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# Torts: Infants--Cause of Action for Prenatal Injury

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task is one of giving effect to the legislative intent and to the purpose of the legislation. That is a matter of law to be decided by the judge and not a matter coming within the province of the trier of fact.[17]

In the instant case, the appellate court is content to pronounce the magic words "presumptive negligence" and then accept the trial court's conclusion that plaintiff was not negligent without examining the violation. There is found no discussion of the facts which constituted the alleged justification or excuse. While the appellate court mentions the rule that the facts which would constitute the excuse or justification must arise from circumstances beyond the control of the person charged with the violation, nowhere is it shown that such was the case here.

It is necessary to find a theory that recognizes the weight of legislative authority and at the same time is mindful of the separate functions of judge and jury. Granted there may be justifications or excuses but what these excuses are is a matter for the judge to decide. Since the jury is the trier of fact it then is for the jury in the first instance to decide what are the facts constituting the excuse. Since the judge decides the law to be applied, it is for the judge then to decide whether the facts as found by the jury come within the statute, or in other words, given a reasonable interpretation of the statute, whether the statute has really been violated.

It is submitted then that the judge should instruct the jury that if it finds certain facts to be so, then the statute is not violated and hence, no negligence can be predicated upon the apparent violation of the statute. It is also submitted that the burden of proving the mitigating circumstances be upon the person charged with the violation.

As Ezra R. Thayer stated in his article, "Public Wrong and Private Action": "Courts have no duty more important than a careful study of the whole statute on the subject in order to extract from it the declared legislative policy and whether the policy be enlightened or the reverse, its free acceptance will best preserve the dignity and the power of the court."[18]

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TORTS: INFANTS—CAUSE OF ACTION FOR PRENATAL INJURY.—The Court of Appeals of Maryland decided that a child, born alive, has a cause of action for injuries sustained before birth.[1]

The plaintiff's mother was riding in an automobile when it was struck due to the alleged negligence of the defendants. At the time of the collision the plaintiff was unborn. It was alleged that as a result of the collision the plaintiff was prematurely born and permanently injured.

The plaintiff alleged that the defendants caused his injuries by their negligence at the time of the accident, and asked damages.

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[17]"It is a question of law in each case whether the acts were in violation of the statute, or excepted therefrom, or if not excepted, whether liability without fault would be imposed by adopting the legislative standard. It is, of course, a question of fact whether the alleged acts occurred." Justice Traynor, Satterlee case.

[18]*Supra,* note 8.

[1]Damassiewicz et al. v. Gorsuch et al., 79 A. 2d 550 (Md., 1951). There are a number of cases concerning the cause of action in the parent under wrongful death statutes where the child born alive or dead. This note deals only with the cause of action in the child, living and suing for its own benefit. See a note in 20 So. Calif. Law Rev. 231 and 10 A. L. R. 2d 1051 for cases on wrongful death.

The trial court sustained demurrers by the defendants stating that there was no cause of action.

The appellate court reversed the decision of the lower court. It stated, on the first determination of this point in Maryland, that the plaintiff, as a matter of common law, had stated a cause of action.

The Roman Law gave the child *in utero* rather extensive rights, stating: "He who is in the womb shall be protected as if alive whenever the advantage of the offspring is in question; but there shall be no advantage to others before he is born."[2] It did not, however, recognize him as an actual human being. "The actual *naciturus* is definitely not a person."[3]

Modern civil law, as exemplified by the Swiss Code, follows the Roman Law. "Personality begins with birth; ends with death, but a child conceived has civil rights if born alive."[4]

In the field of torts the early common law is silent on this matter.[5] The Ecclesiastical and Admiralty courts used the civil law doctrine in part,[6] and early English statutes provided that anyone who wilfully caused miscarriage was guilty of manslaughter.[7] After the Statutes of Uses and Wills it was possible to devise property to an unborn child.[8] Thus it appears that the unborn child was protected by criminal and property law, but not by the law of torts.

During the development of the early law there were no scientific facts upon which the separate existence of the infant in gestation could be based. It was generally assumed that the infant *in utero* was, as a matter of fact, part of the mother's bowels.[9]

The courts in America have generally denied recovery to an infant, born alive, for prenatal injuries on two grounds. First, there was no legal personality to which the law could attach a legal interest,[10] secondly, proof would be too speculative, and there would be a multiplicity of fraudulent claims if such an interest were recognized.[11]

The foundation of the American decisions was an opinion by Justice Holmes in 1884,[12] wherein recovery was denied on the grounds that there was no authority at common law for granting relief, and there was no legal personality in the unborn infant, to which a right could attach.

The problem which has given the courts the most trouble is that of finding legal personality. In those few cases which have granted relief, four points of development, at which legal personality could be deemed to start, have been considered.

The first is "conception." This is the civil law view, and has been adopted in some

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[2]Digest, I, 5, 7. Albertson, "New Interests in the Law of Torts," 10 Calif. L. Rev. 461, 463.

[3]Ulpian, Dig. 25, 4, 1, 1

[4]Swiss Civil Code, art. 31, at p. 608 (Weos 1951). For an application of the civil law in the United States, see Cooper v. Blanck, 39 So. 2d 352 (La. 1923), where a cause of action was granted.

[5]Justice Holmes' discussion in Deitrich v. Inhabitants of Northampton, 138 Mass. 14 (1884).

[6]See remarks of the court in Damassiewicz et al. v. Gorsuch et al., 79 A. 2d 550 (Md. 1951).

[7]I Bl. Comm. 129-30.

[8]Gray, The Rule Against Perpetuities, sec. 173.

[9]Dictum by Coke in The Earl of Bedford's Case, folio 7 (1738).

[10]Bliss v. Passanisi, 95 N. E. 2d 206 (Mass. 1950); Magnolia v. Coca Cola Bottling Co., 124 Tex. 347, 78 S. W. 2d 944, 97 A. L. R. 1513 (1935); Drobner v. Peters, 232 N. Y. 220, 133 N. E. 567, 20 A. L. R. 1503 (1921).

[11]Allaire v. St. Luke's Hospital, 184 Ill. 359, 56 N. E. 638 (1900). See note, 10 A. L. R. 2d 1051 (1949) for a collection of cases. See, also, Rest., Torts, sec. 869.

[12]Deitrich v. The Inhabitants of Northampton, 138 Mass. 14 (1884).

common law jurisdictions as a legal fiction.[13] The California Civil Code provides that a child conceived but not born is to be deemed an existing person so far as it may be necessary for its interests in the event of its subsequent birth.[14] Medical authority recognizes separate existence, as a matter of fact, from conception. The embryo is a separate structure with its own nervous system, circulatory system, and heart beat. The only attachment with the mother is the placenta from which the fetus receives nourishment and oxygen, but there is no mingling of blood.[15]

The second stage of development recognized is called "alive." The principal case makes this the point after which there can be recovery if subsequently the child is born alive. This age seems most difficult to define because it is not a scientifically recognized stage of development. In discussing protection of unborn children by the criminal law, Blackstone defined it as the age at which the child moved, or was "quick."[16] It seems to be a bad point of departure because it is incapable of definition. Independent life begins a conception. As soon as the first blood appears circulation starts. Is this movement? As muscle begins to develop there is slight contraction. Should these contractions be considered movement? There is a considerable range of time in which the mother may feel the first movement of the fetus. Is this movement? Such an indeterminate time should not mark the beginning of a legal right.

The third stage is "viability." This is the stage at which most authorities have urged that recovery be allowed.[17] Viability is defined as the age at which the child could survive and grow to adulthood even if removed from its mother. The exact age is determined by the state of medical art at the time and place of the premature delivery. There are sufficient survivals after six months to establish this as the age of viability in areas where modern medical facilities are available. Viability is a fairly well established stage of development, and it has an appeal to the sense of justice. For if the child could survive outside its mother's womb and develop into a normal adult there seems little doubt of its being a truly living human being.

The fourth stage in development is "birth." In all jurisdictions the child has an action for injury inflicted after birth.

In addition to finding legal personality the courts have shown concern over the collateral questions of proof. The problems of evidence and proof are difficult here, but they are no more perplexing than those arising in other fields of the law. If the plaintiff can prove his case and every allegation therein by a preponderance of the evidence there is little reason to deny him a cause of action.

In conclusion we find that the majority of jurisdictions which have considered the problem deny a cause of action for injuries inflicted before birth. There is a tendency, however, in the recent cases toward allowing a cause of action.[18] To date all the cases have been decided on demurrer, and there is no appellate case reported affirming an actual money judgment for the infant.

The questions to be answered are: (1) Is there an individual? (2) Is this

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[13]Cal. Civ. Code (Deering, 1945), sec. 29; Revised Codes of Montana, 64-103; North Dakota Revised Code of 1943, 14-1015.

[14]The California Code was construed giving a cause of action for prenatal injuries in Scott v. McPheeters, 33 Cal. App. 2d 629, 92 P. 2d 678 (1939). The Montana and North Dakota statutes have yet to be construed on this point.

[15]Herzog, "Medical Jurisprudence," secs. 860-975 (1931).

[16]*Supra*, note 7.

[17]Williams v. Marion Rapid Transit, Inc., 152 Ohio St. 114, 87 N. E. 2d 334, 10 A. L. R. 2d 1051 (1949). Prosser, "Torts," 188 (1941). Albertson, *supra*, note 2.

[18]See collection of cases by states in note, 10 A. L. R. 2d 1051, 1060, noting dates.