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# Missouri Law Review

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## **MAY PARENTS MAINTAIN AN ACTION FOR THE WRONGFUL DEATH OF AN UNBORN CHILD IN MISSOURI?**

In 1884, Mr. Justice Holmes, in the case of *Dietrich v. The Inhabitants of Northhampton*,<sup>1</sup> held that an unborn child was a part of its mother. It was said to follow from this premise that the "parents" of an unborn child could not maintain an action for the "child's" death under a wrongful death statute, since the "child," not being a person, but merely a part of his mother, could not have had an action for his injury had he lived. For a great number of years Mr. Justice Holmes' decision was considered controlling and conclusive by most courts on the question of whether an infant might have an action for a prenatal injury and whether the "parents" of the unborn child might maintain an action for its wrongful death. There have been several vigorous dissents and a few decisions of lower appellate courts to the contrary.

Two recent cases have held that an infant may have an action for a prenatal injury.<sup>2</sup> One 1949 case has allowed an action under a wrongful death statute for the negligent killing of an unborn child.<sup>3</sup> These three recent cases indicate a tendency to re-examine the questions supposed by many to have been settled by Mr. Justice Holmes in 1884. There appear to be cogent arguments both against and supporting the infant's right of action for a prenatal injury and the parent's right of action for the wrongful killing of the "infant." The following articles set forth the principal arguments for and against the two noted rights of action, with particular reference to the situation under the Missouri wrongful death statute.

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1. *Dietrich v. Inhabitants of Northampton*, 138 Mass. 14, 52 Am. Rep. 242 (1884).

2. *Bonbrest v. Kotz*, 65 F. Supp. 138 (D. C. 1946); *Williams v. Marion Rapid Transit*, 152 Ohio St. 114, 87 N.E. 2d 334 (1949).

3. *Verkennes v. Corniea*, 38 N.W. 2d 838 (Minn. 1949).

## THE CASE FOR THE RIGHT OF ACTION

WILLIAM J. CASON\*

A. *The Missouri Wrongful Death Statute*

The following provision is found in *Missouri Revised Statutes* (1939), Section 3653: "Whenever the death of a person shall be caused by a wrongful act, neglect or default of another, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who or the corporation which would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured."

The existence of a cause of action under this statute would appear to depend upon there being (1) a death of a "person," within the meaning of that word as used in the statute, (2) caused by an action which would have entitled the "person" injured to maintain an action and recover damages for the injury if death had not ensued.

The first question thus presented is, "What is the meaning of the word 'person' as it is used in Section 3653?" Or, more specifically, "Is an unborn child a person within the purview of Section 3653?"

It is submitted that the meaning of the word "person" as used in Section 3653 is determined by a following clause in the statute. The clause alluded to is, "... if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof. . . ." The two elements noted, *supra*, are in fact but one. The word "person" used by the legislature refers to anyone who could himself sue for a personal injury sustained through the negligence of another. It is one of the admitted and avowed purposes of the wrongful death statute to remedy the anomalous situation existing at common law in the case of a negligent killing. In such case, of course, the negligent person was subjected to no liability, the cause of action for the negligence expiring with the deceased. Yet, if the negligent person had been guilty of a lesser wrong of only injuring the deceased, there would have been liability. The legislators have therefore given a new right of action to the named beneficiaries if the deceased could have maintained an action for his injury had he only been injured and lived. Anyone who could maintain such an action if injured is a "person" referred to in the statute.

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It is important to note in this respect that every court that has considered the question under a wrongful death statute similar to Section 3653 has decided the question of whether the unborn child is a "person" within the meaning of the statute by determining if the unborn child might himself have a right of action for a personal injury.<sup>1</sup>

In a case construing Section 3652, *Missouri Revised Statutes* (1939), the Missouri Supreme Court has held that the word "person" there used does not include an unborn child.<sup>2</sup> But this holding cannot be presumed to control the question of whether an unborn child is a "person" under Section 3653. Section 3652 provides that certain named types of transportation companies shall "forfeit and pay as a penalty" a stipulated minimum amount of money up to a designated maximum amount in case any employee should negligently kill a person. The court has repeatedly emphasized that Section 3652 is a penal and remedial statute whereas Section 3653 is remedial only. It has been held that the rules governing the construction of the two statutes are different, the purposes of the statutes being quite different.<sup>3</sup> The above noted Missouri case construing the word "person" in Section 3652 as not including an unborn child was expressly based upon the purpose of that statute and for this reason obviously does not preclude an action under Section 3653, which the court has held to have a different purpose.

Section 3653, of course, does not purport to create a cause of action in an unborn child for his own injury. The action of the infant must be founded on common law principles. It must be remembered, however, that if the infant is held to have such right of action for his pre-natal injuries in this jurisdiction on common law principles, the legislature has exhibited an intent that a defendant shall not escape liability for the infant's injury because the defendant's conduct in the particular case was such that he killed the infant outright instead of only injuring him. The question is, "Will the action lie for the infant?" It is submitted that such action does lie on common law principles.

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1. *Dietrich v. Inhabitants of Northampton*, 138 Mass. 14, 52 Am. Rep. 242 (1884); *Gorman v. Budlong*, 23 R. I. 169, 49 Atl. 704 (1884), 55 L.R.A. 118 (1901); *Magnolia Coca-Cola Bottling Co. v. Jordan*, 124 Tex. 347, 78 S.W. 2d 944, 97 A.L.R. 1513 (1935).

2. *Buel v. United Railways*, 248 Mo. 126, 154 S.W. 71 (1913).

3. In the case of *Crohn v. Kansas City Home Telephone Co.*, 131 Mo. App. 313, 109 S.W. 1068 (1908), the court noted that Section 3652 is penal and remedial and that 3653 is remedial only. The court said of 3653 being remedial only, "Being of such nature, it differs not only in purpose, but in the rules and principles of construction."

Let us now consider the question of the infant's right to maintain an action for prenatal injuries. The Missouri courts have never passed upon the question of the infant's right of action. In the case of *Buel v. Railroad*,<sup>4</sup> the only Missouri case really concerned with the general question herein discussed, the court said of the decided cases in other jurisdictions concerning the infant's right of action, "It is not necessary to rule upon the rationale of these decisions." The question as to the infant's right of action would appear to be an open one in Missouri.

The common law, by way of damages, gave redress to all persons for personal injuries inflicted by the wrong or neglect of another.<sup>5</sup> It would appear then that recovery would be had by an unborn child on common law principles for personal injuries. This doctrine was announced by Mr. Justice Holmes in the case of *Dietrich v. The Inhabitants of Northampton*.<sup>6</sup> But a number of authorities have taken the opposite view.<sup>7</sup>

The question in these cases upon which the authorities are in conflict is this: "Is an unborn child a person?" If he is a person, then under common law concepts he may have a cause of action for personal injuries negligently inflicted, as all persons may have such action.

#### B. *The unborn child and the law of property*

It was stated by Blackstone that, "Life is the immediate gift of God, a right inherent by nature in every individual; and it begins in contemplation of law as soon as an infant is able to stir in the mother's womb."<sup>8</sup>

The common law has long considered an unborn child as a person in esse from the time of conception for all purposes beneficial to him.<sup>9</sup> In a

4. 248 Mo. 126, 154 S.W. 71 (1913).

5. 45 C. J., *Negligence*, § 601.

6. 138 Mass. 14, 52 Am. Rep. 242 (1884).

7. See the dissent of Mr. Justice Boggs in *Allaire v. St. Luke's Hospital*, 184 Ill. 359, 56 N.E. 638, 75 Am. St. Rep. 176 (1900); *Bonbrest v. Kotz*, 65 F. Supp. 138 (D. C. 1946); *Williams v. Marion Rapid Transit*, 152 Ohio St. 114, 87 N.E. 2d 334 (1949); *Verkennes v. Corniea*, 38 N.W. 2d 838 (1949); See also *Stemmer v. Kline*, 19 N. J. Misc. 15, 17 A. 2d 58, *reversed* (by a 9 to 6 decision) 128 N. J. L. 455, 26 A. 2d 489, 684 (1942) (see particularly the dissent by Mr. Justice Brogan in the upper court); *Kine v. Zuckerman*, 4 Pa. D. & C. R. 227 (1924), *but see* *Berlin v. J. C. Penney Co.*, 339 Pa. 547, 16 A. 2d 28 (1940); *Lipps v. Milwaukee Electric Ry. and Light Co.*, 164 Wis. 272, 159 N.W. 916 (1916), where the court indicates it would afford a cause of action for prenatal injuries to a viable child; *Cooper v. Blanck*, 39 So. 2d 352 (La. 1949); *Montreal Tramways v. Leveille*, 4 Dom. L. R. (1933); *PROSSER ON TORTS* 188 (1941).

8. 1 BL. COMM. \*129, \*130.

9. *Doe v. Clark*, 2 H. Black., Common Pleas, 389 (1795); *Hone v. Van Schaick*, 3 Barb. Ch. 488 (N. Y. 1948).

devise he is considered at common law as a life in being presently and unconditionally as far as his own rights are concerned, for this is beneficial to him. If another, a third person, should attempt to claim through the unborn child, it was another matter under common law principles, and it not being particularly to the child's interest that such claim be recognized it was held that there was no claim unless the child be *born* alive. But as to the child's rights under the devise he was considered as a life in being while still *en ventre sa mere*.<sup>10</sup> So, it has been held that in equity, while still in his mother's womb, unborn, the infant might have a temporary injunction to stay waste.<sup>11</sup> The infant while still unborn may have a guardian assigned to him.<sup>12</sup> So, also, he may presently be made an executor of an estate.<sup>13</sup>

An examination of the above authorities and references to Blackstone must inevitably lead to the conclusion that at least in many instances at common law the unborn child was recognized presently and unconditionally as a person for the purpose of protecting his property interests. It is a proposition too well established to require citation that it is the policy of the common law to extend far greater protection to the interest of being free from bodily harm than to interests in property. It would seem a necessary conclusion that, if an unborn child is regarded unconditionally as a person presently in *esse* by the common law in the many instances noted for the purposes of protecting his property interests, the law should certainly recognize him as a person when he appears before the bar of justice asking redress for bodily injuries wrongfully inflicted upon him.

It would seem a most anomalous situation if the law should say to an unborn child, "You may *now* have an injunction to stay waste. You may *now* have a guardian appointed for you. We will protect your property interests for you are a person and the law protects a person's property interests. But if you are *now* injured in your body, if the interest which is most important to you is invaded, this you must bear alone. The law will give you no redress, for you are not a person. You must go through life bearing your mark of idiocy or disfigurement without redress against a person who admittedly wrongfully caused your condition."

Some have denied the analogy of the law of property to the tort law

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10. BLACKSTONE'S COMMENTARIES 94 (Chitty Ed. 1840).

11. Lutterers Case cited in Hale v. Hale, Finch's Prec. on Ch. 50.

12. BLACKSTONE'S COMMENTARIES 70 (Gavit's Ed. 1892).

13. *Id.* at 511.

in this situation on the ground that the recognition of the child in esse in the property field is only a fiction of the law. Admitting for the purpose of analysis that this is true, it must be noted that the law applies fiction for a reason. That reason is that it is thought that the fiction must be applied in order to escape injustice. It would seem a necessary conclusion that the fiction, if such it be, must be applied so as to allow the unborn child to be recompensed for bodily injuries. Surely it must be admitted that the far greater injustice to the infant will accrue if he is not recognized as a person for the purpose of protecting the most important interest he has, the right to be free from bodily harm.

In the recent case of *Bonbrest v. Kotz*,<sup>14</sup> the court held that a viable unborn child would have a cause of action for prenatal injuries negligently inflicted. The court posed the following question it apparently thought unanswerable: "Why a 'part' of the mother under the law of negligence and a separate entity and person in that of property and of crime?"

### C. *The unborn child and the criminal law*

At common law the killing of an unborn child, it being born dead, is manslaughter.<sup>15</sup> It should be noted that the crime and the recognition of the infant as a separate entity apart from the mother was not conditioned on the infant's being born alive. If the child was born and subsequently died from injuries inflicted while his mother was enceinte of him it was the greater crime of murder.<sup>16</sup> The punishment was greater if the child was born and then subsequently died, but in each case the crime punished was that of the killing of a person.

Another clear, present and unconditional recognition of the infant en ventre sa mere at common law is stated to be, "As when a woman is capitally convicted and pleads her pregnancy; though this is no cause to stay judgment, yet it is to respite the execution, till she be delivered. This is mercy dictated by the law of nature, *in favorem prolis*. (in favor of the child)."<sup>17</sup>

Thus the common law unconditionally recognized that the unborn child is a presently existing person for purposes of the criminal law. It has been argued that the analogy to the law of crimes is imperfect, that punishment

14. 65 F. Supp. 138 (D. C. 1946).

15. 1 BL. COMM. \*129.

16. BLACKSTONE'S COMMENTARIES 70 (Gavit's Ed. 1892).

17. *Id.* at 930. Italics added.

there rests on grounds of public policy and affects the public, but that the law of torts relates solely to the rights of private parties. Such arguments overlook the fact that the public offense can be and most generally is a private wrong.<sup>18</sup> Though it be admitted that in some cases there is no analogy between crime and tort, it must also be admitted that they are most often merely different aspects of the same facts. It is very difficult to see why if the law recognizes unconditionally the separate existence of the unborn child sufficiently to punish the killing of it as manslaughter, it should not also recognize the child's separate existence for purposes of redressing a tort. Can it be said that the nature of the proceedings changes the infant from a separate individual to only a "part of his mother's bowels." In a recent case it was held, with no dissent in the court, that an unborn child is a person and may have redress for his personal injuries. The court stated, "It is quite difficult to reconcile the rule of recognition of a separate existence of a child in order to punish crime committed against it with complete rejection of such rule in a civil suit by the child to secure redress for a physical injury."<sup>19</sup>

D. *The viable unborn child an actual person, a living human being*

It is submitted that a most cogent reason for holding that a viable unborn child is a person within the meaning of the general word "person" in Section 3653 and a person at common law for purposes of maintaining an action for negligently inflicted personal injuries is simply this: The *viable* unborn child is, in fact, a presently existing person, a living human being.

If the unborn child is found to be an actual person, presently existing, then on common law principles, as illustrated *infra*, the infant may have a cause of action for personal injuries when they occur, as may any person. Then, under the analysis in Part A of this article, the unborn child will be one of the persons referred to by the legislators in Section 3653. Further, if the infant is a presently existing person, we need not necessarily be concerned whether at the time the legislature passed the wrongful death

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18. 4 BL. COMM. \*5.

19. *Williams v. Marion Rapid Transit*, 152 Ohio St. 114, 87 N.E. 2d 334 (1949). Mr. Chief Justice Brogan in his dissent to the case of *Stemmer v. Kline*, 128 N. J. L. 455, 26 A. 2d 684 (1942), notes that, "If such unborn child is to be regarded as a non-entity, actually or legally, why may it not at the common law be destroyed with impunity? Such unborn child has existence. The law does not concern itself with non-entities. . . . If the unborn child may not legally be deprived of his life it is hard to understand how that life may with impunity be totally impaired by the tort of a third person."

statute they consciously thought, one way or another, that the viable unborn child was within the terms of the statute. The statute is one prospective in nature and couched in general terms so as to include all persons. If the viable unborn child is in fact a presently existing person, and including him within the purview of the statute would not defeat the purpose of the statute or reach an absurd result, on accepted rules of statutory interpretation the infant must be held within the scope of the statute.<sup>20</sup> This is particularly so when, as in this situation, as illustrated in Part A above, not doing so will leave the mischief sought to be prevented by the statute unremedied.

It should be emphasized at this point that the proposition contended for is that a *viable* unborn child is a person. It may be noted that there is a definite medical distinction between the term "embryo" and "viable fetus." The embryo is the fetus in its earliest stages of development, but the term "viable fetus" means that the child has reached such a state of development that it can presently live outside the female body as well as within it.<sup>21</sup> A fetus generally becomes a viable child between the sixth and seventh month of its existence, though there are instances of younger infants being born and surviving.<sup>22</sup>

The following illuminating statements are found in a leading treatise concerning prenatal development: "Science, by the way, now overrules the decision by the late great Justice Oliver Wendell Holmes, from a Massachusetts bench in 1884, that an unborn child is not an individual but a 'part' of his mother's bowels." . . . Not only is there no direct blood connection between mother and child, but there is moreover no nerve connection. . . . The mother's blood as such never reaches the child, nor do any mother and child have a single drop of blood in common."<sup>23</sup>

Modern authorities on medical science are replete with such statements. One author notes that the Chinese discount the fraction and reckon a man a year old upon birth, and then he remarks, "To the embryologist such calculation is eminently proper. . . ."<sup>24</sup>

The viable unborn child carries on, independently of the mother whose

20. 50 AM. JUR., *Statutes*, § 237, p. 225; § 293, p. 273.

21. AMERICAN ILLUSTRATED MEDICAL DICTIONARY 483, 1605 (19th Ed., Dorland).

22. "At the twenty-eighth week of pregnancy the baby is said to be viable, capable of living outside the mother's body." HEATON, MODERN MOTHERHOOD 48.

23. SCHENFIELD, YOU AND HEREDITY 33, 32 (1939).

24. CORNER, OURSELVES UNBORN 1 (1944).

body contains it, all the vital functions of life. One noted medical authority states that, "The fetus in utero has all the functions of the infant, respiration, digestion, assimilation, metabolism, heat production and regulation, excretion, etc. . . ." <sup>25</sup> The same author notes further that the unborn child moves his limbs about from the earliest months and even gets the hiccups as any other person. <sup>26</sup>

The unborn child is aided in carrying on its functions by an organ, termed the placenta, which it discards at birth. It is through this organ that the infant receives his sustenance from his mother and eliminates his waste material. The placenta is a prenatal organ of the infant and not an organ of the mother. A non-pregnant woman has no placenta. The placenta develops from the child <sup>27</sup> and leaves the female body with the child at birth, attached to the child's umbilical cord, <sup>28</sup> and must be severed from the child by the obstetrician's knife.

The fact that the placenta aids the child in his existence within the mother's body is probably of little importance. If the infant can presently live outside the female body as well as within it, the fact that it is aided in its living within the mother's body by an organ, which having become useless at birth is severed from it, does not appear to detract from the medical fact that in each instance the child is living, and is, as noted above, an individual, a presently existing human being.

It is true that the viable unborn child does not breathe as we generally think of such process. He "breathes" by taking oxygen from the female body through the placenta. He would breathe as any other person if *now* brought from his mother's body. At any rate, breathing is not an essential to his being recognized as a person in fact and a person at common law. Because two things are generally found to exist at the same time, it cannot be assumed that one is necessarily an essential constituent of the other. So it is with breathing and persons and the recognition of the law of persons.

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25. DE LEE, PRINCIPLES AND PRACTICE OF OBSTETRICS 64 (6th Ed. 1933).

26. *Id.* at 58.

27. "A placenta is a complicated structure which grows out from the developing embryo and becomes fastened to the uterus of the mother in such a way that there is an exchange of nourishment between the mother and offspring through the thin walls of the blood-vessels." PEARSE (Professor of Zoology, Duke University), GENERAL ZOOLOGY. "The placenta consists of a modified part of the chorion of the fetus." WEBSTERS NEW INTERNATIONAL DICTIONARY 1877 (2d Ed. 1933).

28. "The third stage of labor begins immediately after the birth of the child and ends with the birth of the placenta and membranes." BROADHEAD, APPROACHING MOTHERHOOD (1946).

At common law it is murder, the killing of a person, to kill a child which has been born though it has never breathed and never breathes before its death.<sup>29</sup> It is pointed out in the *Eliza Brain* case, *supra*,<sup>30</sup> by medical testimony that sometimes infants do not breathe for as long as an hour after birth but then begin that process and continue life. It could hardly be asserted, and the above case denies, that the infant in such cases is not a person because he has not yet taken air into his lungs.

It is also true that the unborn child is attached to the mother by the umbilical cord and placenta before he is born. But this attachment does not make the infant a part of the mother's person and not himself a separate and distinct person. It is very generally held at common law to be murder to kill a born child, though it is still attached to the female through the length of umbilical cord and placenta at the instant of death.<sup>31</sup>

To say that the infant is not a distinct person and individual because his umbilical cord and placenta is attached to the mother is but to evade the question. It could as well be argued that the mother is not a person because her uterus is attached to the placenta and umbilical cord of the infant. As Mr. Justice McGuire points out by way of footnote in the case of *Bonbrest v. Kotz*,<sup>32</sup> it could hardly be argued that the famous Siamese twins, Chang and Eng, were not persons and could not have an action for a physical injury negligently inflicted on one because each is attached to another person. The Siamese twins are joined to each other much in the same manner as the viable unborn child is joined to the mother, with one important exception: they are inseparable. Separation of the twins could not be achieved without instant death. In the case of the viable unborn child this is not the situation. The viable unborn child will continue to live and will develop into a normal adult as will other infants if he is now taken from the female body.

As was stated by the Supreme Court of Ohio without dissent only very recently, this idea of a viable unborn infant being not an individual person but a part of his mother's bowels is, "... a time worn fiction not founded on fact and within common knowledge untrue and unjustified."<sup>33</sup>

It is now, as the court stated, common knowledge and is universally

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29. *Rex v. Eliza Brain*, 6 C. & P. 349 (K. B. 1834).

30. *Ibid.*

31. *Reg. v. Trilloe*, C. & M. 650 (Q. B. 1842).

32. 65 F. Supp. 138 (D. C. 1946).

33. *Williams v. Marion Rapid Transit*, 152 Ohio St. 114, 87 N.E. 2d 334 (1949).

accepted that although the unborn child is dependent on its mother for food, it develops during the prenatal period a separate individuality with separate circulatory and nervous system. The limited dependency upon its mother for food does not make the unborn infant a part of the mother and not an individual. Dependency of one upon another for sustenance can hardly be said to make the one a part of the other. Could it be suggested that the born infant is a part of the mother after birth when it is taking its sustenance from the mother's breast? The infant is 100% dependent upon its mother or some other person for its food even after birth, but this obviously does not make the fully born infant only a part of the person upon whom he is thus dependent.

The classical judicial statement as to this matter was made by Mr. Justice Boggs in his dissent in *Allaire v. St. Luke's Hospital*,<sup>34</sup> wherein he stated: "... if, while in the womb, it (the unborn child) reaches that prenatal age of viability when the destruction of the life of the mother does not necessarily end its existence also, and when, if separated prematurely, and by artificial means, from the mother it would be so far a natural human being as that it would live and grow, mentally and physically, as other children generally, it is but to deny a palpable fact to argue there is but one life, and that the life of the mother."

Prosser, in his treatise on torts, notes that the rule laid down by Mr. Justice Holmes is to be accorded the weight of authority, but he adds, "All writers who have discussed the problem have joined in condemning the existing rule, in maintaining that the unborn child in the path of an automobile is *as much a person in the street as the mother*, and urging that recovery should be allowed on proper proof."<sup>35</sup>

In the recent case of *Bonbrest v. Kotz*,<sup>36</sup> an infant plaintiff was suing by her next friend to recover for injuries sustained, while she was a viable unborn child, through defendant's negligence. The question was stated to be whether an unborn child is a person such that a duty, the breach of which would be negligence, could be owed to him. Mr. Justice McGuire answered this question with a definite affirmative, saying of the viable unborn child, "It has, if viable, its own bodily form and members, manifests all of the anatomical characteristics of individuality, possesses its own circu-

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34. 184 Ill. 369, 56 N.E. 638 (1900).

35. PROSSER ON TORTS 188 (1941). Italics added.

36. 65 F. Supp. 138 (D. C. 1946).

latory, vascular and excretory systems and is capable *now* of being ushered into the visible world." This case has met with wide commendation from legal writers.<sup>37</sup>

In another recent case, *Williams v. Marion Rapid Transit, Inc.*,<sup>38</sup> the infant plaintiff was suing by her next friend for injuries incurred while a viable unborn child. The infant was injured when her mother fell while alighting from one of the defendant's busses. The question was whether a viable unborn child is a person. The Ohio Court of Appeals held that the viable unborn child is in fact a person and that recovery might be had by it for prenatal injuries. Mr. Justice Jackson, who spent several years in the study of medicine before turning to the law, stated in the opinion of the court, "This court is of the opinion that neither a statute nor a fiction of law is necessary, and that recovery can be had."<sup>39</sup>

The Supreme Court of Ohio affirmed this decision by a unanimous court, saying, "To hold that the plaintiff in the instant case did not suffer an injury to her person would require this court to announce as a matter of law the infant is a part of the mother *until birth* and has no existence in the law *until that time*. In our view such a ruling would deprive the infant of the right conferred by the Constitution upon all *persons*, by the application of a time worn fiction not founded on fact and within common knowledge untrue and unjustified."<sup>40</sup>

It is quite clear from the language used that the Ohio Supreme Court and the Ohio Court of Appeals based their respective decisions on the fact that the viable unborn child is presently an existing person.

In the 1949 case of *Verkennes v. Corniea*,<sup>41</sup> an action was brought by William H. Verkennes, special administrator of the estate of Baby Girl Rita Verkennes, deceased, a viable unborn child at the time of her death. The action was brought under Section 573.02, *Minnesota Statutes Annotated*, which provides in part, "When death is caused by the wrongful act or omission of any person or corporation, the personal representative of the decedent may maintain an action therefor if he might have maintained an action, had he lived, for an injury caused by the same act or omission."

Defendant demurred to plaintiff's complaint on the ground that plain-

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37. Note, 15 U. OF KAN. CITY L. REV. 66 (1947). "The recent ruling in *Bonbrest v. Katz*, *supra*, has at last brought the law abreast with medical science."

38. See note 33, *supra*.

39. 82 N.W. 2d 423 (Minn. 1949).

40. See note 33, *supra*. Italics added.

41. 38 N.W. 2d 838 (Minn. 1949).

tiff's decedent had in fact never existed as a person in being. Demurrer was sustained by the trial court. On plaintiff's appeal the question was whether a viable unborn child is a person and could maintain an action for a negligently inflicted injury. The Supreme Court of Minnesota, without dissent, answered this question affirmatively saying (*italics added*), "We hold that under the wrongful death statute the action here will lie. . . . It seems too plain for argument that where independent existence is possible and *life* is destroyed through a wrongful act a cause of action arises under the statute cited."

Here again the court based its opinion on the fact that the viable unborn child is presently an individual and that "life" has been destroyed by the defendant's wrongful act.

In the *Williams* case and the *Bonbrest* case the infant was injured while unborn and was later born alive. It would not seem, however, that those cases would be distinguishable from a case where the infant was born dead and the action was under a wrongful death statute. The question in each case is whether the infant would have an action for the injury. The liability in the *Williams* and the *Bonbrest* cases was not conditioned on live birth. In the *Williams* case the court does distinguish a cited case decided under a wrongful death statute of another jurisdiction. The case so distinguished was decided in part on the interpretation of the wording of the particular statute. The Ohio Court stated, "Let it be noted that the instant action was not brought by parents to recover for the death of the child but was brought by the child herself to recover damages for an injury." This hardly creates a condition of live birth. The court is merely stating the obvious, that the case before it would not be controlled by a case which was determined under a statute of another jurisdiction, there being no statute involved at all in the *Williams* case.

There is some language in these cases pointing out the unfortunate position of the infant *after birth* if he is not allowed a cause of action for his prenatal injuries. Again, this does not imply that live birth is a condition to the defendant's liability. The decisions are based upon the fact, as the language of the cases indicates, that the unborn child is physiologically in fact a presently existing person. It would seem to follow then that it would make no difference whether the child was born dead or alive and that the action could be maintained under a wrongful death statute.

If a defendant is allowed to escape liability on the ground that a par-

ticular child was not born alive but died unborn, though as a result of the injuries inflicted by the defendant, one of the exact anomalous common law situations that the wrongful death statute purports to remedy will exist, namely this: The greater wrong of killing an unborn child will impose no liability, whereas the lesser wrong of only injuring such a child will impose liability. It should be emphasized that in the *Verkennes* case the child was born quite dead.

The courts in all three of the recent cases noted have based liability primarily on what may be termed the "viability theory." It may be admitted that this theory was at first rejected by the courts, but not without dissent.<sup>42</sup> It is most significant that, without exception, every case of record in the last seven years has imposed liability in these cases and has based liability on the "viability theory."

Whether the assignment of a legal personality to the unborn child is to be based upon scientific truth or upon the analogies noted, the reason for the adoption of this view is made stronger if it be remembered that we are concerned here with the health of an individual and his ability after birth to seek complete happiness and perform his full duty as a citizen and a member of society. Nor does this mean that liability is to be based on "sympathy" instead of negligence. It means only, as Mr. Chief Justice Stone has observed in speaking of the role of the judge in the common law system, that the judge is often engaged not so much in extracting a rule of law from the precedents as in making an appraisal and comparison of social values, the result of which may be of decisive weight in determining what rule he is to apply.<sup>43</sup>

*E. The viable unborn child, being a person, has a duty owed him the breach of which will be negligence*

If the viable unborn child be found to be a person the question of whether a duty, the breach of which will be negligence, is owed him is answered, for all persons have such a duty owed them to keep them free from unreasonable risk of bodily harm. The cause of action vests in the infant, a presently existing person, when the duty is breached and the injury occurs, just as such cause vests in any other person.

It should be remembered in regard to this matter of duty that Mr.

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42. 184 Ill. 369, 56 N.E. 638 (1900).

43. Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4, 10 (1936).

Justice Cardoza, perhaps the greatest exponent of duty in our system of law, indicated by his dissent in the case of *Drobner v. Peters*<sup>44</sup> that he was of the opinion that a duty, the breach of which would be negligence, could be owed to an unborn child.

If the infant is viable, the female will be from seven to nine months pregnant. At such time a defendant will have actual knowledge of the presence of the infant and his existence. At any rate, it is elementary that the actual knowledge of the existence and presence of the plaintiff is not essential to fix a defendant with liability for negligence. As we look about us and conclude that the earth is populated by people, surely we must conclude that pregnancy is not such an uncommon condition that a defendant could not reasonably foresee the presence of an unborn child within the zone of foreseeable risks of harm, assuming that he could foresee the mother was within such zone.

#### *F. Policy and practicality.*

There is no reason of policy or practicality which should preclude a viable unborn child from maintaining an action for his personal injuries or the parents from maintaining an action for the infant's death under a wrongful death statute. Some have argued that even if it be assumed that a viable unborn child is a person and ostensibly has a cause of action for prenatal injuries negligently inflicted, at this date the cause of action should not lie for two reasons: (1) precedent—it being argued that the weight of prior authority holds against the existence of such action; (2) practical inconvenience—which may be rephrased by stating that it is charged that it would be impossible in many cases to establish, except by pure conjecture, that the injury of the child was in fact proximately caused by the negligent act of the defendant.

(1) *Precedent and the infant's action.* It should first be emphasized that the matter of the right of an unborn child to maintain an action for a prenatal injury is one that has never been ruled upon in Missouri. The Missouri courts are not bound by any previous decisions of their own on this matter but rather are free to accept the position which appears to be more in accord with present day facts and the better reasoning.

It must be admitted that the weight of authority in past years has held against any redress in tort in favor of a viable unborn child, though

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44. 232 N. Y. 220, 133 N.E. 567 (1921).

it should be emphasized that the matter has never really been settled. That the action has not been allowed by many courts is no doubt to some extent due to the very eminent Mr. Justice Holmes, who wrote the first opinion on the subject in the United States and denied recovery. The well known conservatism of bench and bar alike, the tendency to cling tenaciously to a "precedent" rather than reason a matter out presently on principle, but with regard to precedent, has also had its influence. It is submitted that when a precedent can no longer be supported on principle, the courts are justified in ignoring the precedent and supporting the principle. This is particularly so in the field of tort liability since no vested rights are involved in the decision.

A federal district court, the Supreme Court of Ohio and the Supreme Court of Minnesota, in the three recent cases noted above,<sup>45</sup> have so held. Lord Mansfield put the proposition nicely when he stated, "The law of England would be an absurd science if it were based on precedent alone."<sup>46</sup>

Mr. Justice Stone has well said, "If, with discerning eye, we see differences as well as resemblances in the *facts and experiences of the present when compared with those recorded in the precedents*, we take the decisive step toward the achievement of a progressive science of law. If our appraisals are mechanical and superficial, the law which they generate will likewise be mechanical and superficial, to become at last but a dry and sterile formalism."<sup>47</sup>

It is submitted that a decision by Mr. Justice Holmes in 1884 that an unborn child, not even viable in that case, did not have a cause of action for prenatal injuries negligently inflicted is no authority for that proposition in 1950; nor are cases that rely on that decision without making an independent analysis of the question. A most essential *fact* to consider in resolving the question is the knowledge, experience and ability of the medical profession. It is here that we must note "the facts and experiences of the present when compared with those recorded in the precedents." It would be but a truism to say that medical science has progressed in knowledge and technique since 1884. Medical knowledge and ability at this date far

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45. *Bonbrest v. Kotz*, 65 F. Supp. 138 (D. C. 1946); *Williams v. Marion Rapid Transit*, 152 Ohio St. 114, 87 N.E. 2d 334 (1949); *Verkennes v. Corniea*, 38 N.W. 2d 838 (Minn. 1949).

46. 1 KENT'S COMMENTARIES 477.

47. Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4, 9 (1936). Italics added.

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surpass that of the 19th century. As Mr. Justice McGuire put it in the *Bonbrest* case,<sup>48</sup> "The law is presumed to keep pace with the sciences and medical science certainly has made progress since 1884."

The courts in the cases of *Bonbrest v. Kotz*,<sup>49</sup> *Williams v. Marion Rapid Transit, Inc.*<sup>50</sup> and *Verkennes v. Corniea*,<sup>51</sup> have refused to blindly follow a 19th century precedent without a reconsideration of the problem. These courts, after due consideration of the "facts and experiences of the present," have concluded that the facts and experiences of the present demand that a viable unborn child be recognized as what he is, an actual person, and that he should have a cause of action for a negligently inflicted prenatal injury. Mr. Justice Holmes would no doubt himself be in accord with the three above noted cases in which the courts allowed the infant a right of action, for in the *Dietrich* case, as noted, the infant was not viable, and further, as Mr. Justice Holmes once stated quite pungently concerning the mechanical application of a precedent, "It is revolting to have no better reason for a rule of law than so it was laid down in the time of Henry IV."<sup>52</sup>

(2) *Difficulty of establishing causation?* To those who would argue that the viable unborn child should not be allowed a cause of action for prenatal injuries because of the "great difficulty" in establishing the defendant's act as a proximate cause of the infant's injury, William L. Prosser, a leading text authority on torts in the United States, has this to say, "The difficulty would seem to be no greater than in the case of other matters of medical proof."<sup>53</sup> It may be well premised that this objection had much greater weight in 1884 when the *Dietrich* case was decided than it does in 1950.

Mr. Justice McGuire, in the *Bonbrest* case, notes of the statement that causation in these cases will be difficult or impossible of proof, that it is, "... a premise with which I do not agree." This statement by an experienced trial judge, one particularly aware and learned in such matters as difficulty of proof or impossibility of proof, should negate conclusively the abstract objections some have made as to the difficulty of proof in this class of cases.

The Supreme Court of Canada, in allowing a viable unborn child a

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48. Note 36, *supra*.

49. *Ibid.*

50. See note 19, *supra*.

51. See note 39, *supra*.

52. "The Path of the Law" in COLLECTED LEGAL PAPERS 187 (1920).

53. PROSSER ON TORTS 189 (1941).

cause of action for a prenatal injury negligently inflicted, noted that the objection of difficulty of proof might well have been a valid objection some years ago, but stated, "With the advance in medical science, however, that which may have been insuperable difficulty in the past may now be found susceptible of legal proof."<sup>54</sup> The case came up out of Quebec and hence was decided under the Civil Law. It would appear, however, that the question of proof would be the same in a Common Law jurisdiction. This decision by the Supreme Court of Canada, as long ago as 1933, in a case wherein the record containing the evidence upon which the infant's case was proved in the trial court, speaks most strongly against the difficulty of proof charge. Any conclusion short of certainty may be miscalled conjecture or surmise, but courts, like individuals, habitually act upon a balance of probabilities.<sup>55</sup>

One writer has aptly observed as to this matter of difficulty of proof, "It is submitted that it is not any concern of the court, as to the soundness or unsoundness of a rule of law, whether it would be difficult or easy to bring the action within the rule. The Court should declare the law and not concern itself with the high hurdles that a litigant might be required to make in order to bring himself within the operation of the rule."<sup>56</sup>

If the plaintiff in these cases proves his case the defendant can hardly be heard to complain that it was difficult for the plaintiff so to do. If the plaintiff does not prove his case because of the difficulty of proof, the defendant cannot complain for there is no liability. We must proceed under the premise that the jury will render a verdict on the proof and not on the basis of its feelings of sympathy for one of the litigants. Any other mode of reasoning would produce an argument capable of defeating any cause of action and, in fact, is not a defense to a particular cause of action but a blow aimed at the jury system itself.

#### CONCLUSION

In summary, the position here taken is briefly this. An unborn child falls within the meaning of the word "person" in Section 3653, *Missouri Revised Statutes* (1939), because an unborn child may maintain an action for personal injuries negligently inflicted. The unborn child may have the

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54. *Montreal Tramways v. Leville*, 4 Dom. L. R. 337 (1933).

55. [1911] A. C. 674.

56. Anderson, *Rights of Action of an Unborn Child*, 14 TENN. L. REV. 151 at 161 (1936).

cause of action for his injury because he is recognized as a person in other analagous fields of law and all persons may have such action. The unborn child may have a cause of action on the alternative ground that he is in fact an actual person, presently existing. Further, as concerns the unborn child falling within the purview of Section 3653, if the unborn child is in fact a presently existing person and including him within the statute, which purports to include all persons, will not reach an absurd result, on accepted rules of statutory interpretation he is to be included. The objections noted on grounds of policy and practicality, while sounding good, cannot stand the test of actual evaluation. It is believed that the "facts and experiences of the present" demand that the unborn child be recognized as a person and be allowed an action for an injury negligently inflicted. The same "facts and experiences" demand that the parents be allowed an action for the death of the unborn child under the usual wrongful death provision. Every court that has considered the matter in the last seven years has recognized these demands.<sup>57</sup>

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57. In a case published since the writing of this article, *Jasinsky v. Potts*, 92 N.E. 2d 809 (1950), the Supreme Court of Ohio has handed down a unanimous decision holding that an action will lie under the wrongful death statute of that jurisdiction for the death of a child caused by a prenatal injury. The Ohio statute is essentially the same as Mo. Rev. Stat. § 3653 (1939). The case appears to be authority for the position here taken as to the applicability of § 3653 to the situation discussed.

See 10 ALR 2d 1059. See also 10 ALR 2d 639. The Missouri case of *Finer v. Nichols*, 158 Mo. App. 539 (1911), referred to in the latter note, can be distinguished from the situation herein discussed on the ground of the early date of the case, medical science having advanced, and the fact that it did not appear that the child was viable in that case.