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INJURIES TO INFANTS EN VENTRE SA MERE

By A. B. Frey*

The philosopher, Zeno, confounded his contemporaries with the inquiry: "Where is an arrow when it flies through the air?" There was no doubt, to those who believed in the reality of things as such, that the arrow was actually there, since this fact was attested by the senses. At the same time, by reason of the fact that the arrow did not appear to be stationary at any particular place, great energy was expended and much learning wasted on the learned philosopher's inquiry.

In the same way, when the question has come before the Courts during the past century as to whether or not there is a right of recovery for injuries to infants *en ventre sa mere,* serious discussions have taken place as to the status of such infants.

Some Courts have declared with much show of learning that although such infants may inherit real property, as individuals and as independent personalities, yet in cases which constitute the subject of this paper, such infants are, in fact, merely a part of the mother and are nonexistent in the eyes of the law. Other Courts have held that while it is a crime, punishable by various severe penalties, to bring about the death of such infants, since the wrong-doer has attacked society by taking human life, yet, so far as the civil rights of the infants or their representatives (who have suffered by the wrong done) is concerned, that is quite another question—since infants *en ventre sa mere* were not human beings at the time they were destroyed or injured.

It is the aim of the law to be consistent. More than this, it is the purpose of the law that for every substantial injury to human life or limb the wrong-doer shall make substantial restitution. The law ab-

*Judge of Circuit Court, St. Louis, Missouri.

hors an invasion of human rights without permitting a recovery therefor. Since, accordingly, this involves a question of human life and human rights and is, as well, a challenge to the boast of the law that it seeks to be reasonable as well as just, this question ought to be of interest to the Courts which hold the scales of justice, to the advocate who is advancing the rights of his client in the Courts, as well as of academic interest to the student who is curious to trace the growth and development of the law.

If we turn for a moment from the law to the science of biology we find that we are told that when the spermatozöon (of the male) comes in contact with the ovum (of the female) in the womb of zygote is formed by the junction of the two into one cell and that a human embryo springs into being in from one to two weeks. By the end of the third month this type of life is then termed a foetus, and upon the first movement that is actually felt (which usually takes place before the end of the fourth month) there is said to be a quickening of the child.

It is considered highly unethical for any physician to take any steps whatever to retard the growth or development of the zygote from the time of its inception, except if necessary to save the life or health of the mother. Every right-thinking physician will promptly advise the inquirer that he regards the embryo and foetus as sacred, since it is human-life in its first stage. More than this, methods of preventing conception have also been frowned upon by the medical profession. Laws have been enacted prohibiting the dissemination of information of contraceptive methods.

Adverting now to the law we find that at the early common law, in order to constitute the crime of Abortion, it was necessary to charge that the woman was quick with child, but this is no longer true; under our statutes, unless they specifically make quickening an essential element of the offense.[1]

Moreover at the common law the commentator in Cyc. says:

> It was not homicide to kill an unborn child, even after it had quickened.[2]

Blackstone, however, does not so state the law, for he says:

> The right of personal security consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body and his reputation. Life is the immediate gift of God, a right inherent by nature in every individual; and it means, in contemplation of law, as soon as an infant is able to stir in the mother's womb. For, if a woman is quick with child, and, by a potion or otherwise, killeth

[1] 1 C. J. Par. 45.

[2] 21 Cyc. 662.

> it in her womb, or if any one beat her, whereby the child dieth in her body and she is delivered of a dead child, this, although not murder, was, by the ancient law, homicide or manslaughter.[3]

While I haven't taken the time to examine all of the statutes on this subject, the rule seems to be in most jurisdictions that it is now manslaughter to bring about the death of an unborn child.

Again, at the common law, when the body of the child had been delivered and an independent circulation was established—even while the child was still attached to the mother by the umbilical cord—the one responsible for its death was guilty of homicide, although the death was caused by injuries inflicted before the birth of the child.[4] The statutes of many of the states, however, have gone much farther than the common law towards increasing the gravity of the offense of killing the infant *en ventre sa mere*. For example, in Missouri, it is manslaughter to produce or promote a miscarriage or abortion which results in the death of a quick child.[5] And it is likewise manslaughter to wilfully kill an unborn quick child by any injury to the mother of such child, provided the act would have been murder if it had resulted in the death of the mother.[6]

Turning now to the subject of property rights of the unborn child, we find that an infant *en ventre sa mere* was regarded at the common law as "in esse" from the time of its conception for the purpose of taking any estate, whether by descent or devise or under the statute of distribution, if the infant was born alive after such a period of existence that its continuance in life was or might be reasonably expected.[7] Amplifying this somewhat, we find in the case of *Doe v. Clarke*,[8] it was held:

> That wherever such consideration would be for his benefit, a child *en ventre sa mere* should be considered as absolutely born.

Again, in *Goodtitle v. Wood*,[9] there is a note to the effect that there is no difference between such a child and one actually born. In *Marcellis v. Thalheimer*,[10] Chancellor Walsworth states the rule to be:

> It is at this day a well settled rule of law relative to successions and to most other cases in relation to infants that a child *en ventre sa mere*, as to every purpose where it is to the benefit of the child, is to be considered in esse.

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[3] BLACKSTON COMMEN. 129-139.
[4] 21 Cyc. 662.
[5] R. S. Mo. 1919, Sec. 3239.
[6] R. S. Mo. 1919, Sec. 3238.
[7] 10 AM. & ENG. ENCY. OF LAW, p. 624.
[8] 2 H. Bl. 399.
[9] 7 T. R. 99.
[10] 2 Paige 39.

If we turn now from this preliminary discussion to the question of the rights of such an infant with reference to the laws of personal injury, we immediately find ourselves enmeshed in a maze of legal contradictions. This question came indirectly before our Supreme Court in the case of *Kirk v. Middlebrook,*[11] in which the opinion was written by our learned jurist, Judge Lamm. While, what he said on the subject there is, in large part, *obiter,* yet it is interesting and highly instructive. I quote:

> Whether damages flowing from negligent injuries to a quick child about to be born—that is, ready and about to be severed from the mother under the mysterious and inexorable laws of nature—belong to the mother to be contracted away as she elects, or belong in the law to the child as a sentient being, is a most formidable, a most novel and anxious question. Few cases are in the books, where that question has been up. Under Lord Campbell's Damage Act it was held that a posthumous child could sue to recover damages sustained by the death of its father. (*The George and Richard,* 3 Ad. and Eccl.. (1 R.) 466). The Supreme Court of Texas came to a similar conclusion under the statutes of that State. (*Nelson v. Railroad,* 78 Tex. l. c. 624, *et seq.,* where an illuminating discussion may be found. See, also, *Railroad v. Robertson,* 82 Tex. 657; 1 Blackstone Com., 129-130; *Aubuchon v. Bender,* 44 Mo. l. c. 568, *arguendo.*) But it has been held that the common law gives no right of action to an infant for injuries received by it while *en ventre sa mere.* (*Allaire v. St. Luke's Hospital,* 184 Ill. 359; *Dietrich v. Northampton,* 138 Mass. 14; *Walker v. Railroad,* 28 L. R. (Ireland) 69). Of the *Allaire* case (decided in two appellate courts) it has been said: 'However, the reasoning in the support of these decisions is not eminently convincing, and the dissenting opinions in the most recent case on the subject are entitled to respectful consideration.' (16 Am. and Eng. Ency. L. (2ed.) 261.)

Since so capable a jurist as Judge Lamm considered this subject a novel, interesting and puzzling one, it is certainly worthy of our consideration. It may be well to subdivide the consideration thereof. Perhaps the easiest way to treat the matter is to group it under the following heads: (a). Trespass or direct force applied to infants *en ventre sa mere.* (b). Case or negligent injuries to such infants. (c). The rights of actions to the survivors or personal representatives for injuries resulting in the death of such infants.

Considering these three phases of the subject in their inverse order, we find that with respect to the right of action to the survivors or personal representatives for injuries, either in trespass or case to such in-

[11] 201 Mo. 245.

fants, resulting in their deaths, the law is settled that there can be no recovery.

The reasoning in support of this rule is that at common law a cause of action for personal injuries did not survive if death resulted from negligence or wrongful act. Lord Campbell Act, enacted in 1846, (and generally made the basis of our statutory law in this country) sought to correct this situation. It provides, in substance, that to enable the survivor or legal representatives to recover, the act, neglect or default must have been such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof. In some cases the Courts have argued that since the child (at the common law and under the decisions to be hereinafter referred to) may not maintain such an action, after its birth, accordingly such an action will not accrue under the Lord Campbell's Act.[12]

It goes without saying that the decisions which are based on this theory are logically sound, if the rule is sound that the infants, if born alive, would have had no right of action for the injury sustained; and, accordingly, they are unsound if such is not the rule.

On the other hand, there is a group of cases which hold that there can be no recovery by the survivor or personal representative under the Lord Campbell's Act for another reason—which is somewhat different: This latter rule finds expression in the case of *Buel v. United Rys. Co.*[13] Says the Court, in considering the matter in the light of the Missouri Statute, modeled after the Lord Campbell's Act:

> The only point for review is whether the statute was intended to provide a penalty for the death of a person after birth, caused by negligent injuries before its birth. The statute in question, with some modifications and expansions of its scope and remedies, has existed in this state for more than fifty years. It was intended originally to alter the common law rule that an action for a personal injury abated upon the death of the injured person, and to provide for the survival of such actions. We have not been able to find any precedent at common law establishing the right of a child injured while *in ventre sa mere,* but subsequently born alive, to bring an action thereafter for the injuries so received. This being the purpose of the Legislature, the declaratory act must be interpreted in that light and to effectuate that object. When this statute was passed no case had arisen wherein the right to maintain such an action had been affirmed.

[12] Gorman v. Budlong, 55 L. R. A. 118; Drobner v. Peters, 230 N. Y. 220; Dietrich v. Northampton 138 Mass. 14.
[13] 248 Mo. 126.

Then, after considering a number of decisions of other jurisdictions, the Court proceeds with the statement:

> It is not necessary to rule upon the rationale of these decisions. It is enough to say that they demonstrate that by the act in question (R. S. 1909, Sec. 5425) the Legislature could not have intended (in view of the law existing or declared at that time) when it used the terms 'persons so dying' to include a person who died after birth from injuries recived by its mother prior to its birth. Such a design on the part of the Legislature would have been out of keeping with the paramount object of the act to create a survival of actions which would have lapsed at common law upon the death of the injured person. For, in the case of a child so injured, no right of action accrued to such child after its birth by the common law as it had been then adjudged; and, hence, there was no prior right to sue, which the statute could take hold of and cause to survive the death of the person injured. If it had been the purpose of the statute to create a cause of action which did not theretofore exist, certainly that intention would have been expressed in the terms of the act. This was not done at the time of its enactment or in any of its subsequent amendments. It follows that the trial court did not err in sustaining the demurrer in this case; and it is affirmed.

While it is true that the Court in this case took occasion to consider the right of an infant, if born alive, to recover for such injuries and to hold by way of *obiter* that such a right did not exist, yet that was not the basis of the decision. The reasoning in the *Buel Case* which actually is the basis of the decision would seem to be sound. This, for the reason, that a statutory enactment must be considered in the light of the situation it is sought to remedy and with due regard to the law then existing.

Coming now to the second subdivision of our question, namely, the right of the infant after birth to recover for prenatal injuries due to negligence, we find this subject has been considered in a large group of cases and decided adverse to the right of such recovery. In *Walker v. Great Northern Ry. Co.*,[14] decided in 1891 (Ir. L. R. 28 C. L. 69), this was the direct question before the Court. An infant *en ventre sa mere* was permanently crippled as the result of an alleged negligent operation of a train, in which the mother of the infant was also injured as a passenger of the railroad. Said the Court in part:

> As a matter of fact, when the act of negligence occurred the plaintiff was not in esse—was not a person or a passenger or a human being. Her age and her existence are reckoned from her birth and no precedent has been found for this action. Lord Coke

[14] Ir. L. R., 28 C. L. 69.

says: 'Although *filius in uter matris est pars viscerum matris,* yet not many cases hath consideration in respect of the apparent expectation of his birth.' *The Bedford Case,* 7 Coke, 8 b. This imputed existence in esse to an unborn child is a fiction of the civil law which regards an unborn child as born for some (not for all) purposes connected with the acquisition and preservation of real or personal property. . . . Thus it would appear that according to this fiction an unborn child may in the civil law at the same moment be regarded as in esse and not in esse; for its own benefit in esse, to its prejudice not in esse, and, unless for the benefit of itself, not in esse. As civil law prevailed in the ecclesiastical and admiralty courts of chancery, most of the authority by which an unborn child is for its own benefit regarded as born is to be found in the decisions of these courts. . . . .These authorities appear to me to show that the doctrine which regards an unborn child as born for its own benefit (which is the utmost element of the doctrine) is a fiction adopted from the civil law by the Courts of Equity for some, but not for all, purposes, and far more seldom recognized in the Courts of Law. The present is and always was a common law action for personal injuries caused by the negligence or breach of duty of the defendants and it lies for the plaintiff to show what was this duty of the defendants towards the plaintiff, and how it arose. 'Negligence' and 'duty' are respectively, relative, not absolute, terms. It is not contended that duty arose out of contract. The contract was between the defendant and Mrs. Walker, and, so far as contract is concerned, it was to Mrs. Walker, the defendants were liable for breach of it. If it did not spring out of contract, it must, I apprehend, have arisen (if at all) from the relative situation and the circumstances of the defendants and plaintiff at the time of the occurrence of the act of negligence. But at that time the plaintiff had no actual existence, and was not a human being, and was not a passenger—in fact, as Lord Coke says, the plaintiff was then *pars viscerum matris;* and we have not been referred to any authority or principle to show that a legal duty has ever been held to arise towards that which is not in esse in fact, and has only a fictitious existence in law, so as to render a negligent act, a breach of that duty.

In the case of *Allaire v. St. Luke's Hospital, supra,* decided in 1900, the Court followed the view expressed in the *Walker Case, supra.* To this decision, however, Judge Boggs dissented, handing down the following illuminating opinion:

It may be conceded no case adjudicated at the common law can be found wherein a plaintiff was awarded damages for injuries inflicted upon his person while in the womb of his mother. But an adjudicated case is not indispensable to establish a right to recover under the rules of the common law. Lord Mansfield declared: 'The law of England would be an absurd science were it

> founded upon precedents only.' 'Precedents,' he observed, 'were to illustrate the principles and to give them a fixed certainty.' 1 Kent. Com. 477. In speaking of the establishment and growth of the rights of common law, Mr. Cooley in his work on Torts (pages 13-15) said: 'The process of growth has been something like the following: Every principle declared by a court in giving judgment is supposed to be a principle more or less general in its application, and it is applied under the facts of the case, because, in the opinion of the court, the facts bring the case within the principle. *It does not limit and confine it within the exact facts, but it furnishes an illustration of the principle, which perhaps, might still have been applied had some of the facts been different.* Thus, one by one, important principles become recognized through adjudications which illustrate them and which constitute authoritative evidence of what the law is when other cases shall arise. But cases are seldom exactly alike in their facts. They are, on the contrary, infinite in their diversities, and, as numerous controversies on differing facts are found to be within the reach of the same general principle, the principle seems to grow and expand and does actually become more comprehensive though so steadily and insensibly, under legitimate judicial treatment that for the time the expansion passes unobserved. But new and peculiar cases must also arise from time to time, for which the courts must find the governing principles and these may, however, be referred to some principle previously declared or to some one which now, for the first time, there is occasion to apply. *But a principle newly applied is not supposed to be a new principle.* On the contrary, it is assumed that from time immemorial it has constituted a part of the common law of the land and that it has only not been applied before because no occasion has arisen for its application.

This well reasoned dissenting opinion deals with the fiction problem in the following manner:

> At common law, actions were maintainable to recover damages occasioned by injuries to the person of the plaintiff, whether inflicted intentionally or through the negligence of the defendants. The governing principle illustrated by such cases is that the common law, by way of damages, gave redress for personal injuries inflicted by the wrong or neglect of another. The case disclosed by the declaration under consideration is embraced within the limits of the principle thus recognized, and it is clear recovery could have been maintained at common law, unless the fact the plaintiff was unborn when the alleged injuries were inflicted would have operated to deny a right of action. The argument is that at common law the unborn child is but part of the mother and had no existence or being which could be the subject-matter of injury to the mother; that in such case there was but one person—one life—that of the mother. A foetus in the womb of the mother may

well be regarded as but a part of the bowels of the mother during a portion of the period of gestation; but if while in the womb it reaches that prenatal age of viability when the destruction of the life of the mother does not end its existence, also, and when, if separated prematurely, and by artificial means, from the mother, it would be so far a matured human being as that it would live and grow mentally and physically, as other children generally, it is *but to deny a palpable fact to argue there is but one life, and that the life of the mother.* Medical science and skill and experience have demonstrated that at a period of gestation in advance of the period of parturition, the foetus is capable of independent and separate life, and that, though within the body of the mother, it is not merely a part of her body, for her body may die in all of its parts and the child remain alive and capable of maintaining life when separated from the dead body of the mother. If at this period a child so advanced is injured in its limbs or members, and is born into the living world suffering from the effects of the injury, *is it not sacrificing truth to mere theoretical abstraction to say the injury was not to the child, but wholly to the mother?*

Coming now to the latest case on the subject, namely, *Drobner v. Peters,*[16] we find that the lower court held there could be recovery for prenatal injuries due to negligence. But when the case reached the Court of Appeals the doctrine announced in the *Allaire Case* was reaffirmed and recovery denied. The reasoning adopted by the New York Court is similar in this case to that of the majority opinion in the *Allaire Case.*

The more these decisions denying recovery are studied the more fallacious the reasoning therein appears. Surely there can be no defense to an action of negligence that the person who was negligent did not know he was going to injure two persons, instead of one, for, indeed, if such reasoning were sound, then if I negligently put a dangerous obstruction in a private right of way and the owner of the premises has with him two or three guests, all of whom are injured from such an obstruction, I, as the tort-feasor, could validly defend on the ground I did not think any one would go over this property except the owner. The absurdity of this is evident from a simple statement of the proposition. Likewise the argument that a railroad company, in accepting a female passenger, contracted to carry her alone and not her unborn infant, would seem to be sophistry unworthy of serious consideration. Surely every carrier knows that mothers carry within their wombs their progeny. They further know that many such mothers ride on the railroads. If then, through the negligence of the railroad, such moth-

[15] 184 Ill. 359.
[16] 232 N. Y. 220.

ers, as well as their unborn children, are injured, is it not ridiculous to reason that the railroad did not contract to carry the unborn child?

Again it is well known that railroads carry children under the age of five years without charge. Suppose the mother has with her a child of one year, for whom the mother does not pay, may the railroad argue that since the mother did not pay for this child that the child has no recovery if injured through the negligence of the carrier? If the matter is put on contractual grounds—which is not correct since the contract is merely the basis for the right of the child to be where it is—then surely the contract between the railroad and the mother of the unborn child is as much consideration for the right of action of that child as it is in the case of the carriage of the mother of the infant child under the age of five years.

If the basis of these decisions were that to permit such a recovery on the part of the infant *en ventre sa mere* would open the door to fraud, the rule denying a recovery would seem to be much more valid on the general ground of public policy. By this I mean that the number of fictitious cases would be so numerous that it would probably be conceived by astute and unscrupulous medical and legal practitioners without a fair chance for the defendant either to prepare or to prove the falsity of the claim, and for that reason the unfortunate injured infant must yield his claim for the good of the community at large. But, after all, could not the infant be allowed such a recovery and still the rights of the defendant be safe-guarded by making the rule that there may be recovery by infants for injuries *en ventre sa mere* in negligence cases, provided the proof that such injuries were actually due to the negligence of the defendant be clear, cogent and overwhelmingly convincing.

Turning now to a consideration of the first subdivision, I find no cases in which a child has sued at trespass for an injury to the child resulting from wilful attack on the mother. Surely in this group of cases, if the reasoning of Judge Boggs is sound, as I believe it to be, there should be a right of recovery for negligent injuries—*a fortiori*, there should undoubtedly be a right of recovery for wilful injuries. In the *Buel Case, supra,* Judge Bond says by way of *obiter*: "In all the cases the right of a mother to maintain an action for negligent injury to herself and her unborn child is conceded." He cites no case in support of his statement, and, indeed, I find no authority which supports this proposition. In fact, in *Nugent v. R. R. Co.*,[17] Judge Thomas states:

[17] 154 N. Y. (App. Div.) 667.

> The fact that the child was deformed and would suffer thereby would cause the mother mental pain, and even if she could recover for that, the mental pain the child would suffer and the mere fact of the deformity with its consequent dimunition of the value of capacities and faculties could not be included in her recovery. The father, in case he could recover at all, could do so only so far as the injury enlarged the expense of the child's maintenance and entailed loss of service. So, however the subject be viewed, there is a residuum of injury for which compensation can not be had, save at the suit of the child, and it is a question of grave import whether one may wrongfully deform or otherwise injure an unborn child without making amends to him after birth.

This would seem to be a correct statement of the law as it now exists. If this be true, then in actions of trespass for injuries resulting to the unborn child due to wilful force applied to the mother, there should certainly be a right of recovery—if the aim of the law to be just is to be fulfilled. Since the law is not settled on this phase of the question at this time, it would not require a departure from any rule now existing so to held.

On the other hand, if there is to be no recovery for the child injured *en ventre sa mere* either through negligence or trespass, then the *obiter* of Judge Bond in the *Buel Case* quoted above should actually become the law in this class of cases. The law should be consistent and hold that the unborn child was actually a part of the mother and that it did not have a separate personality, and then should allow the mother to recover both for the physical injury and the mental suffering resulting both to the mother and the child as a result of the injuries.

It is just such complex problems as are set forth in the cases discussed herein that make the law an interesting and fascinating science. But if we do not strive to study such problems and to arrive at consistent and reasonable conclusions we will surely be reminded by the student of Matthew Green's poem, The Spleen, written in the early 18th century—

> The law grows a forest there perplex
> The byways and the brambles vex:
> Where the twelve verders every day
> Are changing still the public way.
> And if we miss the way and err,
> We grievous penalties incur:
> And wanderers tire and tear their skin,
> And then get out where they got in.