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Torts - Prenatal Injuries - Characterization of Unborn Child as a "Person" Immaterial to Recovery

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years that some jurisdictions have abandoned the whole immunity doctrine.[18]

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TORTS — PRENATAL INJURIES — CHARACTERIZATION OF UNBORN CHILD AS A "PERSON" IMMATERIAL TO RECOVERY

Action was brought by an infant plaintiff for injuries sustained while in the womb of his mother, resulting from an automobile collision due to defendants' negligence. Plaintiff was born seventy-five days after the accident with deformities of his legs and feet. The trial court granted defendants' motion to dismiss on the ground that New Jersey recognized no cause of action for prenatal injuries. On appeal to the Supreme Court of New Jersey, *held,* reversed and remanded for trial. An infant has a legally protected interest in beginning life with a healthy body. If another's wrongful conduct causes him to be born deformed, the infant may recover damages. Though not at issue, the court indicated that the infant need not have been viable at the moment of injury in order to state a cause of action. *Smith v. Brennan,* 157 A.2d 497 (N.J. 1960).

For fifty years after the first unsuccessful attempt to recover for prenatal injuries,[1] most such actions were dismissed on the ground that the common law did not recognize the unborn child as an entity capable of being wronged by another's tortious conduct.[2] Recently however, judicial thinking on this subject

18. See, e.g., Hargrove v. Town of Cocoa Beach, 96 So.2d 130 (Fla. 1957), noted in 18 LOUISIANA LAW REVIEW 756 (1958), 71 HARV. L. REV. 744 (1958); Ragans v. Jacksonville, 106 So.2d 860 (Fla. App. 1958); Schuster v. City of New York, 5 N.Y.2d 75, 154 N.E.2d 534, 180 N.Y.S.2d 265 (1958), noted in 19 LOUISIANA LAW REVIEW 910 (1959), 59 COLUM. L. REV. 487 (1959); 72 HARV. L. REV. 1386 (1959); 33 TUL. L. REV. 723 (1959).

Louisiana might possibly abandon or modify the doctrine of sovereign immunity in the near future. The cases of Duree v. Maryland Casualty Co., 238 La. 166, 114 So.2d 594 (1959), and Stephens v. Natchitoches Parish School Board, 238 La. 388, 115 So.2d 793 (1959), decided within a few months of the instant case (November 30, 1959), have created quite a furor. See McMahon & Miller, *The Crain Myth — A Criticism of the Duree and Stephens Cases,* 20 LOUISIANA LAW REVIEW 449 (1960), which treats these cases as a temporary set-back in the increasing decay of governmental tort immunity and suggests enactment of laws to overrule the *Duree* and *Stephens* cases and to modify the sovereign immunity doctrine in Louisiana.

1. Dietrich v. Inhabitants of Northampton, 138 Mass. 14 (1884).

2. See *ibid.*; Drobner v. Peters, 232 N.Y. 220, 133 N.E. 567 (1921). A common law view of the unborn child is found in 1 BLACKSTONE, COMMENTARIES 129-30. Perhaps this position was fortified in the minds of some judges by grave doubts that dependable proof of causal connection could be produced. For example, "What field would be opened to extravagance of testimony already great enough — if Science could carry her lamp, not over certain in its light where

has changed markedly[3] and only one court remains committed to the earlier view.[4] In order to give the unborn child legal status, most of the recent decisions allowing a cause of action have employed a fiction — that the fetus is a "person" at the moment of injury.[5] Recovery has been limited, at least nominally, to those situations where the fetus has been *viable* at the moment of injury, i.e., so far advanced in gestation as to be capable of living independently outside the womb.[6] It is significant, however, that no court has yet invoked the viability limitation in order to deny a cause of action.[7]

In *Cooper v. Blanck*,[8] Louisiana's only reported case dealing directly with prenatal injuries, the court of appeal relied on Article 29 of the Civil Code[9] to give the unborn child legal status as a constructive "person" and thus found him entitled to re-

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people have their eyes, into the unseen laboratory of nature — could profess to reveal the causes and things hidden there — could trace a harelip to nervous shock, or a bunch of grapes on the face to the fright." Walker v. Great Northern Ry., [Q.B. 1891] 28 L.R. Ir. 69, 81. However, for a survey of modern medical knowledge of prenatal injuries, see Note, 1 CURRENT MEDICINE FOR ATTORNEYS, No. 6, p. 23 (1954).

3. The current trend is said to have commenced with Bonbrest v. Kotz, 65 F. Supp. 138 (D.C. Cir. 1946). See PROSSER, TORTS 175 (2d ed. (1955). See also White, *The Right of Recovery for Prenatal Injuries*, 12 LOUISIANA LAW REVIEW 383 (1952); Comment, 26 TENN. L. REV. 494 (1959); Annot., 27 A.L.R.2d 1256 (1951). In 19 of the 22 reported prenatal injury actions since *Bonbrest v. Kotz* a cause of action has been granted.

4. In Massachusetts, Dietrich v. Inhabitants of Northampton, 138 Mass. 14 (1884) is still followed. However, in Bliss v. Passanesi, 326 Mass. 461, 463, 95 N.E.2d 206, 207 (1950), the court stated: "We do not intimate what our decision would be if the question [of prenatal injuries] were presented for the first time."

5. See Bennett v. Hymers, 101 N.H. 483, 147 A.2d 108 (1958); Kelly v. Gregory, 282 App. Div. 542, 125 N.Y.S.2d 696 (1953); Williams v. Marion Rapid Transit Inc., 152 Ohio St. 114, 87 N.E.2d 334 (1949). Perhaps the courts have thought it necessary to provide an *immediate object* of tortious conduct.

6. See Allaire v. St. Luke's Hospital, 184 Ill. 359, 370, 374, 56 N.E. 638, 641, 642: This theory was first expounded in dissent: "A foetus in the womb of the mother may well be regarded as but a part of the bowels of the mother during a portion of the period of gestation; but . . . it seems to me . . . that whenever a child *in utero* is so far advanced in prenatal age as that, should parturition by natural or artifical 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 for any injuries wantonly or negligently inflicted upon his or her person at such age of viability, though then in the womb of the mother."

7. When faced wih a pre-viable injury, one court merely abolished the viability limitation to which it had been theretofore committed. Taking note of the scientific truism that a fetus is a separate biological entity from the moment of conception, the court said: "We ought to be safe . . . in saying that legal separability should begin where there is biological separability," implying that it would recognize a cause of action for any injury sustained at any period of gestation. Kelly v. Gregory, 282 App. Div. 542, 543, 125 N.Y.S.2d 696, 697 (1953). See also Bennett v. Hymers, 101 N.H. 483, 147 A.2d 108 (1958).

8. 39 So.2d 352 (La. App. 1923, unreported until 1949).

9. LA. CIVIL CODE art. 29 (1870): "Children in the mother's womb are considered, in whatever relates to themselves, as if they were already born. . . ."

cover for personal injuries under Article 2315.[10] The court also adopted the viability limitation.

In the instant case, the New Jersey Supreme Court has introduced a novel theory of recovery.[11] Instead of treating the fetus as a fictive "person," the court simply acknowledged an infant's right to begin life with sound mind and body, holding that one who abridges that right by causing the child to be born defective is liable in damages. Though the issue of viability was not raised in the pleadings, the court indicated that it would not limit recovery to injuries suffered during the period of viability.[12]

Where it is shown that the unborn child was damaged *in utero* and subsequently born alive, it appears immaterial to the outcome of a suit for damages whether a court treats the fetus as a "person" or merely acknowledges his ultimate right to begin life in good health. But given different facts, the courts may hesitate to apply either approach without qualification. For instance, if the unborn child dies in the womb because of another's negligence, one might argue that if the fetus were a *person* before its destruction, the parent should be entitled to bring an action for its wrongful death.[13] Though tenuous, this proposition has formed the basis of recovery in several cases.[14] Apparently the only legitimate objective of such an action would be to compensate for mental suffering due to loss of prospective parenthood, an element of damages which few courts have yet

10. The same approach was taken under a similar provision of the California Civil Code in Scott v. McPheeters, 33 Cal.App.2d 629, 92 P.2d 678 (1939).

11. The court's last pronouncement on prenatal injuries followed RESTATEMENT, TORTS § 869 (1934), which recognized no duty towards the unborn child. Stemmer v. Kline, 128 N.J.L. 455, 26 A.2d 489 (1942).

12. The court objected to the viability limitation because, in many instances, viability cannot be reliably established unless the child is actually born. It is submitted, however, that the court overlooked the most compelling argument against the viability limitation, i.e., that some of the most serious prenatal injuries are incurred in early gestation, e.g., X-ray injuries. *Accord*, 1 CURRENT MEDICINE FOR ATTORNEYS No. 6, p. 23 (1954).

13. Lord Campbell's Act, which served as a model for most American death statutes, provides: "that whensoever the Death of a *Person* shall be caused by wrongful Act, Neglect, or Default and the Act, Neglect, or Default is such as would (if Death had not ensued) have entitled the Party injured to maintain an Action and recover Damages in respect thereof, then, and in every such Case, the Person who would have been liable if Death had not ensued shall be liable to an Action for Damages." (Emphasis added.) 9 & 10 VICT. ch. 93 (1846).

14. "It seems too plain for argument that . . . through a wrongful act a cause of action arises under the [wrongful death] statutes." Verkennes v. Corniea, 229 Minn. 365, 370, 38 N.W.2d 838, 841 (1949). See also Rainey v. Horn, 221 Miss. 269, 72 So.2d 434 (1954); Poliquin v. MacDonald, 101 N.H. 104, 135 A.2d 249 (1957).

acknowledged.[15] But even if such emotional loss were a proper damage element, it is submitted that a direct award to the parent is much more reasonable than the circuity of an action for wrongful prenatal death. Assuming different facts, suppose an infant is born with a serious blood condition directly attributable to the administration of wrong-type blood to his mother *prior to conception.*[16] In the sweeping language of the instant decision one finds nothing which would preclude recovery by the infant from the party responsible for the transfusion. Though the viability limitation may be too harsh in disallowing recovery for injuries inflicted in early gestation;[17] it is submitted that extension of liability to infants conceived *after* the mother's injury would be to impose a burden on the tortfeasor unwarranted by his conduct.

Louisiana courts may wish to re-examine the approach taken in *Cooper v. Blanck* in light of the instant decision. If it is unnecessary to consider the fetus as a *person* at the moment of injury, it appears equally unnecessary to employ Article 29 to impute personality to him.[18] It is submitted that by employing the theory of the instant case, recovery for prenatal injury can be predicated exclusively on Article 2315.[19] Furthermore, since there is evidence that Louisiana courts *will* compensate for mental suffering due to lose of prospective parenthood, an action for wrongful prenatal death would be unnecessary.[20]

15. "Any injured feelings following the miscarriage, not a part of the pain naturally attending it, are too remote to be considered an element of damage. If the plaintiff lamented the loss of her offspring, such grief involves too much an element of sentiment to be left to the conjecture and caprice of a jury. If, like Rachael, she wept for her children and would not be comforted, a question of continuing damage is presented, too delicate to be weighed by any scales which the law has yet invented." Bovee v. Danville, 53 Vt. 183, 190 (1880). See generally, Annot., 145 A.L.R. 1104 (1943).

16. An action was brought alleging these facts but was dismissed on the ground that the statute of limitations had run. Morgan v. United States, 143 F. Supp. 580 (D.C.N.J. 1956).

17. See note 12 *supra.*

18. Except for prenatal injury litigation, Article 29 has been applied exclusively to the accrual of property by the unborn child. There is no evidence that the redactors of the Louisiana Civil Code intended it to apply to personal injury nor does Planiol admit of this possibility. 1 PLANIOL, CIVIL LAW TREATISE (A TRANSLATION BY THE LOUISIANA STATE LAW INSTITUTE) §§ 366-370 (1959).

19. LA. CIVIL CODE art. 2315 (1870): "Every act whatever of man that causes damage to another, obliges him by whose fault it happened to repair it. . . ."

20. Valence v. Louisiana Power & Light Co., 50 So.2d 847, 849 (La. App. 1951): "[W]e think, that when parents are actually expecting the arrival of a child, and they are deprived of the fruition of that great expectation by the actionable negligence of someone else, they may recover from the tortfeasor as an item of damage for that particular loss."

In the only attempt made in Louisiana to recover for wrongful prenatal death, the court denied a cause of action on the basis of a code provision that "children born dead are considered as though they had never been born or con-

From the standpoint of legal analysis, the theory of recovery as presented in the instant decision is preferable since it avoids the use of fiction. However, it is believed that the instant theory should not be applied as broadly as stated — that a cause of action for prenatal injuries should arise only in those instances where the infant survives birth and the injurious condition arises subsequent to conception.[21] It appears that the instant theory thus modified is as applicable in Louisiana as in other jurisdictions.

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WORKMEN'S COMPENSATION — ACCIDENTS ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT

Plaintiff, the widow of a former captain on the city police force, brought suit against the City of Baton Rouge under the Louisiana Workmen's Compensation Statute for the death of her husband. In a physical examination the captain had been found to be physically unfit for all duty except desk work. Within a few months, the Chief of Police forwarded to him a letter which in effect demanded his retirement. The trial court found from the undisputed testimony of the deceased's physician that the resulting emotional upset was a cause in fact of the ensuing heart attack,[1] and recovery was allowed. On appeal to the Louisiana court of appeal, *held,* reversed. Death caused from agitation over retirement and occurring while on vacation neither arises out of nor occurs in the course of the employer's trade, business, or occupation. *Seals v. Baton Rouge,* 94 So.2d 478 (La. App. 1957).

Section 1031 of the Louisiana Workmen's Compensation Act provides that "if an employee . . . receives personal injury by accident *arising out of* and *in the course of* his employment, his

ceived." LA. CIVIL CODE art. 28 (1870). Youman v. McConnell, 7 La. App. 317 (1927).

21. It is felt that should the infant *survive birth* and *afterwards* die from prenatal injuries an action for wrongful death would be appropriate. See Heins v. Guzman, Orleans No. 9484 (La. App. 1924) (unreported); Janinsky v. Potts, 153 Ohio St. 529, 92 N.E.2d 809 (1950).

1. The trial court noted that the cause in fact could have been of extreme significance. In heart attack cases, the crucial issue is often cause in fact, even where the accident is of a physical nature. In this particular case, however, this issue was not contested by the defendant. In this connection, see Neldare v. Schuylkill Products Co., 107 So.2d 487 (La. App. 1958), noted in 19 LOUISIANA LAW REVIEW 916 (1959); Kraemer v. Jahncke Services, 83 So.2d 916 (La. App. 1955).