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ATTORNEYS ARE CONFRONTED by an ever increasing amount of litigation concerning miscarriage occasioned by physical and physic trauma. The proof and evaluation of the proximate cause of miscarriage is perplexing. The subject of miscarriage is not a matter of common knowledge, hence the members of the jury are not competent to determine, without expert testimony, whether trauma is the proximate cause of the miscarriage.[1] To add to the burden of proof, the courts have not always adhered to correct medical terminology.[2] But it is particularly important that the correct terms be employed, and expert testimony must be given by competent authority.

A definition of terms will be necessary to place the discussion on a firm footing. Medical authority has stated:

> if a pregnancy is interrupted during the first three months (a trimester), it is called an abortion. If it occurs during the second trimester, it is referred to as a miscarriage. If it occurs during the last trimester, it is referred to as a premature delivery.[3]

An abortion produced by trauma is the termination of pregnancy by an outside force. It causes physical or mental injury to the prospective mother and physically prevents her from carrying her pregnancy through to term.[4]

Reliable medical authority has stated that the relationship of miscarriage to external traumatic injury is almost invariably coincidental.[5] That trauma may be the cause of abortion has been the subject of bitter controversy, due largely to the difficulty of establishing proximate causation with a reasonable degree of medical certainty.[6] Causation as determined by medical authorities is much more rigid than that employed by the courts.

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1 Superior Transfer Co. v. Halstead, 189 Md. 536, 56 A. 2d 706 (1948).

2 2 Am. Jur., Proof of Facts 528 (1959).

3 Brooke, In the Wake of Trauma 299-300 (1957).

4 1 Am. Jur., Proof of Facts 22 (1959).

5 Culiner, Trauma and the Usual Miscarriage 3 (1960).

6 3 Schweitzer, Proof of Traumatic Injuries 50 (1961).

The present weight of authority is that physicians cannot readily tell whether an accident was the proximate cause of a miscarriage.[7] However, legally sufficient proof is often presented. In this light, it has been stated that accidental trauma leading to miscarriage may be of "legal origin." [8]

In one careful analysis of 1000 non-criminal abortions, only one doubtful case could be traced to external trauma or physic shock.[9] During pregnancy the fetus is well protected from trauma and uterine rupture is very rare.[10] External trauma delivered to the abdomen under ordinary circumstances will not cause an abortion unless the trauma is of considerable magnitude.[11] It is usually only after the abortion has occurred that the trauma is recalled and special significance ascribed to it.[12] Many physicians believe that the woman who has aborted searches for a plausible cause for her unsuccessful pregnancy. Then, remembering a trauma to which she can attribute it, she relieves her unconscious feeling of guilt at having failed to measure up as a woman.[13]

Often, the uterus may absorb rather severe blows without damage, but in some situations, even a minor injury may result in uterine rupture with dire consequences for the fetus.[14] In certain instances when the developing fetus has only a fragile grasp on nature's promise of life to come, trauma to the abdomen could conceivably be enough to tip the balance. The violence may produce such damage to the body that the healing of non-maternal injuries saps the vitality of the maternal organism. Under these circumstances, there may not be sufficient reserve to cope with both the pregnancy and the injuries. Then a wise nature will occasionally relieve the injured mother of the burden of pregnancy.[15]

At least three factors must be proved before recovery can be had for miscarriage caused by trauma: the woman was preg-

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[7] Jenkins, Gynecological and Obstetrical Aspects of Back Injury, 23 Tenn. L. Rev. 669 (1955).

[8] 1 Echlov, Current Medicine For Attorneys 22 (1953).

[9] 5 Moore, Lawyers' Medical Cyclopedia 418 (1960).

[10] 5 *Id.* at 417.

[11] Brooke, *op. cit. supra* n. 3.

[12] 5 Moore, *op. cit. supra* n. 9 at 419.

[13] 1 Am. Jur., Proof of Facts 16 (1959).

[14] 5 Moore, *op. cit. supra* n. 9 at 417.

[15] Brooke, *op. cit. supra* n. 3.

nant, that the trauma did in fact occur, and that the woman did miscarry.[16] Because of the inexactitude of medical science, positive proof that a specific trauma caused the miscarriage is not absolutely necessary nor always possible, as we shall see later. Proof that a woman has missed at least two menstrual periods and that an examining physician has observed an enlargement of the uterus is normally sufficient to lead to the conclusion that the woman was pregnant.[17] The proof that the trauma occurred should be a run-of-the-mill experience for the average attorney. At first blush, too, proof that a woman has miscarried may seem equally easy to establish. However, in *Martin v. Huff Truck Line*,[18] the plaintiff alleged that she was injured in an accident caused by the defendant's negligence, and that as a result, she later aborted. The trial court held that she could not recover since she did not consult a physician when the labor pains appeared. In addition, little testimony was offered that she was pregnant prior to the accident. However, failure to consult a physician for labor pains prior to miscarriage is not necessarily fatal to recovery. In *Comeau v. Beck*[19] the defendant's physician testified that he had grave doubts concerning the plaintiff's pregnancy and her subsequent miscarriage. She had not called a physician at the time of the alleged miscarriage. The plaintiff offered no medical testimony. The defendant's contention was that the alleged damage was conjectural and that medical testimony must be introduced to prove that the plaintiff suffered a miscarriage. The court held that the plaintiff's evidence showing an injury caused by the accident (a rear-end automobile collision) was sufficient for recovery of damages. This decision, however, seems to be limited in its application.

A further problem for the miscarriage action involves the habitual aborter who aborts following trauma. These habitual aborters suffer spontaneous abortions from unknown causes. It is an accepted fact among obstetricians that 20% of all pregnant women bleed or spot during their pregnancies. Half of these (10% of all pregnancies) terminate in spontaneous abortions for one reason or another.[20] Most spontaneous abortions are due to

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[16] 5 Cantor, Traumatic Medicine and Surgery for the Attorney 3 (1961).

[17] 3 Schweitzer, *op. cit. supra* n. 6.

[18] 32 So. 2d 49 (La. App. 1947).

[19] 319 Mass. 17, 64 N. E. 2d 436 (1946).

[20] 2 Dignam, Trauma (No. 2), 71 (1960).

defects of the embryo, faults in the implantation process, and abnormal endocrine influences.[21] In these cases, the burden of proof is more difficult, since such a history may present a serious question as to whether a specific trauma or some pre-existing conditions induced the abortion.

Several factors should be investigated before trauma can be determined to be the cause of the miscarriage: the health of the woman before the trauma, the condition of her reproductive organs, the history of her previous pregnancies, the severity and location of the trauma, and a determination that the fetus was normal.[22]

As an example of a troublesome proof situation, a woman may pass the corpus of the fetus while answering a call of nature, and thus, the fetus may be lost to scientific investigation. This again is not necessarily fatal to the action, since generally it is necessary to have a dilation and curettage (D & C) performed to complete the expulsion and control the bleeding.[23]

Legal Causation in Traumatic Miscarriage

The Time Factor

In *Griffin v. Cascade Theaters Corp.*,[24] a pregnant woman tripped over a theater advertising sign. She did not fall to the floor, but was caught by her father-in-law. She received a skin laceration at the time of the accident. While watching the motion picture, she suffered from cramps and pains. The pains increased in severity during the night and she miscarried the following morning. The trial court held that she was entitled to bring her action for damages and overruled a motion for judgment notwithstanding the verdict.

In *Pinkney v. Cohn Ins. Co.*,[25] a pregnant woman was injured when she fell through the floor. The plaintiff was denied recovery because she did not prove that the fall was the proximate cause of her miscarriage. She was injured in June and miscarried six weeks later. Following her fall she was attended by her physician, who discovered that she had malaria and that this, not the fall, caused her miscarriage.

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[21] *Id.* at 57.

[22] 1 Am. Jur., Proof of Facts 17 (1959).

[23] 2 Dignam 61, *op. cit. supra* n. 20.

[24] 10 Wash. 2d 574, 117 P. 2d 651 (1941).

[25] *Supra* n. 18.

These two cases indicate the importance of time in relation to the miscarriage. Following a trauma, a miscarriage must occur within a reasonable time (usually within two weeks) or recovery will be denied.[26]

Establishing Medical Causation

Certain problems arise where medical testimony indicates that the proximate cause of traumatic abortion cannot be determined absolutely. It is medically impossible to state whether or not a particular trauma produced a particular miscarriage. In *Ephrem v. Phillips*,[27] the plaintiff was involved in an automobile collision. Later she aborted. Her physician testified that the trauma produced the abortion. He further stated that it is not medically possible to determine definitely the exact cause of the abortion. The defendant, in his appeal, contended that the physician's testimony was conjectural. The court affirmed the plaintiff's recovery of damages, declaring that the physician was only showing the inexactitude of medical science. Inability to prove absolutely is not synonymous with speculation.

A physician testified in *Duncan v. Martin's Restaurant*,[28] that in his opinion, there "might" or "could" have been causal connection between the plaintiff's illness and her premature childbirth. The plaintiff was a pregnant woman who, accompanied by her friends, went to the defendant restaurant to attend a bridal shower. She ate contaminated food which subsequently caused violent stomach disorders. She miscarried shortly afterwards. The court held that the doctor's opinion, based on a medical viewpoint, could hardly be called a mere guess unsupported by the evidence. In general, trauma cannot be proved to be the sole cause of miscarriage, but only its probable cause.

In another instance, an intensely nervous woman, who had miscarried on previous occasions, brought an action in *Inter Ocean Oil Co. v. Marshall*[29] to recover for a miscarriage allegedly due to the heat being shut off by the defendant landlord. The woman returned from a trip and found her home extremely cold. She had no place to go, so she stayed. She developed a chill and later miscarried. Her doctor, a chiropractor, testified in effect

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[26] Superior Transfer Co. v. Halstead, *supra* n. 1.

[27] 99 So. 2d 257 (Fla. App. 1957).

[28] 347 Ill. App. 183, 106 N. E. 2d 731 (1952).

[29] 166 Okl. 118, 26 P. 2d 399 (1933).

that he did not know what caused her miscarriage. The trial court reversed a judgment for the plaintiff and remanded for a new trial, stating that the jury should not be permitted to speculate upon or infer when an expert witness refuses to express an opinion.[30]

The Effect of Contributory Negligence

Contributory negligence on the part of the plaintiff does not necessarily bar her recovery. Under the doctrine of *discovered peril,* a person who discovers another's perilous position in time to avoid injuring such person by the exercise of ordinary care, but fails to exercise that care, becomes liable for the other's injuries proximately resulting from such failure, even though the other person was himself guilty of contributory negligence. In *Forth Worth & D. C. Ry. Co. v. Capehard*[31] this doctrine was unsuccessfully applied, but the plaintiff still recovered. The plaintiff in this case was the husband, who sought to recover damages as the result of alleged injuries his wife sustained in passing over the defendant's track at a public crossing. The track was under repair at the time of the accident. The track foreman motioned to her to cross the tracks and in doing so, she suffered bodily injuries to the extent that her baby was born dead. The court held the husband had the burden of proving that his wife was in danger of being injured if she attempted to cross the tracks, that danger was imminent, and that the railroad's section crew foreman realized the danger. The husband failed to prove these points; nevertheless, he recovered for his wife's injury under the theory of negligence of defendant for failure to warn his wife. This was the proximate cause of his wife's injury. It is interesting to note that the situs of the action was Texas, where a wife is not emancipated as is the rule in other states. Her husband must bring the action.

It is common knowledge that a pregnant woman during the later stages of her pregnancy is prone to acute balancing and co-ordination problems. In *Caspermeyer v. Florsheim Shoe Co.*[32] a pregnant woman in her seventh month was walking with her son. She glanced toward her son and fell into an open sidewalk loading chute, suffering injuries to the extent that her baby was

[30] *Id.* at 402.

[31] 210 S. W. 2d 839 (Tex. Civ. App. 1948).

[32] 313 S. W. 2d 198 (Mo. App. 1958).

born dead. She had looked ahead, but had not seen the opening. The defendant alleged that she was guilty of contributory negligence according to law. The court held that she was not negligent in looking to her young son's welfare and, noting her condition at the time of the injury, allowed a substantial recovery.

Fright and Mental Anguish

Can a recovery of damages be had where the plaintiff miscarries due to fright or mental anguish without a physical trauma? The majority of rulings seem to indicate no. However, many jurisdictions hold that fright and any slight trauma will be sufficient basis for compensation for both the fright and the physical injury.

Emotional excitement and anxiety played a part in a miscarriage in *Richardson v. Pridmore.*[33] The plaintiff was two or three months pregnant when she went on a trip. Upon her return, she discovered that the apartment manager had changed the door lock to her apartment and was evicting her. She was forced to make several trips to the basement to retrieve her belongings under the landlord's belligerent threats. Shortly after this upsetting situation, she aborted. The proximate cause of her abortion was blamed on the emotional excitement and anxiety coupled with the physical exertion. The court, however, treated her eviction as an intentional tort, and the miscarriage as a physical injury.

In *Sider v. Reid Ice Cream Co.*,[34] a woman ate a portion of a meal and then discovered that it contained cockroaches due to the ice cream company's negligence. Although pregnancy was not involved, she became ill and nauseated. The court held that she was entitled to recovery even though there was no physical injury. This decision was one of the first to undermine the ancient rule that stated there could be no recovery for mere fright or physical conditions resulting thereupon.

Another case in which the woman miscarried but suffered no actual physical violence was in *Gulf Refining v. Atchison.*[35] In this case the husband owned certain property which was the situs of a trespass by the defendant's trucks. The husband stopped the defendant's truck, and the driver brought two dep-

[33] 97 Cal. App. 2d 124, 217 P. 2d 113 (1950).

[34] 125 Misc. 835, 211 N. Y. Supp. 582 (1925).

[35] 196 F. 2d 258 (5th Cir. 1952).

uty sheriffs to settle the problem. The wife was in the home with her husband when the deputies arrived. The driver stated that they had better get the husband and shoot him. The husband was ordered from the home, but he did not go. Subsequently, one of the deputies shouted, "Move your wife and kid out of the way or we'll let you have it through the door." The court held that the evidence was sufficient to show that the wife was as much a victim of the employee's threats as was her husband, and that the wife's concern for the safety of her husband was not the sole cause of her injuries.

In *McCullough v. Orcutt*,[36] the pregnant woman's husband was injured in an accident. His wife miscarried allegedly due to the shock, strain and anxiety caused by her husband's injuries. The court held that there could be no recovery since there was no physical injury, and the accident itself was not the proximate cause of the miscarriage.

Adherence to the doctrine of foreseeability, as laid down in the *Palsgraf* decision,[37] is still firmly entrenched in this country. A later decision[38] emphasizes the durability of the doctrine concerning the unforeseeable plaintiff. A wife sitting in front of her home witnessed a collision between her husband's automobile and another. The wife brought a suit against the defendant alleging that her miscarriage was proximately caused by severe emotional strain, fright and mental shock. The court sustained a demurrer to her cause of action. No recovery may be allowed for mental stress resulting from fear of injury to another.

Legal Remedies for Traumatic Miscarriage

Various legal actions may be based on trauma experienced by a pregnant woman. Damages for pain and suffering must be reasonable in all instances.[39] Each case must be considered on its own facts in determining the reasonableness of the award.[40] The parties plaintiff may be the injured woman, her husband, or the premature child. The damages which can be claimed by each are discussed in this section.

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[36] 14 Ill. App. 2d 503, 145 N. E. 2d 109 (1957).

[37] 225 N. Y. Supp. 412, 162 N. E. 99 (1928); 59 A. L. R. 1253.

[38] Reed v. Moore, 156 Cal. App. 2d 43, 319 P. 2d 80 (1958).

[39] St. Louis-San Francisco R. Co. v. Fox, 359 P. 2d 710, 83 A. L. R. 2d 1318 (Okla. 1961).

[40] Hampton v. Rautenstrauch, 338 S. W. 2d 105, 83 A. L. R. 2d 1260 (Mo. 1960).

Woman Miscarried By Trauma

Even if trauma to the injured woman does not cause an abortion, she may still recover. In numerous decisions[41] because of proper medical treatment and physical tenacity, the injured woman did not actually miscarry. In such cases there may be recovery for mental anguish resulting from the apprehension that the child would be born dead or deformed, even though subsequent events show the fear to be groundless. Such apprehension is real and compensable. Needless to say, when a woman does miscarry, she can recover for the physical and mental suffering and the physical impairment to her health.[42] However, she is not entitled to compensation for childbirth in the normal manner[43] or for loss of the unborn child.[44] By the majority view, loss of earnings is also compensable to the wife.[45]

Husband of the Miscarried Woman

The husband may be compensated for the loss of his wife's services and the loss of consortium and society of his wife,[46] for medical treatments,[47] mental anguish and worry resulting from his wife's abortion,[48] burial expenses for the stillborn child,[49] and

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[41] Meeks v. Zimmerman, 223 Ark. 503, 266 S. W. 2d 827 (1954). The injured woman was confined to the hospital for four days. She suffered what appeared to be labor pains and was in grave danger of miscarriage. In addition to the physical pains, she suffered mental anguish by reason of this condition. A damage award of $8,500 was determined not excessive. *Accord,* Holmes v. Combs, 120 Ind. App. 331, 90 N. E. 2d 822 (1950); Jordan v. Fidelity & Casualty Co., 90 So. 2d 529 (La. App. 1956); Wiley v. Sutphin, 108 So. 2d 256 (La. App. 1959); Simmons v. Pierce, 104 So. 2d 258 (La App. 1958); Nomey v. Great American Indemnity Co., 121 So. 2d 763 (La App. 1960); Deshotels v. U. S. Fire Ins. Co., 132 So. 2d 504 (La. App. 1961).

[42] Wendt v. Lillo, 182 F. Supp. 56 (N. D. Iowa 1960).

[43] Morris v. St. Paul City Ry. Co., 105 Minn. 276, 117 N. W. 500 (1908).

[44] Rephann v. Armstrong, 217 Md. 90, 141 A. 2d 525 (1958).

[45] Fox v. Fox, 296 P. 2d 252 (Wyo. 1956); Bologach v. United States, 122 F. Supp. 502 (M. D. Pa. 1954); Kraut v. Cleveland R. Co., 132 Ohio St. 125, 5 N. E. 2d 324 (1936); Hrvatin v. Cleveland R. Co., 69 Ohio App. 499, 44 N. E. 2d 283 (1942); Chase v. Fitzgerald, 132 Conn. 461, 45 A. 2d 789 (1946); Helmstetler v. Duke Power Co., 224 N. C. 821, 32 S. E. 2d 611 (1945).

[46] Stephens v. Weigel, 336 Ill. App. 36, 82 N. E. 2d 697 (1956); Ruland v. Zenith Constr. Co., 283 P. 2d 540 (Okla. 1955).

[47] Valence v. Louisiana Power & Light Co., 50 So. 2d 847 (La. App. 1951); Sibley v. Wilcox, 125 So. 2d 49 (La. App. 1960).

[48] Sibley v. Wilcox, *supra* n. 48.

[49] Norman v. Murphy, 268 P. 2d 178 (Cal. App. 1954). In this action the husband and wife were allowed burial expenses for their stillborn child as an incident of their own damages.

the loss of earnings of his wife.[50] The minority view also allows the husband to sue for the loss of his wife's earnings, and it is important to note that the minority view is restricted to those states that have community property laws and where the Married Woman's Act has not been enacted. The reasoning of the minority view is found in *Valence v. Louisiana Power & Light Co.*[51]

The Child of the Miscarried Woman

Most jurisdictions seem to allow the child who is born alive to recover for prenatal injuries sustained after the fetus was viable.[52] However, because of several decisions, the question of viability seems to be in jeopardy.[53] The measure of damages for prenatal injuries is embraced within three general elements: compensation for the injury and resulting impairment of body and mind; compensation for the cost and care necessitated by the injury and impairment, including the cost of probable future care; and compensation for the deprivation of normal life expectancy.[54]

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[50] Valence v. Louisiana Power & Light Co., *supra* n. 48.

[51] *Ibid.*

[52] Tursi v. New England Windsor Co., 19 Conn. Sup. 242, 111 A. 2d 14 (1955); Williams v. Marion Rapid Transit, 152 Ohio St. 114, 87 N. E. 2d 334 (1949); Sox v. United States, 187 F. Supp. 465 (E. D. S. C. 1960).

[53] Sinkler v. Kneale, 401 Pa. 267, 164 A. 2d 93 (1962). The fact that the child was not viable (that is he was injured during the first trimester) does not control, as the fetus is regarded as having existence as a separate entity from the moment of conception. Bennett v. Hymers, 101 N. H. 483, 147 A. 2d 108 (1958). Smith v. Brennan, 31 N. J. 353, 157 A. 2d 497 (1960).

[54] Sox v. United States, *supra* n. 53.