

### **Injuries to an Unborn Child—When Is An Unborn Child Considered a Person in Legal Terminology?**

It appears from numerous decisions over centuries that an infant *en ventre sa mere* has, for certain purposes, been considered a person.<sup>1</sup> The common law finally came to recognize, on the grounds of public policy that an infant conceived but not yet born was a person, and that certain willful acts, on the part of those external to it, which in any way caused the death of that infant, were criminal, and the actors could be indicted for murder.<sup>2</sup> Similarly if a willful abortion of that infant were brought about, all those concerned therein would be criminally liable.<sup>3</sup> This common law rule grew up as a matter of public interest in the propagation of the race.

There was a time when the unborn child was not regarded as a person, and any willful harm directed against it, was harm to no one. But, gradually, as time went on, medical science made evident certain cogent facts relating to conception, gestation, and birth of infants, that the common law could no longer close its eyes to the existence of such infants. The common law recognized such unborn infant's rights under rules governing parent and child, support, inheritance, testamentary disposition of property,<sup>4</sup> etc. However, the bulk of property law is

1. *Reeve v. Long*, 1 Salk. 227; *Harper v. Archer*, 4 Sin. & M. 99; 10 Amer. & Eng. Enc. Law 624; Co. Litt. 36 Blackstone; *Rex v. Senior*, 1 Moody C.C. 346.

2. *Clark v. State*, 117 Ala. 1, 23 S. 671 (1898); 3 Inst. 50 (3 Co. Inst. 50); 1 P. Wms. 345; *Rex v. Senior*, *supra*, note 1; N. Y. Penal Laws, secs. 1050-1052 (for injuries to a child quick in mother's womb); 1 Bl. Com. 129; 4 Bl. Com. 198; *Beale v. Beale*, 1 P. Wms. 244; *Burdet v. Hopegood*, 1 P. Wms. 486; *Régina v. West*, 2 C&K 784, S.C. 2 Cox C.C. 500.

3. Sec. 80-81 (as to producing abortion of a child not quick); Code Cr. Proc., secs. 500-505 (preventing execution of mother quick with child). Some ancient books have allowed the mother an appeal for the loss of her child by a trespass upon her person. Abbrev. Plac. 26, col. 2 (2 Joh.) Lincoln. Rot. 3; Sir Samuel Clarke's note, citing 45 H. 111 Rot. 22; *State v. Cooper*, 22 N.J.L. 52 (S. Ct. 1849); *State v. Murphy*, 27 N.J.L. 112 (S. Ct. 1858).

4. "The law in many cases hath consideration of him in respect to the apparent expectation of his birth." 7 Coke Rep. 8 B; *Long v. Blackall*, 7 Durn. & East 96; *Thellusson v. Woodford*, 4 Ves. Jr. 335 (1805); *Cooper v. Heatherton*, 65 App. Div. 561, 73 N.Y.S. 14.

now more clearly set forth by statutes both in England and America.<sup>5</sup> Some of these statutes are a crystallization or declaration of the common law, while a great number of them are derogatory thereof. Particularly of the latter class, are the decedents estate laws.<sup>6</sup>

The courts in their interpretation and construction of these statutes, have not been in harmonious accord with one another, but on the whole certain property rights of an infant *en ventre sa mere* have been conceded. By the weight of authority, such child may be vouched for in a recovery though it is for the purpose of making him answer over in value. The child may be an executor, take a devise, take under the statute of distribution, be entitled under a charge for raising portions, have an injunction, or a guardian.<sup>7</sup>

Lord Campbell's act gave a cause of action to the personal representatives: wife, parents, children, next of kin, etc., of the deceased for his wrongful death.<sup>8</sup> The cause of action arose by force of law and attached to persons filling the description even though at the time of such death, they were conceived but not yet born. This was the first statute which gave a right of action in favor of an unborn child in tort law. The admiralty courts<sup>9</sup> have applied the statute to produce results similar to those of the law courts.<sup>10</sup> Many cases have arisen where the courts have been called upon to determine civil liability against a wrongdoer or tort-feasor for pre-natal injuries to an unborn

5. Statute of Wills (1540); Statutes of Distribution (C. 1670); N.J.R.S. 1937 3:3-11, N.J.S.A. 3:3-11; Canons of Descent.

6. N. Y. Decedent's Estate Law, sec. 130 (1909)—equivalent of Lord Campbell's Act; N.J.R.S. 2:26-9 and 10, N.J.S.A. 2:26-9 and 10.

7. *Stedfast v. Nicolls*, 3 Johns. Cas. 18; *Doe v. Clark*, 2 H. Black. 400; *Marsellis v. Thalhimer*, 2 Paiges Ch. 35, 21 Am. Dec. 66; *Scattergood v. Edge*, 1 Salk. 229; *Harper v. Archer*, *supra*, note 1; *Reeve v. Long*, *supra*, note 1.

8. N. Y. Decedent's Estates Law, sec. 130; Mass. Pub. Stat., c. 52, sec. 17; *Daubert v. Western Meat Co.*, 139 Cal. 480, 73 P. 244 (1903); Cal. Code Civil Proc., sec. 352, subd. 1; sec. 376.

9. *The George & Richard*, L.R. 3 Ad. & Ec. 465.

10. *Quinlen v. Welch*, 69 Hun. 584, 23 N.Y.S. 963 (1893); *Daubert v. Western Meat Co.*, *supra*, note 8; *Nelson v. G. H. & S. A. Ry. Co.*, 78 Tex. 621, 14 S.W. 1021 (1890); *Wallis v. Hodson*, 2 Atk. 114. Equity has also recognized the infant provisionally while still alive *en ventre*. *Lutterel's Case*, stated in *Hale v. Hale*, Prec. Ch. 50.

child.<sup>11</sup> Only in two cases of record in the United States, in absence of a specific statute, has the court allowed an after born child to recover against the tort-feasor for pre-natal injuries sustained by it.<sup>12</sup>

The rest of the courts have denied that the cause of action exists on one ground or another. Some have denied it on the ground that no privity of contract of carriage existed between the injured child and the carrier tort-feasor;<sup>13</sup> while others have held that the child had no legal existence but was a part of the mother,<sup>14</sup> and that the mother could recover, for those injuries sustained, in her name if not to remote.<sup>15</sup>

11. *Walker v. Great Northern Ry. Co.*, 14 Mews Dig. 228, 28 L.R. 69 (1890); *Allaire v. St. Luke's Hospital*, 184 Ill. 359, 56 N.E. 638 (1900); *In re Robert's Estate*, 158 Misc. 698, 286 N.Y.S. 476 (1936); *Newman v. City of Detroit*, 281 Mich. 60, 274 N.W. 710 (1937); *Lipps v. Milwaukee Elec. Ry Co.*, 164 Wis. 272, 159 N.W. 916 (1916); *Buel v. United Rys. Co.*, 248 Mo. 126, 154 S.W. 71 (1913); *Ryan v. Public Service Coordinated Transport*, 18 N.J.Misc. 429, 14 Atl. 2d 52 (S. Ct. 1940).

12. *Kine v. Zuckerman*, 4 Pa. D. & C. 227, 97 A.L.R. 1524 (1924). See also: *Darley Maine Colliery Co. v. Mitchell*, 11 App. Cas. 127, noted in 1 BEVIN ON NEGLIGENCE (4th ed.) 75; Frey, *Injuries to Infants en Ventre Sa Mere*, 12 ST. LOUIS L. REV. 85 (1927); Kerr, *Action by Unborn Infant*, 61 CENT. L. J. 364 (1905); Morris, *Injuries to Infants en Ventre Sa Mere*, 58 CENT. L. J. 143 (1904); Straub, *Right of Action for Prenatal Injuries*, 33 LAW NOTES 205 (1930); *Montreal Tramways v. Leveille*, 4 Dom. L. Rep. 337 (1935); *Stemmer v. Klein*, 17 Atl. 258 (N.J. Cir. Ct. 1940).

13. *Walker v. Great Northern Ry Co.*, *supra*, note 11; *Nugent v. Brooklyn Heights R.R. Co.*, 139 N.Y.S. 367, 102 NE 1107 (1913); *Buel v. United Rys. Co.*, *supra*, note 11; *Stanford v. St. Louis & S. F. Ry. Co.*, 214 Ala. 611, 108 S. 566 (1926); *Lipps v. Milwaukee Elec. Ry. Co.*, *supra*, note 11 (recovery denied because child not proved viable); *Nelson v. G. H. & S. A. Ry. Co.*, *supra*, note 10; *Berlin v. J. C. Penny Co., Inc.*, 339 Pa. 547, 16 Atl. 2d 28 (1940).

14. *Allaire v. St. Luke's Hospital*, *supra*, note 11; *Gorman v. Budlong*, 23 R.I. 169, 49 Atl. 704 (1901); *Drobner v. Peters*, 232 N.Y. 220, 133 NE 567 (1921), Cardoza dissenting without opinion; *Newman v. City of Detroit*, *supra*, note 11; *Magnolia Coca Cola Bottling Co. v. Jordan*, 124 Tex. 347, 78 S.W. 2d 944 (1935), recovery by mother for all the injuries of the child as a part were denied. Accord: *Smith v. Luckhardt*, 299 Ill. App. 100, 19 NE 2d 446 (1939); *Kirk v. Middlebrook*, 201 Mo. 245, 100 S.W. 450 (1907), action by posthumus child to have a trust declared in his favor as a settlement for prenatal injuries: denied; *In re Haines' Will*, 98 N.J.Eq. 628, 129 Atl. 867 (Prerog. 1925).

15. *Dietrich v. Northampton*, 138 Mass. 14; 52 Am. Rep. 242 (1884); *Snow v. Allen*, 227 Ala. 615; 151 S. 468 (1933); *Baptist Hospital v. Branton*, 218

In *Dietrich v. Northhampton* (1884)<sup>16</sup> the court refused recovery on the basis that the child was unborn, and as such had no relation to the defect in the highway. The court had allowed the mother a recovery which could have included damages for injuries to the child. In *Nugent v. Brooklyn Heights R.R. Co.*,<sup>17</sup> the court said, ". . . and the merger of the unborn's individuality in her own, would seem justly to be limited by her ability to recover full compensation for the injury done both to her and to him." The great majority of the courts have held that under the existing rules of the common law no right of action existed in favor of a child for pre-natal injuries;<sup>18</sup> that for such an action to be given was not within the judicial power of the courts,<sup>19</sup> but clearly a legislative function. Indeed, one jurisdiction<sup>20</sup> has such a statute and a recovery has been allowed thereunder.<sup>21</sup> The California statute draws a distinction as to when the unborn child's right attaches, and that time is when the child is viable. Of late years, the question of such unborn child's viability has occupied the attention of the courts.<sup>22</sup> The medical profession has cast considerable light upon this phase of the subject. It is not disputed by the courts, that today a viable child may often be removed from its mother and continue to live and grow just like any other normal child, months before said child would have been born under natural laws. That this fact should be considered a "legal fiction,"<sup>23</sup> is beyond reconciliation with the normal processes of

Ala. 464, 118 S. 741 (1928).

16. *Supra*, note 15.

17. *Supra*, note 13.

18. *Walker v. Great Northern Ry. Co.*, *supra*, note 11; *Allaire v. St. Luke's Hospital*, *supra*, note 11; *Gorman v. Budlong*, *supra*, note 14; *Buel v. United Rys.*, *supra*, note 11; *Drobner v. Peters*, *supra*, note 14; *Newman v. City of Detroit*, *supra*, note 11.

19. *Newman v. City of Detroit*, *supra*, note 11; *Walker v. Great Northern Ry. Co.*, *supra*, note 11; *Ryan v. Public Service Coordinated Transport*, *supra*, note 11.

20. California Code Proc., sec. 376; Civil Code, sec. 29; Civil Code, secs. 5-29; Probate Code, secs. 90-91.

21. *Scott v. McPheeters* (Cal.), 92 P. (2d) 678 (1939).

22. *Walker v. Great Northern Ry. Co.*, *supra*, note 11, holding that a child is born only when it breathes and has independent circulation; *State v. Winthrop*, 43 Iowa 519, 22 Am. Rep. 257.

23. *Drobner v. Peters*, *supra*, note 14; *Stanford v. St. Louis & San Francisco*

human thinking.

The case of *Smith v. Luckhardt*<sup>24</sup> is in point. In that case the facts were: Plaintiff's mother was diagnosed by defendants (doctors) as having a tumor of the abdomen, and was given X-ray treatments for several months. Later the mother gave birth to that tumor which proved to be the plaintiff. The X-rays had devastating effect upon the foetus during gestation, so much so that plaintiff died at the age of thirteen without attaining the mentality of a two-year-old child. The court held no cause of action in favor of an unborn injured child. Here, justice grossly miscarried because the court adhered to the common law rule. In many instances, the courts have not had the courage to face the issue squarely, despite strong dissenting opinions, although recognizing with the fullest understanding the injustice of the law as it stood and recognizing that a certain residuum of injury would go uncompensated, even where the right to recover was limited to the mother on the basis that the injury to the child was an injury to herself. On such a bare common law technicality the tort-feasor escaped liability.

The crux of the problem presented is: in the light of the present day medical progress, should common law decisions based upon early misconceived and vague hypotheses of obstetric science govern modern people in their ways of life embracing living, transportation, employment, etc., or should a courageous judge follow the example so often followed in other instances, by refusing to be bound by archaic early decisions of the courts, and thus further shape the common law to fit in with modern trends.<sup>25</sup> It has been said that to give such a cause of action would open up new avenues to fraud,<sup>26</sup> because the allegations are hardly rebuttable.<sup>27</sup> The courts are the judges of what constitutes sufficient evidence to warrant a recovery as a matter of law; and it

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Ry. Co., *supra*, note 13; *In re Robert's Estate*, *supra*, note 11; *Smith v. Luckhardt*, *supra*, note 14; *Allaire v. St. Luke's Hospital*, *supra*, note 11.

24. *Supra*, note 14.

25. *Swift v. Tyson* (1842), 10 L. Ed. 865—Overruled by *Erie R.R. v. Thompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938); *Herrin v. Sutherland*, 74 Mont. 587, 241 P. 328 (1925).

26. *Newman v. City of Detroit*, *supra*, note 11; *Magnolia Coca Cola Bottling Co. v. Jordan*, *supra*, note 14; *Walker v. Great Northern Ry. Co.*, *supra*, note 11.

27. *Magnolia Coca Cola Bottling Co. v. Jordan*, *supra*, note 14; *Walker v. Great Northern Ry. Co.*, *supra*, note 11.

is up to the courts to see that justice is done when that evidence is clearly brought out in preponderance. The recent case of *Stemmer v. Kline*, decided in Dec, 1940, allows a recovery to the after born child for pre-natal injuries. The facts are analogous to those of *Smith v. Luckhardt* (*infra*). The New Jersey court approaches the question of liability on the theory of an assault and battery upon the infant while *en ventre sa mere*. The court held that the physician was chargeable with knowledge that the child could be where it was. The right of action in its favor materializes upon the birth of that child. The court, in its courage, held that since assault and battery are punishable criminally, because it is for the public interest to do so, a *fortiori*, they give rise to a cause of action in tort in favor of the after born child, because such action is for the child's interest. In the case of *Scott v. McPheeters*<sup>28</sup> the court said: "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." In *Katz v. Walkinshaw*<sup>29</sup> the court said: "Precedents are valuable so long as they don't obstruct justice or destroy progress."

Regardless of existing notions, there should be a point reached as to when the right of action, in favor of an unborn child for torts to the person, should attach. Throughout the cases that thought has manifested itself strongly.<sup>30</sup> There should be a fair line of demarcation during the period of gestation at which the law can regard such unborn child as possessing legal identity as a basic starting point for the operation of tort law. The courts cannot longer continue to deal with a "legal fiction," when that legal fiction appears in fact, and bears the result of a pre-natal tort.

The court in *Wallis v. Hodson*<sup>31</sup> per Lord Hardwicke said: "The principal reason I go on in the question is that the plaintiff was *en ventre sa mere* at the time of her father's death, and consequently a person in *rerum natura*, so that, by the rules of common law and civil

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28. *Supra*, note 20.

29. *Katz v. Walkinshaw* (Cal.), 70 P 663 (1902).

30. *Lipps v. Milwaukee Electric Ry Co*, *supra*, note 11; *Scott v McPheeters*, *supra*, note 20.

31. *Supra*, note 10.

law, she was to all intents and purposes a child as much as if born in the father's lifetime." What rules of common law?<sup>32</sup> It must be understood, by rules of common law is meant, not a body of law based upon a civil code promulgated by a law-making body; but a body of law evolved over centuries by the precedents of decisions made by the law enforcing body itself, in lieu of any written code or statutory law. The next question which a *fortiori* presents itself is, what gives a single decision, upon a case of novel impression, in absence of statute, the force of common law? The answer is the doctrine of "Stare Decisis."<sup>33</sup> The books, however, are filled with instances, where the succeeding courts have refused to consider the doctrine as sacrosanct, and have refused to be bound by a long chain of decisions, where it appeared that the controlling earlier decisions have been founded upon an erroneous belief or upon circumstances which no longer obtained in the life and social customs of later times.<sup>34</sup> It should follow, that the courts are in a better position to determine when a precedent based upon common law, is no longer applicable to the society to which it is sought to apply, and hence should be forceful enough to say so, and thus change the rule, rather than continue to indulge in legal fictions, and wait for legislatures to pass laws, which in turn will be attacked by the court itself, on the ground of construction. When a court by decision says that certain *agregations* mean thus and so, it stands thus without further question.<sup>35</sup>

Upon the topic under consideration, the courts could very well take the initiative by reversing themselves without encroaching seriously upon the legislative branch of the government. It is submitted that the ends of justice would be adequately served if the foetus, up to the time when it becomes viable, be considered as a part of the mother and any injury to it, be held to be an injury to her; and from the time viability is established, the child should be considered in *esse* and a legal personality regardless of sex. If we examine the common law

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32. COOLEY, TORTS, pages 13-15.

32. "Stare Decisis—To stand by decided cases; to uphold precedents; to maintain former adjudications." 1 KENT, COMM. 477.

34. *Herrin v. Sutherland*, *supra*, note 24; *Erie R.R. v. Thompkins*, *supra*, note 24.

35. *Swift v. Tyson*, *supra*, note 24; *Erie R.R. v. Thompkins*, *supra*, note 24.

rule, it would be seen to lead to absurdities. For example, suppose the injured child dies some time after birth? Under the common law rule that the unborn child is a part of the mother, can it be said that a part of the mother has died (like a limb that is amputated) when in fact she is whole in all respects? Or, as in the case of *Kine v. Zuckerman*,<sup>36</sup> the child was born with one hand as a result of pre-natal injuries, can the mother allege that she has lost a hand, when by all the senses of mankind she in fact possess both hands? If the courts of law are willing to indulge in such absurdities to reach a just result, no one should seriously complain. The suggestion is that the courts should adopt one or the other courses of procedure, instead of buck-passing and allowing a wrongdoer to escape liability while a remedy at law, which might be adequate, is denied to the innocent victim.<sup>37</sup>

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### Labor Law—Closed Shop Agreements in New Jersey

That the judicial process is primarily a function of the economic relationships obtaining in society, and that to a lesser degree the judicial process influences the development and evolution of these same economic relationships are perhaps best illustrated by an analysis of the judicial attitude toward the labor union and its various activities. It is here proposed to examine that attitude toward the "closed shop" in New Jersey courts.

The term, though occurring frequently in the law reports has not been adequately defined, and even in labor history has had various

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36 *Supra*, note 12.

37. *Smith v. Luckhardt*, *supra*, note 14; *Snow v. Allen*, *supra*, note 15; *Baptist Hospital v. Branton*, *supra*, note 15; *Magnolia Coca Cola Bottling Co. v. Jordan*, *supra*, note 14; *Buel v. United Rys.*, *supra*, note 11; *Newman v. City of Detroit*, *supra*, note 11; *Lipps v. Milwaukee Elec. Ry. Co.*, *supra*, note 11; *In re Robert's Estate*, *supra*, note 11; *Allaire v. St. Luke's Hospital*, *supra*, note 11; *Nugent v. Brooklyn Heights Ry. Co.*, *supra*, note 13; *Dietrich v. Northampton*, *supra*, note 15; *Ryan v. Public Service Coordinated Transport*, *supra*, note 11; *Drobner v. Peters*, *supra*, note 14; *Stanford v. St. Louis & San Francisco Ry. Co.*, *supra*, note 13; *Gorman v. Budlong*, *supra*, note 14; *Walker v. Great Northern Ry. Co.*, *supra*, note 11.