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David P. Macoubrie
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TORTS—RECOVERY FOR PRENATAL INJURIES AND DEATHS

The purpose of this article is to show the advancements which have been made by some courts in destroying their archaic ideas of not allowing recovery for injuries and deaths to the child while still *en ventre sa mere.*[1] The article is divided into two parts. Part I is a discussion of recovery for injuries to the fetus. And Part II concerns injuries to the fetus which cause death prior to, or shortly after, birth.

I. Cause of Action As A Result of Prenatal Injuries

Prior to 1946 most jurisdictions denied recovery for injuries received by a viable infant while *en ventre sa mere,* even though the infant was born alive. The courts based their decisions on the following: (1) the defendant could owe no duty of conduct to a person who was not in existence at the time of his act, (2) the difficulty of proving a causal connection between negligence and damage was too great, (3) too much danger of fictitious claims, and (4) a lack of precedent on the matter.[2]

The first reported case to break away from the now obsolescent view denying recovery was *Bonbrest v. Kotz,*[3] decided in the District of Columbia. The court held that a viable infant born alive may maintain an action for the prenatal injuries suffered. Since the *Bonbrest* decision, there has been a series of cases which have followed its holding.[4]

The Missouri Supreme Court, *en banc,* in 1953 followed this well-defined trend in *Steggall v. Morris,*[5] overruling a prior decision denying liability.[6] Observing that a court should not "refuse to entertain suits for the reason that to afford a remedy may at times give rise to fraudulent claims," the court held that:

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1. "In its mother's womb. A term descriptive of an unborn child." Black, Law Dictionary (4th ed. 1951).

2. Buel v. United Railways Co., 248 Mo. 126, 154 S.W. 71 (1913); Allaire v. St. Luke's Hospital, 184 Ill. 359, 56 N.E. 638 (1900); Dietrich v. Inhabitants of Northampton, 138 Mass. 14 (1884); Newman v. City of Detroit, 281 Mich. 60, 274 N.W. 710 (1937); Drobner v. Peters, 232 N.Y. 220, 133 N.E. 567 (1921); Gorman v. Budlong, 23 R.I. 169, 49 Atl. 704 (1901); Magnolia Coca Cola Bottling Co. v. Jordan, 124 Tex. 347, 78 S.W.2d 944 (1935); Lipps v. Milwaukee Electric Ry. & Light Co., 164 Wis. 272, 159 N.W. 916 (1916). For general discussion of the above cases and others of similar holding, see Annotations 97 A.L.R. 1524 (1935); 10 A.L.R.2d 1059 (1950). See also Cason, *The Case for the Right of Action,* 15 Mo. L. Rev. 211 (1950).

3. 65 F. Supp. 138 (D.D.C. 1946).

4. Tucker v. Howard L. Carmichael & Sons, Inc., 208 Ga. 201, 65 S.E.2d 909 (1951); Amann v. Faidy, 415 Ill. 422, 114 N.E.2d 412 (1953); Damasiewicz v. Gorsuch, 197 Md. 417, 79 A.2d 550 (1951); Verkennes v. Corniea, 229 Minn. 365, 38 N.W.2d 838 (1949); Rainey v. Horn, 72 So.2d 434 (Miss. 1954); Woods v. Lancet, 303 N.Y. 349, 102 N.E.2d 691 (1952); Jasinsky v. Potts, 153 Ohio St. 529, 92 N.E.2d 809 (1950). For further discussion of these holdings see Annotation 27 A.L.R.2d 1256 (1953).

5. 258 S.W.2d 577 (Mo. En Banc 1953).

6. Buel v. United Rys., 248 Mo. 126, 154 S.W. 71 (1913). See also Comment, 19 Mo. L. Rev. 81 (1953).

> . . . a viable child, injured while en ventre sa mere, born alive, may after its birth maintain a tort action against the tort-feasor for the injury inflicted.[7]

The court also stated:

> Certainly, courts are not going to refuse to entertain suits for the redress of wrongs because a plaintiff would have difficulty in proving his case. Nor should a court refuse to entertain such suits for the reason that to afford a remedy at times give rise to fraudulent claims. Neither one is a sufficient reason for denying a cause of action.[8]

The language found in the *Steggall* case is representative of that found in most cases on this subject. Most courts, however, carefully limit their decisions to recovery for the infant who was viable at the time of the injury.[9]

The requirement that the injured infant be viable at the time of the injury appears to be predicated upon a questionable basis. Viable is defined as:

> Capable of living, especially capable of living outside the uterus; said of a fetus that has reached such a stage of development that it can live outside of the uterus.[10]

This definition does not greatly assist in the necessary determination of when a fetus becomes viable. Viability does not occur at the same definite time for all infants and, at best, can only be determined within a close approximation. Actual determination of viability is a relative matter, depending upon many factors other than the age of the fetus.[11] In view of this, it is obvious that the only method available for proof of viability is the opinion of an expert medical witness. The reluctance of the courts to allow recovery for injury to the nonviable fetus is mainly based upon the reasoning that there can be no injury to someone who is not yet recognized as a living being.

It is somewhat surprising that courts would make this distinction between viability and nonviability, for in the other fields of law it has long been recognized that "existence" of the fetus begins at the moment of conception.[12] If the infant is in "existence" at the time of the injury there should be a right to recover for any injuries suffered as a result of the negligent act. In response to this idea, courts in a few jurisdictions have expressly abandoned the viability rule in favor of a biological approach which emphasizes the separate nature of the child from the moment of conception.[13] In the *Bonbrest* case,[14] the court quoted a Canadian decision:

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7. *Supra* note 5, at 581.
8. *Id.*, at 580.
9. Cases cited note 4 *supra.*
10. DORLAND, AMERICAN ILLUSTRATED MEDICAL DICTIONARY (21st ed. 1948).
11. GREENHILL, PRINCIPLES & PRACTICES OF OBSTETRICS (10th ed. 1951).
12. The criminal law regards it as a separate entity and the law of property considers it in being for all purposes which are to its benefit. For discussion and cases of these fields of law, see 15 Mo. L. REV. 211 (1950), *supra* note 2.
13. Hornbuckle v. Plantation Pipe Line Co., 212 Ga. 504, 93 S.E.2d 727, 728 (1956) (The fetus was injured in the sixth week of pregnancy and the court, allowing recovery, stated: "Where a child is born after a tortious injury sustained at

> The wrongful act which constitutes the crime may constitute also a tort, and if the law recognizes the separate existence of the unborn child sufficiently to punish the crime, it is difficult to see why it should not also recognize its separate existence for the purpose of redressing the tort.[15]

This statement was not necessary for the decision in *Bonbrest,* so it would have to be considered dictum. However, if the situation should arise, it would seem this court would not require viability as a prerequisite to recovery.

The entire problem in allowing recovery for injury to a nonviable infant is the difficulty of proving causation. However, the proof may be handled in the same manner as for viability—through the use of an expert medical witness. If the causal connection cannot be proved, there will be no recovery. But if causation can

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any period after conception, he has a cause of action."); Daley v. Meier, 178 N.E.2d 691, 694 (Ill. App. Ct. 1961) (Where the mother was one month pregnant when the fetus was injured, the court said, "Therefore, it is our conclusion that an infant, who was born alive and survives, can maintain an action to recover for prenatal injuries, medically provable as resulting from the negligence of another, even if it had not reached the state of a viable fetus at the time of the injury."); Bennett v. Hymers, 101 N.H. 483, 485, 147 A.2d 108, 110 (1958) ("We adopt the opinion that the fetus from the time of conception becomes a separate organism and remains so throughout its life. Also that the mother's biological contribution from conception on is to furnish nourishment and protection for it. And the fact that [the fetus] may not live if its protection and nourishment are cut off earlier than the viable state of its development is not to destroy its separability; it is rather to describe conditions under which life will not continue."); Smith v. Brennan, 31 N.J. 353, 363, 157 A.2d 497, 502 (1960), *quoting with approval* Stemmer v. Kline, 128 N.J.L. 455, 466, 26 A.2d 684, 687 (1942) ("While it is a fact that there is close dependence by the unborn child on the organism of the mother, it is not disputed today that the mother and the child are two separate and distinct entities; that the unborn child has its own system of circulation of the blood separate and apart from the mother; that there is no communication between the two circulation systems; that the heart beat of the child is not in time with that of the mother but is more rapid; that here is no dependence by the child on the mother except for sustenance. It might be remarked here that even after birth the child depends for sustenance upon the mother or upon a third party. It is not the fact that an unborn child is a part of the mother, but that rather in the unborn state it lived with the mother, we might say, and from conception on developed its own distinct, spearate personality."); Kelly v. Gregory, 282 App. Div. 542, 543, 545, 125 N.Y.S.2d 696, 697, 698 (1953) (An action by an infant whose mother was struck by an automobile during her third month of pregnancy. "We ought to be safe in this respect in saying that legal separability should begin where there is biological separability. We know something more of the actual process of conception and foetal development now than when some of the common law cases were decided; and what we know makes it possible to demonstrate clearly that separability begins at conception." And further, "If a child born after an injury sustained at any period of his prenatal life can prove the effect on him of the tort, he makes out a right to recover."). Sinkler v. Kneale, 401 Pa. 267, 273, 164 A.2d 93, 96 (1960) ("As for the notion that the child must have been viable when the injuries were received, which has claimed the attention of several states, we regard it as having little to do with the basic right to recover, when the foetus is regarded as having existence as a separate creature from the moment of conception. . . . The question is primarily one of causation, and since medical proof of that is necessary, we now remove the bars from it *in limine.*").

14. Bonbrest v. Kotz, *supra* note 3.

15. Montreal Tramways v. Leveille, 4 D.L.R. 337 (1933).

be established, there is no logical reason to deny recovery even if the fetus was not viable.

The viability versus nonviability problem was encountered by the New York courts in *Kelly v. Gregory*[16] where an unborn child was injured when its mother, in her third month of pregnancy, was struck by an automobile. The court took the advanced position, and in allowing recovery stated:

> We ought to be safe in this respect in saying that legal separability should begin where there is biological separability. We know something more of the actual process of conception and foetal development now than when some of the common law cases were decided; and what we know makes it possible to demonstrate clearly that separability begins at conception.

The court concluded:

> If a child born after an injury sustained at *any* period of his prenatal life can *prove* the effect on him of the tort, . . . he makes out a right to recover. (Emphasis added).

This decision does not seem offensive to a good sense of justice. Here, there has been an injury caused by a negligent defendant and, as in the usual custom where any wrong is done, the injured is allowed to recover. When it is realized that the results of the negligent actor's conduct are exactly the same whether the fetus was viable or not, the denial of recovery merely because of nonviability works a great injustice. This consideration alone should provide the courts with sufficient reason to discard the viability requirement.

In the *Montreal Tramways* case,[17] the court very ably stated the unjust results of holding to the viability requirement:

> 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.

With expanded medical knowledge and improved scientific techniques making proof easier and more accurate, coupled with the trend in a few cases discarding the viability requirement and allowing recovery, the courts should reconsider this question and base their decisions (as they would in other negligence cases) on the causal connection between the act and the injury.

There is little doubt that the judicial system is qualified to weigh the factors involved and to reach a just decision based upon the proof offered. It is the writer's opinion that the trend to allow recovery for injury to the nonviable fetus will continue, and in the future the courts will make no distinction between injuries sustained in the previable stage and injuries caused in the viable stage.

II. Cause of Action for Death of an Unborn Child

In the event that the fetus is killed by a negligent act, a cause of action for wrongful death arises in favor of the parent or the infant's legal representative.

16. Kelly v. Gregory, 282 App. Div. 542, 543, 125 N.Y.S.2d 696, 697 (1953).
17. Montreal Tramways v. Leveille, *supra* note 15.

This cause of action did not exist at common law but is purely a creature of statute.[18] With the advent of modern statutes creating such a cause of action, courts were confronted with the task of statutory interpretation. The Missouri statute allows a cause of action whenever the death of a "person" is caused by a negligent act. In *Steggall v. Morris*[19] the court interpreted the word "person," as used in the statute, to include a viable unborn child who was allegedly injured on May 2, 1952, born May 5, 1952, and, as a result of such injuries, died on May 23, 1952. It should be observed that the court required the child to be born alive.[20] The *length* of time that the child lives after birth should not be important. It should be important only that the child did live for some instant of time.[21]

A. *Miscarriage*

It has long been established that pregnant women may recover for their injuries which result from a miscarriage caused by a defendant's negligence.[22] But with the advent of a cause of action for prenatal injuries, an action may also be brought for the death of the child who was viable when the accident occurred. It would seem that if the death of the fetus is directly related to the miscarriage, the proof necessary to establish the mother's cause of action would be basically the same as that needed to establish the cause of action for the death of the fetus. It is possible that there would be an act so violent that the causal connection would be so apparent that medical testimony would not be necessary,[23] but, even here, the more convincing decision should be based upon expert testimony.

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18. § 537.080, RSMo 1959 ("Whenever the death of a person shall be caused by a wrongful act, . . ."); Donelson's Estate v. Gorman, 192 S.W.2d 29 (K.C. Mo. App. 1946).

19. Steggall v. Morris, *supra* note 5.

20. Drabels v. Skelly Oil Co., 155 Neb. 17, 50 N.W.2d 229 (1951); *But* Stidam v. Ashmore, 109 Ohio App. 431, 167 N.E.2d 106 (1959), held over a vigorous dissent that survival is not necessary. *Accord,* Hale v. Manion, 189 Kan. 143, 368 P.2d 1 (1962); Verkennes v. Corniea, 229 Minn. 365, 38 N.W.2d 838 (1949).

21. In regard to property law, Sanford v. Getman, 124 Misc. 80, 206 N.Y.S. 865 (1924), held that a child which never cried, but breathed, and whose heart beat for some moments, was "born alive" and capable of inheriting; *In re* Union *Trust Co.,* 89 Misc. 69, 151 N.Y.S. 246 (1915), where the court held a child never heard to cry and who did not live, but where heart beats were perceptible and could be heard, though no respiration could be induced, was "born alive" and was "issue" within the meaning of the will. *But see* Goff v. Anderson, 91 Ky. 303, 15 S.W. 866 (1891), where the court held that "born" as ordinarily understood and in fact, means "brought forth," and a child is completely born when delivered or expelled from and becomes external of the mother, whether the placenta has been separated or the cord cut. It may be contended that there should be no distinction in the different fields of law as to when a child is born. Logically, if there is any sign of life, however slight, at the time of delivery, the child should be considered as being born alive. It is just as illogical to permit recovery for the estate of a viable fetus and to deny it to the case of a nonviable fetus as it is to allow the injured viable fetus to recover damages and deny recovery to the nonviable fetus.

22. Finer v. Nichols, 158 Mo. App. 539, 138 S.W. 889 (St. L. Ct. App. 1911). For a general discussion of this and other cases see Annotation 10 A.L.R.2d 639 (1950).

23. Mentioned in Superior Transfer Co. v. Halstead, 189 Md. 536, 56 A.2d 706 (1948), although not so decided. It would seem if such proof could be estab-

Since the same act that causes injury to the mother through the miscarriage causes death to the fetus, there is no convincing reason for limiting recovery for death of the infant to those cases where the fetus was viable. If proof is adequate the courts should not limit this action to the mother only and, thereby, allow the tort-feasor to escape from liability for causing the death of the fetus.

B. *Abortion*

The civil cause of action for an unlawful abortion is usually against the doctor who has either negligently or intentionally caused the abortion. In the event the abortion was caused negligently rather than intentionally, the action will be one for malpractice. In the negligence action for prenatal injuries the physician is held to a standard of performance similar to standards required in other malpractice actions; that is, of employing the skill and knowledge commonly possessed by members of the medical profession in good standing under similar circumstances.[24] There have been instances reported where malpractice actions have been brought for the negligent administration of irradiation treatment to the mother that affected the child,[25] and causes of action have been allowed for negligent delivery.[26] With increased medical knowledge of the causes of prenatal defects, the physician is duty bound to keep abreast of the recent medical advances in this area.

The courts have rarely been faced with the situation where the abortion was intentional and a parent sues for money damages. The most striking case in this area was that of *Touriel v. Benveniste*.[27] Here the wife's consent did not bar the husband's recovery from the abortionist. The recovery was for the invasion of his personal rights in the matrimonial status. The abortionist contended that the husband's cause of action, if any, was limited to one for the wrongful death of the unborn child, and that this was not actionable. The court, in rejecting this contention, stressed that the act of abortion has, in addition to the defendant's contention, a dual aspect in that it is not only a battery directed against the person of the wife, to which she could consent, but that it is as well an invasion of the rights of each of the parties to the matrimonial status. The court further stated:

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lished by testimony of a layman it should be sufficient. The more obvious case would be where the mother is killed and the child dies in the uterus.

24. PROSSER, TORTS § 31 (2d ed. 1955).

25. See Smith v. Luckhardt, 299 Ill. App. 100, 19 N.E.2d 446 (1939); Stemmer v. Kline, 128 N.J.L. 455, 26 A.2d 489 (1942). Both cases denied recovery and both have been overruled by Amann v. Faidy, 415 Ill. 422, 114 N.E.2d 412 (1953), and Smith v. Brennan, 31 N.J. 353, 157 A.2d 497 (1960). In the overruling cases the physician negligently misdiagnosed the mother's condition as a tumor and administered irradiation treatments which harmed the child; in *Smith*, the infant died after birth; in *Stemmer*, the child was born a microcephalic. These treatments involved therapeutic doses, which were much stronger than the amounts used for diagnosis.

26. Bonbrest v. Kotz, 65 F. Supp. 138 (D.D.C. 1946); Scott v. McPheeters, 33 Cal. App.2d 629, 92 P.2d 678 (1938); Verkennes v. Corniea, 229 Minn. 365, 38 N.W.2d 838 (1949); Rainey v. Horn, 72 So. 2d 434 (Miss. 1954).

27. Civil Docket No. 766890, Los Angeles Super. Ct., Oct. 20, 1961; 30 U.S.L. Week 2203 (1961).

> Abortion is an act directed against the fruits of the matrimonial union. In the fruits of this union the husband as well as the wife has a legally protectable interest.
>
> A wife's control over the destinies and fortunes of the unborn child is not absolute, but is limited by and subject to the rights of others. Her own rights she may forfeit. But she cannot waive or give up or lose rights which are not hers to assert.
>
> We conclude that the husband has a legally protectable interest in his unborn child; that the wife cannot circumvent that interest by consent to an illegal abortion; that the destruction of the unborn child without the consent of the husband is legally ineffectual. In short, the husband's consent is necessary to the performance of an illegal abortion. Absent his consent he is entitled to bring a suit for invasion of his personal rights in the matrimonial status. The performance of an illegal abortion on the person of his wife is as much actionable as an invasion of his privacy or the publication of defamatory matter affecting his reputation.
>
> Since the husband's cause of action is not for wrongful death of the child but for a direct invasion of the husband's personal interest in the matrimonial status, the requirement that a live birth precede a cause of action for wrongful death is irrelevant.

This holding raises two questions: (1) What persons have a legally recognized interest in an unborn child, and (2) What is the nature and extent of this interest? At common law the parent had an interest in the minor child in the form of a property right. This interest was usually for "loss of services";[28] that is, the partial or complete loss of the child's services, due to destruction of his physical or mental ability, during a part or all of the period of his minority. The parent suffered further loss in the impaired capacity of the child to earn and render wages to him. It cannot be denied that the amount of money damages to be awarded in an action for loss of services of a child is subject to conjecture and it is entirely possible that the cost of rearing the child would exceed any conceivable benefit to be expected by the parent.[29] At common law, if the injury caused the death of the child, the parents had no right to recover, except for loss of services between the time of the injury and that of death. Therefore, any cause of action for injuries to a child too young to render services, or which resulted in immediate death of the child, must necessarily have a statutory basis. Under the Missouri Statute,[30] if a factual situation similar to *Touriel,* were presented, it would possibly be decided favorably to the husband; but the cause of action would probably be based upon wrongful death rather than upon an injury to the "personal rights in the matrimonial status." However, the statute creates a cause of action for wrongful death. If the court would find itself bound by the viable doctrine, as set forth in *Steggall v. Morris*,[31] no recovery would be allowed because an abortion is usually induced at an early stage of pregnancy, before the fetus is capable of separate life;

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28. Beebe v. Kansas City, 223 Mo. App. 642, 17 S.W.2d 608 (K.C. Ct. App. 1929).
29. PROSSER, TORTS § 105 (2d ed. 1955).
30. § 537.080, RSMo 1959.
31. Steggall v. Morris, *supra* note 5.

and if there is no life which the law recognizes there can be no wrongful death. But if the court would discard the viability requirement the same result as the *Touriel* case could be reached in an action for wrongful death.

It is the writer's opinion that the *Touriel* case should have been decided on the sounder basis of wrongful death, as opposed to the "invasion of the personal rights of the matrimonial status." The court was faced with the precedent denying recovery to the mother for damages resulting from abortions to which she had consented,[32] but this should have presented little difficulty since the father, and not the mother, was bringing the action.

Conclusion

Concepts of fairness and justice in the protection of human interests change as society, in its development, makes new evaluations of those interests. The field of tort liability for injury or death to the infant in the prenatal state is rapidly changing at this time. Many courts have yet to make their first decision allowing recovery for injury to the unborn child.

From an examination of the cases which have given careful consideration to an action by the child injured while a fetus, or an action by the parent for the death of the fetus, whether negligent or intentional, it would appear that the tendency is to abandon the viability requirement and to place greater reliance on medical science in the proof in establishing the cause of action.

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32. Sayadoff v. Warda, 125 Cal. App.2d 626, 271 P.2d 140 (1954).