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Right of Action of Child for Pre-Natal Injuries

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Many of the state courts have not been prone to give the *Michigan Central* case an interpretation as in the instant case. In a Virginia case, where a writ of certiorari was denied, the carrier was held liable to the shipper for conversion of the goods as the carrier's agent had pointed out the carload of goods consigned to the consignee's agent who proceeded to unload the car without presenting the bill of lading. The court held that where a carload of freight is placed upon a delivery track and the consignee's agent is permitted to open it and commence unloading it that such constitutes a final and complete delivery even though the goods were returned.*12* A Missouri case held that a final delivery of the car terminated the carrier's liability as an insurer because the carrier's contractual obligations had ceased. A final delivery was held to be spotting the cars at the convenience of the consignee.*13* A Massachusetts case held that the delivery of a car to a private siding for partial unloading was sufficient to terminate the liability of the carrier.*14* A Kentucky case held that where the consignee has assumed full control over the carload of goods and such goods have been left in the carrier's car that it constitutes a final and complete delivery to the consignee and terminates the liability of the carrier.*15*

The instant case is an apt example of imposing liability as an insurer after the contract of carriage has been performed by the carrier. On rehearing, it also sets up the proposition that the carrier was in possession of these goods as the goods were still in the carrier's cars when destroyed even though the carrier no longer had access to these cars, nor any right to recapture the actual possession of the cars. The Supreme Court of the United States remarked in a later case*16* in regard to its decision in the *Michigan Central* case that there was not a delivery of the goods which would terminate the liability of the carrier. Accordingly, the defense of delivery of the goods as terminating the carrier's liability is apparently still available. The custody and control of the goods to the exclusion of the carrier whether within or without the carrier's cars should be sufficient to terminate the carrier's liability.

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RIGHT OF ACTION OF CHILD FOR PRE-NATAL INJURIES

A personal injury action was brought for injuries received due to the negligence of the defendant in the operation of its bus line. Plaintiff at the time of the injury was a viable child existing in the womb of his mother. *Held,* that injries wrongfully inflicted upon an unborn viable child capable of existing independently of his mother are injuries done him in his "person" within the meaning

12. Norfolk & W. Ry. Co. v. Aylor, 153 Va. 575, 150 S.E. 252, cert. denied, 282 U.S. 847, 51 Sup. Ct. 26, 75, L. Ed. 751 (1929).
13. Southern Advance Bag & Paper Co. v. Terminal R. Ass'n. of St. Louis, 171 S.W. (2d) 107 (St. Louis Court of Appeals 1943).
14. Rice & Lockwood Lumber Co. v. Boston & M. R. R., 308 Mass. 101, 31 N.E. (2d) 219 (1941).
15. Gus Datillo Fruit Co. v. Louisville & Nashville R. Co., 251 Ky. 566, 65 S.W. (2d) 683 (1933).
16. See note 11 supra.

of section 16, article I of the Ohio constitution and, subsequent to his birth, he may maintain an action to recover damages for the injuries so inflicted. *Williams v. Marrion Rapid Transit, Incorporated,* 152 Ohio St. 114; 87 N. E. 334 (1949).

The right of action in a child who suffers from a pre-natal injury as a result of the negligence of another has been denied by nearly all courts which have considered the question.[1] There are two principal reasons for denying recovery. The first is demonstrated in *Dietrich v. Northampton,*[2] which held that the defendant can owe no duty of conduct to a person not in existence at the time of the injury. In that case the mother of the child was between four and five months advanced in pregnancy, when a fall by the mother brought about a miscarriage. Although recovery was not allowed, on the theory that a child was a part of the mother, the court expressed the query, "whether an infant dying before it was able to live separately from the mother could be said to have become a person recognized by the law as capable of having a locus standi in court, or being representated there by an administrator."

Following the *Dietrich* case the Illinois Supreme court in 1901 in *Allaire v. St. Lukes Hospital,*[3] held that although an infant en ventre mere might be considered as in esse for some purposes in criminal and property law, it was a mere legal fiction not indulged in by the courts to the extent of allowing an action for the recovery of damages for personal injuries occasioned before its birth. In that case a strong dissent pointed out that at a period of gestation in advance of the period of perturition the feotus is capable of independent and separate life, and that if an infant is born suffering from injuries inflicted during such period of gestation, it is sacrificing truth to a mere theoretical abstraction to say the injury was not done to the child, but to the mother.

The Wisconsin court in *Lipps v. Milwaukee Electric Railway,*[4] held that no cause of action accrues to an infant enventre su mere for injuries received before it could be born viable, but added that "very cogent reasons may be urged for a contrary rule where the infant is viable."

In *Nugent v. Brooklyn Heights R. Co.,*[5] the plaintiff's mother, who was then enceinte with the plaintiff, was a passenger on the defendants railroad and the plaintiff was injured by the defendant's negligence in transporting the mother. The court recognized that in some cases a cause of action might exist for injuries received before birth, but held that the child in its distinct entity was not a passenger, and the defendant owed it, as a separate person, no duty in the matter of safe carriage. The court further concluded that there could be no action on a breach of contract since the defendant did not contract for the safe carriage of

1. Prosser, Torts 188 (1941).
2. 138 Mass. 14, 52 Am. Rep. 242 (1884). See also Drobner v. Peters 232 N.Y. 220, 133 N.E. 567, 20 A.L.R. 1503.
3. 184 Ill. 359, 56 N.E. 638, 48 L.R.A. 225, 75 Am. St. Rep. 176 (1900). In concluding their decision the court said, "If the action can be maintained, it necessarily follows that an infant may maintain an action against its own mother for injuries occasioned by the negligence of the mother while pregnant with it."
4. 164 Wis. 272, 159 N.W. 916, 917 L.R.A. 1917B, 334 (1916).
5. 154 App. Div. 667, 139 N. Y. Supp. 367 (1913).

the plaintiff, nor was it the duty of the carrier to scrutinize its passengers for the detection of unborn children, to the end that they, though latent, may be regarded as passengers.

The second reason was demonstrated in *Stamford v. St. Louis-San Francisco Ry. Co.*,[6] where the court felt the difficulty of proving any causal connection between negligence and damage would be too great, and that there was too much danger of fictitious claims. In that case the court recognized that such a rule of law might burden a child through life with an infliction produced before its birth but to hold otherwise would open a large field of litigation where recovery would be based upon the merest conjecture of speculation as to whether or not the pre-natal injury was the cause of the death or condition of the child.

Many decisions have been based on precedent established by earlier courts. Thus the court in *Stemmer v. Kline*[7] followed the rule formulated in the Restatement of Torts,[8] that a person who negligently causes harm to an unborn child is not liable to such child for the harm "at common law," and there being no statute in such case made and provided, it follows that no cause of action exists in favor of the child subsequent to its birth. In *Berlin v. J. C. Penny*,[9] the court held that there is no warrant for holding, independent of statute, that a cause of action for pre-natal injuries accrues at birth.

California, by statute, has allowed a right of action for pre-natal injuries to a child. Section 29 of the California civil code provides that an unborn child which is conceived is deemed to be an existing person when that assumption is necessary for its interest, in the event of its subsequent birth. In the case of *Scott v. McPheeters*,[10] the court construed the statute to include the right to maintain an action for tort committed upon the child before its birth.

Two courts[11] have indicated by dictum, that they would afford a cause of action for pre-natal injuries to a viable child. Construing a viable child as a person in existence, the Minnesota Supreme Court in *Verkennes v. Corniea et al.*[12] applied it to their wrongful death statute to allow a right of action to the personal representative of a viable child who died as the result of the alleged negligence of the defendant.

In the District Court of the United States for the District of Columbia an action was brought to recover for injuries sustained by the infant when it was allegedly taken from its mother's womb through professional malpractice.[13] In allowing a right of action the court found a direct injury to a viable child as

6. 214 Ala. 611, 108 So. 566 (1926).
7. 128 N.J.L. 455, 26 A. (2d) 489 (1942). Overruling 19 N.J. Misc. 15, 17 A. (2d) 58, where it was held that a physician who knew of the pre-natal existence of the child was under a duty to the child to use proper care in treating the mother; and it was intimated that the duty might exist even in the absence of such knowledge.
8. Restatement, Torts sec. 869 (1939).
9. 339 Pa. 547, 16 A. (2d) 28 (1940).
10. 33 C. A. (2d) 629, 92 P. (2d) 678 (1939).
11. See notes 4 and 9 supra.
12. —Minn. —, 38 N.W. (2d) 838 (1949).
13. Bonbrest et. al. v. Kotz et. al., 65 F. Supp. 138 (1946).

distinguished from earlier decisions where the injury was transmitted through the mother.

Where a child is deformed by injuries occasioned prior to its birth by the negligence of another, the mother can usually recover for her own pain and mental suffering,[14] but the mental pain the child would suffer and the fact of deformity with its consequent diminution of the value of capacities and facilities could not be recovered by the mother. The indenfication of the unborn child with the mother, and the merger of its individuality with that of the mother restricts the amount of the recovery to the injury to her. To conclude that a right of action does not accrue to the child upon its birth is but to close the doors of justice to the child and to harness him with the stamp of another's negligence for which he can have no redress. The inconvenience of discovering the resultant injury is no reason to deny such right of action in the child. Medical science has long demonstrated the ability of a child en ventre su mere, upon reaching a certain state of development, to exist separate and distinct from the mother and that even the death of the mother cannot deprive it of life.[15] As pointed out in the principal case, to hold that a child is not a person until birth would be the application of a time worn fiction not founded upon fact and within common knowledge untrue and unjustified. The absence of precedent to the contrary should afford no refuge to those who by their wrongful acts have invaded the rights of an individual.[16]

The Wyoming constitution[17] provides, that "all courts shall be open and every person for an injury done to person, reputation or property shall have justice administrated without sale, denial or delay." This provision is substantially the same as that of the Ohio constitution, by with the court in the principal case allowed a right of action to accrue to a viable child subsequent to its birth for pre-natal injuries.

Wyoming's wrongful death statute[18] is not unlike the Minnesota wrongful death statute which construed an unborn viable child as a person in existence and subject to the protection afforded by the statute.

The effect of recent cases has been to limit the common law rule to injuries suffered during the embryonic or early fetal stage of development, allowing a right of action to a viable child or his legal representative. Since Wyoming has established no precedent on the right of an unborn child to maintain a cause of action subsequent to its birth, or to allow the legal representative to maintain such action, they may be expected to follow this trend.

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14. See note 3 supra.
15. Boggs, J. dissenting, note 3 supra.
16. See note 13 supra.
17. Article 1, section 8, Wyoming State Constitution.
18. Wyo. Comp. Stat. 1945 sec. 3-403.