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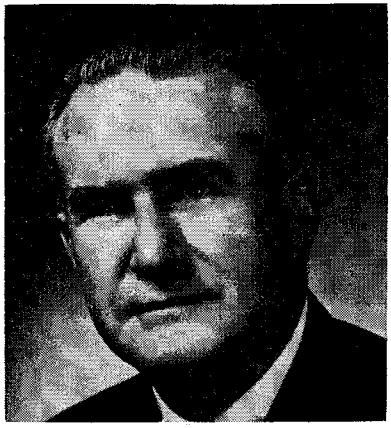

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In New Jersey on May 2, 1935, a baby was born permanently retarded, both mentally and physically. A suit was brought alleging the doctor had negligently misdiagnosed the mother's pregnant condition as tumor.[1] X-ray treatments had been given three times before the baby's birth, the last treatment about six weeks before the birth.

In 1935 it was known that if a mother had deep X-ray treatment to which a fetus was exposed, the baby could be expected to have a gravely defective central nervous system.[2] At this time no New Jersey court had held that a baby had a right to recover for negligently caused injuries before birth.

"Life is the immediate gift of God, a right inherent in every individual," wrote Sir William Blackstone in 1765, "and it begins in contemplation of law as soon as the infant is able to stir in its mother's womb."[3]

In the ancient Assyrian Code, circa 1500 B.C.,[4] the fetus is spoken of as a human life and cognizance is also taken of the stages of fetal development. The unborn baby was, under this and other ancient and later laws, protected by the threat of penalties: a fine, the lash, and in severe cases, death.

Hippocrates, who lived four centuries before the Christian era, sought to protect unborn babies from the aborting drugs of Aspasia by appeal to the consciences of his fellow physicians; asking them to swear the oath saying, "I will not give to any woman anything to produce abortion."

In 1935 American criminal and civil law treated an unborn baby as a person in being for some purposes beneficial to the

1 Stemmer v. Kline, 128 N.J.L. 455, 26 A.2d 489 (Ct. Err. & App. 1942).
2 Hobbs, *Fetal Tolerance to Roentgen Rays*, 54 Radiology 242 (1950); *Radiation Induced Mutations in Mammals*, 55 Radiology 581 (1950).
3 1 Blackstone, Commentaries *129.
4 3 Smith, The Origin and History of Hebrew Law 211 (1931); Belkin, *Philo and the Oral Law*, Harvard Semitic Series IX, 131, 132, n. 125.

baby. Then as today one who feloniously inflicted injuries upon an unborn baby which was born alive but subsequently died from the injuries was chargeable under the criminal law with homicide as in the killing of any human being. Also, the criminal law generally protects the unborn baby from being intentionally aborted.

The American civil law regards a baby in his mother's womb as capable of taking a legacy or devise. The word "children" or "issue" as used in a bequest, or a life insurance policy, or a workmen's compensation act, would include a baby in his mother's womb. With respect to such property rights posthumous children are regarded as in being from the time of conception.

Did the solicitude of the law for the protection of the unborn babies against the criminal conduct of others and as to inheritance and property rights prompt New Jersey's highest court in the *Stemmer* case to extend the protection to such babies against the negligence of others? No. In 1942 the long battle through the courts ended with nine of the fifteen judges of New Jersey's highest court holding against the right of the defective and crippled child to recover for injuries suffered while in the womb. Mr. Chief Justice Boggs and five other justices dissented.[5]

Another mistaken diagnosis of a pregnancy as a tumor followed by X-ray therapy reached the Illinois Supreme Court in 1939.[6] This Court followed its 1900 decision in *Allaire v. St. Luke's Hospital,*[7] which in turn followed the 1884 majority opinion written by Mr. Justice Holmes in the first American case, *Dietrich v. Northampton.*[8] This Massachusetts case involved an injury between the fourth and fifth month of pregnancy. The decision rested on two grounds; first, no case had ever decided that if the unborn baby lived he could sue for injuries received while in his mother's womb, and, secondly, since the unborn baby is part of the mother any damage to him which is not too remote to be recovered is recoverable by her.

In 1924 a lower Pennsylvania court had held that injuries received through negligence of another entitled the quickened unborn baby to sue after birth.[9] But this forward-looking approach was disapproved in 1940 in *Berlin v. J. C. Penney Co.,*[10] by the Pennsylvania Supreme Court.

As early as 1921 a lower New York court attempted to grant recovery in a similar case,[11] but New York's highest court, following Justice Holmes' opinion, reversed.[12] Justice Cardozo dissented without giving any reason.

As early as 1901 a legal writer had asked the law to recognize the legal right of the unborn baby to begin life with a sound

5 Stemmer v. Kline, 128 N.J.L. 455, 26 A.2d 489 (Ct. Err. & App. 1942).
6 Smith v. Luckhandt, 299 Ill. App. 100, 19 N.E.2d 446 (1939).
7 184 Ill. 359, 56 N.E. 638 (1900).
8 138 Mass. 14, 52 Am. Rep. 242 (1884).
9 Kine v. Zuckerman, 4 Pa. D. & C. 227 (1924).
10 339 Pa. 547, 16 A.2d 28 (1940).
11 Drobner v. Peters, 194 App. Div. 696, 186 N.Y. Supp. 278 (1921).
12 Drobner v. Peters, 232 N.Y. 220, 133 N.E. 567 (1921).

body.[13] Others urged relief for tort injuries to the unborn baby.[14] By 1941 the reasons for denying recovery were ascribed to two factors: (1) the practical difficulty of proving causation inviting fictitious claims and (2) the legalistic assumption that a baby in his mother's womb is owed no duty of care because "it" is not a person.[15] The injustice of denying recovery has been emphasized by an English writer.[16]

Before 1935 the Supreme Court of Canada in *Montreal Tramways v. Leveille,*[17] extended to the unborn baby the protection of the law that recognized his separate existence under the criminal law and the laws of estates and property rights by allowing recovery against the torts of others. As early as 1923 an intermediate Louisiana court had held that a baby injured in the ninth month of gestation that died three days after birth had a right of action as a "child" within the contemplation of the civil law and the meaning of the civil code, which gives a child a right of action for personal injuries.[18]

The injustice of denying recovery to the child, physically deformed or mentally deficient for life as a result of prenatal injuries caused by the wrongful act of another, continued to haunt the courts. The first strong precedent to establish the baby's right to recover came from the U.S. District Court for the District of Columbia in 1946.[19] This well-reasoned decision gave the precedent needed to ultimately reverse the prior numerical weight of authority.

This case involved a malpractice claim springing from the alleged fact that a viable baby was taken from its mother's womb through professional malpractice, with resultant injury to the child. It paved the way for later cases involving tortious injury to the baby in the womb before viability.[20]

In 1949 the Ohio Supreme Court[21] held a viable baby to be a "person" within the purview of a provision of the state constitution that "every person, for an injury done him in his person . . . shall have remedy by due course of law." This was the first decision by an American court of highest jurisdiction to hold, in the absence of statute, that a child who survives birth can bring an action for prenatal injuries. In the same year the Minnesota Supreme Court held that where independent existence is possible and life is wrongfully destroyed a cause of action arises under the wrongful death statute.[22] Two years later the Court of Appeals of Maryland in *Damasiewicz v. Gorsuch,*[23] and also the Supreme Court of Georgia in *Tucker v. Carmichael and Sons,*[24] upheld the right of the injured baby to a claim against the tortfeasor.

13 Note, 15 Harv. L. Rev. 313 (1901).
14 Morris, *Injuries to Infants En Ventre Sa Mere,* 58 Cent. L.J. 143 (1904).
15 Prosser, Torts, 174 (2d ed. 1955).
16 Winfield, *The Unborn Child,* 8 Camb. L.J. 76, 90 (1942).
17 4 D.L.R. 337 (1933).
18 Cooper v. Blanck, 39 So. 2d 352 (La. Ct. App. 1923).
19 Bonbrest v. Kotz, 65 F. Supp. 138 (D.D.C. 1946).
20 A viable fetus is one sufficiently developed to survive outside the womb. Whether a fetus of six, or eight months or younger is viable depends on all the facts, including the nature of the pediatric care available.
21 William v. Marion Rapid Transit Inc., 152 Ohio St. 114, 87 N.E.2d 334 (1949).
22 Verkennes v. Corniea, 229 Minn. 365, 38 N.W.2d 838 (1949).
23 197 Md. 417, 79 A.2d 550 (1951).
24 208 Ga. 201, 65 S.E.2d 909 (1951).

In 1951, New York's highest court in *Woods v. Lancet*[25] overruled its 1921 decision in the *Drobner case*[26] and held the baby had a cause of action for prenatal injury which occurred during the ninth month of his mother's pregnancy.

The shadow of Holmes was fading. The logic and the respect for human life shown by dissenting Chief Justice Boggs in *Allaire v. St. Luke's Hospital*[27] was making new precedents. In *Steggal v. Morris*[28] the Supreme Court of Missouri specifically overruled its earlier decision in *Buel v. United Rys. Co.*[29] In 1953 Boggs' reasoning was adopted by his successors on the Illinois court in the case of *Amann v. Faidy*[30] which overruled *Allaire* after more than fifty years.

Additional states, Kentucky and Oregon among others,[31] adopted the modern view and allowed recovery. This enlightened view rejected the old argument that it is too difficult to prove or disprove the causation of injury to an unborn baby, and found the difficulty of proof neither special to this type of claim, nor relevant to a determination of the right to sue.

In 1957 the New Hampshire Supreme Court, in *Poliquin v. Macdonald*,[32] held that a viable baby injured in his mother's womb

25 303 N.Y. 349, 102 N.E.2d 691 (1951).
26 232 N.Y. 220, 133 N.E. 567 (1921).
27 184 Ill. 359, 56 N.E. 638 (1900).
28 363 Mo. 1224, 258 S.W.2d 577 (1953).
29 248 Mo. 126, 154 S.W. 71 (1913).
30 415 Ill. 422, 114 N.E.2d 412 (1953).
31 Mitchell v. Couch, 285 S.W.2d 901 (Ky. Ct. App. 1955); Mallison v. Pomeroy, 205 Ore. 690, 291 P.2d 225 (1956).
32 101 N.H. 104, 135 A.2d 249 (1957).

and born alive, or dying in his mother's womb, could have an action brought in his name against the negligent person. In the following year the same court was asked to decide whether a negligent injury to a baby in his mother's womb before viability had a cause of action when he lived to sue.[33] In this recent decision, the New Hampshire Supreme Court held that "an infant born alive can maintain an action to recover for prenatal injuries inflicted upon it by the tort of another even if it had not reached the state of a viable fetus at the time of injury."[34]

The New York court in *Kelly v. Gregory*,[35] a case in which the injury took place during the third month of pregnancy, said that, "If the child born after an injury sustained at any period of his prenatal life can prove the effect on him or the tort . . . we hold he makes out a right to recover."[36] In 1956 the Supreme Court of Georgia in *Hornbuckle v. Plantation Pipe Line Company*,[37] where the injury took place in the sixth week of pregnancy, held, "where a child is born after a tortious injury sustained at any period after conception, he has a cause of action."[38]

These three modern precedents illustrate how the law has caught up with the scientific finding that the embryo from the time of conception becomes a separate being and remains so throughout its life.[39] Medical experience has discovered that the mother's contribution from conception on is to furnish nourishment and protection for her baby.[40]

The new rule of tort law that a baby is to be considered as in being from the time of conception in his mother's womb reflects the respect for human life found in the recent oaths of doctors.

The pertinent sentence in the Geneva version of the Hippocratic Oath, as adopted by the World Medical Association, comprising thirty-nine national medical societies including the American Medical Association, reads: "I will maintain the utmost respect for human life from the time of its conception." The International Code of Medical Ethics in defining the doctor's duty speaks to his conscience in these words: "A doctor must always bear in mind the importance of preserving human life from the time of conception until death."

"The life of the law has not been logic: it has been experience," said the 1881 pragmatic philosophy of Holmes.[41] To the student seeking knowledge of the common law, he cautioned: "In order to know what it is, we must know what it has been, and what it tends to become." In 1959 the common law, rejecting Holmes, tends to give the unborn baby in his mother's womb, from the time of conception, the benefit of his separate being and a legal claim for tortious injury by others.

By 1965 Blackstone's 1765 statement[42] may be corrected to

33 Bennett v. Hymers, 147 A.2d 108 (N.H. 1958).
34 *Id.* at 110.
35 282 App. Div. 542, 125 N.Y.S.2d 696 (1953).
36 125 N.Y.S.2d at 698.
37 212 Ga. 504, 93 S.E.2d 727 (1956).
38 93 S.E.2d at 728.
39 Baxter, Frazer's Manual of Embryology 1 (3d ed. 1953).
40 Maloy, Legal Anatomy and Surgery 668 (1930); Patten, Human Embryology 181 (1946); Cunningham, Anatomy 7 (6th ed. 1931).
41 Holmes, The Common Law 1 (1951).
42 See note 3 *supra*.

read: "Life is the immediate gift of God, a right inherent in every individual; and with the advance findings of medical science that an embryo is a separate being from his mother, from the moment of conception, life begins in contemplation of law as soon as the baby is conceived in his mother's womb."

What will be the law in Colorado? Richard John Marquez, by his father as next friend, brought a claim in Denver District Court against a doctor alleging prenatal injury due to malpractice causing a brain injury which "caused him to be mentally retarded and to have a spastic condition, which condition will be permanent throughout" his life.[43] He asked for $500,000 damages. A motion to dismiss was filed based on the theory that no recovery could be had for prenatal injury. The attorneys for Richard invoked Sections 3 and 6 of Article II of the Colorado Constitution declaring, "All persons have certain natural, essential and inalienable rights among which may be reckoned the right of enjoying . . . their lives . . ." and "Courts of justice shall be open to every person, and a speedy remedy afforded for every injury to person . . . ." They further claimed that these sections were at least equal to the Ohio Constitutional provisions in *William v. Marion Rapid Transit, Inc.*[44] No decision was rendered. The case was settled.

Prenatal injury to the unborn, in the future as in the past, may be caused by such things as auto collisions, induced premature labor, negligent use of forceps during delivery, excess use of drugs during delivery, and radiation from X-ray. To what extent fall-out from atomic tests will cause subsequent developmental defects in unborn babies and result in tort claims cannot at this time be predicted. Certainly imagination indicates such claims as possibilities. This whole subject should be put on the 1965 calendar, thirty years from the *Stemmer* case, 200 years from Blackstone's statement, and revisited. Critical legal reasoning, aided by increased medical knowledge, is widening the rights of the unborn baby tortiously injured.

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43 Marquez v. Ashmun, Civil No. A-86771, Denver District Court (Dec. 26, 1952).
44 152 Ohio St. 114, 87 N.E.2d 334 (1949).