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THE CASE AGAINST THE RIGHT OF ACTION

JOHN DAVID COLLINS*

Section 3653, *Missouri Revised Statutes* (1939), provides that whenever "the death of a person shall be caused by a wrongful act, neglect or default of another, and the act, . . . is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages . . .," then the party who would have been liable shall be liable "notwithstanding the death of the person injured." If the "parents" of a fetus (unborn child) seek to recover under this statute for the death of the fetus, it would appear that they must establish that the fetus is a "person" within the meaning of the statute and that there has been a breach of a duty owed to it.

A. The Fetus as a "Person" Under the Wrongful Death Statute

In the case of *Buel v. Railways*,¹ an action was brought by the parents of a deceased child under Section 3652, *Missouri Revised Statutes* (1939). This statute provides that when any person's death is caused by the negligence of the employee of certain types of transportation agencies the beneficiaries named therein may maintain an action and recover damages. The facts of the case were that a pregnant woman was a passenger on defendant's street railway. It was alleged that the car was negligently put in motion while the "mother" was alighting, thereby throwing her to the ground. The fall of the "mother" was said to injure the fetus so that it died a few months after birth. The petition prayed for judgment under the above noted statute. Judge Bond, speaking for the court, stated that the action could not lie. He said that Section 3652 was intended originally to alter the common law rule that an action for personal injury abated upon the death of the injured person. It was stated that Section 3652 was modeled after Lord Campbell's Act,² the original wrongful death statute. The court reasoned that since at the time of the enactment of the statute there was not a single case allowing a child to maintain an action for prenatal injury, the legislature could not have intended when it used the word "person" to include a fetus.

It would seem equally clear that no action will lie in such case under Section 3653. That section only purports to give a cause of action when

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1. 248 Mo. 126, 154 S.W. 71 (1913).

2. 9 & 10 Vict., c. XCIII (1846).

the deceased person could have maintained one had he lived. At the time of the passing of the statute no case had held that a child could maintain an action for a prenatal injury. Therefore, under the reasoning of the *Buel* case, the fetus is not a deceased "person" referred to in the statute.

It is argued, however, that the *Buel* case is inapplicable to a case arising under Section 3653 because Section 3652, under which that case was decided, is both penal and remedial in nature and hence requires a different construction than Section 3653, which is only remedial in nature. This argument is based on the idea that because, the legislature provided for a different disposition of the money after liability had been established, the scope of the liability in the two sections must also be different. However, this argument can not withstand the simple test of a reading of the two sections. In regard to the disposition of the damages the sections are quite obviously different. In regard to the scope of the liability, and particularly the use of the word "person," it is equally obvious that the two sections are almost identical in language, and are identical in meaning. It may also be observed that the case of *Crohm v. Kansas City Home Telephone Co.*³ was not a construction of the word "person" as it is used in either section. That case did not contain so much as a hint that the word "person" in Section 3653 included a fetus. Moreover, the question may always be asked—if the word "person," when used by itself, is intended to include an "unborn person," why is the word "unborn" always used in front of the word "person" when reference is made to what is properly called a fetus?

In *Hannibal Trust Co. v. Elzea*⁴ the Supreme Court of Missouri said: "Again, in the interpretation of statutes, words in common use are to be construed in their natural, plain and ordinary significance."

Applying this well accepted rule of statutory construction to the word "person" in either Section 3652 or 3653, the question becomes—just what is the "natural, plain and ordinary significance" of the word "person"?

Perhaps the best example of the "natural, plain and ordinary" meaning of any word is its use in the newspapers and magazines. For example, in reports of plane, automobile and train wrecks the only "persons" listed as dead or injured are living, breathing human beings that have been born alive. When a pregnant woman is killed or injured, she is reported as only one "person" dead, or injured. The stage of her pregnancy makes no differ-

3. 131 Mo. App. 313, 109 S.W. 1068 (1908).

4. 315 Mo. 485, 286 S.W. 371 (1926).

ence.⁵ Journalists, like legislators, are people who give ordinary words their natural and plain meaning. As a matter of fact they concentrate on giving words their ordinary signification because they want their stories to be read and understood by farmers, business men, legislators, and members of the public in general.

For purposes of taking the census a fetus is not considered by the census takers as a "person," regardless of the stage of pregnancy.⁶

When a pregnant woman is admitted to the hospital for delivery, the attendant admits and records her as one "person." Records are kept only on her. It is not until the actual live birth of the baby that records are kept on it. At the date of birth the baby is given a patient's number and is registered as a *new patient*.⁷

In calculating age, one is not a "person" until he is born alive. Thus, election judges, (whose vocabulary is usually identical with a legislator's) calculate a "person's" age from the date of *birth*.⁸ The "friends and neighbors" who were on the draft boards in the recent war determined a "person's" age from the date of his *birth*. So we see that both in determining our greatest right (voting) and our greatest duty (defending our country) one is not a "person" until he is born alive. Why? Because the natural, plain and ordinary meaning of that word does not include a fetus.

Webster's New International Dictionary⁹ defines a person as:

"A being characterized by conscious apprehension, rationality, and a moral sense; a being possessing or forming the subject of personality; hence, an individual human being; a particular individual."

Measured by this definition a fetus is not a "person." It does not have conscious apprehension. It does not have rationality. It does not have a moral sense; and certainly it does not have a personality. Furthermore, the same dictionary defines a "fetus" as:

". . . —Commonly restricted to the young in the later stages of development in the womb or egg, in man often from the end of the third month *until birth*, . . ."

5. According to statements made to the author by Professors R. M. Neal and E. C. Lambert, University of Missouri, School of Journalism.

6. Columbia Census Bureau, Columbia, Mo. (1950); 14 C.J.S. 101.

7. Obstetrical Floor Records, Medical Record Room Files, University Hospital, Columbia, Mo. (1950).

8. *Frost v. State ex rel. Clements*, 153 Ala. 654, 45 So. 203 (1907); 29 C.J.S. 38.

9. P. 1827 (2d ed. 1940).

It is submitted that the use of the word "person" by journalist, census takers, hospital employees, election judges, draft boards and Webster's New International Dictionary is of the very essence of the "natural, plain and ordinary signification" of the word. Hence the application of this universally accepted rule of statutory construction¹⁰ not only supports the *Buel* case, but also refutes the argument that the word "person" in Section 3653 has a different meaning than the very same word in the immediately preceding section.

Assuming for purposes of argument that the *Buel* case is not applicable, it still does not follow that Section 3653 confers a right of action on the parents in the situation under discussion. For that statute requires as a condition of recovery that the case be one in which the "party injured" could have recovered damages, for which the defendant would have been liable, "if death had not ensued." In other words, the defendant must have owed a duty to the party injured.

B. No Duty Owed to Fetus

In the case of *Palsgraf v. Long Island Railroad Company*,¹¹ Judge Cardozo wrote the classic statement of what is required before there arises a duty not to cause physical injury to a plaintiff. Although that case did not involve a fetus,¹² it should be noted that it said that the duty arose out of a relationship between the *parties*, and that the duty arises when there is a foreseeable risk of harm to the *one injured*. The recipient of the duty must in fact have a separate existence at the time the alleged duty was owed and breached. Otherwise a duty not to injure would be owed to each part of the person's body which is in existence. So, if an automobile ran against a man's side and broke his leg and arm, he would have two causes of action because both his leg and arm, were in existence at the time of the injury. To avoid this result the law has provided that the recipient of the duty must not only have an existence, but further, it must have a *separate* existence.¹³

10. *Betz v. Kansas City Southern Ry. Co.*, 314 Mo. 390, 284 S.W. 455 (1926); 59 C. J. 957.

11. 248 N. Y. 339, 162 N.E. 99, 59 A.L.R. 1253 (1928).

12. In that case a passenger was running to catch one of the defendant's trains. The defendant's servants, assisting him to board it, dislodged a package from his arms, and it fell upon the rails. The package contained fireworks, which exploded with some violence. The concussion broke some scales, many feet away at the other end of the platform, and they fell upon the plaintiff and injured her.

13. *Dietrich v. Inhabitants of Northampton*, 138 Mass. 14, 52 Am. Rep. 242 (1884); *Drobner v. Peters*, 232 N. Y. 220, 133 N.E. 567, 20 A.L.R. 1503 (1921); *Smith v. Fox*, 53 Ont. L. R. 54 (1922).

A fetus, or unborn child, does not have a separate existence. The food that goes into the mother's mouth gives nourishment to the fetus. The air that is taken into the mother's lungs provides oxygen for the fetus. Although the mother's blood and the fetus' blood are not mixed, the circulation of the blood in the fetus before its birth is different from that afterward and at no part of the fetus is purely arterial blood supplied. The lungs and chest cavity of the fetus are flat, for it has never breathed. What is known as the placenta performs its digestion, assimilates its food, stores its glycogen, and is its excretory organ.¹⁴ Furthermore, at birth the fetus must be cut away from the mother.

Since the fetus does not have a separate existence until it is born, it cannot be the recipient of a duty owed, so a duty not to injure it does not exist. Any action for negligence will have to be based upon the duty owed to the mother.

Whether or not a particular fetus would be *capable* of living if removed from the mother (a "viable" fetus) does not alter the fact that until it actually is removed, it does not have a separate existence. No duty is owed to something that *will* separately exist, or *might* separately exist,¹⁵ or is *capable* of separately existing. As said before, the recipient of the duty must in fact have a separate existence at the time the alleged duty was owed and breached.

The Supreme Court of Missouri, in the case of *Buel v. United Railways Company*,¹⁶ held that no duty was owed to the fetus. Judge Bond said that, "We have not been able to find any precedent at common law establishing the right of a child injured while en ventre sa mere but subsequently born alive, to bring an action thereafter for the injuries so received."¹⁷

14. DE LEE, *PRINCIPLES AND PRACTICE OF OBSTETRICS*, 61-70 (6th ed. 1933); KRAFKA, *HUMAN EMBRYOLOGY* 106 (1942) says: "The placenta is the afterbirth extruded about fifteen minutes after the birth of the child . . . and has a double original fetal and maternal."

15. Whether or not a particular fetus would live if removed from the mother at the end of the seventh month no one knows. It is true that some of them have. It is also true that many of them have not. Sometimes an otherwise normal fetus is unable to retain its body temperature until the end of the ninth month. This is mainly because the fetus gains most of its weight during the ninth month and before that weight is gained the fetus has nothing with which to retain the requisite heat.

16. 248 Mo. 126, 154 S.W. 71 (1913), *supra* note 1.

17. This case caused the Missouri Children's Code Commission to attempt to have a statute enacted which would create a duty owed to a fetus. However, their attempt failed. REPORT, MISSOURI CHILDREN'S CODE COMMISSION 94 (1917); Appendix, Missouri Legislature, 50th General Assembly, Bills to be Submitted (1919).

In the famous case of *Dietrich v. Inhabitants of Northampton*,¹⁸ a pregnant woman slipped and fell as the result of a defect in a highway. The fetus was prematurely born, but lived only ten or fifteen minutes. The court, in an opinion written by Judge Holmes, which is still the law of Massachusetts, held that no duty was owed to the fetus because it did not have a *separate* existence—it was still part of the mother. (It existed, in one form or another, from the moment of conception—but not separately.)

The Supreme Court of Illinois, in the case of *Allaire v. The St. Luke's Hospital*,¹⁹ held that no duty was owed to the fetus. In that case the mother had entered the hospital approximately ten days before the expected delivery. The court pointed out that the legal fiction of the civil law and the ecclesiastical and admiralty courts that a fetus may be regarded as *in esse* for some purposes, had not been adopted by the common law for allowing an action for negligence.

Likewise, in the case of *Drobner v. Peters*²⁰ it was held by the New York Court of Appeals that no duty is owed to a fetus. Judge Pound wrote the opinion, saying (*italics added*):

"No liability can arise therefrom except out of a duty disregarded, and defendant owed no duty of care to the unborn child in the present case, apart from the *duty to avoid injuring the mother.*"

The reason no duty was owed to the fetus was because it, in fact, did not have a separate existence.

The same rule of law was announced by New Jersey's highest court, in the case of *Stemmer v. Kline*.²¹ In spite of the fact that the injury was by a doctor during delivery, the court held that no duty was owed to the fetus. The court stated that it would take an act of the legislature to raise the duty. The Supreme Courts of Alabama, California, Pennsylvania and Wisconsin have also held that no duty is owed to a fetus.²²

In the case of *Magnolia Coca-Cola Bottling Company v. Jordan*,²³ the

18. 138 Mass. 14, 52 Am. Rep. 242 (1884).

19. 184 Ill. 359, 56 N.E. 638, 48 L.R.A. 225 (1900).

20. 232 N. Y. 220, 224, 133 N.E. 567, 20 A.L.R. 1503 (1921).

21. 128 N. J. L. 455, 26 A. 2d 489 (1942).

22. *Stanford v. St. Louis-San Francisco Ry.*, 214 Ala. 611, 108 So. 566 (1926); *Scott v. McPheeters*, 93 P. 2d 562 (Cal. 1939), *denying hearing and in effect affirming* *Scott v. McPheeters*, 33 C. A. 2d 629, 92 P. 2d 678 (1939); *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, L.R.A. 1917B, 334 (1916); *Stanford v. St. Louis-San Francisco R. Co.*, 214 Ala. 611, 108 So. 566 (1926).

23. 124 Tex. 347, 360, 78 S.W. 2d 944, 97 A.L.R. 1513 (1935).

Texas court, in perhaps the most carefully considered opinion on the subject, said (*italics added*):

"We think that, tested by the knowledge, experience, and conduct of the ordinary prudent man, it 'owed no duty of care to the unborn child in the present case, *apart from the duty to avoid injuring the mother.*'"

This opinion was adopted by the Supreme Court of Texas. Judge Smedley thoroughly examined the arguments which have been advanced in favor of holding that a duty exists. He concluded that the problem could not be solved by analogies to rights which are not based upon a duty growing out of a relationship to other separately existing people. As the quotation above indicates, that separate existence is not present in the case of a fetus.²⁴

In the case of *Newman v. City of Detroit*,²⁵ the accident occurred just 22 days prior to birth and while the mother was a passenger on a street car. The Supreme Court of Michigan held that no duty was owed to the fetus.

In the case of *Gorman v. Budlong*,²⁶ an expectant mother was hit by plaster which fell from the ceiling as a result of the defendant's negligence. The fetus was prematurely born and died three days later. An action was brought under a wrongful death statute which contained the condition that if death had not ensued the injured party could have maintained an action. Rhode Island's highest court also held that no duty was owed to a fetus.

Thus, the highest courts of Missouri, New York, Massachusetts, Pennsylvania, Michigan, Illinois, New Jersey, Wisconsin, California, Texas, Rhode Island, and Alabama have held that no duty is owed to a fetus, either in a case where the action is brought by the child, which has been born alive, or in a case where the action is under a wrongful death statute which contains the condition that if death had not ensued the injured party could have maintained an action.

In the Canadian case of *Smith v. Fox*,²⁷ a pregnant woman was injured in an automobile collision. An action was brought by her husband as the next friend of the fetus (before it was born). In determining whether or not the fetus had a cause of action, the Supreme Court of Ontario had to decide the very question that is now under discussion, *i.e.* does a fetus have

24. See *Lewis v. Steves Sash and Door Co.*, 177 S.W. 2d 350 (Tex. App. 1943).

25. 281 Mich. 60, 274 N.W. 710 (1937).

26. 23 R. I. 169, 49 Atl. 704, 55 L.R.A. 118 (1901).

27. 53 Ont. L. R. 54 (1922).

an existence separate from the mother so as to make it the recipient of a duty owed? The court held that it did not. It said (*italics added*):

“Consequently, there can be no assessment of damages unless and until the *birth and separate existence* of the child—that is still hypothetical; and now, as at the teste of the writ, there is no certainty that there will be any such entity.”

The arguments which have been advanced in support of the contention that a fetus is a separately existing person before birth are based mainly upon analogies drawn from the law of property, the Civil Law, and the criminal law. Analysis reveals that in every one of these analogies it is recognized that a fetus does not have a separate existence until birth.

As to the law of property, it is argued that the common law regards one as in esse from the time of conception for purposes of taking an estate by devise or descent, but this is only true where the fetus is born alive. If the fetus is not born alive, the law of property gives it no rights at all. In other words, a fetus acquires no property rights before it is born alive, those rights are merely held in abeyance until the fetus is born alive and at that time it acquires them. Otherwise the fetus would have property rights if it ever became “viable,” even though it was born dead.

In the case of *Marsellis v. Thalkimer*,²⁸ it was held that for purposes of the law of property if the fetus is born dead it is considered as never having been born or conceived. The New York Court was not of the opinion that a fetus had a separate existence before birth or they would not have made its rights dependent upon live birth.²⁹ Professor Tiffany would agree that under the common law a fetus does not have a separate existence so as to acquire rights *until* it is born alive.³⁰ He cites “The Legal Status of Unborn Children.”³¹ This note, speaking of the fact that if a fetus is born alive it takes by devise or descent, says:

“This does not, however, involve the recognition of a child en ventre sa mere as a *separate existent entity*, but is purely a rule of construction based on the ground that ‘such children come within the motive and reason of the gift.’ . . . Indeed, quite the contrary is shown by the well settled rule that in the interim between the death of a testator devising land to a child en ventre sa mere and the [live] birth of the child, the Heir-at-law is entitled to the rents and profits.”³²

28. 2 Paige Ch. 35 (N. Y. 1830).

29. 26 C.J.S. 1035.

30. TIFFANY, REAL PROPERTY, Sec. 1127, p. 391 (3d ed. 1939).

31. 26 HARV. L. REV. 638 (1913).

32. *Id.* at 638. *Italics added.*

Thus it is seen that the property law recognizes that a fetus does not have a separate existence until and unless it is born alive.

Now let us examine the analogy to the Civil Law. It is argued that in the Civil Law one is regarded as in esse from the time of conception. But in the Civil Law, as in the property law, it is recognized that a fetus does not have a separate existence, and consequently it has no rights. It is only when the fetus is born alive that it acquires rights.³³ Until then it has no separate existence and no rights. Domat states the Civil Law thus: "Children that are born dead are considered as if they had never been born, or conceived."³⁴

The analogy to the criminal law also fails to help the infant plaintiff in an action for a prenatal injury or aid the parents of an unborn child in an action under a wrongful death statute for its wrongful "death." It is argued that if a person beats a woman who is "quick with child," and the child is born alive, and then dies, it is murder; so by analogy a fetus *born* alive should be able to recover damages. It should be observed, of course, that the criminal law rests upon grounds of public policy and affects the public; the law of torts relates solely to the rights of private parties. Whether or not this distinction is fatal to the analogy makes no difference because the criminal law recognizes that a fetus does not have a separate existence apart from its mother until it is born alive. Hence, it was held by the New York Court of Appeals in *Evans v. The People*,³⁵ that homicide cannot be committed upon a fetus,³⁶ the court saying: "Such an infant is not considered a person or a human being, upon whom the crime of murder can be committed." Burdick on Crimes puts it thus:³⁷ "An unborn child is not a human being in existence (in rerum Natura), and at common law it is not felonious to kill such a child." Another author has this to say:

"On the other hand the holding that no injuries to a child en ventre sa mere can be homicide *unless the child is born alive* are conclusive against the contention that the criminal law recognized the unborn child as a person."³⁸

We see, then, that by analogy to the law of property, the Civil Law

33. LA. CIV. CODE Art. 955, p. 318 (Dart, 1932).

34. DOMAT, CIVIL LAW, Tit. II, Sec. 1, Art. IV, p. 137 (Cusing ed.).

35. 49 N. Y. 86, 88 (1872).

36. Cordes v. State, 54 Tex. Cr. R. 204, 112 S.W. 943 (1908); 1 RUSSELL, CRIMES 671 (9th Am. ed. 1877).

37. Vol. 2, Sec. 445, p. 155 (1946).

38. Note, *Legal Status of Unborn Children*, 26 HARV. L. REV. 638 (1913).

and the criminal law, a fetus does not have a separate existence. So all three of the arguments which have been advanced in favor of recovery, if the fetus is born alive, are actually illustrations of the well known fact that a fetus does not have a separate existence until it is born alive.

The cases holding that a fetus, if it is subsequently born alive, has a cause of action are not well reasoned. For the most part they are based upon the analogies which have just been discussed. But they have failed to realize that even under these analogies a fetus has no separate existence and consequently no duty is owed to it. This is because these courts have not analyzed the problem in terms of duty, but instead have based the liability upon sympathy. This is very apparent because they have limited the liability to cases where, as Judge Boggs says in his dissent in the *Allaire* case,³⁹ the fetus "becomes a living human being." If the liability had been based upon the fact that a fetus has a separate existence and so has a duty owed to it, it would make no difference whether the fetus was born alive or dead.

The most convincing proof that the cases which allow recovery where the fetus is born alive are based upon sympathy, and not duty, is furnished by those very cases.

The case of *Williams v. Marion Rapid Transit, Inc.*,⁴⁰ is relied upon as supporting a right of action. A careful examination of that opinion reveals that the Ohio Court did not analyze the liability problem in terms of duty but instead, as have other courts allowing recovery when the fetus is born alive, they based the liability upon sympathy. This is very apparent because they say:

"If a right of action be denied to the child it will be compelled without any fault on its part, to go through life carrying the seal of another's fault and bearing a very heavy burden of infirmity and inconvenience without any compensation therefor."⁴¹

Two things are made obvious by this quotation. First, the court's holding was based upon sympathy and not upon breach of a duty. Second, that sympathy was the result of the fact that the fetus was born alive and sued for its own benefit in that case, and not that it had a separate existence before birth. The court made it very clear that it conditioned the liability upon the live birth of the fetus: "Let it be noted that the instant action was

39. *Allaire v. The St. Luke's Hospital*, 184 Ill. 359, 56 N.E. 638, 48 L.R.A. 225 (1900).

40. 152 Ohio St. 114, 87 N.E. 2d 334 (1949).

41. 87 N.E. 2d at 339, quoting with approval *Montreal Tramways v. Leveille*, *infra* note 34.

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. . . ."⁴²

Another striking illustration is the case of *Montreal Tramways v. Leveille*.⁴³ In that case it was held that a living child could maintain an action for injuries received while still a fetus. The crux of the decision appears in this statement by the court: "To my mind it is but *natural justice* that a child, if *born alive and viable*, should be allowed to maintain an action. . . ."⁴⁴

In the case of *Bonbrest v. Kotz*,⁴⁵ recovery was allowed to a living infant for injuries received during delivery. The case was largely based upon the *Montreal Tramways* case, the court quoting extensively from that opinion. The court laid great stress upon the fact that the infant in the case had been born alive. Quoting from the *Montreal Tramways* case, the court said: "If a child *after birth* (italics supplied) has no right of action for prenatal injuries, we have a wrong inflicted for which there is no remedy. . . ."⁴⁶ This opinion completely ignores the "duty" concept of negligence. The quotation indicated that recovery should be allowed for every injury. In other words, liability should be based on sympathy, not negligence. If this idea were to prevail, damages could be recovered for what the law now calls "unavoidable accidents," because in every "unavoidable accident" there is "a wrong inflicted for which there is no remedy."

The dissenting opinion of Judge Boggs in *Allaire v. St. Luke's Hospital*⁴⁷ is another classic illustration of the fact that sympathy and the condition that the fetus be born alive are the true basis of the opinions that would allow recovery. He says:

"The law should, it seems to be, be, that whenever a child in utero is so far advanced in pre-natal age as that, should parturition by natural or artificial means occur at such age, such child, could and would live separable from the mother and grow into the ordinary activities of life, *and is afterwards born and becomes a living human being*, such child has a right of action. . . ."⁴⁸

That Judge Boggs conditions recovery upon the fetus being born alive is extremely significant because his opinion is the foundation upon which most of the claims for recovery are built.

42. 87 N.E. 2d at 338. Italics added.

43. 4 Dom. L. R. 337 (1933).

44. *Id.* at 345. Italics added.

45. 65 F. Supp. 138 (D. C. 1946).

46. *Id.* at 141.

47. *Supra*, note 30.

48. 184 Ill. at 374. Italics added.

The case of *Verkennes v. Corniea*⁴⁹ is in a class by itself. The Minnesota court's opinion appears to be based upon the misinterpretation of three other opinions, every one of which expressly conditioned the liability upon the live birth of the fetus.⁵⁰ These three opinions, together with a long list of cases that hold that no duty is owed to a fetus, occupy almost all of the three and one-half pages of the opinion. One of the opinions, the *Allaire* case, was a dissent written in 1900 and is still not followed in its own jurisdiction. Another of the opinions was a Canadian case which came up out of Quebec and was decided under the Civil Law. The opinion in the *Bonbrest* case was based squarely upon the Canadian case, but apparently the court was not aware that the Canadian case was decided under the Civil Law because no mention was made of that fact.

Since the *Verkennes* case was entirely based upon opinions which expressly conditioned the liability upon live birth and the fetus in that case was never born alive, and since two out of those three opinions were based upon the Civil Law, the case is very weak.

The so-called "viability theory" has been the purported basis of three recent cases⁵¹ which have held that the duty does exist. Those cases argue that the discovery that a fetus is capable of living apart from its mother after seven months of growth is a very recent development of medical science. From this they argue that the cases that hold no duty is owed to a fetus have been decided in ignorance of this newly discovered fact and so they should not be followed today. But even casual observation reveals that the "viability theory" was the basis of the dissent in the *Allaire* case in 1900, half a century ago, and that since that time eleven states⁵² out of the fourteen⁵³ that have decided the question have rejected the "viability theory" and have held that no duty is owed to a fetus. So the "viability theory" has not only been evaluated by the courts, but it has also been consistently rejected.

49. 38 N.W. 2d 838 (Minn. 1949).

50. *Bonbrest v. Kotz*, 65 F. Supp. 138 (D. C. 1946); dissenting opinion in *Allaire v. The St. Luke's Hospital*, 184 Ill. 359, 56 N.E. 638 (1900); *Montreal Tramways v. Leveille*, 4 Dom. L. R. 337 (1933).

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

52. Missouri, New York, Pennsylvania, Michigan, Illinois, New Jersey, Wisconsin, California, Texas, Rhode Island and Alabama.

53. Massachusetts held that no duty exists in 1884. Ohio and Minnesota have held that the duty does exist.

Some have made the argument that the authority (numerically and by judicial prestige) holding that no such duty exists is the result of a rigid application of *stare decisis*. This is obviously fallacious. Twelve of the cases so holding were cases of first impression. Those courts could not possibly have been bound by precedent because at the time they made their decisions there was no precedent in their respective jurisdictions.

An argument that has been relied upon quite often by the courts that hold the duty does not exist is that, as a practical matter, it would be an impossibility to prove either the plaintiff's cause of action or the defendant's defense. Text and law review writers usually by-pass this argument by some very general statement which is "supported" by equally meaningless authorities. Typical is the statement of Professor Prosser in his work on the law of torts. He says, "The difficulty would seem to be no greater than in the case of other matters of medical proof."⁵⁴ However, trial judges, who are daily reminded of the great amount of false testimony (both intentional and unintentional) which is given under oath,⁵⁵ are likely to want to know *how* the cause in fact, proximate or legal cause, or a sole or intervening cause are to be proved. To the best of our knowledge and belief there is no way to prove these things. Defects in babies, or still births, may be caused by one or a combination of several things. A jolt or blow against the mother either prior to or subsequent to the alleged cause, a defective gene, improper diet, physical defects of the mother, improper use of instruments during delivery, any one of many other things may be the sole or contributory cause. Since no one seems to know *how* the cause in fact, proximate or legal cause, or a sole or intervening cause could be proved, the consequence of allowing the action to be maintained would be this. A young woman (whose equally young husband is struggling for a living), who had either just lost her baby or given birth to a defective child, would sue a gigantic corporation. The jury would be composed either of poor farmers or laborers who pay dues to organizations which are the avowed enemies of big corporations. Neither side could prove their case; so the jury would give the unfortunate young woman a few thousand dollars as a token of their sympathy. This would be a far cry from liability based upon fault, which has been the common law criteria for tort liability for centuries. It may be argued with much force that this reason by itself is sufficient to support a holding that no duty is owed to a fetus. Many of the cases already cited would

54. PROSSER ON TORTS 189 (1941).

55. McCarthy, *Perjury in Judicial Proceedings*, 35 AM. L. REV. 684 (1901).

support this view. The case of *Magnolia Coca-Cola Bottling Company v. Jordan*,⁵⁶ had this to say:

“But there are instances in the law where rules of right are founded upon the inherent and inevitable difficulty or impossibility of proof. And it is easy to see on what a boundless sea of speculation in evidence this new idea would launch us. What a field would be opened to extravagance of testimony, already great enough—if Science could carry her lamp, not over-certain in its light where people have their eyes, into the unseen laboratory of nature—could profess to reveal the causes and things that are hidden there.”

CONCLUSION

In brief, the parents have no right of action for the death of a fetus under Section 3653 for these reasons: A fetus is not a person referred to in that statute because there was no case holding that a fetus could have an action for a prenatal injury at the time the statute was passed. Under the reasoning in the *Buel* case, the legislature could not have intended to include a fetus within the terms of the statute. Assuming the action could be brought under the statute if a child may today have an action for a prenatal injury, the action must still fail. No duty can be owed a fetus because it is not a separately existing person and in fact is not even a person. This has been the opinion of the vast majority of courts since 1884, when Mr. Justice Holmes first laid down the rule. The recent cases holding that a child may have an action for a prenatal injury are not well reasoned and are based primarily on sympathy. Two of the recent cases condition liability on live birth and are no authority for recovery for the death of a fetus under a wrongful death statute.⁵⁷ Even if it could be assumed that a duty is owed a fetus, still the action should not be allowed for the very cogent reason stated by the Texas court in the *Magnolia* case, above, namely, “impossibility of proof.”

56. 124 Tex. 345, 78 S.W. 2d 944, 97 A.L.R. 1513 (1935).

57. In *Jasinsky v. Potts* 92 N.E. 2d 809 (Ohio, 1950), published after this article was written, recovery was allowed under the Ohio wrongful death statute for the death of a three-month-old baby that had been injured while still a fetus. Without discussion the court accepted the *Williams* case as controlling on the existence of a duty owed the fetus, so the case is subject to the some criticism as the *Williams* case, i.e., the liability was not based upon the breach of a duty. In addition, the *Jasinsky* case accepts the construction of the word “person” as used in the Ohio constitution as determinative of the meaning of the word as used in the wrongful death statute. The court did not cite a single case which had construed a wrongful death statute using the word “person” as including a fetus. Quite to the contrary, *Buel v. Railways*, holding that a wrongful death statute using the word “person” did not include a fetus, was disposed of by the glib comment that the Ohio statute “does not require interpretation.”