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ACTIONS FOR NEGLIGENTLY CAUSING PRE-NATAL INJURIES

Recently two of the intermediate courts of Ohio have each handed down a decision concerning pre-natal injuries. Both cases involved very similar facts but the courts reached opposite conclusions. This has given rise once more to discussions concerning the rule followed almost universally in this country of denying a recovery for injuries received by an infant while yet en ventre sa mere.

The opinion in the first of the two cases considered, that of Mays v. Weingarten, followed the recognized rule and by blind adherence to precedent denied that a right of action existed in favor of the plaintiff. The unborn infant had been injured when the defendant negligently permitted his automobile to strike the bus in which plaintiff's enceinte mother was riding, thereby inflicting injuries on both the mother and the unborn plaintiff. However, in the second case, Williams v. Marion Rapid Transit Inc., a right of action was granted to an infant who had been injured prior to his birth by the negligent operation of a city bus operated by the defendant whereby the mother was thrown to the ground causing severe bruises to both the mother and unborn child. The court permitted the child after his birth to recover for the injuries he had received while yet in his mother's womb.

The court in the latter case, noting the conflicting rules of law applied in the two cases, certified to the Supreme Court of Ohio the question whether or not a right of action exists in favor of an infant for prenatal injuries at common law. That court is now faced with a situation in which it may either recognize the duty of the law to keep abreast of an advancing civilization or adhere to the doctrine of stare decisis and render an opinion which recognizes a wrong but refuses to grant a redress.

It must be admitted that by the overwhelming weight of authority there can be no recovery for injuries received en ventre sa mere. In fact, this writer has been able to discover only three cases in which recovery was allowed. Of these one was by a lower court of Pennsylvania which was overruled by a later case decided by the highest court of that state; the second permitted a recovery only under a statute and not by a rule of the common law; the third, decided by the Supreme Court of Canada, permitted a recovery only by relying strongly on that remnant of the civil law which still pre-

182 N.E. 2d 421 (Ohio 1948).
24 RESTATEMENT, TORTS sec. 869 (1934).
82 N.E. 2d 423 (Ohio 1948).
vails in Canada as a vestige of the days when that country was New France. Any discussion of precedent in this field should recognize that several of the cases have denied a recovery by an application of the law of contract. That is to say, in most of the cases involving common carriers the courts deny a recovery on the basis that since no contract was made to carry the infant no duty was owed to protect him from harm. Notable among these is the leading case of Walker v. Great Northern Railways in which two of the judges who wrote opinions based the denial of a right of action entirely on a lack of privity of contract.

The courts in denying a recovery in tort for injuries received en ventre sa mere have consistently relied on one or more of the following reasons for denying recovery: ¹

1) The courts lack authority at common law to create such an action, i.e., lack of precedent. ²

2) To permit such an action would open the courts to a surge of trumped-up suits and invite perjury. ³

3) The child had no separate identity apart from the mother, and therefore any duty of care was owed only to her; a breach of that duty creates a right of action in the mother only. ⁴

4) There was no such person in esse at the time of the injury hence the defendant could not have injured him. ⁵

The merits, if any, of each of these contentions will be discussed separately in an attempt to determine the validity of the announced rule that there can be no recovery in such a case.

The validity of the first reason cannot be questioned if one is to adhere rigorously to the doctrine of stare decisis. For at the present time there is no case directly in point allowing a recovery without the benefit of a statute or of the civil law. Yet it is submitted there is much merit in the statement by Lord Mansfield, "The law of Eng-


land would be an absurd science were it founded on precedent only. Precedents were to illustrate principles and to give them a fixed certainty. It should be the duty of the courts, within proper limits, not merely to extract a rule of law from the cases, but to make an appraisal and a comparison of the social values involved. The result of such a balancing of values should be decisive in determining the proper principle to apply in a given situation. Or as more cogently stated by Justice Holmes, “It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.” It is suggested that now is the time to stop following a rule laid down in a time when much less was known of the medical facts of conception, gestation and parturition. With the present day knowledge of obstetrics and gynecology, prenatal injuries can be traced with a fair degree of certainty, hence the strongest reasons for denying a right of action to the child have disappeared.

The law cannot long survive as a stagnant pool of decisions; it must not be a dead thing. It must live and progress with our changing civilization. It must keep abreast of the other arts and sciences if its existence is to be justified. Although precedent is valuable as a stabilizing influence and as a means whereby lawyers may predict the legal rights and duties of their clients, unless a legal principle can be justified without resort to precedent that principle has outlived its usefulness. Thus it readily appears that unless these decisions can be supported by the remaining reasons they exist as a rule of law without foundation.

It would appear there is more merit in the second contention than in any of the other three. This fear, that the courts would be swamped with fraudulent claims, was first expressed in the case of Walker v. Great Northern Railway,” wherein Justice O’Brien remarks, “on what a boundless sea of speculation in evidence this new idea would launch us.” The growth of the law in each of the tort phases has been preceded by comments that to so hold would open wide the door to extravagance of testimony and lead in all probability to fraud and perjury. Each time some far-seeing jurist has had the courage to reject such arguments, and justice has not suffered thereby nor have frauds been perpetrated on the courts by applying old principles to new fact situations. No court should turn justice aside and permit wrongs to go unremedied for fear it may not be able to ascertain the true facts. One need not be apprehensive of this point for, although special care will be required on the part

\textsuperscript{25} I Kent, Commentaries on American Law 477 (11th ed., Comstock, 1867)

\textsuperscript{26} Holmes, Collected Legal Papers 187 (1920).

\textsuperscript{27} L.R. 28 Ir. 69 (1890)

\textsuperscript{28} In this regard examine the development of the law in permitting a recovery for mental anguish.
of the judge when he instructs the jury in some cases, one may be quite confident that the rules of evidence are adequate to require satisfactory proof of responsibility. Moreover, the determination of the relation of cause and effect should not involve the court in any greater difficulty than now exists in many cases.

The first impression created by reading these cases is that the decisions could be defended on the ground of public policy if their basis is that to allow such actions would promote fraud. That is to say, there is a very real possibility that numerous fictitious suits would be commenced in which the defendant would not be able to prove the falsity of the claim. But for that reason must the poor, unfortunate infant go through life with no recompense, all for the good of the community at large? Is it truly impossible to permit the infant to maintain such an action and at the same time provide adequate judicial safeguards for the protection of the defendant? Would the protection of the defendant be unreasonably lessened if the rule were that the infant could recover for injuries received en ventre sa mere provided the proof that his injuries were actually caused by the defendant's negligent acts be clear, cogent, and convincing?

The contention that the child was not a separate entity apart from its mother and hence no duty was owed to it, or that the tortfeasor could not be aware of its presence, was a make-weight argument advanced at a time when relatively little was known of the science of obstetrics. The court in Lipps v. Milwaukee Electrical Ry. and Light Co., realizing the lack of merit in such an argument, attempted to bolster its shaky position by saying, "Neither does the medical or scientific recognition 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."

But it is practical that an infant injured before its birth should go through life maimed because of this injury and with no recompense from the tortfeasor? It is quite difficult to perceive any great distinction between an injury to an unborn fetus, at such a stage of development that if it were removed from its mother it could survive and develop into a normal human being, and an injury to that same being a few moments after its birth. It is submitted that the ends of justice would be more fully served if the fetus before it becomes viable should be considered as a part of its mother and any injury to it be considered as an injury to her, but that from the time viability is established the child should be considered in esse and a legal personality, entitled to a recovery in tort for any injuries received while en ventre sa mere.

The fallacy inherent in the reasoning of the cases becomes more apparent each time they are examined. Surely there can be no de-

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fense to an action for negligence that the person injured was not at
the time enjoying an independent existence, but was dependent in
part at least on some other person or object for sustaining life; for,
indeed, if this reasoning were sound then if one negligently injures
a victim of a respiratory disease, while he is in an iron lung, he as
a tortfeasor could plausibly defend on the basis that this was no
human being, since its existence was dependant on the iron lung and
the only injury for which he is responsible is that to the iron lung.
The absurdity of this is evident from a simple statement of the
proposition.

The final argument advanced in support of a denial of any such
right is much akin to the last; namely, there was no such person in
existence at the time of the mishap, hence he could not have suffered
any injury. But the authorities are legion that the child will be recog-
nized as in existence from the time of his conception for any purpose
beneficial to him. A guardian may be appointed for him.\textsuperscript{22} An estate
may be given or bequeathed to him.\textsuperscript{23} Failure to provide necessities
for such a child will support a criminal action for failure to provide
necessities for an infant.\textsuperscript{24} He may also recover damages for the
death of his parents by the wrongs of others.\textsuperscript{25} In some instances to
take his life may be murder.\textsuperscript{26} Yet despite the fact that it is beneficial
to be born uninjured, and if injured, to recover damages, the rule
stated above has yet to be applied in an action involving a prenatal
injury. A contrast of the result of the cases leads to the absurd para-
dox that the child's property is protected while his bodily integrity
is not, and an injury to him may be murder but not a private wrong.

Should the child be denied a recovery and an attempt be made
to balance the scales of justice by allowing the mother to recover for
all injuries not too remote, as has been attempted in some cases;\textsuperscript{27}
there would still be an area of uncompensated damages. It has been
said, "The fact that the child was deformed, and would suffer
thereby, would cause the mother mental pain, and, even if she could
recover for that, the mental pain the child would suffer and the
mere fact of deformity with its consequent diminution of the value
of capacities and faculties could not be included in her recovery
So, however the subject be viewed, there is a residuum of injury
for which compensation cannot be had save at the suit of the child,
and it is a question of grave import whether one may wrongfully

\textsuperscript{22} Long v Blackhall, 3 Ves. 486, 30 Eng. Rep. 1119 (1797)
\textsuperscript{23} Marsellis v Thalhimer and others, 2 Paige 35, 21 Am. Dec. 66
(N.Y. 1830).
\textsuperscript{24} People v Yates, 114 Cal. App. 782, 298 Pac. 961 (1931).
\textsuperscript{25} Nelson v. Galveston, H. & S. A. Ry., 78 Tex. 621, 14 S.W 1021
(1890).
\textsuperscript{26} Clarke v State, 117 Ala. 1, 23 So. 671 (1898)
\textsuperscript{27} Snow v Allen, 227 Ala. 615, 151 So. 468 (1933), Birmingham
Baptist Hospital v Branton, 218 Ala. 464, 118 So. 741 (1928).
deform or otherwise injure an unborn child without making amends to him after birth."

To base a decision on the contention that the child does not exist until he has been separated from his mother by birth is to fly in the face of medically proven fact. While presumptions both *prima facie* and conclusive have a certain value in the law, the merit of denying facts accepted by all of the other branches of science is questionable to say the least. It appears that the courts have accepted at face value the story, told by prudish parents to their inquisitive offspring, that children are found under a mulberry bush, and have predicated a rule of law thereon.

It is submitted that the ends of justice would be far better served if the courts would discard their archaic precedents in this field and make a re-evaluation of the principles involved. Admittedly many of the later cases continue to be decided not on reason but on precedent. Yet judging from those opinions which have rested upon an inquiry of the basis of the rule, it is apparent that the courts are not wholeheartedly in support of the doctrine, but to some extent have been straining at the leash and trying to break away.

Would it not be a far better rule to permit any child born alive who at the time of the injury could, if removed from his mother by artificial means, live and develop as a normal child, to maintain an action for these injuries and to permit a recovery by the infant provided the proof that such injuries were actually due to the negligence of the defendant be clear, cogent, and convincing?

WILLIAM THRELKELD.

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