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Rights of an Unborn Child - Suit for Prenatal Injury Allowed in Maryland - Damasiewicz v. Gorsuch

RIGHTS OF AN UNBORN CHILD — SUIT FOR PRENATAL INJURY ALLOWED IN MARYLAND

Damasiewicz v. Gorsuch[1]

The plaintiff was an infant *en ventre sa mere*[2] at the time an automobile driven by one of the defendants struck the automobile operated by the other defendant, in which the plaintiff's mother was a passenger. It was alleged that the negligence of the defendants caused the premature birth of the plaintiff and permanent injuries resulting in the loss of sight of both of his eyes. The trial court sustained demurrers filed by both defendants, without leave to amend, and entered judgment for costs in their favor, from which judgment this appeal was taken. The Court of Appeals reversed and remanded. Thus, for the first time, this Court had before it the question whether there is any right of action based upon injury to a person prior to his birth, *i. e.*, inflicted while still in his mother's womb, and it was held that such a right did exist.

The Court reviewed all of the cases upon the point, and indicated the lack of any direct English decision before 1776, or indeed up to the present time. Courts have denied recovery in Ireland,[3] Massachusetts,[4] Illinois,[5] Rhode Island,[6] Missouri,[7] Alabama,[8] Texas,[9] Michigan,[10] Pennsylvania,[11] New Jersey,[12] and Wisconsin[13] (as to an inviable[14] child,

[1] 79 A. 2d 550 (Md., 1951).

[2] *I.e.*, in its mother's womb. Black, Law Dictionary, 659 (3rd ed., 1933).

[3] Walker v. Great Northern Railway, 28 L. R. Ireland (Q. B. Div.) 69 (1891).

[4] Dietrich v. Inhabitants of Northampton, 138 Mass. 14 (1884). See also Bliss v. Passanesi, 95 N. E. 2d 206 (Mass., 1950).

[5] Allaire v. St. Luke's Hospital, 184 Ill. 359, 56 N. E. 638 (1900). See also Smith v. Luckhardt, 299 Ill. App. 100, 19 N. E. 2d 446 (1939).

[6] Gorman v. Budlong, 23 R. I. 169, 49 A. 704 (1901).

[7] Buel v. United Railways Co., 248 Mo. 126, 154 S. W. 71 (1913).

[8] Stanford v. St. Louis-San Francisco Ry. Co., 214 Ala. 611, 108 So. 566 (1926).

[9] Magnolia Coca Cola B. Co. v. Jordan, 124 Texas 347, 78 S. W. 2d 944, 97 A. L. R. 1513 (1935). See also Lewis v. Steves Sash & Door Co., 177 S. W. 2d 350 (Tex. Civ. App., 1943).

[10] Newman v. City of Detroit, 281 Mich. 60, 274 N. W. 710 (1937).

[11] Berlin v. J. C. Penney Co., 339 Pa. 547, 16 A. 2d 28 (1940), apparently overruling an earlier lower court decision in Kine v. Zuckerman, 4 Pa. Dist. & Co. R. 227 (1924).

[12] Stemmer v. Kline, 128 N. J. L. 455, 26 A. 2d 489 (1942).

[13] Lipps v. Milwaukee Electric Ry. & Light Co., 164 Wisc. 272, 159 N. W. 916 (1916).

[14] That is, a child not having reached the point in foetal life at which it could live separate from its mother, if separated by natural or artificial means. For a discussion of viability in general see, BECK, MEDICAL JURISPRUDENCE, 404 *et seq.* (11th ed., 1860).

but expressly reserving opinion as to a viable child). The opinion of the Maryland Court points out that the decisions have not always been based upon the same grounds, that strong dissents appear in several of them, and that later cases have frequently distinguished or tried to distinguish them. Recovery has been allowed in California[15] on the basis of a local statute, and in Louisiana[16] and Canada[17] upon the basis of the Civil Law. The only square decisions, prior to the principal case, in agreement with our Court in allowing a recovery have been in the District Court for the District of Columbia,[18] in Minnesota,[19] and in two Ohio decisions.[20] Since the decision in the principal case, both Georgia and New York have allowed recovery. The latter state reversed, by a 5 to 2 vote, its rule of thirty years standing, and cited the principal case.[21] In addition, virtually all writers who have treated the problem have urged such a right of recovery.[22] Nonetheless, the Maryland decision is

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[15] Scott v. McPheeters, 33 Cal. App. 2d 629, 92 P. 2d 678, 93 P. 2d 562 (1939).

[16] Cooper v. Blanck, 39 So. 2d 352 (La., 1923), holding the Civil Law as the basis of Louisiana jurisprudence.

[17] Montreal Tramways v. Leveille, 4 (1933) D. L. R. 337 (1933), applying the Civil Law of Quebec.

[18] Bonbrest v. Kotz, 65 F. Supp. 138 (1946), the suit being based on professional malpractice.

[19] Verkennes v. Corniea, 229 Minn. 365, 38 N. W. 2d 838, 10 A. L. R. 2d 634 (1949), being a suit for malpractice in a maternity case.

[20] Williams v. Marion Rapid Transit, 152 Ohio St. 114, 87 N. E. 2d 334, 10 A. L. R. 2d 1051 (1949) and Jasinsky v. Potts, 153 Ohio St. 529, 92 N. E. 2d 809 (1950).

[21] Tucker v. Carmichael & Sons, 208 Ga. 201, 65 S. E. 2d 909 (1951). Woods v. Lancet, 102 N. E. 2d 691 (1951), refusing to follow Nugent v. Brooklyn Heights R.R. Co., 154 App. Div. 667, 139 N. Y. S. 367 (1913) and Drobner v. Peters, 232 N. Y. 220, 133 N. E. 567, 20 A. L. R. 1503 (1921). The Court in Woods v. Lancet said, p. 694:

> "The sum of the argument against plaintiff here is that there is no New York decision in which such a claim has been enforced. Winfield's answer to that (4 Univ. of Toronto L. J. 285 (1941-2)) will serve: 'if that were a valid objection, the common law would now be what it was in the Plantagenet period.' And we can borrow from our British friends another mot: 'When these ghosts of the past stand in the path of justice clanking their medieval chains the proper course for the judge is to pass through them undeterred.' (Lord ATKIN in *United Australia, Ltd. v. Barclay's Bank, Ltd.*, (1941) A. C. 1). We act in the finest common-law tradition when we adapt and alter decisional law to produce common-sense justice."

[22] See PROSSER, HANDBOOK OF THE LAW OF TORTS (1941), 190, and articles cited in his footnote 12. See also the following articles and comments in accord with this view, published since 1941; *Injuries to an Unborn Child — When Is An Unborn Child Considered a Person in Legal Terminology?*, 6 Univ. of Newark L. Rev. 113-20 (1941); Winfield, *The Unborn Child*, 4 Univ. of Toronto L. J. 278-95 (1942); *New Infant Rights in Tort*, 35 Va. L. Rev. 618-27 (1949); Gamble, *Tort Actions for Injuries To Unborn Infants*, 3 Vand. L. Rev. 282-97 (1950); Schell, *Torts — Unborn Child — Right of*

in accord with what is still the minority view. The importance of the problem was pointed out by the forward-looking Appellate Division of New York, in *Nugent v. Brooklyn Heights Railroad Co.*[23] (since overruled, as pointed out above), where, although refusing to allow recovery, the Court said:

> ". . . if this action upon proper pleading may not be maintained, there is no remedy unless in an action by the mother for damages to her by reason of injuries to her son, and that would be inadequate. . . . The fact that the child was deformed and would suffer thereby, would cause the mother mental pain, and, even if she could recover for that, the mental pain the child would suffer, and the mere fact of deformity with its consequent diminution of the value of capacities and faculties could not be included in her recovery. The father, in case he could recover at all, could do so only so far as the injury enlarged the expense of the child's maintenance and entailed loss of service. So, however the subject be viewed, there is a residuum of injury for which compensation cannot be had save at the suit of the child, and it is a question of grave import whether one may wrongfully deform or otherwise injure an unborn child without making amends to him after birth."

Several cases are important enough to bring to mind here, despite the fact that they are discussed in the Court's opinion. The first case that arose was *Dietrich v. Inhabitants of Northhampton,*[24] in which the opinion was by Mr. Justice Holmes (then an associate on the Massachusetts Court). That suit was under a wrongful death statute, and it should be noted that the child was not directly injured save by the transmission of shock from the mother, and the injury was apparently before the age of viability, for the child was described as being too little advanced in foetal life to continue a separate existence. Recovery was denied, with Justice Holmes pointing out the lack of precedent, although the situation was surely not a new one. The theory of the decision seems to rest primarily upon the ground that until birth the child is part of the mother, and at the

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Action for Prenatal Injury, 28 N. C. L. R. 245-9 (1950); Gaines, *The Infant's Right of Action for Prenatal Injuries*, 1951 Wisc. L. Rev. 518-28.

Numerous other comments and notes (collected in the Index to Legal Periodicals, under the heading "Infants") are also in general agreement.

[23] *Supra*, n. 21, 368.

[24] *Supra*, n. 4.

time of this accident, therefore, the only injury was to the mother.

Walker v. Great Northern Railway Co.,[25] decided by the Supreme Court of Ireland, also denied recovery. Two of the justices followed the reasoning of the *Dietrich* case, *i.e.*, that the child was a part of the mother and had no separate existence at the time of the injury. The other two justices held that the defendant contracted with the mother alone, was unaware of her pregnancy, and therefore owed no duty to the plaintiff.

Allaire v. St. Luke's Hospital[26] seemed firmly to establish the rule against recovery. It approved the *Dietrich* case and quoted O'Brien, Ch. J., in the *Walker* case, as follows:

> "That a child before birth is, in fact, a part of the mother, and is only severed from her at birth, cannot, we think, be successfully disputed."[27]

The dissent of Justice Boggs in the *Allaire* case was referred to by our Court of Appeals as one of the ablest arguments on record for the plaintiff's side of the case. Stressing medical knowledge upon the subject, Justice Boggs maintained that when a child reaches the age of viability, "it is but to deny a palpable fact to argue there is but one life, and that the life of the mother".[28] He then stated the rule as he thought it should be and as most writers have since favored it:

> "The law should, it seems to me, be that whenever a child in utero is so far advanced in prenatal age as that, should parturition by natural or artificial means occur at such age, such child could and would live separable from the mother, and grow into the ordinary activities of life, and is afterwards born, and becomes a living human being, such child has a right of action for any injuries wantonly or negligently inflicted upon his or her person at such age of viability, though then in the womb of the mother."[29]

The rule of these cases stood undisturbed by any state appellate court until 1949, when recovery was allowed in

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[25] *Supra*, n. 3.
[26] 184 Ill. 359, 56 N. E. 638 (1900).
[27] *Ibid*, 640.
[28] *See ibid*, 56 N. E. 638, 640, 641 (dissenting opinion).
[29] *See ibid*, 642.

Ohio.[30] In the same year the Supreme Court of Minnesota also allowed such an action.[31] The cases allowing recovery generally stress medical knowledge to the effect that a separate existence begins at that point in foetal development known as the age of viability.

Several things in the Maryland decision should be considered. The decision specifically ruled only upon the question of injury to a viable child, and it was pointed out that recent cases have distinguished this from a situation involving a non-viable child, citing *Lipps v. Milwaukee Electric Ry. and L. Co.*[32] The Court stated that this was an effort to bring the older doctrine that a child is part of the mother until birth into line with modern medical facts. The significant language then used by the Court is this:

> "But, from a medical point of view, a child is alive within the mother *before the time arrives when it can live apart from her.* If it is injured at a time when, according to Blackstone, it is 'able to stir in the mother's womb' there would seem to be just as logical a basis for allowing it to recover, as if it were injured after it had reached the period in its growth when it could be removed from the mother and live. In both cases it is alive, and in both cases there has occurred an injury to a living human being for which the responsible party should be made liable." (Emphasis added.)[33]

This would seem to be the first indication by any court that recovery *might* be had for an injury to a child not yet viable, or capable of separate existence. But if recovery should be given to protect an unborn viable child it would seem that it should be extended to protect a non-viable child also. For it is said upon medical authority that, "The foetus is certainly, if we speak physiologically, as much a living being immediately after conception as at any other time before delivery; and its future progress is but the development and increase of those constituent principles which it then received."[34] The concurring opinion of Judge Henderson,[35] however, would seem to make it quite doubtful if even our Court of Appeals would allow such a right

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[30] *Supra*, n. 20.
[31] *Supra*, n. 19.
[32] *Supra*, n. 13.
[33] Damasiewicz v. Gorsuch, 72 A. 2d 550, 559 (Md., 1951).
[34] BECK, MEDICAL JURISPRUDENCE, Vol. 1, 227 (10th ed.), quoted in Magnolia Coca Cola B. Co. v. Jordan, 124 Texas 347, 78 S. W. 2d 944, 949, 97 A. L. R. 1513 (1935).
[35] *See supra*, n. 33, 562.

of action. His opinion attached little significance to "the alleged progress of medical science", and his agreement with the Court's opinion was based upon the early criminal law as stated by Lord Coke.[36] Murder and torts both being crimes against the person, he concluded that liability in tort for harm to unborn children should extend no further than the protection given by the criminal law. This law, at least, would punish for the appropriate level of criminal homicide one who injured the pregnant mother, whereby the child was born alive, but succumbed post birth to the effects of the pre-natal injuries.[37] The statement that "the rule should not be applicable unless it is shown that the embryo has acquired a human personality and become viable",[38] indicates that Judge Henderson would not extend the rule of this case to permit recovery for an injury to an inviable child.

Two members of the Court[39] dissented from the result of the majority opinion, thereby showing a greater respect than the rest of the Court for Justice Holmes' decision in the *Dietrich*[40] case, for the decisions of the majority of courts that have passed on the point, and for the position of

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[36] As stated by Holmes, J., in Dietrich v. Inhabitants of Northhampton, 138 Mass. 14, 15 (1884):

> "The plaintiff founds his argument mainly upon a statement by Lord Coke, which seems to have been accepted as law in England, to the effect that if a woman is quick with child, and takes a potion, or if a man beats her, and the child is born alive and dies of the potion or battery, this is murder."

[37] It may be speculated whether the Maryland decision may have any effect in the field of criminal law upon what is usually termed "infanticide". As a general proposition the subject of a homicide must be a living human being, but the problem is when to determine that a conceived child becomes the subject of homicide. In CLARK & MARSHALL, A TREATISE ON THE LAW OF CRIMES (3rd ed., 1927), Sec. 234, it is said:

> "According to the better opinion, a child is not fully born and is not the subject of homicide, *until the umbilical cord has been severed*, for until then the blood of the child is renovated through the lungs of the mother, and its circulation, therefore, is not independent. . . . It is not necessary that the child shall be fully born before the *injury* is inflicted. If a child is wounded by an instrument, or if a drug is administered, while the child is in its mother's womb, or while it is in the process of delivery, and it is fully born alive, and dies *afterwards* as a result of the wound or drug, it is homicide." (First emphasis added.) See cases cited therein.

There are apparently no Maryland decisions on this point, but it would seem doubtful if the present case would be sufficient to persuade the Court to deviate from the majority rule in the analogous criminal problem.

Quaere: Would the criminal law punish for criminal battery of the child, as separate from battery of the mother, if the child were either still-born, or born alive but deformed?

[38] *See supra*, n. 33, 562 (Concurring opinion).

[39] Markell, J., and Collins, J. *See supra*, n. 33, 561.

[40] *Supra*, n. 36.

the Restatement of Torts.[41] This opinion emphasized the practical results of the decision, saying in part:

> "We need not . . . we must not — shut our eyes to the possible practical consequences of our decisions. . . . Whether the persuasive abstract reasoning in the opinion of a plurality of the court should prevail over practical consequences that might result is properly a legislative, not a judicial, question."[42]

Though frequently not mentioned at length, many of the cases seem really to be wrestling with the concepts of duty and of the "unforseeable plaintiff" in the law of negligence. Prosser[43] says that as the idea of negligence developed there also developed the idea of duty, *i.e.*, a relationship between the plaintiff and the defendant without which no liability could exist. Though the concept is firmly imbedded in law, he informs us that "courts will find a duty where, in general, reasonable men would recognize it, and agree that it exists".[44] The difficult problem is to determine if any duty is owed to an unforseeable plaintiff. Such would seem to be the position of a child *en ventre*, and the question is whether the duty not to injure the mother can be extended to the child who, it might well be argued, is beyond the zone of any apparent danger. The Restatement of Torts[45] has taken the view that there is no duty owed to the unforseeable plaintiff. There is, however, authority to the contrary,[46] taking the position that "Every one owes to the world at large the duty of refraining from those acts which unreasonably threaten the safety of others."[47] The question has not been settled by the courts yet, and Prosser makes the following statement upon it:

> "The essential issue is whether the plaintiff's interests are to be afforded protection against the defendant's conduct, and 'duty' is nothing more than a word, and a very indefinite one, with which we state our conclusion."[48]

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[41] *See* RESTATEMENT, TORTS (1934), Ch. 42, Sec. 869.
[42] *See* Damasciewicz v. Gorsuch, 79 A. 2d 550, 561, 562 (Md., 1951) (dissenting opinion).
[43] PROSSER, HANDBOOK OF THE LAW OF TORTS (1941), 178 *et seq.*
[44] PROSSER, *op. cit. supra*, n. 43, 181.
[45] RESTATEMENT, TORTS (1934), Sec. 281.
[46] PROSSER, *op. cit. supra*, n. 43, 183.
[47] *Ibid*, quoting dissent by Andrews, J., in Palsgraf v. Long Island R. Co., 248 N. Y. 339, 162 N. E. 99 (1928).
[48] PROSSER, *op. cit. supra*, n. 43, 184.

Thus our Court of Appeals, following the recent decisions of two other states and the District of Columbia, has adopted the view that the unborn child is to be protected against the negligent actor, calling attention to a law review article urging the recognition of "a legal right in the newborn child to begin life with a sound body".[49]

The opposing view has been well summed up by the Texas Supreme Court in *Magnolia Coca Cola Botting Co. v. Jordan*:[50]

> "That man (referring to the test of the ordinary reasonable man) reckons life from the time of birth. His conscious care and solicitude are for the expectant mother and not for the unborn child apart from her. His obligations and his liability in damages for his acts should be measured and determined from his viewpoint."

Thus the issue is whether the innocent plaintiff or the negligent defendant, whose negligence was to another person however, should bear the loss. The tendency of the recent cases seems to extend the defendant's liability, which really imposes no new burden on him, for the exercise of reasonable care will still protect him from liability. While the Maryland case has given impetus to what has been called the "shifting weight of authority" in the case of the unborn child, it remains to be seen how far the Court will extend its decision in other situations involving the unforseeable plaintiff. It is extremely doubtful that the case here considered will be at all extended, for Judge Henderson in concurring was especially careful to point out that the Court was deciding only the immediate issue before it, saying: "I think it should be emphasized that we are now deciding only the general proposition and that all subsidiary questions are reserved."[51] The decision of such reserved questions must wait until such time as the application of the expanding rule is necessitated by the concrete facts of actual cases presented to the Court in the future.

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[49] Damasciewicz v. Gorsuch, 79 A. 2d 550, 558 (Md., 1951), calling attention to 63 Harv. L. Rev. 173 (1949-50).

[50] 124 Texas 347, 78 S. W. 2d 944, 949, 97 A. L. R. 1513 (1935).

[51] *See supra*, n. 49. 563.