Cleveland State Law Review

Volume 7 | Issue 3 Article 11

1958

Prenatal Injuries

Andrew L. Johnson Jr.

Prenatal Injuries

Andrew L. Johnson, Jr. *

OUR COURTS HAVE BEEN INCREASINGLY PERPLEXED by the question of whether or not an infant should have a right of action for personal injuries negligently caused to its body prior to birth. Stated another way, does an infant while in its mother's womb have an interest in the freedom from invasion of its bodily security equivalent to and commensurate with that of a person already born?[1] Until recently, the question had been answered almost uniformly in the negative;[2] the courts holding a prenatal injury to be no basis for an action in tort in favor of the child or its next of kin.

An early United States case dealing with the question is *Dietrich, Admr. v. Inhabitants of Northampton,*[3] decided in 1884. A woman between four and five months pregnant was injured by falling on a defective highway. As a result of the fall, the infant was born prematurely, lived for only a few minutes and died. The Massachusetts court, speaking through Holmes, *J.*, denied recovery principally on the ground that "the unborn child was a part of the mother at the time of the injury" and that "any damage to it which was not too remote to be recovered for at all was recoverable by her (the mother)."[4]

Since the *Dietrich* case a majority of jurisdictions have denied recovery on various grounds, without regard to whether or not the fetus was viable.[5] However, following two recent decisions, *Williams v. Marion Rapid Transit Co.*[6] and *Verkennes*

---

* B.S., Northwestern University; a third year student at Cleveland-Marshall Law School.

1 Note, 36 Va. L. R. 611 (1950).

2 52 Am. Jur., Torts, 440.

3 138 Mass. 14; 52 Am. Rep. 242 (1884).

4 Ibid.

5 See Tursi v. New England Windsor Co., 19 Conn. Sup. 242, 111 A. 2d 14 (1955). This case gives the principal reasons favoring a denial of recovery.

6 152 Ohio St. 114, 87 N. E. 2d 334 (1949); Noted, 35 Corn. L. Q. 648 (1949-50) and 63 Harv. L. Rev. 173 (1949). The Williams case is the first decision by an American court of final jurisdiction to hold, in the absence of a statute, that a child who survives birth can bring an action for injuries incurred before birth.

v. Corniea,[7] several jurisdictions have allowed recovery either in favor of the infant or its next of kin.[8]

In the *Williams* case, a suit was brought to recover damages for injuries to a viable child *en ventre sa mere.* The injury occurred when the mother fell while alighting from a street car, allegedly caused by the defendant transit company's negligence. The Supreme Court of Ohio held that since the plaintiff was viable at the time of the alleged negligent injury, she was a "person" within the purview of Article I, Section 16 of the Ohio Constitution, which provides that "every person, for an injury done him in his . . . person . . . shall have remedy by due course of law . . . ."

Verkennes v. Corniea was an action for the wrongful death of an unborn child, allegedly due to the negligence of the defendant hospital during the period of confinement and treatment of the mother before childbirth. The Supreme Court of Minnesota held that an action by the personal representative of the decedent could be maintained on behalf of the decedent's next of kin under a wrongful death statute.

Most of the jurisdictions which have allowed recovery have limited it to cases where the fetus was proved to have been viable[9] at the time the injury was inflicted. The reasoning is that whenever a child is so far advanced in prenatal age that, should natural or artificial parturition occur, the child could live separately from its mother, and is thereafter born and lives, such child has a right of action for any injuries wantonly or negligently inflicted while in its mother's womb. Before such a time the child is only a part of its mother, while thereafter it is considered as something more. Recovery has been limited to the viable stage because the problem of proof of causation increases as the injury occurs earlier in the period of gestation. However,

---

[7] 229 Minn. 365, 38 N. W. 2d 838 (1949); 10 A. L. R. 2d 634.

[8] Amann v. Faidy, 415 Ill. 422, 114 N. E. 2d 412 (1953); Mallison v. Pomeroy, 291 P. 2d 225 (Ore., 1955); Tucker v. Howard L. Carmichael & Sons, Inc., 208 Ga. 201, 65 S. E. 2d 909 (1951), and Hornbuckle v. Plantation Pipe Line Co., 212 Ga. 504, 93 S. E. 2d 727 (1956); Poliquin v. MacDonald, 135 A. 2d 249 (N. H., 1957); Steggall v. Morris, 363 Mo. 1224, 258 S. W. 2d 577 (1953); Damasiewicz v. Gorsuch, 197 Md. 417, 79 A. 2d 550 (1951); Rainey v. Horn, 221 Miss. 269, 72 S. 2d 434 (1954); Woods v. Lancet, 303 N. Y. 349, 102 N. E. 2d 691 (1951); Tursi v. New England Windsor Co., 19 Conn. Sup. 242, 111 A. 2d 14 (1955).

[9] A "viable" fetus is one sufficiently developed for extra-uterine survival, normally a fetus of seven months or older. Also see N. Y. Times, Sept. 25, 1949, Sec. 1, pg. 75, col. 2 for report that the viability age is now being reduced to the order of six months.

in *Hornbuckle v. Plantation Pipe Line Co.*[10] the Georgia Court, in allowing recovery, said:

> At what particular moment after conception or at what particular period the prenatal existence of the child the injury was inflicted is not controlling, for, as was said in Morrow v. Scott, 7 Ga. 535, 537, "In . . . general, a child is to be considered as in being, from the time of its conception, where it will be for the benefit of such child to be so considered." If a child after an injury sustained at any period of its prenatal life can prove the effect on it of a tort, it would have a right to recover.

Keeping in mind the foregoing concise historical background regarding the question, a critical examination of the arguments advanced in favor of allowing recovery where the fetus was proved to have been viable will reveal apparent weaknesses of those arguments.

It has been commonly argued that an unborn viable child is capable of existing independently from its mother and, hence, should be regarded as a separate entity.[11] This argument may have some merit, but it is rendered less potent because it is based upon the questionable concept of viability. In order for a child to be viable it is necessary that not only its organs be adequately developed, but that there be no congenital abnormalities capable of opposing the establishment or continuation of its life.

It is important to distinguish between a viable and a non-viable child, although the latter may outlive the former. The viable child may die of some disease on the day of its birth, while a non-viable child may live for two weeks. The former possesses the organs essential to life in their entirety, while the latter has some imperfection which prevents the complete establishment of life. The fact that a child dies within a few hours of its birth is no evidence of non-viability, nor do the facts that a child appears to be well and its functions of respiration fully established prove viability.

There are many afflictions and abnormalities that a child may have at birth which are not necessarily fatal. Such infants are considered to be viable. There are also many diseases which, without being necessarily fatal, are an impediment to the establishment of independent life and affect different parts of the sys-

---

[10] 212 Ga. 504, 93 S. E. 2d 727 (1956).

[11] Bonbrest v. Kotz, 65 F. Supp. 138 (D. C., D. C. 1946); supra n. 6.

tem. Inflammation and some malformations belong to this second class. There is a third class in which the afflictions are necessarily fatal. These children are non-viable. These distinctions are of great importance. Afflictions of the second type may constitute extenuating circumstance in questions of infanticide; while those of the third admit of little discussion on the subject of their viability.[12] Infants born one to two months prematurely have excellent chances for survival. However, the greater the period of prematurity, the less chance of survival. The point where viability and non-viability meet is indefinite and difficult to fix.[13]

> The novelty of the Williams case[14] is over-shadowed by the Verkennes case[15] which allows the estate of a viable child who is born dead to recover under a wrongful death statute. Although some recovery to the mother may be desirable where the child is stillborn . . . such recovery should not come through the estate of a foetus that is never born alive merely because it was once viable. However, this result seems to follow logically from the viability theory. The difficulty would seem to lie with that theory itself, which is too broad in that it allows recovery in the Verkennes situation and too narrow in that it would not aid a surviving child injured before viability.[16]

Since the law recognizes an unborn child sufficiently to protect its property rights and rights of inheritance, and protects it against the crimes of others, the law should also recognize its separate existence for the purpose of redressing torts. It is clear that a child *en ventre sa mere* is far from a nonentity. He may be an executor. He may take under the Statute of Distributions. He may take by devise. He may have an injunction, and he may have a guardian.[17] His status both in criminal law[18] and in the law of property[19] is established. The reason that he is recognized as a person in property law depends on special property rules.

---

[12] Bouvier's Law Dictionary, 1213 (Students Edition, 1934).

[13] Taylor, Principles and Practice of Medical Jurisprudence, 34 (10th ed., 1948).

[14] Supra n. 6.

[15] Supra n. 7.

[16] Note, 63 Harv. L. R. 174 (1949-50).

[17] Thellusson v. Woodford, 4 Ves. 227, 321, 31 Eng. Rep. 117, 163 (1799).

[18] Clarke v. State, 117 Ala. 1, 23 S. 671 (1898); The Queen v. West, 2 Car. & K. 784, 175 Eng. Rep. 329 (N. P. 1848); Rex v. Senior, 1 Mood 346, 168 Eng. Rep. 1298 (C. C. 1832).

[19] Mallison v. Pomeroy, supra n. 8; Villar v. Gilbey, A. C. 139 (1907); Note, 20 Harv. L. Rev. 651 (1907).

His rights do not come into existence until birth, and then they relate back. However, this function of relation does not involve any idea of the child as a separate entity, and at best it is a special equitable provision.

The criminal law is harder to understand. It is murder or manslaughter if one injures an unborn child, if that child is born alive, and later dies of the injury.[20] It is argued that every murder must of necessity be a tort and that, therefore, there has been a tort against the child in the womb. The answer to this contention probably is that the criminal law has erred in placing this crime against the child in the category of murder. The crime properly belongs in the same category with the offense of causing an abortion. The fundamental concept of murder or manslaughter is the application of some force to a human being resulting in death. The crime in the eyes of the law occurs, not at the time and place of the death, but at the time and place of the prisoner's act. Therefore, if the child has a right of action, it must arise at the time of the injury; but at that time it is uncertain whether the child will be born alive, and thus a right of action is created which is contingent on the child being born alive. The cases that have called the crime murder or manslaughter have stated no convincing reasons.[21] Also it is well established that the reason an unborn infant may be the object of homicide is not because he is capable of individual rights, but only because of the state's interest in human life.

Those who would allow recovery have also unduly minimized the difficulty of proving the causal connection between the tortious act and the subsequent physical defect. Winfield, in referring to cases where the injury precedes birth by a substantial period of time, states:

> As I have indicated, such members of the medical profession as I have sounded on the question were of the opinion that in general no one can positively and truthfully assert in such a case that there is a pathological connection between the prenatal injury and postnatal affliction.[22]

There are many general diseases of the mother which are likely to result in fetal death. Medical authority asserts that there is no way in any specific instance to distinguish between

---

[20] Supra n. 16.

[21] Notes, 12 Harv. L. Rev. 209-216 (1898-99); 13 Harv. L. Rev. 521 (1899).

[22] Winfield, "The Unborn Child," 4 Toronto L. J. 278, 293 (1942), reprinted in 8 Camb. L. J. 76 (1942).

deformities caused by trauma and those caused by other factors inherent in the female such as nutritional or physiological deficiencies. Moreover, whether trauma can cause a deformity is open to doubt.[23]

Miscarriage is the term limited to between the 12th and 28th weeks, and viability abortion is the expulsion of a fetus up to 3 months of age. After the viability the process is spoken of as premature labor. With delivery before this time there is little likelihood of continued life.

The causes of abortion, miscarriage, and premature labor are legion. Almost anything which may mechanically, chemically, or physiologically interfere with the normal development of the child may lead directly to its death, or to early separation of the after-birth, whose firm attachment to the uterus is necessary to continued life.

In spite of careful studies, the part played by over-exertion, a jar, mis-step, tripping, douches, and fright have not been determined. Modern belief inclines far more toward relegating them to the role of coincidence than formerly. It is common knowledge that the rudest manipulations ordinarily do not produce abortion even in the presence of predisposing causes of major significance. The insertion of bougies or balloons inflated within the uterus are frequently non-effective. Admittedly, trauma sufficient to cause rupture of the sac with escape of amniotic fluid may be sufficient. The genital organs are so well protected that damage is extremely rare. Fracture of the pelvis very rarely leads to abortion. The pregnant uterus is so freely movable, slipping easily within the abdomen, that fragments of bone almost never damage the organ to the slightest degree.[24]

In view of the extremely difficult problem of proof, an extension of the viability rule will probably accentuate the danger of over-sympathetic juries granting relief where the plaintiff's evidence of causation is at most fragmentary.[25] Another factor which must be considered is the effect which the contributory negligence of the mother has on the child's right to recover.[26]

The general rule formulated in the Restatement of the Law of Torts is that:

---

[23] Note, Syracuse L. R. 116 (Fall, 1956).

[24] 1 Gray, Attorney's Textbook of Medicine, 596, 598-599 (1949).

[25] Supra n. 16.

[26] Note, 35 Va. L. R. 626 (1949).

"A person who negligently causes harm to an unborn child is not liable to such child for the harm." [27]

Another author states that:

Prenatal injuries furnish no basis for an action by a child or its personal representative. Such injuries, when inflicted, are injuries to the mother, the child in the mother's womb having no separate existence of its own. The mother of an unborn child may recover damages to her and it if such injury and damage are not too remote.[28]

In recent years there has been a great deal of litigation and writing on the question here under discussion, but it appears that few have come forth with an adequate solution to what is admittedly a very difficult and complex problem. The most reasonable approach would probably be through legislative action. If an unborn child is to be endowed with a right of action for personal injuries negligently caused to its body some time prior to birth, that right should not be created by a judicial decision based on the facts in a single case. Instead, that right should be the product of legislative action taken after hearings at which the legislature can be advised, by the aid of medical science and research, not only as to the age at which a fetus is considered viable, but also as to appropriate means—by time limitation for suit and otherwise—for avoiding abuses, which might, and have resulted, from the difficulty of tracing causation from prenatal injury to postnatal deformity.[29]

A change in the common law, like the one under consideration, cannot safely be made without the kind of factual investigation for which the legislature, and not the courts, is equipped. It requires elaborate research and the consideration of perhaps a variety of possible remedies, and such questions are peculiarly appropriate for scrutiny by a law revision commission. California has handled the problem through legislative action, apparently with success.[30] Justice Almand, dissenting in *Hornbuckle v. Plantation Pipe Company*,[31] brought out the need for a statutory remedy when he said:

The majority opinion in the instant case in effect holds that an infant becomes a "person" from the moment of concep-

[27] 4 Restatement of The Law of Torts, par. 869 (1939).

[28] 1 Shearman and Redfield on Negligence, par. 142 (Revised ed., 1941).

[29] See dissenting opinion in Woods v. Lancet, supra n. 8, for a discussion of the remedy through legislative action.

[30] Norman v. Murphy, 268 P. 2d 178 (Calif., 1954).

[31] Supra n. 8.

tion, with the right to sue for a tortious injury after its birth. We reached the limit of reasonableness in the Tucker case, and I am now unwilling, in the absence of legislation, to extend that case and to hold the life of a person, possessing or forming the subject of individual personality, begins when the male and female elements of procreation unite to form the seed of a person. Assuredly, we could not call an acorn a tree. The eternal riddle, which comes first, the egg or the chicken, can be solved by saying they are one and the same.