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## Torts - Prenatal Injuries - Louisiana Law

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protection, in effect, as if the mortgagor never sold the property to the third party. If the mortgage is unrecorded, the rights of the mortgagee against the mortgagor are still the same as if the mortgage was recorded, but the mortgagee has no right of seizure against the third party; the third party is liable, however, if he has no affidavit. This personal liability can, in some cases, impose a very harsh penalty on the third party. For example, if the property involved were an automobile that had been wrecked since the original purchase, the third party might be held for possibly a \$2000 debt because he purchased a car for \$900 without getting the affidavit.

Under the present law the *Harris* case was certainly correctly decided. It would seem, however, that the statute which is the basis for the decision does not achieve its purpose by imposing personal liability on third parties who fail to obtain the affidavit. Also the penalty for this failure seems to be harsher than it need be. This purpose of the statute might be achieved as effectively by having a statute which would merely make unrecorded mortgages effective against third parties who fail to obtain the affidavit.

*C. Alan Lasseigne*

#### TORTS—PRENATAL INJURIES—LOUISIANA LAW

Defendant sold bottled gas in a defective container and an explosion resulting from this defective condition injured the plaintiff's unborn child, which was in the eighth month of gestation. The child was born dead and action was brought under Nebraska's wrongful death statute.<sup>1</sup> That act provides that where the decedent could have maintained an action for injuries had death not ensued, the wrongful death action permits recovery by the appropriate members of the family or next of kin.<sup>2</sup> The Supreme Court of Nebraska denied recovery, adhering to the majority common law rule that for actions in tort for personal injuries, an unborn child is not recognized as a separate being. *Drabbels v. Skelly Oil Company*, 50 N.W. 2d 229 (Neb. 1951).

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1. Neb. Rev. Stat. 30:809 (1943).

2. The act is based on the English wrongful death statute, Lord Campbell's Act. Practically every state has adopted similar acts and it follows that there is no reason to segregate physical injury actions from wrongful death actions in treating the problem.

Both the common law and the law of civilian jurisdictions recognize the unborn child as in esse for purposes of receiving certain civil rights.<sup>3</sup> Until recent years, however, common law courts have refused to recognize a cause of action for the child for injuries incurred prenatally.<sup>4</sup>

Civil law jurisdictions are somewhat at variance in approaching the problem. Although French law, like the common law, has shown unwillingness to recognize the rights of the unborn child in tort,<sup>5</sup> the courts of Quebec and California have adopted a more liberal view.<sup>6</sup>

The Louisiana law on prenatal injuries is also unsettled. The Supreme Court of Louisiana has never had occasion to pass on a tort action in the name of a child prenatally injured;<sup>7</sup> however, our courts of appeal have dealt with the problem. In *Cooper v. Blanck*<sup>8</sup> in 1923 a mother in the ninth month of pregnancy was struck by falling plaster from the ceiling of defendant's house. A premature birth followed and the child lived only a few days.

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3. For example, the common law recognizes the child's right to take a legacy (Page, *Wills*, § 216 [2 ed. 1926]) and rights of inheritance (*id.* at § 896).

Civil law recognizes the right to receive gifts and the right to successions (French law, see 1 Planiol, *Droit Civil* §§ 10-11 [1952]; Louisiana law, see Arts. 954, 1482, *La. Civil Code of 1870*).

The unborn child has been recognized as in esse in the law of crimes. For example, if an unborn child is maliciously injured and is born alive and dies, the crime may be murder. See *Clark v. State*, 117 Ala. 1, 23 So. 671, 67 Am. St. Rep. 157 (1898).

4. For a thorough discussion of the common law on prenatal injuries, see White, *The Right of Recovery for Prenatal Injuries*, 12 *LOUISIANA LAW REVIEW* 383 (1952).

5. 1 Planiol, *loc. cit.* supra note 3. See also Winfield, *The Unborn Child*, 8 *Camb. L.J.* 76, 87 (1942).

6. Art. 608, *Quebec Civil Code*, provides that persons are considered to be civilly in existence at the instant of conception if they are later born alive. Articles 771 and 838, respectively, provide that an unborn child may receive a gift inter vivos and may take a benefit under a will. The Supreme Court of Canada, on the basis of these articles concluded that a child en ventre sa mere is a separate being and applied this conclusion to actions in tort for physical injuries. *Montreal Tramways v. Leveille*, Can. S.C. 456, 4 D.L.R. 337 (1933).

The California Civil Code in Article 29 provides that a child conceived but not yet born is to be deemed an existing person so far as may be necessary for protection of its interests in the event of a subsequent birth. In the case of *Scott v. McPheeters*, 33 Cal. App. 2d 629, 92 P. 2d 678 (1939), a California court of appeals held that this provision included compensation for personal injuries sustained by the negligent use of surgical instruments during delivery. Both the Quebec and the California cases involved a viable child and the courts gave attention to the fact but did not expressly ground their decisions on it.

7. It did rule in a converse situation that a posthumous child had a cause of action for injuries to its father who could not complete the suit because of his death. *Badie v. Columbia Brewing Co.*, 142 La. 853, 77 So. 768 (1918).

8. 39 So. 2d 352 (*La. App.* 1923).

The suit was under Article 2315 of the Civil Code which provides that parents have a right of action for the wrongful deaths of their children. The court discussed the codal articles that imply that a child en ventre sa mere is a living person<sup>9</sup> and held that parents may sue for the wrongful death of a child even if the injury causing death was prenatal. Speaking of injuries received during the viable stages of gestation, Justice Westerfield said, ". . . if the child be killed at this period, before its birth, we see no reason why its parents cannot maintain an action for the death of the child."

It would appear from the *Cooper* decision that the rules are clearly set out. However, complications were confronted within a short time. In *Youman v. McConnell*<sup>10</sup> in 1927 a mother in the seventh month of pregnancy was negligently injured; two months later the child was stillborn. The defense urged application of Article 28 which provides that children born dead are considered as if they had never been born or conceived. The court applied the article literally and refused damages for the wrongful death.<sup>11</sup>

In future cases the Louisiana courts might hold that a child conceived is a separate being and that any injury, whether it be to an embryo or to a foetus<sup>12</sup> would be grounds for recovery by the child. This position could be justified by Article 29 of the Civil Code which provides that children in the mother's womb are considered, in whatever relates to themselves, as if they were already born. In all probability, an action in which it is alleged that the injury was received by an embryo would not be entertained, the reason being the difficulty of proving the cause of such injury. The courts might, as a second possibility, recognize Blackstone's theory that a child is a person after it has once

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9. See note 3, supra.

10. 7 La. App. 315 (1927).

11. The inconsistency of such a situation is quite apparent. In the only other Louisiana case involving prenatal injuries, *Heins v. Guzman*, Orleans No. 9484 (La. App. 1924), twin children were injured; subsequently, one was born alive and died after a few hours and the other was stillborn. Damages were allowed for the suffering and death of the child who had lived, but after the district court trial, plaintiffs abandoned any attempt to recover in the name of the child who was stillborn. The probable reason was Article 28. It is manifest that this article was not directed at such a situation; the problem could be remedied.

Notice that Article 29 of the California Civil Code (see note 6, supra) is qualified by the words "in the event of a subsequent birth." The Quebec code has a similar provision. If that provision is strictly applied, courts of California and Quebec face the same problem presented in Louisiana by Article 28 of the Louisiana Civil Code.

12. The organism is considered an embryo for approximately the first three months of gestation after which it is known as a foetus.

moved in the womb of its mother—the “quick” child.<sup>13</sup> A third possibility for Louisiana courts is the adoption of the theory propounded by Justice Boggs, dissenting in *Allaire v. St. Luke's Hospital*, that a foetus is a separate entity after it reaches that stage of gestation at which it could live without its mother.<sup>14</sup> There is language in the *Cooper* case which could justify either an acceptance or a rejection of the doctrine. The court said, “. . . we content ourselves with the observation that the civil law is still the basis of our jurisprudence.”<sup>15</sup> Those words imply that it was adhering to the general civil law principle that an unborn child is considered an individual for matters which may be to its advantage. However, in writing for the majority, Justice Westerfield further said that the court was concerned in that case with a foetus advanced to the final stages of gestation when all authorities, medical and legal, agree that the foetus is viable. This clearly implied that it was adopting the theory of the *Boggs* dissent. The latter appears to be the more enlightened view and the most adaptable to tort actions.

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13. 1 Blackstone, Commentaries, 129-139 (4 ed., Cooley, 1899).

14. The reasoning of the dissent was that while it is correct to consider a foetus in its early stages as a part of the mother, it is contrary to medical science to consider a “viable” child as such. Relative to having a cause of action for personal injury, the dissent said, “If at that period (when the child is viable) a child so advanced is injured in its limbs or members and is born into the living world suffering from the effects of the injury, is it not sacrificing truth to a mere theoretical abstraction to say the injury was not to the child but wholly to the mother?”

Although the hypothesis of the *Boggs* dissent is a more enlightened approach to the problem, it does not eliminate all of the difficulties. In *Smith v. Luckhardt*, 299 Ill. App. 100, 19 N.E. 2d 446 (1939), the defendant physician diagnosed pregnancy as a tumor and gave x-ray treatments for four months before realizing his mistake. These treatments were given before the viable stage of pregnancy, yet the evidence was quite conclusive that the rays were the cause of the child's being crippled and feeble-minded. An acceptance of the viable theory would not have changed the decision denying recovery to the child.

15. *Cooper v. Blanck*, 39 So. 2d 352, 358 (La. App. 1923).