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The Right of Recovery for Prenatal Injuries

A. A. White*

Many years ago, arguments raged on the question of whether the unborn child had a soul. It is not known whether that argument has ceased, but if we assume this spiritual problem has been settled, another has rushed in to take its place. This question is somewhat more mundane and involves whether such child has a body prior to its birth which the law of torts will recognize as worthy of its concern.

This latter argument got under way in 1884 with the decision of Dietrich v. The Inhabitants of Northampton.1 From this acorn quite an oak has grown. But what is perhaps more significant, this same seed seems to have produced a walnut and perhaps a pine for it is believed that some of the decisions since 1884 have produced results quite unlike the original. In view of the fact that early precedents have played quite a significant role in this particular area, it should be helpful to look rather closely at the earliest decisions and briefly trace their effect.

In the Dietrich case, the pregnant mother, or so it was alleged, was caused to fall because of a defective condition of the street of the defendant town which existed because of the latter's negligence. The mother was between four and five months advanced in pregnancy, and the fall brought on a miscarriage though the unborn child received no traumatic injury. It is doubtful that the child lived at all after birth though some signs of life were noted for ten or fifteen minutes.2 This action was by the administrator for the benefit of the mother to recover damages for the death of the child. Mr. Justice Holmes wrote for the court. He expressed some doubt as to what extent the criminal law of Massachusetts extended its protection to children en ventre sa

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2. These signs of life might have been nothing more than muscular twitchings caused by the change in temperature. 1 Beck, Medical Jurisprudence 411 (11 ed. 1860).
mere, but he argued that if it gave its protection to the extent urged by counsel for the plaintiff, such would not be controlling in favor of the plaintiff in the case before the court. Mr. Justice Holmes concluded:

"But no case, so far as we know, has ever decided that, if the infant survived, it could maintain an action for injuries received by it while in its mother's womb. . . . Taking all the foregoing considerations into account, and further, that, as the unborn child was a part of the mother at the time of the injury, any damage to it which was not too remote to be recovered for at all was recoverable by her."

It should be emphasized that here the child was not viable and most likely did not experience any extraterine life; that it received no direct injury but only a communication of the shock to the mother and that the injury was caused without any specific chance for the alleged wrongdoer to be aware of the presence of the unborn child.

The next case to be decided by a common law court was that of Walker v. Great Northern Railway Company of Ireland. In that case plaintiff was injured while en ventre sa mere when his mother, who was a passenger on defendant's trolley, suffered a mishap alleged to be due to defendant's negligence. The plaintiff was denied recovery. All four of the judges participating wrote opinions and concluded that no contractual relationship with the plaintiff existed, there being a contract only with the mother, made in ignorance of the existence of the plaintiff, and, therefore, that no basis for plaintiff's recovery existed. This was the real basis of decision. But two of the judges went further and stated dicta to the effect that it was doubtful that one could recover in tort under any circumstances for injuries negligently inflicted while en ventre sa mere. Justice Johnson typically stated, "as a matter of fact when the act of negligence occurred

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5. 28 L.R. Ir. 69 (Q.B. 1891).
6. "The contract was between the defendants and Mrs. Walker, and, so far as contract was concerned, it was to Mrs. Walker that the defendants were liable for a breach of it." Walker v. Great Northern Ry., 28 L.R. Ir. 69, 87 (Q.B. 1891).
the plaintiff was not in esse,—was not a person or a passenger or a human being.”

These somewhat feeble authorities against recovery were the only two authorities of any kind outstanding at the time the first case with factual appeal came before a court of last resort. In *Allaire v. St. Luke's Hospital* plaintiff's mother, in anticipation of his birth, had entered the defendant hospital for pre-delivery care. This purpose was specifically known to the defendant. While a passenger in one of defendant's elevators, plaintiff's mother was seriously injured because of the alleged negligence of the operator and upon plaintiff's birth four days later, it was learned that he too had suffered severe traumatic damage which developed into permanent injuries. Here the court had before it a case where the child was clearly viable at the time of injury; where there could be no question about the defendant being aware of the existence of the plaintiff as a viable fetus and where there seemed to be little question about the causal relationship between the defendant's conduct and the injuries which plaintiff, then a living person, was continuing to suffer. Nevertheless the majority cited and relied heavily on the *Dietrich* and *Walker* cases and adopted them as full, complete and adequate authority for denying the plaintiff's right to recover. The factual differences between those cases and the case before the court either did not occur to the majority or were regarded by it as irrelevant. That the latter was the case is indicated by the following statement contained in the able dissenting opinion of Justice Boggs:

"This case [Dietrich v. Inhabitants of Northampton] can have little application here, for the reason in the case at bar it appears from the declaration the child had reached that stage of foetal life when it was capable of continued existence independent of the mother; that its person was injured within itself, and it was afterwards born alive and with sufficient strength and maturity to maintain independent existence, and still lives. It does not follow from the *Dietrich Case* the plaintiff in this cause should not be recognized as capable of having a locus standi in court to recover damages for injuries to his person, or that the Supreme Court of Massachusetts would have so held."
That the majority was not impressed by these distinctions is also indicated by this extract from its opinion:

"That a child before birth is, in fact, a part of the mother and is only severed from her at birth, cannot, we think, be successfully disputed. The doctrine of the civil law and the ecclesiastical and admiralty courts, therefore, that an unborn child may be regarded as in esse for some purposes, when for its benefit, is a mere legal fiction, which, so far as we have been able to discover, has not been indulged in by the courts of common law to the extent of allowing an action by an infant for injuries occasioned before its birth." 10

With this decision the rule denying recovery to viable as well as nonviable infants at the time of injury; to those who survived in an injured state as well as to those who were stillborn; and to those whose existence though in the womb was clearly known to the actor as well as to those whose existence was unknown seemed to become clearly established. There then followed a long series of decisions denying recovery based upon these authorities.11

It was not until 1923 that any court in the United States allowed an action based upon injuries prenatally sustained. In that year a Louisiana intermediate court approved such a petition in Cooper v. Blanck.12 In that case the mother who was eight months advanced in pregnancy was injured while lying in bed when struck by falling plaster from the ceiling of her apartment which was owned by the defendant. The child, which was born prematurely, lived only three days and died from injuries alleged to have been sustained from the falling plaster. The action was brought by the father and mother under a Louisiana statute13

10. 184 Ill. 359, 368, 56 N.E. 638, 640.
13. Art. 2315, La. Civil Code of 1870, which reads in part as follows: "Every act whatever of a man that causes damage to another, obliges him by whose fault it happened to repair it; the right of this action shall survive in case of death in favor of the children, including adopted children . . . or
which provides for recovery similar to that allowed by both survival and wrongful death statutes of the type generally in effect in most of our states. The court held that the plaintiff's petition stated a cause of action. This case loses some of its force as a common law precedent, however, since it was decided in a civil law jurisdiction and under a provision of the local code. Nevertheless much of the reasoning of the court would have been applicable to an action maintained in any type of jurisdiction. In *Kine v. Zuckerman* a lower Pennsylvania court allowed recovery though it was later impliedly overruled by a Pennsylvania Supreme Court decision.

At this point, chronologically, an interesting case appears. In *Korman v. Hagen* the Supreme Court of Minnesota allowed a child recovery for injuries sustained by malpractice in the course of its delivery. Clearly the child had not been born at the time the injuries were inflicted, but apparently the point did not occur to either counsel or the court. It might very well be argued that this case demonstrates what the natural instincts of justice and the common sense of the situation produces when the court is not distracted by decisions reached under less appealing circumstances. This case, despite its departure from precedent, however, seems to have been overlooked by all courts and writers on the subject.

In 1933 recovery was allowed in a case of this type in *Montreal Tramways v. Leveille*. Again this case loses some of its force as a common law precedent in view of the fact that it was decided under the influence of the civil law. In 1939 California allowed a petition based upon prenatal injuries in the case of

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14. "In Badie v. Columbia Brewing Co., 142 La. 853, 77 So. 768, our own Supreme Court held that a right of action survived to a child en ventre sa mere and that it could recover after its birth for the loss of its father, killed by the wrongful act of another. This decision has an important bearing in the instant case for, as we see it, it presents the converse of the proposition we are discussing. If a child en ventre sa mere is in contemplation of law a separate entity, to the extent that a right of action survives to it for injury to its father inflicted during its gestation, why does not the right of action survive to the father for personal injuries to the child, inflicted prior to parturition?" Cooper v. Blanck, 39 So. 2d 352, 360 (La. App. 1923).
17. 165 Minn. 320, 206 N.W. 650 (1925).
Scott v. McPheeters. The case was decided under a statute which provided: "A child conceived, but not yet born, is to be deemed an existing person, so far as may be necessary for its interests in the event of its subsequent birth. . . ." Differing opinions might be entertained as to whether that statute did more than enact the common law rule that one en ventre sa mere will be considered as in esse, particularly in property matters, where it is for such one's benefit to be so regarded. It is pretty clear, however, that the California court considered something had been added. But again, as in the Cooper case much of the language used would be applicable to a case of this kind arising under the common law.

In 1946 a federal district court approved a prenatal injury petition in a case in which the common law was relied upon solely. All of the reasons theretofore given for denying recovery were examined and rejected. It was not until 1949, however, that a decision of a court of last resort approved such a petition based solely upon common law considerations. In that year the Supreme Courts of both Ohio and Minnesota allowed such

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23. "It is common knowledge that when a child's lungs and organs are fully developed, even in a seven-months baby, it is frequently capable of living and that it actually exists as a human being separate and distinct from its mother, even though it is prematurely born by artificial means or by accident. Who may say that such a viable child is not in fact a human being in actual existence? . . .

"It would seem to us inhuman and an acknowledgment of inherent weakness of the law to deny a remedy to one who is condemned to contend with the struggles of life in a maimed and crippled condition due to the wanton or negligent acts of another person. The difficulty of obtaining proof of the wrong should prompt greater leniency in affording the remedy, rather than a denial of plain justice. We are not impressed with the reasoning that a clear remedy for an injustice should be denied because the wrong is not readily susceptible of proof. Law is progressive and should lend its aid to secure justice rather than to block it." 33 Cal. App. 2d 629, 635, 92 P. 2d 678, 681-682 (1939).
25. See Williams v. Marion Rapid Transit Corp., 152 Ohio St. 114, 87 N.E. 2d 334 (1949). Ohio has the following constitutional provision which was considered by the court: "All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay." Ohio Const. Art. I, § 16. But since the basic issue has always been whether an unborn infant was a "person" within the eyes of the law, it is believed that this provision did not essentially alter the common law issues.
Prenatal Injuries

actions. The action in the Ohio case was by the infant who had survived, while the action in the Minnesota case was purely one under that state’s wrongful death statute, the child having been stillborn. This difference is considered by some to be material on the ground that the policy considerations are much stronger for allowing recovery to the living child whose mind or body was impaired by a prenatal injury than for allowing recovery to the next of kin under a wrongful death statute where the infant was stillborn.\(^{27}\)

As an aside, it is interesting to note that these cases were decided within approximately six weeks of each other and that the Minnesota court in deciding the Verkennes case, the second decided, was wholly unaware of the Williams case in Ohio. This perhaps lends some support to those who wish to explain all things in terms of an inevitable concatenation of general but multiple and complex factors.

These two decisions have not created a stampede in the direction of allowing such actions, but it is believed that they restored, in part at least, a wholesome balance among the authorities which will enable the courts to consider more freely cases hereafter on their merits rather than under the pressure of a unanimous weight of authority denying recovery. Consequently, two of the three courts which have considered this problem for the first time since 1949 have allowed such actions\(^{28}\) and one has denied it.\(^{29}\) And one court which had denied the action previously allowed it on reconsideration,\(^{30}\) while Massachusetts, which began the trend against recovery with its decision in the Dietrich case\(^ {31}\) adhered to that position upon reconsideration.\(^ {32}\) That the ardor of the Massachusetts court for its original position was weakened

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\(^{29}\) See Drabbels v. Skelly Oil Co., 155 Neb. 17, 20, 50 N.W. 2d 229 (1951). The child in this case was stillborn and the court reserved its opinion on other types of action in these words: "There are cases holding that a child born alive may maintain an action for prenatal injuries. Williams v. Marion Rapid Transit, Inc., 152 Ohio St. 114, 87 N.E. 2d 334, 10 A.L.R. 2d 1051; Jasinsky v. Folls, 153 Ohio St. 529, 92 N.E. 2d 809; Bonbrest v. Kots, D.C. 65 F. Supp. 135. This question, however, is not before us and we leave it for determination if and when it arises." 155 Neb. 17, 20, 50 N.W. 2d 229, 232.


somewhat is indicated by the following statement of the court made after summarizing the reasons for allowing recovery:

“We readily concede the strength of these grounds, but there is also strength in the arguments to the contrary, including that based upon the practical difficulty of reliable proof. We do not intimate what our decision would be if the question were presented for the first time. The Dietrich case not only established the law in this Commonwealth since its rendition more than sixty years ago but it is still supported by the great weight of authority in other jurisdictions.” 33

Thus the authorities stand. The numerical weight of authority, particularly if we consider only courts of last resort, is still substantially against allowing recovery.34 But those who make predictions in the law based on trends should take serious notice of the strong one in favor of allowing recovery.

The foregoing is a somewhat sketchy recitation of the development of the authorities. A better insight into the overall problem can be obtained by examining in detail the principal reasons for denying recovery. If this approach appears to be placing the burden of proof35 upon those who deny recovery, that is where it appears it should be. It seems that elementary justice requires that recovery be allowed to the injured in mind or body who come into court and establish by a preponderance of the evidence that such impairment was caused by action of the defendant which, had it been toward the born, would be the basis of recovery. The principal reasons for denying recovery can be grouped under four headings.

First, lack of precedent and stare decisis. These grounds seemed to either weigh heavily or be the sole grounds of decision in all cases denying recovery.36 But it seems that lack of prece-

34. Jurisdictions denying recovery are Alabama, Ireland, Massachusetts, Michigan, Missouri, Nebraska, New Jersey, Pennsylvania, Rhode Island, Texas and Wisconsin. See notes 3, 5, 9 and 11, supra. Those allowing recovery are Federal District Court of District of Columbia, California, Canada, Georgia, Louisiana, Maryland, Minnesota, New York and Ohio. See notes 12, 17, 18, 23, 24, 25, 27, and 29, supra. But we should be reminded that the decisions in the District of Columbia and Louisiana have the sanction only of lower courts, that the Canadian and Louisiana decisions were under the influence of the civil law and that the Louisiana and California decisions were under their respective codes. For a discussion of Louisiana law on prenatal injuries, see Note, 12 LOUISIANA LAW REVIEW 519 (1952).
35. The term "burden of proof" as used here has nothing to do with on whom the burden lies in an individual lawsuit.
36. See cases in notes 3, 5, 9 and 11, supra.
dent, in the sense of there being no favorably decided case on a fact situation similar in substantial detail to that before the court, is at most a half reason for denying an action. It is perhaps much less than that when there is no decision anywhere to the contrary and there are broad general principles of the common law which point to allowing such an action. It seems fair to say that this was exactly the situation in which the Massachusetts court found itself when it came to decide the Dietrich case. True, there were no cases allowing recovery for injuries sustained by an unborn child. But there was a broad common law rule which allowed recovery to those who suffered bodily injury because of the wrongful acts of another. This general rule had then, as it does now, a number of qualifications, but a rule denying recovery for injuries prenatally sustained was not one of them.

On the contrary, there were markers pointing in the opposite direction. The criminal law undoubtedly took some heed of the existence of the unborn child as did the law of property where it was to the infant’s benefit to do so. The fact that this latter policy was borrowed from the civil law should have no bearing. The common law does not have its own private legal well; and whether it has drawn from the Law of Moses, the Code of Hammurabi or the Civil Law, it is the policy of the common law if it is applied by its courts.

And at the time the Dietrich case was decided there was elementary learning which would have supported recovery if the court had elected to so hold. Blackstone, who was no doubt the greatest authority on the common law in his day, said: "Life is the immediate gift of God, a right inherent by nature in every individual; and it begins in contemplation of law as soon as an infant is able to stir in the mother’s womb." And the unborn child has been known to stir in its mother’s womb as early as ten weeks following conception, and such activity generally

37. See p. 396 et seq., infra.
38. See p. 397 et seq., infra.
39. "The doctrine of the civil law and the ecclesiastical and admiralty courts, therefore, that an unborn child may be regarded as in esse for some purposes, when for its benefit, is a mere legal fiction, which, so far as we have been able to discover, has not been indulged in by the courts of common law to the extent of allowing an action by an infant for injuries occasioned before its birth." Allaire v. St. Luke’s Hospital, 184 Ill. 359, 368, 56 N.E. 638, 640 (1900).
40. 1 Blackstone, Commentaries, 130 (4 ed., Cooley, 1899).
begins by the sixteenth week of intrauterine life.\textsuperscript{41} Though a live fetus which moves independently of any thought processes or motor responses of the mother may not completely meet our popular notions of a person in being, it is many civilized thoughts beyond either an outlaw or a nonentity.

So it seems that the claim that there was no precedent in the broad sense of the term for allowing recovery at the time the \textit{Dietrich} case was decided rested "upon a slender reed" if I may be so ungracious as to borrow one of Mr. Justice Holmes' own phrases.\textsuperscript{42} That lack of precedent in the narrow sense in which it did not exist should not alone have barred recovery, is indicated by the whole history of the growth of the common law. The court in \textit{Bonbrest v. Kotz}\textsuperscript{43} stated:

"The absence of precedent should afford no refuge to those who by their wrongful act, if such be proved, have invaded the right of an individual—employed as the defendants were in this case to attend, in their professional capacities, both the mother and child. . . . The Common law is not an arid and sterile thing, and is anything but static and inert." \textsuperscript{44}

A similar thought was more fully stated in \textit{Russick v. Hicks}\textsuperscript{45}:

"The novelty of an asserted right and the lack of common-law precedent therefor are not valid reasons for denying its existence. The genius of the common law is its flexibility and capacity for growth and adaptation. It has always been recognized that the common law is not a rigid, inflexible, static thing, but is a living organism, ever growing and expanding to meet the problems and needs of changing social and economic conditions. The common law is not a primer of rigid and absolute rules, but rather a body of broad and comprehensive principles created by judicial decisions and based on justice, reason, and common sense. Its principles have been determined by the needs of society and are ever susceptible to adaptation to new conditions, relations, and usages, as the progress of civilization may require." \textsuperscript{46}

\textsuperscript{41} Beck, Medical Jurisprudence, 277 (11 ed. 1860).
\textsuperscript{42} See Missouri v. Holland, 252 U.S. 416, 434 (1920).
\textsuperscript{43} 65 F. Supp. 138 (D.C. D.C. 1946).
\textsuperscript{44} Id. at 142.
\textsuperscript{46} Id. at 285-286.
Even if we add to the lack of supporting specific precedent the existence of opposing specific precedent, we do not have an insuperable barrier, especially in the field of torts, to the reaching of a particular result. In the case of Woods v. Lancet the New York Court of Appeals was faced with a weight of authority opposing a recovery in cases of this type including one of its own decisions. The court nonetheless allowed the action and had this to say concerning lack of precedent and stare decisis:

"Following Drobner v. Peters, supra, would call for an affirmation but the chief basis for that holding (lack of precedent) no longer exists. And it is not a very strong reason, anyhow, in a case like this. Of course, rules of law on which men rely in their business dealings should not be changed in the middle of the game, but what has that to do with bringing to justice a tort-feasor who surely has no moral or other right to rely on a decision of the New York Court of Appeals? Negligence law is common law, and the common law has been molded and changed and brought up-to-date in many another case. . . .

"The sum of the argument against plaintiff here is that there is no New York decision in which such a claim has been enforced. . . . We act in the finest common-law tradition when we adapt and alter decisional law to produce common-sense justice.

"The same answer goes to the argument that the change we here propose should come from the Legislature, not the courts. Legislative action there could, of course, be, but we abdicate our own function, in a field peculiarly nonstatutory, when we refuse to reconsider an old and unsatisfactory court-made rule." 49

If the analysis of the condition concerning precedent at the time the Dietrich case was decided is correct, such precedent as there was then for recovery exists today augmented by the cases allowing recovery decided in recent years. And if, by the same token, the opposing body of case law has been built, in part at least, upon a first case of equivocal precedential value, any court wherein such a case is one of first impression, should have no reluctance to freely consider it in the light of advanced scien-

47. 303 N.Y. 349, 102 N.E. 2d 691 (1951).
49. 303 N.Y. 349, 353, 102 N.E. 2d 694 (1951).
tific knowledge and a good, common, garden variety sense of justice. Even where there is a precedent adverse to recovery in the particular jurisdiction, there would seem to be justification for a re-examination of the whole question.

A second reason given by most courts for denying recovery in cases of the type here under consideration is that the child is a part of the mother until birth and therefore is not a person in being. Of course, the whole problem here is in determining what is meant by “in being.” Each man here can win his argument if he is permitted to define his terms. So perhaps we should eschew definitions and turn to those who have recorded some facts for us at a time when they were not concerned with a controversy over the right of one to recover for injuries prenatally sustained. We are told that by the eighth week following conception, the embryo or fetus is “an unmistakable human being, even though it is only three-fourths of an inch long”; that it has been known to stir noticeably as early as the tenth week and movements are generally noticed as early as the sixteenth; that an unmistakable case is on record where a five and one-half month fetus was born and lived to maturity; that “The foetus is certainly, if we speak physiologically, as much a living being immediately after conception, as it is at any other time before delivery” and that normal infants have been taken from dead mothers to live without difficulty. Chief Justice Brogan, dis-


51. Of the cases that have discussed this question none has been called upon to make a precise statement on when birth is accomplished. But one gathers the impression from reading the cases that birth is not fully accomplished until the umbilical cord is severed.

52. “In mammals and other viviparous vertebrates embryo is applied only to early stages passed within the mother’s body; later (in human embryology, usually after the third month of development) the young is called a fetus.” Webster’s New International Dictionary (2 ed. 1934).


54. 1 Beck, Medical Jurisprudence 277 (11 ed. 1880).

55. Herzog, Medical Jurisprudence 683 (1931).

56. 1 Beck, Medical Jurisprudence 276 (11 ed. 1880).

57. De Lee, Principles and Practice of Obstetrics 949-950 (9 ed., Greenhill, 1947). If the unborn child physiologically is a part of the mother, as is argued by courts denying recovery, I suppose we would have to call that feat a resurrection rather than a birth.
senting in *Stemmer v. Kline*,\(^5\) summarized the physiological facts thusly:

> "While it is a fact that there is a 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 tune with that of the mother but is more rapid; that there is no dependence by the child on the mother except for sustenance." \(^5\)

All of us fathers can join with Chief Justice Brogan in his further comment that dependency for sustenance does not end with birth. In fact most of us are tattered proof of the fact that a new dependency begins at birth—a dependency for clothes.

So the principal thing wrong with the argument that an unborn child is not in being is that it simply does not accord with physical fact.\(^6\) Lawyers and judges kid no one but themselves when they continue to say so. I should not envy the one who had to explain to a plumber's convention that an unborn child was not in being, or, worse still, to a chapter of the Junior League. Perhaps least of all would I envy the one who sought to make that explanation ring true to the child with an impaired body acquired through prenatal injuries wrongfully inflicted by another. If that be said to be sentimental dramatization of the argument, it can be replied that some courts have similarly dramatized their reasons for denying recovery by raising a spectre of torrents of fictitious litigation which, it is believed, it is unrealistic to fear.\(^6\)

Except for the bearing it might have on the question of duty presently to be discussed,\(^6\) it seems that the whole argument on whether the unborn child is a person in being is rather pointless. The incontrovertible fact confronts us that the processes of nature have been irrevocably set in motion which, if no mishap occurs, will ultimately produce a child whom all will concede to be in

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58. 128 N.J.L. 455, 463, 26 A. 2d 489, 685 (1942).
59. 128 N.J.L. 455, 466, 26 A. 2d 489, 687.
60. If what the courts are talking about is legal fact, that, of course, puts us right back on the merry-go-round by assuming the question in issue.
61. See p. 402 et seq., infra.
62. See p. 400 et seq., infra.
esse; and that from the time of conception until birth, it is subject, whether or not a person in being, to having the course of its life permanently affected by the physical treatment it receives. Recognizing such as fact, why should one flounder about in the argument as to whether such "thing" is or is not a person in being?

A discussion of this issue should not be closed without taking note of the fact that the unborn child is recognized by other branches of the common law as well as by statute. Blackstone said:

"For if a woman is quick with child, and by a potion or otherwise, killeth it in her womb; or if anyone beat her, whereby the child dieth in her body, and she is delivered of a dead child; this, though not murder, was by the ancient law homicide or manslaughter. But the modern law does not look upon this offense in quite so atrocious a light, but merely as a heinous misdemeanor." 63

It has been held to be murder if a child is born alive but later dies from injuries feloniously inflicted before birth, 64 and abortion is made a crime by statute in practically all jurisdictions. 65 In the field of property law we find that the infant en ventre sa mere is capable of taking a legacy or as a grantee or cestui que trust, may have a guardian appointed for it and have an estate limited to its use, 66 and in tort law we find that such infant may bring an action for the wrongful death of its father occurring before its birth. 67

Substantially all of the courts denying recovery for injuries prenatally sustained have felt the necessity of explaining away this rather imposing array of evidence that the child at birth did not break forth into a legal world wholly oblivious to its prior existence. A concise effort in this respect was made by the Wisconsin court in these words:

"The fact that the criminal law protects nonviable infants does not affect the question of their civil rights. The criminal law rests upon grounds of public policy and affects the

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63. 1 Blackstone, Commentaries 129 (4 ed., Cooley, 1899).
65. See 1 C.J.S. Abortion, § 2 (1936).
public; the law of torts relates solely to the rights of private parties. So, too, the fact that for purposes of inheritance, taking under a will, etc., the existence of unborn children is recognized in law has no particular bearing upon the question of their right to recover for injuries sustained before birth. Neither does the medical or scientific recognition of the separate entity of an unborn child aid in determining its legal rights. The law cannot always be scientific or technically correct. It must often content itself with being merely practical."

To the court's comments on the difference between the functions of the criminal and civil law, the response might be: What does it prove on the issues involved in actions for prenatal injuries? The comments on an unborn infant's property rights moves one to yet ask, why not? And the comments on being practical suggest the inquiry, practical as to whom? It would doubtless be quite practical to the injured child and its parents to be compensated for provable losses sustained at the hands of a wrongdoer.

The Texas court in the Magnolia case took up one by one these recognitions of infants en ventre sa mere by other branches of the law and sought to distinguish them. Feeling that it should confine itself to a consideration of Texas criminal law, it quoted two articles of the Texas Penal Code apparently to prove that Texas criminal law did not concern itself with infants until born or in the process of being born. But the court failed to discuss Article 1191 of the same penal code which reads in part:

"If any person shall designedly administer to a pregnant woman . . . , or shall use towards her any violence or means whatever, externally or internally applied, and thereby procure an abortion, he shall be confined in the penitentiary not less than two nor more than five years . . . . By 'abortion' is meant that the life of the fetus or embryo shall

68. Lipps v. Milwaukee Electric Ry. & Light Co., 164 Wis. 272, 276, 159 N.W. 916, 917 (1916).
70. The two articles quoted are Art. 1205, Tex. Pen. Code (Vernon, 1925), which reads: "The person upon whom the homicide is alleged to have been committed must be in existence by actual birth. It is homicide, however, to destroy human life actually in existence however frail such existence may be or however near extinction from other causes," and Art. 1195, Tex. Pen. Code (Vernon, 1925), which reads: "Whoever shall during parturition of the mother destroy the vitality or life in a child in a state of being born and before actual birth, which child would otherwise have been born alive, shall be confined in the penitentiary for life or for not less than five years."
be destroyed in the woman's womb or that a premature birth thereof be caused.” (Italics supplied.)

It should be noted that the statute uses, and it is assumed advisedly, both the terms “embryo” and “fetus” and speaks of the “life” of each. So it may be concluded that the statute intended to cover the entire gestation period. While it is true, as the court concludes, that it is not homicide in Texas to destroy the life of an infant *en ventre sa mere*, it does not seem to follow that Texas criminal law does not concern itself about such infants from the time of conception.

The analogy of property rights was briefly disposed of, but a feature of this decision unique among all those denying recovery is its efforts to distinguish an earlier Texas case which allowed a child unborn at the time of his father's wrongfully caused death to recover after birth as a “surviving” child under the Texas wrongful death statute. The court in so deciding had very clearly said that the unborn infant was in being. The court in the *Magnolia* case, however, seemed to think that the decision afforded “little, if any, argument in favor of recovery in the instant case. The child when it is born and lives is in fact a surviving child and comes within the express language of the statute.” To which it might be replied that if an injured unborn

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72. See note 52, supra.
73. “This state, therefore, has not brought unborn children within the protection of its penal statutes defining and prescribing penalties for homicide.” *Magnolia Coca Cola Bottling Co. v. Jordan*, 124 Tex. 347, 357, 78 S.W. 2d 944, 948 (1935).
74. “The decisions which protect unborn children in property and property rights but undertake by the indulgence of a fiction of existence to save to the child property which in fairness belongs to it. They do not support the imposition of liability upon others for torts indirectly committed against a prospective human being, one unseen and unknown, and who may never have an independent existence. As said by Justice Pound, in *Drobner v. Peters*, supra: ‘Rights of ownership of property do not connote a duty of personal care to the inchoate owner.’” 124 Tex. 347, 357, 78 S.W. 2d 944, 948 (1935).
76. In fact the mother was advanced only some three months in pregnancy. 78 Tex. 621, 622, 14 S.W. 1021.
77. “Action for damage arising from death shall be for the sole and exclusive benefit of and may be brought by the surviving husband, wife, children, and parents of the persons whose death has been caused by or either of them for the benefit of all.” Tex. Rev. Civ. Stat. Art. 4675 (Vernon, 1925).
78. “We think, also, that the plaintiff in this case, although unborn at the time of his father's death, was in being, and one of his surviving children.” 78 Tex. 621, 626, 14 S.W. 1021, 1023.
80. 124 Tex. 347, 357, 78 S.W. 2d 944, 948.
child is later born and lives, it is a “person” within the meaning of other operative portions of the Texas wrongful death statute.\textsuperscript{81}

Thus it would seem that the courts denying recovery for prenatal injuries have not effectively escaped the implications for tort law of the recognition by the criminal law and other fields of the civil law of the infant’s prenatal existence.

And the courts allowing actions for prenatal injuries have been unable to escape such implications. A number of strong statements appear in such cases, that from the Georgia court in a recent case\textsuperscript{82} being typical. It commented concerning the property law analogy:

“...It cannot seriously be denied that the purpose of the common law in allowing the appointment of a guardian for the unborn child is to make available processes of the law for the protection and preservation of the properties belonging to the child. There is nothing in the common law to indicate that it would withhold from such a child its processes for the purpose of protecting and preserving the person as well as the property of such child. It would therefore seem to us to be an unwarranted reflection upon the common law itself to attribute to it a greater concern for the protection of property than for the protection of the person. Whether the recognition of the right of property in the unborn child is founded upon the welfare of the child or of society, each of these is more vitally concerned about the physical impairments of the child itself than about its property. It would therefore be illogical, unrealistic, and unjust—both to the child and to society—for the law to withhold its processes necessary for the protection of the person of an unborn child, while, at the same time, making such processes available for the purpose of protecting its property.” \textsuperscript{83}

With respect to the criminal law analogy it commented:

“This court will not overlook, however, the provisions of the criminal law of this State, Chapter 26-11 of the Georgia Code of 1933, providing punishment for those inflicting injury upon an unborn child. Code, § 26-1103 provides that,\textsuperscript{83}


\textsuperscript{83} 65 S.E. 2d 909, 910.
if under circumstances therein described an injury to the mother and her unborn child would, if the mother dies, constitute murder, then, for the wilful killing of the unborn child, the punishment shall be death or life imprisonment for the person committing the crime. The purpose of criminal law is to protect both the individual and society from criminal conduct. If the killing of the unborn child is regarded by the law as being sufficient injury to society to justify taking the life of the perpetrator of the crime, then, to be logical and just to the injured child, the law must allow it to employ legal process and recover damages for the injury inflicted upon it. It would be contrary to every principle of right and justice, which are the very essence of law, to deny such rights to the injured child.84

Thus it seems that the evidence from medical men and other branches of the law compels the conclusion that the infant en ventre sa mere is a being in fact.

It is not clear from reading the cases allowing recovery to unborn children for the wrongful death of their father occurring before birth85 whether the cause of action vested in such child subject to being defeated if it was born alive or whether a potential cause of action in its favor was suspended until birth and vested only at that time. If the former, it is a clear recognition that the child is in being before birth; if the latter, it is an example of a lag between the conduct of the wrongdoer and the maturing of the cause of action. Either theory will suffice to overcome a problem in connection with actions for prenatal injuries.

A third reason, and one closely allied to the second, for denying recovery is that no duty to exercise reasonable care under the circumstances for its safety is owed to the unborn child.86 That statement simply has a hollow ring. So to understand better what the courts have in mind when they make this obser-

84. 65 S.E. 2d 909, 912.
Prenatal Injuries:

Let us examine briefly the function of duty in the law of torts. It is safe to say that the concept of duty is primarily an adjunct of the law of negligence. The law is not now, nor has it ever been, seriously concerned about limiting the liability of the intentional wrongdoer. But when the law of negligence came along, the courts, feeling that it did not represent conduct terribly anti-social, began to cast about for means of limiting the consequences of the negligent actor's conduct. The concept of duty is one of the results. Mr. Prosser defines it "as an obligation, to which the law will give recognition and effect, to conform to a particular standard of conduct toward another." But Mr. Prosser himself is the first to recognize this definition is of little value in solving duty-problem cases. In fact, considerations of duty are never the substantive reasons for a decision, but only the legal sounding explanation for it. Faced with a new negligence problem, the courts, based upon a multiplicity of considerations, many of which are subtle and complex, arrive at what they conclude to be the proper result. Since all those considerations would not sound judicial and since some of them may even be inarticulate, a shorthand statement is needed to express the result and such terms as duty and proximate cause have been pressed into service. Such unquestionably is the case where recovery has been denied for injuries prenatally sustained. That such is true concerning the function of duty is indicated by what I feel certain the courts, including those which deny recovery in prenatal injury cases, would do with the following situation. Suppose the manufacturer of a Buick automobile was negligent in the construction of one of the wheels on which it was to roll. This negligent conduct occurred, and the car was sold to a dealer, three months before P was conceived. P is later conceived and shortly after his birth, the defective Buick is bought by his father. On a cheery Sunday afternoon the family goes for a ride, the wheel collapses and P is injured. Would the manufacturer escape liability because at the time he engaged in his negligent conduct, P was nowhere around for people to owe a

88. Id. at 178.
89. "Its artificial character is readily apparent; in the ordinary case, if the court should desire to find liability, it would be quite as easy to find the necessary 'relation' in the position of the parties toward one another, and hence to extend the defendant's duty to the plaintiff. The statement that there is or is not a duty begs the essential question—whether the plaintiff's interests are entitled to legal protection against the defendant's conduct." Id. at 180.
duty to? Or, if he recovers, is he the beneficiary of the duty owed by the manufacturer to persons in being at the time he acted? It is realized that the explanation here would be that the manufacturer's negligence was a continuing one and was thus operating at the time of P's injury when he was a proper subject of duty. But that is a fiction pure and simple. The manufacturer acted only once and that action was in fact wholly completed before P was ever conceived. At any rate, if courts allowed recovery to P, and it is believed that all would, it demonstrates how courts turn duty on by fiction to allow recovery when it is so desired and turn it off by fiction, as in the prenatal cases, to defeat recovery when other considerations dictate such result.

So if the unborn child is, physiologically speaking, a person in being and is so recognized in many branches of the law; and if the courts can, at least in cases of first impression, find or not find duty as required by the results they feel should be reached; and if the lack of precedent or even the rule of stare decisis is not an insurmountable difficulty to allowing recovery, why have courts, in what appeared to be some meritorious cases, denied to the plaintiff a cause of action? The courts were on the whole strong courts and the judges able ones. Something made them reluctant to allow recovery, and it is believed that the real and only reason is the one sometimes expressed, but most often not, that if the court grants recovery in such cases, it will turn loose upon itself a torrent of litigation of a nature with which it will be unable to cope. This is the fourth reason given by courts for denying recovery and was expressed by the Texas court in these words:

"Good reason is found for denial of the right of recovery in the fact that in many cases it would be impossible to establish except by speculation or conjecture that the death or

91. The case of Allaire v. St. Luke's Hospital, 184 Ill. 359, 56 N.E. 638 (1900) presented a case where all of the factors warranting recovery seemed to be of an establishable nature. See p. 385, supra. And in both Stemmer v. Kline, 128 N.J.L. 455, 26 A. 2d 489 (1942) and Smith v. Luckhardt, 299 Ill. App. 100, 19 N.E. 2d 446 (1939), the mother's physician negligently diagnosed her condition as tumor and gave her x-ray treatments designed to kill a tumor until within some two months of time for delivery. Each of the children when born had the conditions of destroyed bone and tissue which would likely result from such treatment.
92. Stanford v. St. Louis-San Francisco Ry., 214 Ala. 611, 108 So. 566 (1926); Magnolia Coca Cola Bottling Co. v. Jordan, 124 Tex. 347, 78 S.W. 2d 944 (1935); and Walker v. Great Northern Railway Co., 28 L.R. Ir. 69 (1891) are the only cases expressing in a substantial way this reason for denying recovery.
condition of the child was proximately caused by the injury. But, far worse than the indulgence of such speculation and conjecture and the insurmountable difficulty of satisfactorily proving viability, there would follow in the wake of this character of litigation many fictitious claims, with false testimony in their support, which the defendant would always find difficult and often impossible to refute. These considerations, we think, outweigh the denial of justice in the abstract to the meritorious case.”

This reason undoubtedly has some merit or at least did have at one time. But it is believed that experience in the earliest jurisdictions allowing such actions demonstrates that there is no real cause for alarm in doing so. Louisiana allowed recovery as early as 1923, Canada as early as 1933, California in 1939, the District of Columbia in 1946, and there is no indication that these courts opened a Pandora's Box. In fact, no other cases have reached the appellate courts in those jurisdictions.

It is believed that if the courts will quit shadow boxing with unreal reasons for denying recovery and concentrate on such problems of proof as exist, they will be able to cope with them as well as they do similar difficulties in cases involving sacroiliac strains, ruptured discs, cancer by trauma and injuries caused by fright. W. T. Gamble in a recent law review article listed the principal types of prenatal injuries that might be used as a basis of a lawsuit and analyzed the nature of the proof presently available in each type of injury. His general conclusion was that there was no sound basis for denying the right of action in such cases because of difficulties of proof. The New York Court of Appeals reached the same conclusion in the case of Woods v. Lancet, where it said:

“Two other reasons for dismissal (besides lack of precedent) are given in Drobner v. Peters, supra. The first of those, discussed in many of the other writings on the subject herein cited, has to do with the supposed difficulty of proving or

95. See Montreal Tramways v. Leuelle, Canada S.C. 456 (1933).
disproving that certain injuries befell the unborn child, or that they produced the defects discovered at birth, or later. Such difficulties there are, of course, and, indeed, it seems to be commonly accepted that only a blow of tremendous force will ordinarily injure a foetus, so carefully does nature insulate it. But such difficulty of proof or finding is not special to this particular kind of lawsuit (and it is beside the point, anyhow, in determining sufficiency of a pleading). Every day in all our trial courts (and before administrative tribunals, particularly the Workmen's Compensation Board), such issues are disposed of, and it is an inadmissible concept that uncertainty of proof can ever destroy a legal right. The questions of causation, reasonable certainty, etc., which will arise in these cases are no different, in kind, from the ones which have arisen in thousands of other negligence cases decided in this state, in the past.\textsuperscript{100}

This ground for denying the right to bring actions for prenatal injuries seems to be invalid for another reason. When courts have denied the right to bring actions because of the fear of a "flood of litigation," they have usually talked as though they could not open the gates a little way; but that, if opened at all, they must throw them completely ajar, and that, if they did so and the "flood" came, there were never thereafter any curbing measures, judicial or legislative, that could be brought to their rescue. Such a view, it is believed, is unjustified.

In the first place, there is nothing which compels any court to accept any principle in full and with all its implications. One of the oldest judicial techniques is to proceed cautiously in a new area, pricking out the law case by case. In this manner experience becomes the guide to the court, telling it how far to go. This appears to be what the New York court has done in the Woods case.\textsuperscript{101} There appears to be no valid reason why other courts may not similarly feel their way along.

In the second place, if a court should, in allowing an otherwise valid new application of recognized principles, let loose a torrent of fictitious litigation supported by conjectural and speculative evidence, there are a number of corrective measures

\textsuperscript{100} 102 N.E. 2d 691, 695.

\textsuperscript{101} "It is to be remembered that we are passing on the sufficiency of a complaint which alleges that this injury occurred during the ninth month of the mother's pregnancy, in other words, to a viable foetus, later born. Therefore, we confine our holding in this case to prepartum injuries to such viable children." 303 N.Y. 349, 102 N.E. 2d 691, 695.
available. One would be for the court to overrule its former decision. This would occur so rarely it is not believed it would introduce fickleness into the law. The court would then at least be acting on fact and not on surmise as when it denies the action without experience with it. But it probably would never be necessary for a court to overrule its former decision. Trial courts, if sustained by appellate courts, have devices which normally would be effective in keeping litigation from running disastrously to the spurious. The Texas court in the Magnolia case\textsuperscript{102} said, "Good reason is found for denial of the right of recovery in the fact that in many cases it would be impossible to establish except by speculation or conjecture that the death or condition of the child was proximately caused by the injury."\textsuperscript{103} The answer to that problem is not to submit such a case to a jury. No court is required to say that reasonable minds can find the plaintiff has established his case by a preponderance of the evidence if any essential part of it is supported only by conjecture and speculation. Courts have been known to be reasonably conservative in this respect,\textsuperscript{104} and it would seem to be better for courts to allow meritorious actions and resort to conservatism in evaluating the evidence to determine whether there is an issue for the jury than to resort to blanket denials of the good and the bad.

And finally, if courts get themselves into a bad situation from which they cannot extricate themselves by the means at their disposal, a situation which will be rare indeed, there is no reason why the legislature could not be called upon for corrective measures. There would be nothing undignified in the courts doing so. We are all familiar with the fact that the legislatures of several states intervened to eliminate heart balm actions when they felt abuses indicated such course to be necessary.\textsuperscript{105} Our guest statutes provide an example of corrective action instead

\textsuperscript{102} Magnolia Coca Cola Bottling Co. v. Jordan, 124 Tex. 347, 78 S.W. 2d 944 (1935).
\textsuperscript{103} 124 Tex. 347, 360, 78 S.W. 2d 944, 950 (1935).
\textsuperscript{104} Berryhill v. Nichols, 171 Miss. 769, 158 So. 470 (1935).
\textsuperscript{105} The following language of the court in Woods v. Lancet, 303 N.Y. 349, 360, 102 N.E. 2d 691, 694 (1951), explains why it is not appropriate that common law courts wait for the legislature to direct them to apply existing common law principles to allow recovery in prenatal injury cases. The court said, "We act in the finest common-law tradition when we adapt and alter decisional law to produce commonsense justice. "The same answer goes to the argument that the change we here propose should come from the Legislature, not the courts. Legislative action there could, of course, be, but we abdicate our own function, in a field peculiarly nonstatutory, when we refuse to reconsider an old and unsatisfactory court-made rule."
of eliminating the cause of action altogether. That does not exhaust the illustrations. Why there should be so much fear when there are so many weapons at hand is difficult to understand.

It is a reproach to the law for a court to ignore the realism of the case before it because of a fear of results which can be otherwise appropriately avoided. In the course of our legal history we have had considerable law by judicial fear. We still have a great deal. It is doubtful that any of it is, or ever was, justified. It is hoped it will cease to be a reason for denying otherwise meritorious actions.

CONCLUSION

The study devoted to the problem of this paper leads me to conclude: (1) that there should be no blanket denial of tort actions for injuries prenatally sustained; (2) that there are broad common law principles which can be properly applied by the courts to allow recovery; (3) that none of the reasons for denying such actions has substantial merit; and (4) that viability should not be made an absolute criterion for allowing such actions because (a) it has no overpowering reasons to support it and the time of viability is difficult to ascertain in many cases,106 (b) there are some types of serious injuries which are much more likely to be inflicted,107 or to the causes of which the child is much more likely to be wrongfully exposed before viability than afterwards,108 and (c) to so use viability will raise another artificial standard to haunt us and to interfere with the realistic consideration of cases as does now the oft applied standard of requiring the severance of the umbilical cord.

107. "Animal experiment and human experience have both revealed an incidence of malformations of the central nervous system, eyes and limbs in the offspring of irradiated pregnant mothers. Injury is most likely to occur if irradiation is applied during early pregnancy, particularly before the third month." Dunlap and Smith, X-Rays and Radioactive Substances, 11 Mo. L. Rev. 137, 187 (1946).
108. Studies have revealed that 87 per cent of mothers who had German measles within the first three months of pregnancy gave birth to abnormal babies. Abel and Van Dellen, The Effect of German Measles During Pregnancy, 32 J. Lab. and Clin. Med. 1536 (1947). Actionable conduct might arise from a negligent exposure of the mother to such disease; by a failure to advise vaccination against it, or to advise a legal abortion after the mother had had the disease.