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Daniel A. Ruley Jr.

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Recovery of Damages for Injuries Sustained by Children en Ventre sa Mere

DANIEL A. RULEY, JR.*

The principal legal question dealt with here is whether there is a cause of action for the wrongful death of a child which while *en ventre sa mere* is injured and subsequently is born dead as the result of negligence of a third party. This question is closely related to the questions of: (1) whether there is a cause of action for the wrongful death of a child which while *en ventre sa mere* is injured as the result of negligence of a third party, subsequently is born alive and then dies as a result of such injuries; and (2) whether a child may maintain a cause of action for damages for personal injuries sustained as the result of negligence of a third party while it was *en ventre sa mere.* There is no precedent in West Virginia which is directly in point respecting any of the three questions. As will be demonstrated hereinafter, the marked trend of authority is toward permitting recovery of damages in all of the three situations.

I. WEST VIRGINIA STATUTES

The current West Virginia statutes relating to actions for wrongful death refer to death of a "person."[1] This is a common, if not universal, term in wrongful death statutes. It gives rise to the basic inquiry of whether a child *en ventre sa mere* is a "person."

II. MALONE V. MONONGAHELA VALLEY TRACTION CO.

Malone v. Monongahela Valley Traction Co.[2] is the only West Virginia case even remotely related to the instant question. It was an action for damages for personal injuries sustained by the plaintiff

* Member, West Virginia State Bar. Attorney at Law, Parkersburg, West Virginia.

[1] W. VA. CODE, ch. 55, art. 7, §§ 5, 6 (Michie 1961).

[2] 104 W. Va. 417, 140 S.E. 340 (1927).

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which had resulted in a miscarriage. A verdict for the plaintiff was set aside by the Supreme Court of Appeals of West Virginia because of a prejudicially erroneous instruction permitting the jury to award damages for "the pain, suffering and mental anguish, if any, the plaintiff sustained by reason of the injuries to and for the death of said child, and for the resultant pain and mental anguish, if any, suffered by the plaintiff by reason of the loss of said child." A fair inference from this decision is that, if West Virginia recognizes any civil legal remedy for a wrong inflicted upon the person of a child *en ventre sa mere,* it will have to be a remedy falling into one of the three classifications of civil actions to which this paper relates.[3]

III. MEDICAL TERMINOLOGY

An understanding of the following medical terms will facilitate understanding of the cases on this subject:[4]

(a) *viable fetus*—a fetus capable of living outside the womb or uterus;

(b) *abortion*—expulsion of fetus from uterus before viable, i.e., before the 24th week (28th week according to Taber), the fetus measuring 35 cm. or less and weighing less than 3¼ lbs.;

(c) *miscarriage*—expulsion of fetus from uterus after four months and before viable;

(d) *premature delivery*—expulsion of fetus from uterus after viable but before full term.

IV. CASE LAW

A detailed statement of all of the cases concerning the three principal questions is not warranted because of their volume. Accordingly, although all of the cases which an exhaustive search has disclosed will be cited herein, only the more significant cases will be discussed in detail.

A. Early Cases

The first case on the subject in either the United States or the United Kingdom and formerly the leading case was the case of *Dietrich v. Northampton*[5] where in an opinion written by Holmes, J.,

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[3] For cases similar to the Malone case, see Annot., 10 A.L.R.2d 640 (1950).
[4] TABER, CYCLOPEDIC MEDICAL DICTIONARY (7th ed. 1958); MALOY, MEDICAL DICTIONARY FOR LAWYERS (2d ed. 1951).

the Supreme Judicial Court of Massachusetts laid down the rule that there could be no recovery for the wrongful death of a child who was born alive and survived only for a few minutes as a result of injury to its mother resulting in miscarriage because: such child was not a "person" within the meaning of the Massachusetts wrongful death statute; there was no precedent for allowing such recovery; and, at the time of injury, such child was a part of its mother. It is interesting to note that, at the time of the injury, the child's mother was between four and five months advanced in pregnancy.

Five early decisions followed the *Dietrich* case in denying recovery of damages for wrongful death under similar circumstances.[6]

The first reported judicial voice dissenting from the rule of the *Dietrich* case was that of Judge Boggs of the Supreme Court of Illinois in the case of *Allaire v. St. Luke's Hospital.*[7] This was an action by a child for damages for permanent personal injuries which it had sustained while *en ventre sa mere* but after it had become viable. The majority of the court, citing and relying upon the *Dietrich* case, held that there could be no recovery. Judge Boggs' eloquent and didactic dissenting opinion is a landmark. It warrants full quotation but that is prohibited by its length.

First, he demolished the old argument that there could be no recovery because there was no precedent for recovery. After quoting Lord Mansfield's famous declaration, "The law of England would be an absurd science were it founded upon precedents only,"[8] he then quoted Mr. Cooley's work on *Torts,* as follows:

> "But new and peculiar cases must also arise from time to time, for which the court must find the governing principle, and these may either 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."

[5] 138 Mass. 14 (1844).
[6] Stanford v. St. Louis, S.F. Ry., 214 Ala. 611, 108 So. 566 (1926); Newman v. Detroit, 281 Mich. 60, 274 N.W. 710 (1937); Buel v. United Ry., 248 Mo. 126, 154 S.W. 71 (1913); Gorman v. Budlong, 23 R.I. 169, 49 Atl. 704 (1901); Magnolia Bottling Co. v. Jordan, 124 Tex. 347, 78 S.W.2d 944 (1935).
[7] 184 Ill. 359, 56 N.E. 638 (1900).
[8] 1 KENT, COMMENTARIES 477.

Judge Boggs then stated that the principle to be applied is the general principle that the common law, by way of damages, gives redress for personal injuries inflicted by the wrong or neglect of another.

Next, Judge Boggs assailed the contention that an unborn child is merely a part of the mother. Respecting a child *en ventre sa mere,* he said:

> "* * * if, while in the womb, it reaches that prenatal age 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 that it would live and grow, mentally and physically, as other children generally, it is but to deny a palpable fact to argue that there is but one life, and that the life of the mother."

He then pointed out that a child *en ventre sa mere* was regarded at common law as *in esse* from the time of conception for purposes of inheritance and also that at common law there was criminal liability for the death of a child either stillborn or born alive and afterwards dying as a result of injuries inflicted upon it while in its mother's womb.

Finally, Judge Boggs stated that natural justice demanded that the recovery of damages be allowed in such cases. His opinion was limited, however, to injuries sustained by a child *en ventre sa mere* after it became viable.

B. Personal Injury Cases

Six subsequent cases wherein a child sought damages for personal injuries sustained while it was *en ventre sa mere* have followed the majority opinion in the *Allaire* case[9] and denied recovery.[10] It is of particular significance that four of them have been overruled.

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[9] 184 Ill. 359, 56 N.E. 638 (1900).

[10] Cavanaugh v. First Nat'l Stores, Inc., 329 Mass. 179, 107 N.E.2d 307 (1952); Stemmer v. Kline, 128 N.J.L. 455, 26 A.2d 489, 684 (1942); Drobner v. Peters, 232 N.Y. 222, 133 N.E. 567 (1921); Mays v. Weingarten, 82 N.E.2d 421 (Ohio App., 1943); Berlin v. J. C. Penney Co., 339 Pa. 547, 16 A.2d 28 (1940); Lipps v. Milwaukee Elec. Ry., 164 Wis. 272, 159 N.W. 916 (1916).

It is noteworthy that the four cases which were overruled were in New York, New Jersey, Ohio and Massachusetts.[11]

Ten subsequent cases have followed or extended the dissenting opinion of Judge Boggs in the *Allaire* case[12] and allowed recovery of damages for personal injuries.[13]

In the case of *Tucker v. Carmichael*[14] the court, after making detailed observations of the legal processes available for the protection of the property of an unborn child, stated:

> "It would therefore be illogical, unrealistic, and unjust—both to the child and to society—for the law to withhold its processes necessary for the protection of the person of an unborn child, while, at the same time, making such processes available for the purpose of protecting its property."

Smith v. Brennan[15] is an especially important New Jersey case because not only did it overrule *Stemmer v. Kline*[16] but, also, it discarded the viability test which, of course, first was enunciated by Judge Boggs. The lucid reasoning of the court in reaching its decision on the latter point is set out in the opinion as follows:

> "The semantic argument whether an unborn child is a 'person in being' seems to us to be beside the point. There is no question that conception sets in motion biological processes which if undisturbed will produce what every one will concede to be a person in being. If in the meanwhile those processes can be disrupted resulting in harm to the child when born,

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[11] Keyes v. Construction Service, Inc., 340 Mass. 633, 165 N.E.2d 912 (1960) (overruling Cavanaugh v. First Nat'l Stores, Inc., *supra* note 10); Smith v. Brennan, 31 N.J. 353, 157 A.2d 497 (1960) (overruling Stemmer v. Kline, *supra* note 10); Woods v. Lancet, 303 N.Y. 349, 102 N.E.2d 691 (1951) (overruling Drobner v. Peters, *supra* note 10); Williams v. Rapid Transit, Inc., 152 Ohio St. 114, 87 N.E.2d 234 (1949) (overruling Mays v. Weingarten, *supra* note 10).

[12] 184 Ill. 359, 56 N.E. 638 (1900).

[13] Bonbrest v. Kotz, 65 F. Supp. 138 (D.D.C. 1946); Tursi v. Windsor Co., 19 Conn. Super. Ct. 242, 111 A.2d 14 (1955); Tucker v. Carmichael, 208 Ga. 201, 65 S.E.2d 909 (1951); Damasiewicz v. Gorsuch, 197 Md. 417, 79 A.2d 550 (1951); Bennett v. Hymers, 101 N.H. 483, 147 A.2d 108 (1958); Smith v. Brennan, 31 N.J. 353, 157 A.2d 497 (1960); Woods v. Lancet, 303 N.Y. 349, 102 N.E.2d 691 (1951); Williams v. Rapid Transit, Inc., 152 Ohio St. 114, 87 N.E.2d 334 (1949); Mallison v. Pomeroy, 205 Ore. 690, 291 P.2d 225 (1955); Seattle-First Nat'l Bank v. Rankin, 367 P.2d 835 (Wash. 1962).

[14] 208 Ga. 201, 65 S.E.2d at 911.

[15] 31 N.J. 353, 157 A.2d 497 (1960).

[16] 128 N.J.L. 455, 26 A.2d 489, 684 (1942).

it is immaterial whether before birth the child is considered a person in being And regardless of analogies to other areas of the law, justice requires that the principle be recognized that a child has a legal right to begin life with a sound mind and body. If the wrongful conduct of another interferes with that right, and it can be established by competent proof that there is a causal connection between the wrongful interference and the harm suffered by the child when born, damages for such harm should be recoverable by the child.

"Although the viability distinction has no real justification, it is explainable historically. The Dietrich case announced a theory that an unborn child was part of its mother. The first dissent from this proposition, by Justice Boggs in the Allaire case pointed out than an unborn child who could sustain life apart from its mother could not be considered part of her. The logical appeal of Justice Boggs' approach, coupled with the understandable conservatism of the earlier courts who broke with the Dietrich theory, resulted in a rule of recovery limited by the viability distinction. But the usefulness of that distinction has disappeared with the modern repudiation of the Dietrich theory. And since it has no cogent medical reason to support it, and no relevancy to the harm resulting from prenatal injury, we do not believe that it has any place in the determination of the question of liability for wrongful conduct."[17]

C. Cases for Wrongful Death of Children Born Alive

Seven cases, including the *Dietrich* case, have denied recovery of damages for the wrongful death of a child as a result of injuries sustained while it was *en ventre sa mere* but subsequently was born alive.[18] Significantly, two of them have been expressly overruled[19] and a third, the precendent setting *Dietrich* case, has been overruled

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[17] 31 N.J. 353, 157 A.2d 497 at 503, 504.

[18] Stanford v. St. Louis-S.F. Ry., 214 Ala. 611, 108 So. 566 (1926); Bliss v. Passanesi, 326 Mass. 461, 95 N.E.2d 206 (1950); Dietrich v. North hampton, 138 Mass. 14 (1884); Newman v. Detroit, 281 Mich. 60, 274 N.W. 710 (1937); Buel v. United Ry., 248 Mo. 126, 154 S.W. 71 (1913); Gorman v. Budlong, 23 R.I. 169, 49 Atl. 704 (1901); Magnolia Bottling Co. v. Jordan, 124 Tex. 347, 78 S.W.2d 944 (1935).

[19] Bliss v. Passanesi, *supra* note 18 (overruled by Keyes v. Construction Service, Inc., *supra* note 11); Buel v. United Ry. *supra* note 18 (overruled by Steggall v. Morris, 363 Mo. 1224, 258 S.W.2d 577 (1953)).

in everything but name by the case of *Keyes v. Construction Service, Inc.*[20]

Six cases, most of them more recent decisions, have allowed recovery of damages for the wrongful death of a child under the same circumstances.[21]

Steggall v. Morris[22] is of particular interest in West Virginia in the light of the *Malone* case[23] because the Missouri court points out that:

> "A court of justice can hardly say to a mother that she cannot recover damages for injuries to the child because 'the child alone suffers damage on that account;' and then deny a cause of action by the child seeking damages by saying, 'as the unborn child was a part of the mother at the time of the injury, any damage to it which was not too remote to be recovered for at all was recoverable by her. . . .' "

In *Prates v. Sears, Roebuck & Co.*,[24] the court, after observing that the trend of modern authority definitely is in favor of allowing recovery of damages in cases of this type, commented:

> "A rule of law that a child who has been rendered permanently blind or deformed as a result of prenatal injuries caused by the tort of another must go through life so handicapped without remedy should be carefully scrutinized and considered before adoption."

and then went on to hold that there could be recovery of damages for the wrongful death of a child caused by prenatal injuries sustained as a result of a third party's negligence.

Although, in *Keyes v. Construction Service, Inc.*,[25] the Supreme Judicial Court of Massachusetts overthrew the prior Massachusetts

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[20] *Supra* note 15.

[21] Prates v. Sears, Roebuck & Co., 19 Conn. Super. Ct. 487, 118 A.2d 633 (1955); Amann v. Faidy, 415 Ill. 422, 114 N.E.2d 412 (1953), reversing 348 Ill. App. 37, 107 N.E.2d 868 (1952), and expressly overruling Allaire v. Hospital, 184 Ill. 359, 56 N.E. 638 (1900); Cooper v. Blanck, 39 So. 2d 352 (La. App., decided 1923, opinion published 1949); Keyes v. Construction Service, Inc., *supra* note 11; Steggall v. Morris, *supra* note 19; Jasinsky v. Potts, 153 Ohio St. 529, 92 N.E.2d 809 (1950).

[22] *Supra* note 19.

[23] 104 W. Va. 417, 140 S.E. 340 (1927).

[24] 19 Conn. Super. Ct. 487, 118 A.2d 633 (1955).

[25] 340 Mass. 633, 165 N.E.2d 912 (1960).

decisions, it indicated that it would not recognize a cause of action for the wrongful death of a stillborn child.

D. Cases for Wrongful Death of Stillborn Children

Six reported decisions have denied recovery of damages for the wrongful death of stillborn children.[26] The denial of recovery in the cases of *Drabbels v. Skelly Oil Co.* and *Hogan v. McDaniel*[27] was based, in part at least, upon the conclusion that an unborn child is merely a part of its mother's body. It seems incredible that the courts of last resort in the great states of Tennessee and Nebraska could reach such a conclusion in this supposedly enlightened era. The Nebraska court, in the *Drabbels* case volunteered, needless to say without the citation or quotation of any authority, that the early common law appeared to preclude recovery. In *Howell v. Rushing*[28] the Oklahoma court, apparently seeking refuge in brevity, stated little more in a half-page opinion than that it had decided to adhere to the rule applied in the *Drabbels* case.

In re Logan's Estate[29] was a proceeding upon an application for letters of administration on the goods, chattels and credits of a child who was stillborn allegedly as a result of injuries sustained through the negligence of a third person while it was *en ventre sa mere* during the third month of its mother's pregnancy. The Surrogate's Court denied letters of administration on the ground that there was no cause of action for the wrongful death of the child and therefore no property warranting administration. In a very brief opinion, the Court of Appeals of New York affirmed the order denying letters of administration but did not state the reason for its decision.

The denial of recovery in both *West v. McCoy*[30] and *Mace v. Jung*[31] was limited expressly to cases where the unborn child was not viable at the time of injury.

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[26] Mace v. Jung, (Fed. Dist. Ct. Alaska, November 30, 1962); Drabbels v. Skelley Oil Co., 155 Neb. 17, 50 N.W.2d 229 (1951); *In re* Logan's Estate, 4 Misc. 2d 283, 156 N.Y.S.2d 49, *app. denied* 2 App. Div. 2d 886, 157 N.Y.S.2d 900, *aff'd* 3 N.Y.2d 800, 144 N.E.2d 644 (1957); West v. McCoy, 233 S.C. 369, 105 S.E.2d 88 (1958); Hogan v. McDaniel, 204 Tenn. 235, 319 S.W.2d 221 (1958); Howell v. Rushing, 261 P. 2d 217 (Okla. 1953).

[27] *Supra* note 26.

[28] 261 P.2d 217 (Okla. 1953).

[29] *Supra* note 26.

[30] *Supra* note 26.

[31] *Supra* note 26.

Eight cases, the earliest in 1949, have allowed recovery of damages for the wrongful death of stillborn children.[32] *Rainey v. Horn*[33] expressly limited recovery to cases where the unborn child was viable at the time of injury. The Kentucky court in *Mitchell v. Couch*[34] made the point that, as a matter of plain biological fact, a viable unborn child is a *person*. In *Poliquin v. McDonald*[35] the court, after referring to the early cases, pointed out that: "Precedents are valuable so long as they do not obstruct justice or destroy progress."

In *Stidham v. Ashmore,*[36] an Ohio appellate court, respecting the contention of defense counsel that a distinction should be made in the case of a stillborn child, observed:

> "Such a distinction could lead to bizarre results. Suppose, for example, viable unborn twins suffered simultaneously the same prenatal injury of which one died before and the other after birth. Shall there be a cause of action for the death of the one and not for that of the other? Surely logic requires recognition of causes of action for the deaths of both, or for neither. Inasmuch as the Supreme Court has already determined that there is a cause of action in the case of the one, we can see no valid reason for denying it in the other."

V. Cases Holding That Recovery Should Not Be Dependent Upon Viability

As of this time, three reported cases have held expressly that recovery should not be dependent upon whether the fetus was viable at the time of injury.[37] As is apparent from the context of this writing, some courts have indicated disagreement with this view. There is no more logic in a distinction based upon viability than there was in the early cases which denied recovery of damages for injuries sustained by all children *en ventre sa mere*. Such a distinction, like a distinction based upon stillbirth as opposed to livebirth, surely could lead to bizarre results. It is suggested that the line of

[32] Gorke v. LeClerc, 181 A.2d 448 (Conn. 1962); Worgan v. Creggo & Ferrara, Inc., 11 Terry 258, 128 A.2d 557 (Del. 1956); Mitchell v. Couch, 285 S.W.2d 901 (Ky. 1955); Hale v. Manion, 368 P.2d 1 (Kan. 1962); Verkennes v. Corniea, 229 Minn. 365, 38 N.W. 2838 (1949); Rainey v. Horn, 221 Miss. 269, 72 So. 2d 434 (1954); Stidham v. Ashmore, 109 Ohio App. 431, 167 N.E.2d 106 (1959); Poliquin v. McDonald, 110 N.H. 104, 135 A.2d 249 (1957).

[33] *Supra* note 32.

[34] *Supra* note 32.

[35] 110 N.H. 104, 135 A.2d 249 (1957).

[36] *Supra* note 32.

[37] Damasiewicz v. Gorsuch, *supra* note 13; Bennett v. Hymers, *supra* note 13; Smith v. Brennan, *supra* note 13.

liability should be coincident with and dependent upon only the line of causation: that is to say, that liability should be imposed for an injury either willfully or negligently inflicted by a third party upon the person of an unborn child provided it is proved that the injury was proximately caused by such wrong or neglect without any regard whatever for any wholly independent matter such as whether the child was viable at the time of injury or whether the child at some later time was stillborn. It is submitted that any such wholly independent matter or distinction is in irreconcilable conflict with natural justice and with the purpose of the applicable common law principle, i.e., to make the wrongdoer respond in damages for injuries willfully or negligently inflicted upon the person of another.

VI. Summary and Conclusion

It is interesting to note that the earliest case on this subject, *Dietrich v. Northampton,*[38] was decided only seventy-nine years ago. Of course, it set the precedent and cut the pattern for the early cases which denied recovery of damages for injuries sustained by children *en ventre sa mere.* It is more noteworthy that it had been decided for only sixteen years before it was judicially assailed by Judge Boggs who, in *Allaire v. Hospital,*[39] very lucidly exposed its fallacies. Since the *Allaire* case, the pendulum has swung the other way and, with considerable acceleration since 1950, so that, now, a study of the cases admits of no conclusion other than that the marked trend of authority is toward allowing recovery of damages for injuries sustained by children *en ventre sa mere* without regard to whether the damages are for personal injuries or wrongful death and, in the latter case, without regard to whether the child is born alive or is stillborn.

The study of this subject is an invigorating experience for those who try to breath life into the law and who look upon the legal profession as a living rather than a dead science. It is refreshing to observe, in our time, the courts of our country boldly break away from precedents manifestly wrong, unjust and inconsistent with the common law, such as were the early cases in this field, and change the law. It rebuts the commonly heard criticism that the law does not or cannot keep up with the times. It illustrates, in letters high and plain enough for all to see and read, the majesty of the law.

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[38] *Supra* note 5.
[39] *Supra* note 7.