NOTES

CHILD'S RIGHT OF ACTION FOR PRENATAL INJURIES

I. INTRODUCTION

An important question has arisen as to whether a child *en ventre sa mere* is deemed a legal person in the law of torts, or stated differently, whether a person has a cause of action for injuries allegedly incurred when he was in his mother's womb.

In many respects a child *en ventre sa mere* is considered in point of law as in *esse, i.e.,* a legal person, from the moment of conception. Thus the unborn child is deemed to be living at the time of the death of the testator for purpose of taking by devise, and the fee vests in the unborn infant as devisee, subject to being divested if the child is not born alive.[1] Furthermore, if a child born alive dies by reason of injuries feloniously inflicted upon it before birth, the offense is murder.[2] A fair generalization seems to be that ". . . a legal personality is imputed to an unborn child . . . for all purposes beneficial to the infant after his birth, . . . but not for purposes working to his detriment."[3] While it is well settled that the unborn child is considered a legal person in the fields of property and criminal law, he has not usually been granted such a status in the law of torts.

II. GENERAL DENIAL OF RECOVERY

Although a few recent decisions hold otherwise, the weight of authority is that a child does not have a cause of action for his prenatal injuries. Several reasons have been advanced by the courts.

A. Unborn Child Merely A Part of the Mother; Not a Person In Esse.

One of the principal reasons offered by the courts which deny recovery for prenatal injuries is that the child *en ventre sa mere* is not a person at all, but merely a part of the mother. In *Mays v. Weingarten*[4] plaintiff's mother, then in her sixth month

1. Valley National Bank v. Hartford Accident &. Indem. Co., 57 Ariz. 276, 113 P.2d 359 (1941); Tomlin v. Laws, 301 Ill. 616, 134 N.E. 24 (1922).
2. Clarke v. State, 117 Ala. 1, 23 So. 671 (1898).
3. Drobner v. Peters, 232 N.Y. 220, 133 N.E. 567 (1921).
4. 82 N.E.2d 421 (Ohio App. 1943).

of pregnancy, was riding on a bus which was struck by defendant's automobile. Plaintiff alleged that defendant's negligent operation of the car and the resulting accident caused his (plaintiff's) premature birth and subsequent illness. The order sustaining defendant's demurrer was affirmed on appeal. Plaintiff argued that since a "person" has a cause of action for personal injuries negligently inflicted, plaintiff's petition had stated facts sufficient to constitute a cause of action. The Ohio Court of Appeals answered:

> The manifest difficulty with this argument is that even though he had plead he was a person when injured in the mother's womb, *he had no separate existence of his own.* When born he became a person. [Italics added].[5]

And in *Ryan v. Public Service Co-ordinated Transport,*[6] where plaintiff brought suit by next friend for prenatal injuries negligently inflicted, the New Jersey Supreme Court, refusing to admit the independent existence of the plaintiff while *en ventre sa mere,* stated:

> May this court attach an unnatural meaning to simple words and hold independently of statute that a cause of action for prenatal injuries is reserved to the child until the moment of its birth and then accrues? The formulation of such a principle of legal liability against precedent and practice may be a tempting task, to which sympathy and natural justice point the way; but I cannot bring myself to the conclusion that plaintiff had a cause of action at common law. *The injuries were, when inflicted, injuries to the mother.* [Italics added].[8]

This proposition, that from the moment of conception to the moment of birth the unborn child is merely a part of its mother, and not a separate and independent being, is universally supported by those courts refusing a cause of action to the child for prenatal injuries.[8]

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5. Mays v. Weingarten, 82 N.E.2d 421, 422 (Ohio App. 1943). A later Ohio Supreme Court opinion, Williams v. Marion Rapid Transit, Inc., 152 Ohio St. 114, 87 N.E.2d 334 (1948) seems to overrule this case.

6. 18 N.J. Misc. 429, 14 A.2d 52 (Sup. Ct. 1940).

7. Ryan v. Public Service Co-ordinated Transport, 18 N.J. Misc. 429, 434, 14 A.2d 52, 55 (Sup. Ct. 1940).

8. Stanford v. St. Louis-San-Francisco R. Co., 214 Ala. 611, 108 So. 566 (1926); Allaire v. St. Luke's Hospital, 184 Ill. 359, 56 N.E. 638 (1900); Smith v. Luckhardt, 299 Ill. App. 100, 19 N.E.2d 446 (1939); Bliss v. Passanesi, 95 N.E.2d 206 (Mass. 1950); Dietrich v. Northhampton, 138 Mass. 14 (1884); Gorman v. Budlong, 23 R.I. 169, 49 Atl. 704 (1901).

B. No Duty Is Owed To the Unborn Child

Once a court holds that an unborn child is not a person in *esse,* the court deduces that the unborn child is owed no duty by a defendant who negligently injures the child's mother. In *Nugent v. Brooklyn Heights Ry. Co.,*[9] plaintiff's mother was negligently injured by defendant's agent while a passenger on defendant's carrier. When the accident occurred plaintiff was a foetus of eight months. Plaintiff was born thirty-six days later with injuries allegedly caused by said accident. Refusing plaintiff a cause of action, a New York Appellate Court declared:

> Negligence is culpable failure to observe a duty owed by one to another in a particular relation, and a remedy is allowed for injury therefrom. What duty did the defendant as a carrier owe the unborn child? The child in its distinct entity was not a passenger, and the company owed it as a separate person no duty in the matter of safe carriage.[10]

C. Impossibility of Proof of Causal Relation

A number of courts refusing recovery for prenatal injuries have said that it is virtually impossible to show with any degree of certainty a causal connection between the plaintiff's particular injury or deformity and the accident complained of. Admittedly it is easy to see that it would be difficult to show that a deformity in a child was proximately caused by an injury to his mother which occurred two, or three, or four months before his (the child's) birth. Being mindful of this medicolegal difficulty, the courts have put much weight on the proposition that any expert medical testimony might well be based on conjecture rather than informed opinion; and coupling this argument with others against allowing recovery, the courts refuse to let the case go to the jury. Such a case is *Magnolia Coca-Cola Bottling Co. v. Jordan.*[11] There plaintiff, who was struck by defendant's truck, alleged that as a result of this accident she was prematurely delivered of twins, one of which died, and for whose wrongful death she sued. Denying recovery, the Texas Supreme Court discussed the difficulty of showing the causal connection between the accident and the subsequent death of the child, and concluded:

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9. 154 App. Div. 667, 139 N.Y. Supp. 367 (2d Dep't. 1913).
10. Nugent v. Brooklyn Heights R. Co., 154 App. Div. 667, 672, 137 N.Y. Supp. 367, 371 (2d Dep't. 1913).
11. 124 Tex. 347, 78 S.W.2d 944 (1935).

> . . . it is easy to see on what a boundless sea of speculation in evidence this new idea [allowing a cause of action for prenatal injuries] would launch us. What a field would be opened to extravagance of testimony, already great enough, if science could carry her lamp, not over certain in its light where people have their eyes, into the unseen laboratory of nature—could profess to reveal the causes and things that are hidden there.[12]

The same line of reasoning was employed in *Smith v. Luckhardt*.[13] There plaintiff's mother employed defendant, a physician. The defendant incorrectly diagnosed her pregnancy as a tumor of the womb. The treatment the defendant prescribed and administered consisted primarily in X-ray treatments of the abdominal cavity. Plaintiff was born several months later. The tissues of her body were scarred, and she was feeble-minded. At age thirteen she brought suit (by next friend) against defendant.[14] At that time her mental faculties had not progressed beyond those of a normal two year old child. Plaintiff alleged that defendant's incorrect diagnosis of her mother's condition was negligence, and that this negligent act resulted in the administration of the X-ray treatments, which was the proximate cause of plaintiff's maladies. When the case reached an Illinois appellate court, plaintiff was denied recovery. The court restated the other arguments voiced against allowing a cause of action for prenatal injuries, and also emphasized the belief that:

> . . . the cause of physical or mental defects that appear at childbirth or thereafter may be congenital, or due to [other] injuries prior or subsequent to the accident.[15]

A number of other courts have adopted this argument, *i.e.*, that a causal relation between a negligently caused injury to the mother and an injury to the unborn foetus cannot be established.[16]

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12. Magnolia Coca-Cola Bottling Co. v. Jordan, 124 Tex. 347, 353, 78 S.W.2d 944, 946 (1935).

13. 299 Ill. App. 100, 19 N.E.2d 446 (1939).

14. Plaintiff was not barred by the statute of limitations, since it does not begin to run until plaintiff has reached his majority.

15. Smith v. Luckhardt, 229 Ill. App. 100, 108, 19 N.E.2d 446, 450 (1939).

16. Bliss v. Passanesi, 95 N.E.2d 206 (Mass. 1950); Durivage v. Tufts, 94 N.H. 265, 51 A.2d 847 (1947); Ryan v. Public Service Co-ordinated Transport, 18 N.J. Misc. 429, 14 A.2d 52 (Sup. Ct. 1940); Krantz v. Cleveland, Akron, Canton Bus Co., 32 Ohio N.P.(N.S.) 445 (1933); Lewis v. Steves Sash & Door Co., 177 S.W.2d 350 (Tex. Civ. App. 1943); Walker v. Great Northern R. Co., L.R. 28 C.L. 69 (Ireland 1891).

D. Other Reasons: Probability of Fictitious Claims; Lack of Precedent; Mother Can Recover for Injuries Not Too Remote; Courts' Refusal to Legislate

The principal reasons offered by courts denying recovery for prenatal injuries are discussed above. There are, in addition to those, other arguments offered, not as forcibly, but worthy of note here. First, it is said that if the courts open the door to recovery for prenatal injuries, numerous plaintiffs will come forth demanding compensation for alleged prenatal injuries or deformities, probably the result of any number of causes other than an accident involving plaintiff's mother and defendant.[17] Second, a number of courts are unwilling to overrule the cases formerly denying recovery under similar circumstances; the respect for precedent effects reluctance to establish new causes of action.[18] Third, in addition to other reasons for denying recovery, the courts say that the child's mother can recover for any damage to the child if such damage is not too remote for recovery at all.[19] Finally, many courts have said that, since constitutions and statutes giving "persons" a cause of action for wrongful injuries did not intend an unborn child to be considered a "person," the legislature, not the court, must create the cause of action for prenatal injuries, if any is to be created.[20]

In general, then, the majority of the decisions involving suits for prenatal injuries deny the plaintiff a cause of action. The various courts use varying combinations of the reasons discussed above.

III. Trend Towards Permitting Recovery

In spite of the majority holding to the contrary, a few courts have recently decided that a child has a cause of action for prenatal injuries negligently inflicted. The opinions in these

17. Bliss v. Passanesi, 92 N.E.2d 206 (Mass. 1950); Krantz v. Cleveland, Akron, Canton Bus Co., 32 Ohio N.P.(N.S.) 445 (1933).

18. Bliss v. Passanesi, 92 N.E.2d 206 (Mass. 1950); Ryan v. Public Service Co-ordinated Transport, 18 N.J. Misc. 429, 14 A.2d 52 (Sup. Ct. 1940); Krantz v. Cleveland, Akron, Canton Bus Co., 32 Ohio N.P.(N.S.) 445 (1933).

19. Stanford v. St. Louis-San-Francisco R. Co., 214 Ala. 611, 108 So. 566 (1926); Allaire v. St. Luke's Hospital, 184 Ill. 359, 56 N.E. 638 (1900).

20. Newman v. City of Detroit, 281 Mich. 60, 274 N.W. 710 (1937); Buel v. United Rys. Co. of St. Louis, 248 Mo. 126, 154 S.W. 71 (1923).

cases endeavor primarily to refute the arguments set out above as reasons for denying recovery. It seems best, then, to discuss the refutation of these arguments in the same order in which they appear in the first part of this note.

A. Child in the Womb as a Person in Esse

Those courts allowing recovery for prenatal injuries condemn the theory that until born the child is merely "a part of the mother." In *Kine v. Zukerman*[21] plaintiff's mother, who was in her seventh month of pregnancy, was injured as the result of defendant's negligence. Plaintiff was born about a month and a half later, and bore injuries which he alleged were caused by the defendant's negligent injury to plaintiff's mother. In allowing plaintiff a cause of action a Pennsylvania court declared:

> . . . at early common law an injury to an unborn child was looked upon as an injury to the mother exclusively. The child and the mother were one until delivery, . . . the former was not yet a human being. . . . It was not long, however, before the basic narrowness and inequity of this view was recognized.[22]

And in *Scott v. McPheeters*,[23] where plaintiff sued for defendant's alleged negligence in the use of clamps as incident to the delivery of plaintiff at childbirth, a California Appellate court stated:

> 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.[24]

Obviously both these courts were making reference to the proposition that in the law of wills an unborn child may take a devise or bequest, *i.e.*, that he is there considered a legal person from the moment of conception. These courts feel that since the unborn person may take property by descent or devise, certainly he should be entitled to compensation for injuries wrongfully inflicted upon him by the negligent act of another. This reasoning seems sound.

There seems to be another legal analogy which supports the argument that the unborn child is, or should be considered an independent legal person. As was mentioned, if a person feloni-

21. 4 Pa. D. & C. 227 (1924).
22. Kine v. Zukerman, 4 Pa. D. & C. 227 (1924).
23. 33 Cal. App.2d 629, 92 P.2d 678 (1939).
24. Scott v. McPheeters, 33 Cal. App.2d 629, 630, 92 P.2d 678, 679 (1939).

ously wounds a pregnant woman, and her child is born but dies thereafter as a result of such injuries, the defendant is guilty of murder.[25] Analogizing, it would seem that where the criminal law acknowledges the independent existence of the unborn, so also should the law of torts. As was stated by Lamont, J., in *Montreal Tramways v. Leveille:*[26]

> While in some cases there may be no analogy, yet there are, in my opinion, many cases in which crime and tort are merely different aspects of the same set of facts and in which there is so close an analogy that something more than the bare denial of it is necessary to carry conviction. The wrongful act which constitutes a crime may constitute also a tort, and, if the law recognizes the separate existence of the unborn child sufficiently to punish the crime, it is difficult to see why it should not also recognize its separate existence for the purpose of redressing the tort.[27]

Perhaps the most convincing agrument voiced in favor of the rule regarding an unborn child as a person in *esse* was that expounded by Chief Justice Brogan, of the Court of Errors and Appeals of New Jersey, in his dissenting opinion in *Stemmer v. Kline:*[28]

> 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 his 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. . .[29]

It will be noticed that the cases quoted above did not discuss the question as to whether any restrictions should be placed upon the rule that the unborn child should be considered a person in *esse.* There are, however, some courts which impose a restriction based on the stage of development of the unborn child, upon the child's right of action. These courts hold that in

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25. See note 2 *supra.*
26. Can. S.C. 456, 4 D.L.R. 337, 344 (Canada 1933).
27. Montreal Tramways v. Leveille, Can. S.C. 456, 4 D.L.R. 337 (Canada 1933).
28. 128 N.J.L. 455, 26 A.2d 489 (Ct. Err. & App. 1942).
29. Stemmer v. Kline, 128 N.J.L. 459, 466, 26 A.2d 684, 687 (Ct. Err. & App. 1942) (dissenting opinion).

order to maintain the action, the plaintiff must have been a "viable foetus" when the injury occurred. The definition offered by the courts of "viable" is that stage of prenatal development at which the child could survive if artificially separated from its mother. All foetuses do not become viable at the same relative time. In one case a child was born alive 144 days after its conception in the womb of its mother.[30] Of course this case is an exceptional one. In general it is believed that the earliest state of development at which the child becomes viable is at the beginning of the sixth month.

In *Cooper v. Blanck*[31] plaintiff sued her landlord for injuries received by herself and for physical and mental suffering endured by her child. Plaintiff was lying on her bed when the plaster from the defendant's ceiling fell on her abdomen. At that time plaintiff was in her eighth month of pregnancy. She alleged that as a result of the injury her child was born prematurely, suffered physical and mental pain, and died shortly thereafter. Among other things the Louisiana Court of Appeals discussed the viability theory, and concluded:

> While the earliest period at which a foetus may be said to be viable is still a matter of considerable doubt, . . ., the fact that the foetus [here] is in an advanced stage of pregnancy, viable and in fact possessed of prenatal life, is indisputable.[32]

The court went on to point out that a child has a cause of action for injuries received when he was a viable foetus.

The courts which allow recovery in these prenatal injury cases, and those which support the theory that a viable child should be considered an independent person often quote Justice Boggs' dissenting opinion in *Allaire v. St. Luke's Hospital*:[33]

> 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 stage of viability when the destruction of the life of the mother does not necessarily 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 so that it would live and grow, mentally

30. 3 WHARTON & STILLES MEDICAL JURISPRUDENCE 36 (4th ed. 1884).
31. 39 So.2d 352 (La. App. 1923) (Not reported until 1949).
32. Cooper v. Blanck, 39 So.2d 352, 355 (La. App. 1923) (Not reported until 1949).
33. 184 Ill. 359, 56 N.E. 638 (1900).

> and physically as other children generally, it is but to deny a palpable fact to argue there is but one life, . . . the life of the mother.[34]

If it is felt that the concept of "legal personality" is essential, the distinction between viability and non-viability is probably an important, if not controlling, element in the determination of whether plaintiff was a legal person.

Surely, however, the problem goes deeper than that. The concept utilized by the courts, *ie.*, that one must be a legal person at the time of injury, does not seem either necessary nor properly descriptive of all factors of policy which form the real basis of decision in cases of this type. It appears abundantly clear that the defendant has engaged in conduct which is legally blameworthy and that the plaintiff, as a result of such conduct[35] has suffered certain injuries. Such a problem is not solved by adroit statements that plaintiff was or was not a legal person. Such a statement is nothing more than a verbalization of an otherwise reached conclusion, *i.e.*, that plaintiff may not recover from defendant. The problem is rather whether this consequence of defendant's conduct is outside the scope of the risk or, stated differently, whether this interest of the plaintiff is protected against this hazard.[36] That in turn involves a weighing of factors, the making of an important value decision. The defendant's interest in freedom of activity should, on the one hand, be restricted to the least degree necessary. In this situation the more consequences for which the defendant will be held liable, the more restricted will be his freedom of activity. Conversely, the interest of the plaintiff in the integrity of his person is one of the most important interests given protection in tort law.

Many factors go into the weighing process. Convenience of judicial administration, ability to distribute losses through insurance or increased prices or rates are two. Another is what Judge Andrews describes as a "rough sense of justice."[37] Here it would appear that the relative wrongfulness of the defen-

34. Allaire v. St. Luke's Hospital, 184 Ill. 359, 370, 56 N.E. 638, 641 (1900).

35. Ability to prove a causal relationship is assumed for the purpose of this analysis. That the assumption is unwarranted for other purposes is demonstrated *infra*.

36. See GREEN, RATIONALE OF PROXIMATE CAUSE (1927).

37. Palsgraf v. Long Island R.R. Co., 248 N.Y. 339, 352, 162 N. E. 99, (1928) (dissenting opinion).

dant's conduct become important. There is abundant analysis tending to support this view when there is a "difference in kind" in the conduct of the defendant. Thus it has been deduced that certain interests are given legal protection only against intentional misconduct, *e.g.*, the interest in freedom from emotional disturbance. Then too the conclusion has been reached that the defendant is responsible for more consequences in an intentional tort situation than in one where he has only been negligent, and for more where he has been negligent than where the consequences result from his engaging in an ultrahazardous activity. The theory is that the gradation is based on the relative fault involved.[38] It seems likely that the same idea holds true to a greater or less extent in different kinds of negligence situations. Holmes has pointed out that fault connoted the idea of choice, and there is no choice when we do not know (either objectively or subjectively) the likely consequences of the conduct in which we engage.[39] The idea, of course, is often expressed in terms of "risk." Since liability for consequences is related at least roughly to some concept of perceived or "ought to be perceived," risk,[40] and since perception of risk is an essential element in choice and since choice determines relative wrongfulness, it seems fair to say that relative fault on the part of defendant is not unimportant in determining liability for particular consequences.

Presumably in these cases there is a perceived risk of injury to the mother, a person, so that it cannot be said that the risk against which the usefulness of defendant's conduct is to be weighed is not violation of someone's personal integrity. It is true, however, that the risk is greater where there is likelihood of injury to 100 persons than it is where there is a risk of injury to only one person. We seem now to have arrived at the crux of the question. It seems not unreasonable to say that a defendant should be expected to realize that any woman may be pregnant and that that factor must be considered part of his choice. If then, the factors, other than relative wrongfulness, are not of sufficient importance to be controlling in the particular case, we may conclude that the risk of injury to a foetus is one which

38. PROSSER, HANDBOOK OF THE LAW OF TORTS 457 (1941).
39. HOLMES, THE COMMON LAW 94 (1881).
40. The phrase "perceived risk" should be understood to convey the meaning that the risk either was subjectively perceived or ought to have been perceived in an objective sense.

should be borne by a defendant who is negligent with respect to a woman in such a way as to subject her interest in her personal integrity to an unreasonable risk of harm.[41]

B. Duty Owed to the Unborn Child

Once the courts recognize that the unborn child is to be considered a legal person, there naturally follows the holding that a defendant owes the unborn child a duty to use reasonable care to refrain from injuring him. Thus, in *Verkennes v. Corniea*,[42] where plaintiff sued for his decedent's prenatal injuries and subsequent death under a wrongful death statute, the Minnesota Supreme Court allowed recovery, considering plaintiff's decedent a "person" at the time of the injury, hence owed a duty by defendant.

C.[43] *Others Reasons: Probability of Fictitious Claims; Lack of Precedent; Mother Can Recover for Injuries Not Too Remote; Court's Refusal to Legislate*

These last four arguments offered by those courts which deny a cause of action for prenatal injuries are seemingly without merit, and have been ably refuted by those courts allowing recovery.

First, there is the argument that allowance of recovery will induce fictitious and unwarranted claims. A Pennsylvania court has answered:

> Shall we close the door of justice in the face of a deserving litigant merely because of the fear that the underserving might at times receive more than their due? We think not.[44]

Certainly this line of reasoning seems sound. It can be fairly stated that here are inherent dangers of fictitious claims in a great number of lawsuits. But this aspect of the problem is to be regarded as one of *proof* not of *right*. Correct rules of procedure and enforcement of the rules of evidence will negative the infiltration into the courts of fictitious plaintiffs.

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41. See note 63 HARV. L. REV. 671 (1950).
42. 229 Minn. 280, 38 N.E.2d 838 (1949).
43. Since there is much controversy as to whether a plaintiff can show that an injury to his mother caused a prenatal injury to the plaintiff, and since this seems to be the only argument against allowance of a cause of action which causes any real difficulty, it seems best to dispose of other arguments offered against allowance of recovery and discuss the causation problem last.
44. Kine v. Zuckerman, 4 Pa. D. & C. 227, 229 (1924).

Second, there is the argument that there is lack of precedent favoring recovery, and that the courts should respect the doctrine of stare decisis. This reasoning is also fallacious. As has been said, ". . . an adjudicated case is not indispensable to establish a right to recover under the rules of the common law."[45] Early in the development of the common law a right of action in a person negligently injured by another was recognized. This was the "doctrine of law" out of which innumerable causes of action arose. A few decades ago an unborn child was regarded as merely a part of its mother. However, as civilization progressed and became more complex, as new discoveries were made in science and medicine, the unborn child *en ventre sa mere* came to be looked upon as a *person,* not as a mass of flesh attached to, and a part of, its mother. The great merit of the common law is its flexibility, its adaptability to changing social conditions. While the unborn child was formerly considered a part of its mother, it is now recognized as a person, hence entitled to a cause of action under the age-old doctrine permitting compensation for injuries negligently inflicted.

The next argument offered opposing recovery for prenatal injuries is that the mother can recover for injuries to the child which are not too remote for any recovery. No court has directly answered this proposition, probably because it is vague and because it is refuted when a duty to the viable foetus is found. But this answer may be given: the child is a person; he, in addition to his mother, was injured; certainly *she* has a cause of action; but there were two persons, not one; two causes of action arose, not one.

Finally, it has been argued that it is the province of legislation, not judicial decision, to give the cause of action for prenatal injuries. Of course this proposition arose from the court's view that the child is not a "person," hence not entitled to a cause of action under constitutions or statutes conferring such a right only upon persons. Since that proposition seems to have been rebutted, the courts need not regard a recovery as "judicial legislation."

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45. Allaire v. St. Luke's Hospital, 184 Ill. 359, 368, 56 N.E. 638, 640 (1900).

D. Proof of Causation Between the Injury to the Mother and the Resultant Injury to the Unborn Child

It seems fair to state at this point that all the other arguments voiced against allowance of a cause of action for prenatal injuries are not persuasive. There remains only the causation problem.

The courts which allow recovery find little difficulty in saying that causation can be shown by expert medical testimony, and that the question as to whether the defendant's negligent conduct caused the injury to the child is for the jury.[46] Prosser supports this view by saying:

> . . . it seems clear that adequate safeguards could be established by requiring sufficient proof by competent medical evidence, which is possible at least in many cases.[47]

If the case is one in which there is a reasonable probability that the injury to the mother did in fact cause the injury or deformity in the child, then this question of causation would properly be submitted to the jury, since it is never incumbent on the plaintiff to rule out all possibility that the defendant's conduct was not a cause. However, if the case is one in which even expert medical testimony can only be based on conjecture, and where a causal relation between the accident and the injury to the child cannot be established to any degree of certainty, then the case should never be submitted to the jury. Discussion with obstetricians reveals that such is the present state of medical knowledge.

In order to discuss the problems incident to the establishment of causation, it seems best to divide the cases factually into the following categories:

1. Malpractice cases
2. Cases involving traumatic injury
   (a) Cases in which there is a direct physical injury to the womb and foetus.
   (b) Cases in which, immediately following a traumatic injury, plaintiff is born prematurely.

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46. Scott v. McPheeters, 33 Cal. App.2d 629, 92 P.2d 678 (1939); Williams v. Marion Rapid Transit, Inc., 152 Ohio St. 114, 87 N.E.2d 334 (1949).

47. PROSSER, HANDBOOK OF THE LAW OF TORTS 189, 190 (1941).

(c) Cases in which there is trauma to the mother, but where the plaintiff is not born until the completion of normal gestation.

1. Malpractice cases

There are a number of recognized causes of congenital malformations and deformities for which the obstetrician or attending physician might well be held responsible. For instance, it has been established that food deficiencies during pregnancy might cause various anomalies in the child.[48] A defective diet prescribed by a doctor who disregards the nutritional needs of the mother and child might be successfully shown to be the cause of a deformity or malformation prenatally developed.

It has also been shown that where short wave irradiation treatments are used on the pregnant woman, congenital malformations may develop in the unborn child.[49] This may occur when either X-ray or radium treatments are administered. Low voltage treatments will not have any evil effects, but "deep ther-

48. BLEYER, ADRIEN, M.D., "Congenital Malformations" (Lecture delivered to seniors in the School of Medicine, Washington University, St. Louis, Mo., on Oct. 24, 1949, and on May 10, 1950). Dr. Bleyer points out that a deficiency of iodin may cause blindness in the child, or even a stillbirth. So also, deficiencies of certain vitamins during pregnancy may cause congenital malformations, *e.g.*, blindness. He goes on to summarize the findings of Dr. Douglas P. Murphy of the Department of Obstetrics of the University of Pennsylvania. Dr. Murphy's article, "Food Habits of Mothers of Congenitally Malformed Children" reveals that:

1. 35% of the mothers of malformed children took no milk during pregnancy.
2. About 81% of these mothers had less than two servings daily of leafy vegetables.
3. 69% went through pregnancy without citrus fruits.
4. Only 17% used whole grain bread.
5. Anemia was observed with unusual frequency among women giving birth to defective children.

Dr. Bleyer cites other reports indicating that women maintaining defective diets miscarried about three times as often as women with sensible diets.

The diet deficiency aspect of Dr. Bleyer's lecture concludes:

> The thing that comes out of all of this is, that we must begin to think of the fetus as a separate being, quite independent of the mother and having his own nutritional requirements; we must remember that the fetus is made, not from the mother's body, but from what she eats, and that, although the hostess, she is not the larder. Henceforth we must think of the dietary of the unborn much as we have been thinking of the dietary of infancy. Nor is there any doubt that pediatric interest, although not so practical, starts with conception rather than with the birth of the child.

49. BLEYER, ADRIEN, M.D., "Congenital Malformations" (Lecture delivered to seniors in the School of Medicine, Washington University, St. Louis, Mo., on Oct. 24, 1949, and on May 10, 1950); Dunlap, Charles E., *Effects of Radiation* in PATHOLOGY 175, 191 (Anderson ed. 1948).

apy" (*i.e.*, treatments of greater intensity) may cause anomalies in the unborn child. If, for instance, a doctor incorrectly diagnosed an actual pregnancy as a tumor of the womb, and further, if it could be shown that his incorrect diagnosis was the result of actionable negligence, it might fairly be inferred that X-ray treatments administered on the person of the plaintiff's mother caused the plaintiff's resultant deformities. One such case is *Stemmer v. Kline.*[50] There the jury found the defendent physician negligent in failing to discover that plaintiff's mother was pregnant. Defendent administered deep therapy X-ray treatments. Plaintiff was born so defective that he was incapable of speech, sight and hearing. On appeal the judgment for the plaintiff was reversed, the court holding that plaintiff had no cause of action for prenatal injuries. From what has been said here, the result seems erroneous. However, it must be remembered that plaintiff was denied recovery for reasons other than the court's belief that sufficient proof of causation was not made.

It would seem that in at least the two discussed instances sufficient proof of causation between doctor's negligence and the malformation of the plaintiff might be established. However, the answer is not quite that simple. It has been shown that there are other recognized causes of congenital malformations, such as Rubella (*i.e.*, German measles) and Diabetes in early pregnancy; syphilis, aging of the mother, and heredity also play an important role in causing congenital malformations.[51] In addition to these, the records are replete with cases of deformities *where there is no known cause and where the pregnancy has been a normal one from all appearances.*

It seems obvious, then, that in the malpractice cases, the courts should be very skeptical of expert medical testimony in determining whether to permit the jury to find causal relation. Even where it is shown positively that the defendant doctor has breached the duty to his patient, this by no means proves that his particular negligent act caused a particular malady; there may have been other known causes; there may have been unknown causes. Yet there seems to be a sufficient basis for permitting a doctor to give expert testimony relating to causation under these circumstances. It cannot be urged too strongly,

50. 128 N.J.L. 455, 26 A.2d 489 (Ct. Err. App. 1942).
51. See note 49 *supra.*

however, that the trial judge should ride with a tight rein here. He should insist on a showing that there is no history of any of the other known causes, *i.e.*, Rubella, diabetes in early pregnancy, syphilis, etc. When the absence of other possible known causes is *affirmatively shown, then the fact that unknown causes* may be in operation should not preclude the judge from permitting the jury to find a causal connection.

2. Cases Involving Traumatic Injury

(a) Trauma To The Womb and To The Foetus

Where there is direct injury to the uterus by penetration thereof, and the penetrating object is alleged to have come into contact with the foetus, there should be recovery only where some part of that object is found imbedded in the child when the child is born at term, or at least born alive. While this rule may seem extremely rigid when applied in certain situations it is clear that the present state of medical knowledge will not permit a more lenient one to be applied. Suppose, for example, that a pregnant woman is involved in an automobile accident occasioned by defendant's negligence; that her abdomen is pierced by a long and sharp piece of glass; that at term the child is born with scars, or even with an amputation. In such a situation while it is possible that the penetration by the sliver of glass caused the amputation or scar, there are so many cases where precisely that condition is found even though there was no trauma history of any kind,[52] that it cannot be said with any reasonable probability that the scar or amputation resulted from the penetration by the sliver of glass. Any doctor who testifies that in his opinion it did, is simply guessing. If, however, a piece of glass is found imbedded in the child, quite a different situation is presented. There the probabilities are all in favor of the existence of a causal connection.

(b) Trauma To the Mother Followed By Immediate Premature Birth of Plaintiff

Where there is severe trauma to the mother, followed by immediate and premature birth of the plaintiff, it seems reasonable to conclude that the accident, caused by defendant's negligence, has

52. Birnbaum, Dr. R., A CLINICAL MANUAL OF THE MALFORMATIONS AND CONGENITAL DISEASES OF THE FOETUS 13 (1912).

"forced nature's hand," and caused the plaintiff's entrance into the world at a date earlier than that appointed. In such case, where there is no other explanation of the premature birth, and the early arrival of plaintiff has caused him to be weak or anemic, causation has been sufficiently proven. In *Williams v. Marion Rapid Transit, Inc.*,[53] plaintiff's mother fell when defendant's servant negligently started the carrier on which she was riding. At that time plaintiff was a foetus *en ventre sa mere* of seven months. Plaintiff's mother began labor immediately, and plaintiff was born two months before term. She (plaintiff) alleged that as a result of her premature birth, caused by defendant's negligence, she was suffering from heart trouble, anemia, inability to walk, and Jacksonian Epilepsy. At the trial level defendant's demurrer to plaintiff's petition was sustained. On appeal to the Ohio Supreme Court the case was reversed, the court saying that the child has a cause of action for prenatal injuries, and that sufficient proof of causation had been adduced at the trial.

(c) There remains for discussion the factual situation in which the pregnant woman is injured, completes her normal term and delivers a child which is malformed or defective in one or more respects. Perhaps because of a general assumption on the part of medical authorities that causation could not be demonstrated, remarkably little medical research has been undertaken for the purpose of demonstrating the presence or absence of such causal relationship.

One medicolegal article has related an interesting case involving trauma during early pregnancy.[54] The patient was a woman in her third month of pregnancy. She was found unconscious on the street, and was taken to the hospital. X-rays showed:

1. Fracture of the right acromial process (*i.e.*, the outward extension of the spine of the scapula, forming the point of the [right] shoulder.[55]
2. Fracture of the pelvis.
3. Fracture of the sacrum, with no displacement.

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53. 152 Ohio St. 114, 87 N.E.2d 334 (1949).
54. Meyer, Harry, M.D., and Cummins, Charles, M.D., *Severe Maternal Trauma In Early Pregnancy; Congenital Amputations in the Infant at Term*, 42 AM. JOUR. OBSTETRICS AND GYNECOLOGY 150, 153 (1941).
55. DORLAND, 2 AM. ILLUSTRATED MEDICAL DICTIONARY 47 (1948).

4. Compound comminuted fractures of the lower halves of the right tibia and fibula, with overriding.
5. Fracture of the right parietal (from which patient complained of persistent headache and diplopia).

The patient could remember nothing of what happened to her, but the obvious conclusion is that she was struck (evidently with great force, considering the injuries) by a hit-and-run driver. At the close of the normal period of gestation the patient delivered a 6½ pound boy. The child had several congenital amputations, *i.e.*, a deep cleft in the upper arm, completed amputations of parts of the fingers of the left hand, and a partial amputation of the right foot.

A thorough examination was made of the mother as to any other illnesses or abnormalities during her pregnancy; none were discovered. Further, the records showed she had completed a normal pregnancy previous to the one in question, and delivered a normal child.

To the ordinary layman all the evidence in this case seems to indicate that the deformities present in the child were probably caused by the accident. However, the authors point out:

> *A causal relationship between the maternal injury and the fetal defects cannot be established,* but since the possibility is not absolutely excluded, the potential medico-legal aspects of this and similar cases are deserving of note. [Italics added].[56]

Thus the authors of the article quoted affirm the views of the vast majority of obstetricians and gynecologists. In spite of the fact that *the only known abnormal circumstance which occurred during the pregnancy of the mother was the traumatic injury,* the authors declare:

> From consideration of other reported instances of congenital amputations in human subjects and of the parallel conditions observed in mice and rats, we conclude that the amputations in the present case are to be explained as the result of incapacity which was inherent in the developing embryo.[57]

This opinion seems to indicate that an allegation that trauma is the cause of a prenatal injury to a child born at term is without merit, and the question as to its truth or falsity should not be

56. Meyer, *supra* note 54, at 150.
57. Meyer, *supra* note 54, at 153.

submitted to the jury. As was said, the possibility of causation has not been wholly ruled out. But a plaintiff should not be allowed to take his case to the jury on a mere scintilla of evidence. Such is the case here. Where there is trauma during pregnancy and the child is born at the end of term bearing some defect or abnormality, such anomaly is presumptively the result of some other known cause, or unknown cause. There is no medical information showing positively that mechanical trauma has any effect on a foetus, a quite different situation from that where deep therapy X-ray treatments or improper diet is involved. In such case, therefore, no cause of action should accrue.

CONCLUSION

We may fairly conclude that neither archaic notions of legal identity nor most of the other stated reasons for denying recovery are satisfactory determinants for the solution of this problem. Nevertheless, it appears that the vast majority of cases have reached a correct result, and that courts should proceed with extreme caution in the direction of varying the existing law. Above all, they should be kept constantly aware of the then state of medical knowledge with regard to the connection between trauma and injury to a foetus. In most of the situations considered, medical knowledge refutes the existence of any causal connection, hence that issue should not be submitted to the jury.

WALTER M. CLARK