Volume 64
Issue 2 *Dickinson Law Review - Volume 64, 1959-1960*

1-1-1960

Right of Action by an Infant for Injuries Sustained En Ventre

Carl A. Belin Jr.

NOTES

RIGHT OF ACTION BY AN INFANT FOR INJURIES SUSTAINED EN VENTRE

Two lower court cases in Pennsylvania [1] have expressed dissatisfaction in recent years with the present Pennsylvania position denying the infant a right of action for injuries sustained *en ventre sa mere*.[2] This position is criticized as being outmoded because it fails to recognize the infant *en ventre* as an independent entity in the eyes of the law. As evidence for this proposition, the lower courts point to the recent trend away from the position denying recovery by the majority of courts in other jurisdictions.[3] Since this demonstrates that there has been a change in judicial approach to the problem, it appears that Pennsylvania should re-examine its present position as to the rights of these infants.

The only Pennsylvania appellate court decision involving the issue of whether an infant has a right of action for injuries sustained *en ventre* is *Berlin v. J. C. Penney Co.*[4] The question arose in a trespass action where the minor alleged he had been injured while in the mother's womb. In a very terse decision the supreme court affirmed the lower court's decision denying the infant a right of action for these injuries. The court based its decision on precedent of other states where the right of action had been denied and the fact that at common law a mother and child were considered as one. Hence, there was no warrant for holding a cause of action existed for prenatal injuries independent of a statute.

A more complete statement of the reasons given by the courts taking the same position is found in *Drobner v. Peters*.[5] They are summarized as follows:

(1) The mother and child were considered as one at common law and there was no person injured apart from the mother;

(2) There is no independent duty owed to this entity because it was considered as one with the mother;

(3) There might be possible injustice and practical inconvenience if the infant were accorded a right of action; and

(4) There was a lack of authority holding that the infant has a right of action.

---

[1] Rimpa v. Sears Roebuck and Co., 37 Pa. Erie County Leg. Journ. 267 (1953); Von Elbe v. Studebaker Packard Corp., 15 Pa. D. & C. 2d 635 (1958). In both cases the questions arose as to whether the infant had a right of action on preliminary objection. In the former case, the court dismissed the infant's cause stating it had not the power nor right to change the law. However the court in the latter case upheld the cause of action stating that Pennsylvania position was no longer tenable.

[2] Berlin v. J. C. Penney Co., 339 Pa. 547, 16 A.2d 28 (1940).

[3] Von Elbe v. Studebaker Packard Corp., 15 Pa. D. & C. 2d 635 (1958).

[4] 339 Pa. 547, 16 A.2d 28 (1940).

[5] 232 N.Y. 220, 133 N.E. 567 (1921).

In holding that the mother and child were treated as one at common law the *Berlin* case [6] indicated that there was no judicial basis for relaxing this historical fact. It follows that there could be only one person in *esse* to be injured, and but one cause of action, that accruing to the mother. This argument appears to be an inference from the fact that there was no case at early common law actually deciding whether an infant had a right of action for personal injuries.[7] If any inference is to be based on the common law, consideration should be given to the fields of crimes and torts in order to arrive at a sound historical conclusion.

The nearest case was found in criminal law where an infant *en ventre* was criminally injured, subsequently born alive and died. This was held to constitute an unlawful homicide, a crime involving the killing of a human being.[8] However, this analogy had been rejected due to the difference between the law of torts and crimes.[9] It can be asserted that the criminal law primarily is concerned with the actor's conduct and not the injured party, but to label the actor's conduct an unlawful homicide necessarily classifies the infant as a person at the time of the injury, unless, as it seems to this writer, the infant is said to become a human being *"ab initio"* upon being born alive. In either approach the criminal law protected the infant against criminal action while *en ventre* as a person apart from the mother. In any case it did not recognize the foetus born lifeless in the same manner, for causing its death did not constitute a homicide. Nevertheless it was a crime at common law to procure or cause an abortion of the foetus when the woman was quick with child.[10] This crime has become a part of the present day criminal codes of all states.[11] While the status of the foetus in the mother's womb remains unanswered, the criminal law has always felt it should be protected against criminal action. For these reasons it might be said the infant *en ventre* has always been regarded as a separate entity apart from the mother by the criminal law.

To some extent its rights were also recognized in property law. The infant was considered as a person in *esse* where it was to its advantage from a comparatively early date.[12] It was considered as capable of taking property by descent and devise, having a guardian appointed, and through the guardian

---

[6] 339 Pa. 547, 16 A.2d 28 (1940).

[7] Dietrich v. Inhabitants of Northampton, 138 Mass. 14, 15 (1884).

[8] 3 BURDICK, CRIME, § 858.

[9] 138 Mass. 14, 15 (1884).

[10] 3 BURDICK, *op. cit. supra* note 6, § 858.

[11] As an example, see PA. STAT. ANN. tit. 18 § 4719 (1939). This statute seems rather conservative when compared with statutes from other states. They generally do not require the woman to be quick with child, but only require that she be pregnant: 3 BURDICK, CRIME, § 861.

[12] The child was permitted to take a remainder interest even though it was *en ventre* when the prior estate terminated: Reeve v. Long, 3 Lev. 408, 83 Eng. Rep. 754 (K.B. 1695).

obtaining an injunction to stay waste.[13] Admittedly this may stem from the protection of an abstract interest due to the ancestor's intent. However, there has been a transition to the point where an infant's rights have become enforceable independent of any prior legal basis.[14] By this transition the law of property seems consistent with the law of crimes in recognizing an infant *en ventre.* The reasons allowing the infant to recover in property and to be protected in the realm of crimes differ somewhat from the law of torts. However, they illustrate that the common law for some purposes did recognize the unborn infant as a separate entity.

The courts denying recovery also advance a second argument that there is no cause of action accruing to the infant because there is no independent duty owed to the infant. This argument necessarily depends on finding the child as a part of the mother. If it is accepted that an infant has independent rights this argument is illogical because there would be an independent breach of duty. The infant, having rights which the law must protect, would stand as any other person tortiously injured. The result would not be a problem of finding a duty owed to a person not in *esse,* but rather a person not in *conspectus.* The recognition of a duty in such a case would not be novel to tort law. It would be similar to colliding with another automobile in which the baby lay on the seat hidden from view. The duty to that child exists independent of seeing the child when the cars collided. While there is a difference between that situation and one where an infant *en ventre* is involved, it would appear to be a mere difference of degree. To say that a person was there, but had no rights would be anomalous to the law of torts. One need not make this comparison in cases where a person deals directly with a woman pregnant for six or seven months because he can generally detect the presence of the infant. The woman's physical condition is sufficient to put the person on notice that he is dealing with an infant *en ventre.* In either case the duty concept poses no problem in allowing an infant to recover for personal injuries.

These courts are also hesitant since there might be grounds for possible injustice by recognizing the infant's rights and assign that as a third argument for denying the infant a right of recovery. It would seem that there might be difficulty in distinguishing between congenital defects and injuries caused by the tort-feasor. Since this evidence will be of a highly technical character, the courts may inadvertedly accept evidence of a questionable nature. These are problems

[13] Swift v. Duffield, 5 S. & R. 38, 40 (Pa. 1819); Kline v. Zuckerman, 4 Pa. D. & C. 227 (1924).

[14] As an example, the Intestate Laws, which are not based on the ancestor's intent, recognize that the infant has a right to property as if he were born during the life of the testator: PA. STAT. ANN. tit. 20, § 1.4(3)(1947). It is interesting to note that this was founded on section 10 of the Act of 1794, April 19, 3 Sm. L. 143, because it demonstrates the time of this transition.

of proof and should be treated in that light. Since the courts have coped with such technical problems in other areas, such as the tort of emotional disturbance, these problems should be handed to our courts with confidence.[15] In addition it should be apparent that medical science is progressing, thereby either minimizing such problems or identifying the difficulties contained therein. While it is true that there may be false claims, this possibility exists in all areas of the law and should not be a deterrent from recognizing human rights in the infant *en ventre*.

Lack of authority is mentioned as a fourth argument for this position. It would seem that this basis has been soundly rebutted in light of the authority holding to the contrary.[16] The authority cited in the *Berlin* case[17] is an example of this change that has been taking place. The court cited leading cases of four other jurisdictions, which denied the infant a right of action. Two of these cases have been overruled,[18] and the third has been weakened by a later case in which the court was almost evenly divided.[19] The fourth case is the only one which has been upheld in recent years.[20] This case appears to be an example of adherence to stare decisis, as indicated by the following:

> 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. [This is correct as of the time the opinion was written.] See 10 A.L.R. 2d 1059, note. It is the rule of the Restatement: Torts § 869. We are not inclined to overrule the Dietrich case.[21]

Hence, it appears that the position, which denies an infant *en ventre* a right of action, is based on questionable grounds. Nevertheless, it was accepted by all courts deciding the question until recent years.[22]

---

[15] 2 HARPER AND JAMES, TORTS, § 18.3.

[16] Tursi v. New England Windsor Co., 19 Conn. Super. 242, 111 A.2d 14 (1955); Woods v. Lancet, 303 N.Y. 349, 102 N.E. 2d 691 (1951); Bonbrest v. Kotz, 65 F. Supp. 138 (D.C.D.C. 1946); Tucker v. Howard L. Carmichael & Sons, 208 Ga. 201, 65 S.E. 2d 909 (1951); Amann v. Faidy, 415 Ill. 422, 114 N.E. 2d 412 (1953); Mitchell v. Couch, —— Ky. ——, 285 S.W. 2d 901 (1955); Damasiewicz v. Gorsuch, —— Md. ——, 79 A.2d 550 (1951); Verkennes v. Corniea, 229 Minn. 365, 38 N.W. 2d 838 (1949); Rainey v. Horne, 221 Miss. 269, 72 So. 2d 434 (1954); Steggall v. Morris, 363 Mo. 1224, 258 S.W. 2d 577 (1953); Poliquin v. Macdonald, 101 N.H. 104, 135 A.2d 249 (1957); Worgan v. Greggo & Ferrara Inc., 50 Del. 258, 128 A.2d 557 (1956); Williams v. Marion Rapid Transit, 152 Ohio St. 114, 87 N.E. 2d 334 (1949); Mallison v. Pomeroy, 205 Or. 690, 291 P.2d 225 (1955).

[17] 339 Pa. 547, 16 A.2d 28 (1940).

[18] Drobner v. Peters, 232 N.Y. 220, 133 N.E. 567 (1921), *overruled by* Woods v. Lancet, 303 N.Y. 349, 102 N.E. 2d 691 (1951); Allaire v. St. Lukes Hospital, 184 Ill. 359, 56 N.E. 638 (1900), *overruled by* Amann v. Faidy, 415 Ill. 422, 114 N.E. 2d 412 (1953).

[19] Ryan v. Public Service Coordinated Transport, 18 N. J. Misc. 429, 14 A.2d 52 (1940), which seems to be weakened by Stemmer v. Kline, 128 N.J.L. 455, 26 A.2d 489 (1942).

[20] Dietrich v. Inhabitants of Northampton, 138 Mass. 14 (1884), which was followed in Bliss v. Passanesi, 326 Mass. 461, 95 N.E. 2d 206 (1950).

[21] Bliss v. Passanesi, 326 Mass. 461, 95 N.E. 2d 206, 207 (1950).

[22] As late as 1946, the courts were fairly unanimous in denying recovery: Stanford v. St. Louis-San Francisco Ry. Co., 214 Ala. 611, 108 So. 566 (1926); Allaire v. St. Lukes Hospital, 184 Ill. 359, 56 N.E. 638 (1900); Dietrich v. Inhabitants of Northampton, 138 Mass. 14 (1884); Newman v. City of Detroit, 281 Mich. 60, 274 N.W. 710 (1937); Buel v. United Railways, 248

It was only fourteen years ago that a court turned away from this position and permitted the infant the right of recovery. This marked the beginning of a trend and has resulted in the formulation of a new majority position as to this problem in the United States. Its inception occurred when a federal court, in *Bonbrest v. Kotz*[23] held that a foetus, sufficiently developed, should be accorded the same rights as any other injured person in tort law. They reasoned that since a foetus at seven months has been found to be capable of independent existence, it should be *treated* as a person in *esse* at that point. The fact that physiological separation normally occurs two months later should be treated as merely anticlimactic to the previous development of the foetus. This is the concept of viability which has been adopted by the majority of courts in the United States.[24]

This position appears to have historical merit and to be consistent with the common law results in criminal law and property law. It would accord the viable infant rights in the law of torts for personal injuries.

The position has the added value of being accurate from a physiological point of view as it is accepted and defined in medical science.[25] In addition, it has some support in philosophy because one school theorizes that the foetus becomes a person before birth.[26] Under this theory, the foetus goes through various stages of development until it is capable of functioning as a human. Until it reaches this stage, it cannot properly be termed a person. This, at least in theory, corresponds to the viability doctrine and gives it added weight from a psychical point of view.

Human experience and desires seem to be a strong root which vitalizes this position permitting the infant a right of action. There is the realization that this foetus may one day mature into an adult of the community. When it is sufficiently developed in the womb, it will have the same complex make-up and will be able to sustain the same injuries as we. It should have the right to begin life *ex utero* unimpaired by physical or mental injury inflicted upon it by its fellowmen.[27] Our law should demand that others respect its rights, and in the

Mo. 126, 154 S.W. 71 (1913); Ryan v. Public Service Coordinated Transfer, 18 N.J. Misc. 429, 14 A.2d 52 (1940); Drobner v. Peters, 232 N.Y. 220, 133 N.E. 567 (1921); Berlin v. J. C. Penney Co., 339 Pa. 547 16 A.2d 28 (1940); Gorman v. Budlong, 23 R.I. 169, 49 Atl. 704 (1901); Magnolia Coca Cola Bottling Co. v. Jordan, 124 Tex. 347, 78 S.W. 2d 944 (1935); Lipps v. Milwaukee Electric Ry. & Light Co., 164 Wisc. 272, 159 N.W. 916 (1916). The only exceptions were Louisiana, whose system of law is patterned after the Civil Law: Cooper v. Blanch, —— La. ——, 39 So. 2d 352 (1923), and California, which had a statute covering the problem: Scott v. McPeters, 33 Cal. App. 2d 629, 93 P.2d 562 (1939).

[23] 65 F. Supp. 138 (D.C.D.C. 1946).

[24] See cases cited note 15 *supra*.

[25] 2 TAYLOR, PRINCIPLES AND PRACTICE OF MEDICAL JURISPRUDENCE 34 (10th ed. 1948); 3 WHARTON & STEELE, MEDICAL JURISPRUDENCE 35 (5th ed. 1905).

[26] 2 THOMAS ACQUINAS, SUMMA CONTRA GENTILES, Ch. 89.

[27] Amann v. Faidy, 415 Ill. 422, 114 N.E. 2d 412, 416 (1953).

alternative, permit it to sue as any other aggrieved person in tort law. No wrong upon this entity should go without a remedy as it is desirable for social justice to protect the members of the community.

As previously noted this position poses no problem as to applying the concept of duty in tort law. Since the majority of courts[28] have accepted viability in deciding this question this concept has stature in law as a desirable position in viewing the infant injured *en ventre.* However, the courts accepting the viability concept have arrived at two different results as to when the infant acquires the right to sue. One group says that the infant must be born alive before it has a right of action for injuries sustained *en ventre.*[29] Thus being born alive is a condition precedent to the vesting of this right to sue. Once the right is acquired, it may be said to extend from birth back to the time when the infant became viable. This position does not acknowledge the entity in the womb as it is but rather seems to be concerned with what it will be when it is born alive. Hence, a policy that the infant be given a right to begin life unimpaired by injuries seems to be the basis for the decisions.

The only objection to this "condition precedent" view is that it seems arbitrary because it recognizes only those foetuses injured after reaching seven months. It excludes those foetuses who have not reached seven months even though tortious conduct will affect these foetuses in a similar manner as it would those who have become viable. This position would seem to be illogical in its present state if it is founded on policy because an infant's life can be impaired by physical or mental injuries at any time after conception. It would appear to be sound when extended to protect foetuses at any time against personal injuries. Some courts have extended this position completely by protecting the foetus from conception.[30] They withdraw any objection as to injustice within this position except for cases where a foetus is injured and later dies before birth. Further, this position is consistent with the above-mentioned policy that an infant should have the right to begin life unimpaired by physical or mental injury and it projects this policy to the most acceptable point.

Although the "condition precedent" view necessarily excludes those foetuses who dies before birth, another group of courts have held that an infant

---

[28] See cases cited note 15 *supra.*

[29] Tursi v. New England Windsor Co., 19 Conn. Super. 242, 111 A.2d. 14 (1955); Worgan v. Greggo & Ferrara, 50 Del. 258, 128 A.2d 557 (1956); Tucker v. Howard L. Carmichael & Sons, 208 Ga. 201, 65 S.E. 2d 909 (1951); Amann v. Faidy, 415 Ill. 422, 114 N.E. 2d 412 (1953); Damasiewicz v. Gorsuch, —— Md. ——, 79 A.2d 550 (1951); Bennett v. Hymers, —— N.H. ——, 147 A.2d 108 (1958); Muschetti v. Pfizer, 208 N.Y. Misc. 870, 144 N.Y.S. 2d 235 (1955); Williams v. Marion Rapid Transit, 152 Ohio St. 114, 87 N.E. 2d 334 (1949); Mallison v. Pomeroy, 205 Or. 690, 291 P.2d 225 (1955).

[30] Plantation Pipe Line Co. v. Hornbuckle, 212 Ga. 504, 93 S.E. 2d 727 (1956); Bennett v. Hymers, —— N.H. ——, 147 A.2d 108 (1958); Kelly v. Gregory, 282 App. Div. 542, 125 N.Y.S. 2d 696 (1953), *motion to leave for appeal granted,* 308 N.Y. 842, 129 N.Y.S. 2d 914 (1954).

has the right of action which survives its death in the same manner as the survival of personal injury actions in other cases.[31] These courts not only differ as to the basis for the right of action where a foetus is born lifeless but they also differ on approach. They recognize the infant as having inherent rights to sue for personal injuries when it becomes viable without qualification, other than the foetus reaching a sufficient stage of development. This must be distinguished from the "condition precedent" view because its foundation is the inherent nature of the foetus rather than social policy.

The courts which give the infant an inherent right have only extended this position to viable foetuses. The chief objection to the "inherent rights" view is that it would encounter difficulty if it were to be extended to a period before the foetus reaches viability. Since the position is based on the nature of the foetus it would have to be maintained that an infant is a person from conception. This contradicts at least that school of philosophy adverted to earlier, which denies that a foetus is a person until sufficient development. It could also be met with the fact that foetuses at an early stage of development are incapable of independent existence. The only way that this position could be extended to protect the infant completely would be to presume a person from conception. However, what would be the reasons for such a presumption? It will never be a member of the community. The only basis for this presumption would be to punish the actor for tortious conduct in this case which seems rather tenuous. This position, as a result, appears to be sound only when extended to viability.

In comparing these two views of the viability concept the "condition precedent" view seems to more completely protect an infant *en ventre*. It can be extended beyond viability without any theoretical difficulties. It seems more practical because it envisages the protection of live infants rather than "metaphysical entities" as found in the "inherent rights" theory. If the "inherent rights" theory is accepted there is the possibility of inelasticity of the view or the formulation of a rather tenuous theory. While the "condition precedent" view excludes those foetuses born dead, it accords the infant *en ventre* a right of action for personal injuries in those cases where it seems most desirable to protect it in modern tort law.

In conclusion, when compared with modern views there appears to be no valid reason for the present Pennsylvania position as announced in the *Berlin* case. This position also appears to be unjust to the infant himself. Since he is being exposed to greater possibilities of injury everyday due to the

[31] Mitchell v. Couch, —— Ky. ——, 285 S.W. 2d 901 (1955); Verkennes v. Corniea, 229 Minn..365, 38 N.W. 2d 838 (1949); Rainey v. Horne, 221 Miss. 269, 72 So. 2d 434 (1954).

increased social activities of his emancipated mother, the determination of his rights becomes an ever-pressing problem. With the development of medical science and the growing soical policy of protecting all individuals, it seems desirable to permit recovery by an infant who has been injured while *en ventre*. The court should adopt the legal approach which can best protect the infant without theoretical difficulties. To this end the view making birth a "condition precedent" should be adopted. Finally, where the infant meets his burden of proof, liability should be extended to protect the infant from conception to birth.

CARL A. BELIN, JR.