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Torts: Prenatal Injuries

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RECENT CASES

Torts — Prenatal Injuries

The case of *Sinkler* v. *Kneale*[1] is a recent example of the extended deviation from the outmoded rule laid down in the landmark decision of *Dietrich* v. *Inhabitants of Northampton.*[2] The *Sinkler* decision sustained the right of an infant to bring an action for injuries received while she was one month *en ventre sa mère,* said injuries alleged to have resulted in her being a Mongoloid. In reaching its decision the court was cognizant of three potential barriers to allowing recovery for prenatal injuries: (1) adequate proof of causal relationship is difficult, (2) the *nonviable* state of the foetus further invites speculation and conjecture, and (3) the concept that the child *in utero* is "part of" the mother and therefore unable to bring a cause of action.

To refute the cogent problem pertaining to proof of causation, the court placed upon the jury the ultimate responsibility for evaluating medical testimony necessary to establish legal causation and reasoned that the task was no greater in a prenatal injury than in certain other cases involving personal injury. In response to the arguments for the non-entity of the foetus and its lack of viability, the court said:

> As for the notion that a child must have been viable when the injuries were received, which has claimed the attention of several of the 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.[3]

Thus, the essence of the court's decision is premised upon the theory that a foetus has an independent legal existence and this existence arises from *the moment of conception.* In view of this,

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[1]401 Pa. 267, 164 A. 2d 93 (1960).

[2]138 Mass. 14 (1884). In this leading case the infant was injured while four or five months *en ventre sa mère.* The court, speaking through Judge Oliver W. Holmes, Jr., denied recovery because there was not a "person" injured.

[3]Sinkler v. Kneale, 401 Pa. 267, 164 A. 2d 93, 96 (1960).

the question is raised concerning the propriety of the "viable" test, which is the standard and majority criterion as applied to actions based on prenatal injuries.[4]

At present, nineteen jurisdictions allow recovery for injuries inflicted upon a child while *en ventre sa mère*,[5] but only four courts have relied upon the doctrine that legal rights for tortious injury arise in the foetus from the moment of conception.[6]

An example of this minority rule is a recent decision from the court of New Jersey.[7] In over-ruling their 1942 decision in *Stemmer* v. *Kline*,[8] the court erected and then demolished some ancient obstacles barring the way to recovery for a prenatal injury. The lack of precedent no longer restrains a court, and *stare decisis* is not an absolute and inflexible rule. Furthermore, the difficulty of proving a fact before a jury "is not a very good reason for blocking all attempts to prove it."[9] The court cited

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[4]Annot: 10 A.L.R. 2d 1051.

[5]California—Scott v. McPheeters, 33 Cal. App. 2d 626, 92 P. 2d 678 (1939); Connecticut—Prates v. Sears, Roebuck & Co., 19 Conn. Sup. 487, 118 A. 2d 633 (1955); Delaware—Worgan v. Greggo & Ferrari, Inc., 50 Del. 258, 128 A. 2d 557 (1956); District of Columbia—Bonbrest v. Kotz, 65 F. Supp. 138 (1946); Georgia—Tucker v. Howard I. Carmichael & Sons, 208 Ga. 210, 65 S.E. 2d 909 (1951); Illinois—Amann v. Faidy, 415 Ill. 422, 114 N.E. 2d 412 (1953); Kentucky—Mitchell v. Couch, Ky. Ct. App. 1955 285 S.W. 2d 902 (1955); Louisiana—Cooper v. Blanck, La. App. 1923, 39 So. 2d 352 (1923); Maryland—Damasiewicz v. Gorsuch, 197 Md. 417, 79 A. 2d 550 (1951); Massachusetts—Keyes v. Construction Service, Inc., ... Mass. ....., 165 N.E. 2d 912 (1960); Minnesota—Verkennes v. Corniea, 229 Miss. 365, 38 N.W. 2d 838 (1949); Mississippi—Rainey v. Horn, 221 Miss. 269, 72 So. 2d 434 (1954); Missouri—Steggall v. Morris, 363 Mo. 1224, 258 S.W. 2d 577 (1953); New Hampshire—Poliquin v. MacDonald, 101 N.H. 104, 135 A. 2d 249 (1957); New Jersey—Smith v. Brennan & Galbraiths, 31 N.J. 353, 157 A. 2d 497 (1960); New York—Woods v. Lancet, 303 N.Y. 349, 102 N.E. 2d 691 (1951); Ohio—Williams v. Rapid Transit, Inc., 152 Ohio St. 114, 87 N.E. 2d 334 (1949); Oregon—Mallison v. Pomeroy, 205 Or. 690, 291 P. 2d 225 (1955); South Carolina—Hall v. Murphy, S.C. 1960, 113 S.E. 2d 790 (1960).

[6]Georgia—Hornbuckle v. Plantation Pipe Line Co., 212 Ga. 504, 93 S.E. 2d 727 (1956); New Hampshire—Bennett v. Hymers, 101 N.H. 483, 147 A. 2d 108 (1958); New Jersey—Smith v. Brennan & Galbraiths, 31 N.J. 353, 157 A. 2d 497 (1960); New York—Kelly v. Gregory, 282 App. Div. 542, 125 N.Y.S. 2d 696 (1953).

[7]Smith v. Brennan & Galbraiths, 31 N.J. 353, 157 A. 2d 497 (1960).

[8]128 N.J.L. 455, 26 A. 2d 489 (1942).

[9]Smith v. Brennan & Galbraiths, *supra* 157 A. 2d at 503.

leading medical authorities which supported their views[10] and adopted the doctrine which gives a legal right of action from the moment of conception.

In the majority of those jurisdictions permitting recovery for a personal injury, the applicable test is that of the viability of the foetus at the time of the injury.[11] "Capable of independent life" is the wording of the South Carolina court.[12] The Illinois court limits recovery to those cases in which the infant is "viable and capable of separate and independent existence."[13]

The decisions of those jurisdictions which do *not* permit recovery for prenatal injuries[14] afford some basis to properly evaluate the relative merits of the doctrines of 'viable foetus' and 'moment of conception.' Alabama[15] voiced a fear of speculation and a general lack of precedent in a 1926 opinion of that court. The Tennessee court, in rejecting the views of certain medical authorities, held that a child *in utero* was not a 'person' within the meaning of their Death by Wrongful Act Statute: "In truth and in fact, it (the foetus) is part of its own mother's physical body."[16] The court tacitly welcomed legislative action to alter this interpretation of the statute. In Rhode Island the court denied recovery for a prenatal injury, stating that "This imputed existence *in esse* to an unborn child is a fiction of the civil law . . . for purposes connected with the acquisition and preservation of real

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[10]*Id.* at 502.

[11]See *supra* note 5, Connecticut, Delaware, Illinois, Kentucky, Louisiana, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Ohio, Oregon and South Carolina.

[12]Hall v. Murphy, S.C. 1960, 113 S.E. 2d 790, 791 (1960).

[13]Aman v. Faidy, 415 Ill. 422, 114 N.E. 2d 412, 417 (1953).

[14]Alabama—Standford v. St. Louis-San Francisco R. Co., 214 Ala. 611, 108 So. 566 (1926); Michigan—LaBlue v. Specker, 358 Mich. 558, 100 N.W. 2d 445 (1960); Nebraska—Brabbels v. Skelly Oil Co., 155 Neb. 17, 50 N.W. 2d 229 (1951); Oklahoma—Howell v. Rushing, Okl. Sup. Ct., 1953, 261 P. 2d 217 (1953); Rhode Island—Gorman v. Budlong, 23 R.I. 169, 49 A. 704 (1901); Tennessee—Hogan v. McDaniel, Tenn. Sup. Ct. 1958, 319 S.W. 2d 221 (1958); Texas—Magnolia Coca-Cola Bottling Co. v. Jordan, 124 Tex. 347, 78 S.W. 2d 944 (1935); Wisconsin—Puhl v. Milwaukee Auto Ins. Co., 8 Wis. 2d 343, 99 N.W. 2d 163 (1960).

[15]Standford v. St. Louis-San Francisco R. Co., *supra* note 14.

[16]Hogan v. McDaniel, *supra* note 14 at 224.

and personal property"[17] and therefore was not applicable to an action in tort.

Thus, the difficulty of proving a causal connection and some antiquated concepts of obstetrics seem to be the only real barriers against recovery for a prenatal injury. However, the courts are recognizing the advances of modern medical science which acknowledge the separate character of the foetus *in utero;* therefore, it would seem that the sole remaining objection is the difficulty of proving a cause of action brought by the injured infant.

Certain justifiable anxieties expressed by those conservative tribunals which have refused relief to the infant injured while *en ventre sa mère* should not be ignored and primary among these is the extreme difficulty of proof. The Wisconsin court recognized this in the pertinent case of *Puhl* v. *Milwaukee Auto Ins. Co.*[18] On all fours with the principal case of *Sinkler,* the suit involved the right to bring an action where the injury *in utero* purportedly resulted in the birth of a Mongoloid. Assuming that the right of recovery arose from the moment of conception, the appellate court rejected the finding of the jury in favor of the infant-plaintiff upon the grounds that "there was not sufficient credible proof to sustain an award."[19] The court acknowledged the progress of medical research but properly applied the cautious machinery of the law to act as a scale upon which the rules of evidence must be carefully balanced against rapid, and yet theoretical advances of science. After considering the conflicting statements of various doctors who testified to the causal connection between the injury and its possible influence upon the infant, the court concluded:

> While this court has gone a long way in admitting expert testimony deduced from well-recognized scientific and medical principles or discoveries, nevertheless the facts from which the opinion is made must be sufficiently established to have gained general acceptance in the particular medical field in which they belong. Otherwise, the opinion is based not on facts but conjecture.[20]

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[17]Gorman v. Budlong, *supra* note 14 at 705.

[18]8 Wis. 2d 343, 99 N.W. 2d 163 (1960).

[19]*Id.* at 169.

[20]*Ibid.*

Here, an alert court placed close scrutiny upon evidence presented to establish a causal connection in a case involving prenatal injury. Such scrutiny by an appellate court greatly reduces the inherent threat of speculative evaluation by a jury and the proof of the cause of action takes on a desired stability.

Medical science is satisfied that a child *en ventre sa mère* is not a "part of" its mother, but is a separate and individual creature. Furthermore, this separate character arises from the time of conception. Although the test of 'viability' has a basic quality of reducing speculation and conjecture in prenatal injury cases, it must be admitted that it does not afford an adequate remedy for an injured infant. The fundamental problem is one of proof. It is submitted that the 'moment of conception' doctrine does offer substantial legal relief to an infant injured *in utero* and accords with modern concepts within the science of medicine. However, a conservative and penetrating eye should carefully maintain a constant surveillance to prevent unmerited or sham claims from passing through the courts.

S. T. M.