DEVELOPMENT OF TORT LIABILITY FOR INJURY TO THE UNBORN

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Abstract

Both the common law and the law of civilian jurisdictions recognize an unborn child as in *esse* for purposes of receiving certain civil rights. In most of the cases involving prenatal injuries, it has been advocated that the tort law, by analogy to criminal law and property law, should recognize an unborn child as a person in being. The courts formerly rejected this argument, saying that in order to protect social and property interests a "fiction" has arisen that an unborn child is in being but that this "fiction" should not be invoked to protect personal security. The recent cases have found the protection of an unborn child's personal security to be equally important as the protection of social and property interests, but have impliedly limited the protection to the personal interests of a viable child. The object and purpose of this article is to analyze and review development of tort liability for injury to the unborn - from the first precedential case till the newest era of liability for prenatal injuries, especially in those conditions, when Georgian Civil Legislation does not recognize this type of Tort Liability.

Keywords: Tort, Liability, Maternal Liability, Fetus, Prenatal injuries

Introduction

Until recent years, however, common law courts have refused to recognize a cause of action for a child for injuries incurred prenatally [10]. Civil law jurisdictions are somewhat at variance in approaching the problem. French law, like the common law, has shown unwillingness to recognize the rights of anunborn child in tort, the courts of Quebec and California have adopted a more liberal view – the Article 608 of Quebec Civil Code provides that persons are considered to be civilly in existence at the instant of conception if they are later born alive. The Articles 771 and 838, respectively provide that an unborn child may receive a gift *inter vivos* and may take a benefit under a will. The Supreme Court of Canada, on the basis of these articles concluded that a child *en ventre sa mere* is a separate being and applied this conclusion to actions in tort for physical injuries [7].

Actions for the recovery of damages resulting from prenatal injuries have arisen in two ways: Where a child after birth brought an action and where parents brought an action under the wrongful death statutes. Under the death statutes parents have no action unless a child could have maintained an action had he/she lived. Thus, the problem is basically the same in both: Can a child maintain an action to recover damages for prenatal injuries? Though the great weight of authority has denied a cause of action for prenatal injuries [2].

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social and property interests, but have impliedly limited the protection to the personal interests of a viable child [2].

Historical Development

The history of the development of the concept that one may be liable for injury to the unborn is an often-told tale [6]; it forms such an integral part of the analysis that it is necessarily a part of any discussion of the concept.

The early common law recognized that the life of an unborn child was entitled to the legal protection of the criminal law from the time it stirred in its mother's womb. Blackstone, in his *Commentaries* stated: “Life is the immediate gift of God, a right inherent by nature in every individual; and it begins 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, killed it in her womb; or if any one beat her, whereby the child died in her body, and she is delivered of a dead child; this, though not murder, was by the ancient law homicide or manslaughter. But the modern law do not look upon this offence in quite so atrocious a light, but merely as a very heinous misdemeanor” [6].

Any discussion of the history and background of the law of liability in tort for injury to the unborn usually begins with the case of *Dietrich v. Northampton* which appears to be the first reported case on this subject in a common law jurisdiction.

Massachusetts Supreme Court in *Dietrich* refused to extend the criminal and property law precedents to include a cause of action in tort. Apart from the lack of precedent, which in his view was a substantial reason for denying a cause of action, Justice Holmes had difficulty with the proposition that an infant dying before it was able to live separate from its mother could be said to have become a person recognized by the law as capable of having a *locus standi* in court, or being represented there by an administration [6].

Another influential early case was the Irish decision of *Walker P. Great Northern Railway of Ireland.* In sustaining a demurrer to a claim against a common carrier for injury to a child *en ventre sa Me're,* Chief Justice O'Brien reasoned that any duty to a child must flow from the contract of carriage, and, since the existence of a child was not known to the carrier, no duty could exist.

The next case to arise was *Allaire v. St. Luke's Hospital* which was decided by the Illinois Supreme Court in 1900. In that case, the plaintiff's mother, her pregnancy having gone its full term, had entered the defendant hospital for the purpose of delivering the plaintiff. According to the complaint, the unborn child was seriously and permanently disabled by a malfunctioning elevator in the hospital. In a *per curiam* opinion that merely concurred in the views of the appellate court which in turn had relied solely on *Dietrich* and *Walker,* the Illinois Supreme Court denied that a cause of action existed [6].

The denial of a right of recovery for prenatal injuries on the theory that "the unborn child was a part of the mother" may have been in accord with the state of medical knowledge. Standard medical works of the period recognized the separate biological existence of the fetus and an impressive body of medical knowledge concerning the effect of the prenatal environment on the unborn human fetus was accumulating.

On the early-stage fetus can be caused by a number of phenomena, including trauma, other diseases, drugs and even emotional distress. Since essentially all of the vital organs take form at a very early stage of fetal life, the most serious postnatal disabilities result from injuries occurring in the first trimester of pregnancy - long before viability. From a medical point of view, therefore, it makes little sense to condition recovery on the viability of the fetus at the time of injury. The question courts have had to resolve is whether the results of this increased medical knowledge can be translated into a suitable formulation of duty upon which tort liability can be predicated [3].

Most of the early cases rested on the theory that a fetus has no existence separate from its mother and thus no duty toward such a "nonexistent" being could arise, it was to be expected that the early decisions should find a duty most clearly in those cases in which the fetus was viable-that is, where it had reached the stage of development where life could be maintained outside the mother's womb.

In these cases, the "personhood" and separate existence of the child were most clearly apparent, and courts could most readily find a duty of care. Such a duty was found by courts deciding both the claims of surviving infants seeking damages for disabilities resulting from prenatal injuries ("injury" cases) and the wrongful death actions of survivors of infants born alive but subsequently dying as a result of prenatal injuries [6].

The legal - as opposed to the medical-infirmity of the Holmes position was pointed out dramatically in *Montreal Tramways v. Leveille,* in which Justice Phillips (Supreme Court of Canada) stated: "If a child after birth has no right of action for pre-natal injuries, we have a wrong inflicted for which there is no remedy, for, although the father may be entitled to compensation for the loss he has incurred and the mother for what she has suffered, yet there is a residuum of injury for which compensation cannot be had save at the suit of the child. If a right of action be denied to the child it will be compelled, without any fault on its part, to go through life carrying the seal of another's fault and bearing a very heavy burden of infirmity and inconvenience without any compensation therefore. To my mind it is but natural justice that a child, if born alive and viable, should be allowed to maintain an action in the Courts for injuries wrongfully committed upon its person while in the womb of its mother." [4].

Just as *Dietrich* case had received immediate and universal acceptance, so also did *Bonbrest v. Kotz;* courts have been almost unanimous in allowing a cause of action in at least some circumstances. The case of *Bonbrest* was one in which injuries to *a viable* fetus created a cause of action. Recent case have rejected the argument that "legislative action" is necessary for recovery and have allowed recovery without express statutory authorization [8]. The Court have extended viability so that child is considered a person from the time of its conception [9].

The Current Law and Maternal Liability for Prenatal Injuries

According to the current case-law and legislation, a person is liable for injuries they cause to an unborn child; a fetus has legal rights the materialize when the child is born alive (Australia – Watt v. Ramma; Canada - Dobson v. Dobson; United Kingdom – the Congenital Disabilities (Civil Liability) Act 1976).

In case *R.R. v. Poland* European Court of Justice replied that "the applicant (mother of the baby girl effected with the Turner Syndrome – caused by the negligence of medical professionals) experienced considerable anguish and suffering, having regard to her fears about the situation of her family and her apprehension as to how she would be able to cope with the challenge of educating another child who was likely to be affected with a lifelong medical condition and to ensure its welfare and happiness. Moreover, the applicant had been humiliated by doctors' lack of sensibility to her plight". The Court has found a breach of both Articles 3 and 8 of the Convention [11].

Although a number of hypothetical situations can be visualized in which a child could suffer damage from wrongful acts of another prior to its conception, there appear to be only three reported appellate cases in which this issue was raised. In *Jorgensen v. Meade Johnson Laboratories, Inc.*, the United States Court of Appeals for the Tenth Circuit, applying its interpretation of Oklahoma law, held that an allegation that birth control pills manufactured by the defendant caused chromosomal changes in a mother resulting in her giving birth to mongoloid twins stated a cause of action for the twins for retardation, deformity, and pain and suffering during their lifetimes. The Illinois Supreme Court held in *Renslow v. Mennonite*

Hospital' that an allegation that the negligent transfusing of a thirteen-year-old Rh-negative female with Rh-positive blood resulting in permanent disability to a child born to her nine years later stated a cause of action on behalf of the child. In *Bergstreser v. Mitchell,* the Eighth Circuit Court of Appeals held that, under Missouri law, a cause of action was stated on behalf of an infant who suffered harmful hypoxia or anoxia during an emergency premature Caesarian section caused by the defendant physicians' and hospital's negligence in performing a prior Caesarian section on the mother [6].

Nowadays, one of the most important questions is whether negligent acts of a pregnant women causing injury to her child "en ventre sa mere" fall within the scope of the well-established principles of tort law.

The New South Wales Court of Appeal in Lynch v. Lynch replied that a mother owes a legally enforceable duty to care her unborn child that will be breached by negligent driving. The Decision of Supreme Court of Canada in Dobson v. Dobson established that while a fetus has certain rights against the third parties that materialize upon birth, a child cannot sue its mother for injuries caused prenatally by the mother's negligence. The majority in Dobson asked whether a mother should be found liable for failing to obtain from the activities – smoking, drinking, strenuous exercise, avoiding safety checks while pregnant. The Judgment implies that she should not. It was contended above that tort law provides a principal limit for prenatal negligence and it is contended further that these particular example fall within that limit and therefore should be prima facie actionable [9].

In Stallman v. Youngquist case, the United States position was that a mother was not liable for injuries caused to her unborn child by her negligent driving in order to preserve the mothers right to privacy and bodily integrity. Conversely, in other cases a child was found to have a cause of action against its mother for negligently failing to cross a road at a designated cross-walk, or for using drug during pregnancy causing discoloration of the child's teeth [9].

Thus, the case-law and legislation toward maternal liability is not uniform.

"Wrongful Death"

It is very interesting whether parents have right to bring an action for the death of their unborn child. Under the death statutes parents have no action unless a child could have maintained an action had he/she lived. In Case *Cooper v. Blanck* in 1923 mother in the ninth month of pregnancy was struck by falling plaster from the ceiling of the defendant's house. A premature birth followed and the child lived only a few days. The suit was under the Article 2315 of the Civil Code which provides that parents have a right of action for the wrongful deaths of their children. The court of appeal of Luisiana discussed the codal articles that imply that a child en ventre sa mere is a living person and held that parents may sue for the wrongful death of a child even if the injury causing death was prenatal. Speaking of injuries received during the viable stages of gestation, Justice Westerfield said, ".... if the child be killed at this period, before its birth, we see no reason why its parents cannot maintain an action for the death of the child." In *Youman v. McConnell'* in 1927 mother in the seventh month of pregnancy was negligently injured; two months later the child was stillborn. The defense urged application of the Article 28 which provides that children born dead are considered as if they had never been born or conceived. The court applied the article literally and refused damages for the wrongful death [1].

In future cases the Louisiana courts might hold that a child conceived is a separate being and that any injury, whether it be to an embryo or to a foetus' would be grounds for recovery by the child. This position could be justified by the Article 29 of the Civil Code which provides that children in the mother's womb are considered, in whatever relates to themselves, as if they were already born [1].

The courts might, as a second possibility, recognize Blackstone's theory that a child is a person after it has once moved in the womb of its mother-the "quick" child. The third possibility for Louisiana courts is the adoption of the theory propounded by Justice Boggs, dissenting in *Allaire v. St. Luke's Hospital*, that a foetus is a separate entity after it reaches that stage of gestation at which it could live without its mother. The court said: "... we content ourselves with the observation that the civil law is still the basis of our jurisprudence" [1]. Those words imply that it was adhering to the general civil law principle that an unborn child is considered an individual for matters which may be to its advantage. However, in writing for the majority, Justice Westerfield further said that the court was concerned in that case with a fetus advanced to the final stages of gestation when all authorities, medical and legal, agree that the fetus is viable.

"Wrongful Life"

The terms "wrongful life" and "wrongful birth" seem to have been used first in *Zepeda v. Zepeda.* Although courts and commentators have applied the terms to a wide variety of actions brought by parents or by infants for damages growing out of unexpected or unwanted birth, or out of birth under conditions of disability or disadvantage, it is helpful for purposes of analysis to break these cases down into three categories. The first American case in which the issue of "wrongful life" was presented to an appellate court was *Zepeda.* In that case, the infant-plaintiff sued his father for damages because he had been born an adulterine bastard; his father had induced his mother to have sexual intercourse by promising to marry her when in fact the father was already married. The damages sought were for deprivation of the right to be a legitimate child, have a normal home, have a legal father, inherit from his father and from his paternal ancestors, and for being stigmatized as a bastard. The trial court dismissed the complaint for failure to state a cause of action [6].

The second case to reach an appellate-level court was *Williams v. State*. That case presented the New York Court of Appeals with the same issue but in the different context. In *Williams* the defendant was the State of New York whose alleged negligent supervision of a state mental institution allowed a female patient, the plaintiffs mother, to be raped by another patient, resulting in the plaintiffs birth to a mentally defective mother. The New York Court of Appeals, like the Appellate Court of Illinois, held that the common law did not recognize as actionable the act of causing one to bear the "shame and sorrow" of illegitimate birth. New York Court of Appeals in *Williams v. State replied* "Being born under one set of circumstances rather than another or to one pair of parents rather than another is not a suable wrong that is cognizable in court." [6].

Conclusion

In this article, we tried to overview the development of tort Liability for injury to the unborn. The law concerning tort liability for injuries to the unborn has evolved in several distinct but sometimes overlapping phases since the first case was posed for the American judiciary by *Dietrich* in 1884. In the first era there was uniformity of decision that recovery was not allowed for prenatal injuries. That phase came to an abrupt end in 1946 with the *Bonbrest* decision. The phase immediately following *Bonbrest* was one in which injuries to *a viable* fetus created a cause of action. The next phase, which is not marked by any clear initial boundary and continues to the present, is the era in which a cause of action is recognized for injuries received by the fetus prior to viability. The newest phase in the developing law of the unborn is introduced by actions seeking recovery for maternal negligence, wrongful life or wrongful birth.

However, despite the rapid development of tort Liability for injury to the Unborn, the best end of justice cannot be served until the courts and the legislatures have fully recognized

that an individual has a value simply for his status as a human being. The Courts and legislators should reconsider the legal status of the unborn fetus and the measure of damages in death actions or health injuries.

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