the federal district court which decided that case has had much to do with the decisions of the state courts. Since 1946, courts in ten jurisdictions have held that the unborn child is as much a person as his mother.\(^8\)

At the time of writing, research indicates that courts of thirteen states have recognized a right of action for prenatal injury, while those in nine states have expressly declined to do so.\(^9\) The remaining states have not been presented with the question.

The nine state minority, however, is not as significant as mere numbers indicate. In Massachusetts, the court bowed to precedent, saying: "We do not indicate what our decision would be if the question were presented for the first time."\(^{10}\) The New Jersey court denied the action for prenatal injury, but a strong (five to ten) dissent endorsed it.\(^{11}\) In Nebraska, the court declined to allow a wrongful death action by the estate of an unborn child, but intimated that its decision would be different if the child had been born alive.\(^{12}\) The decisions in the other six states were made before 1946, when only two states recognized the action for prenatal injury. What the courts in those six states would do if the question were presented in 1956 is, at least, debatable.

In light of the situation as it appears today, it seems fair to predict that the development of the law as to prenatal injury will continue in the pattern set by the progressive Louisiana court in 1923.

It is indeed difficult to find justice in a rule of law which denies an infant a right of action for his injury simply because it occurred prior to his birth. Is negligence toward an unborn child not so wrong as negligence toward someone else? Is the foetus less deserving of our

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\(^9\) These states are Alabama, Massachusetts, Michigan, Nebraska, New Jersey, Pennsylvania, Rhode Island, Texas, and Wisconsin. See Anno. 10 A.L.R. 2d 1059 (1950); 27 A.L.R. 2d 1256 (1953) and Supplement, p. 1344 (1956).


\(^{11}\) Stemmer v. Kline, 128 N.J.L. 455, 26 A. 2d 489 (1942).

protection than the independent adult? Far from it. Why then, did the courts in the beginning see fit to deny the unborn child his remedy? It is submitted that the objection as to difficulty of proof was the real, and actually the only, barrier to this action in the beginning.

In the modern time, it would appear unwarranted, in view of the proficiency of medical science, to say that causation is too uncertain of proof in the case of a prenatal injury. In the early days of the common law, however, the objection would seem to be valid. In an age when “Evil humours” were cured by bleeding, when midwives presided, for the most part, over birth, and when congenital deformities were attributed to evil spirits, it is no difficult to understand why the courts felt that an injury occurring within the obscure and mystic process of gestation might be difficult of explanation. If such an objection might still be offered, the Kentucky court in the instant case disposed of this objection with the following words: “In the eyes of the law it is a wrongful concept that uncertainty of proof can ever destroy a legal right.”

The objection that the unborn child is not a person is hardly valid. It is a statement of result rather than reason. The arguments as to whether the child qualifies as a member of the human race are irrefutable, both pro and con. In one universe of discourse, the child is a person as soon as conceived, because his constituent principles are present at that time, and his future growth is merely the development of those principles. In another manner of speaking, he is not an “independent” person because he is not separate. If one attitude prevails over the other, it is due to legal definition, not to the exclusive truth of the argument.

Having defined “person” in accordance with the decision desired, the early courts were able to support their opinions with a proposition which sounded better than the argument that proof would be too difficult.

In overcoming the objection that the child is not a person, the modern courts, with one exception, have used the “viability theory.” A viable child is one who could, if severed from his mother, live independently. The courts have used this possibility of independent life as the basis for saying that a child, if viable, is a separate person, and entitled to recover for personal injury.

Since viability usually occurs between the sixth and seventh months of pregnancy, this reasoning leaves without redress the foetus in-

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13 Mitchell v. Couch, 283 S.W. 2d 901 (Ky. 1955).
14 Beck, Elements of Medical Jurisprudence 227 (10th ed. )
jured earlier, although he is a victim of the same negligence as his older brother, is born into the same world, and may bear throughout life the same disability or disfigurement. There is either justice nor logic in such a paradox, if proof, in the two cases, is equally conclusive.

The viability theory may be compared to a double-edged sword. The courts have used it successfully to overcome the objection that the child is not a person, but have, in so doing, placed upon themselves a convenient, but unfortunate, limitation, if the language of the viability theory is followed strictly in the future. This language, of course, has been used in cases involving viable infants, and the courts have not, strictly speaking, bound themselves to deny recover to a prenatally injured non-viable infant.

Prosser says of the viability theory: "There appears to be no good reason for the distinction, which will inevitably involve difficult questions of proof."\(^\text{17}\)

The viability theory has been discarded by a New York court.\(^\text{18}\) The court which dropped the distinction handled the problem of the child's status as a person most effectively, stating that the right to recover should be based not upon severability, but upon legal separability. At the moment of conception, a separate organism is created. From this time forward, the function of the mother is to nourish and protect the separate, living organism within her body. It is true that the child, before viability, could not live if taken from the mother, but this is not to say that it is not separate; this is merely to say that the conditions necessary to survival have been removed.

**Conclusion:** Although the Kentucky court has made an admirable decision in recognizing a right of action for death occurring prenatally, it has unfortunately chosen language which indicates that viability will be the dividing line in future prenatal injury cases. The court, however, is free to use this case as a guidepost, rather than as a limitation—to discard the viability theory in future cases.

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\(^{17}\) Prosser, *supra* note 2, 175.