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Torts—Prenatal Injury

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found the existence of a nusance per se in a personal injury suit. It is suggested that the label serves no purpose whatever in personal injury cases, and its use there should be discontinued. Actually, in such cases the only relevant issues are those of ultrahazardous, intentional, or negligent misconduct. To refer to nuisance at all is superfluous and might well be dispensed with.

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Prenatal Injury. *Seattle-First National Bank v. Rankin*[1] is the first Washington case allowing recovery for injuries suffered before birth because of negligence. By recognizing a cause of action for prenatal injuries, this jurisdiction joins the trend of recent decisions in the area.

The suit was based on a malpractice claim brought by the Seattle-First National Bank as guardian ad litem for the minor plaintiff against a Seattle physican. The plaintiff's mother had employed the defendant to attend her during pregnancy and ultimate delivery. The plaintiff was born with permanent brain damage and resulting cerebral palsy. The complaint alleged that this brain damage was the proximate result of the defendant's negligence, in that he failed (1) to discover (2) to ascertain from the mother's pelvic measurements the difficulty or impossibility of a normal delivery, and (3) to perform a Caesarean section in sufficient time to save the plaintiff from injury. (Instead the defendant had attempted a natural delivery.) The trial court gave judgment in accordance with the jury verdict in favor of the plaintiff. On appeal, the Washington Supreme Court affirmed.

Acknowledging that the issue of tort recovery for prenatal injuries had never been presented in this jurisdiction, the court cited a number of recent decisions from other jurisdictions permitting such a cause of action,[2] and chose to follow what it termed "the clear trend of recent decisions."[3] Quoting from the New York case of *Woods v. Lancet*,[4] which sets forth the proposition that a viable fetus has a separate existence which should be recognized by the law, the Washington court reasoned that its "holding does not collide with any unyielding theoretical barrier."[5] The court determined that the difficulties of

[1] 59 Wn.2d 288, 367 P.2d 835 (1962).

[2] The court, *id.* at 291, 367 P.2d at 838, cites five recent cases in the area. Keyes v. Constr. Serv. Inc., 340 Mass. 633, 165 N.E.2d 912 (1960); Bennett v. Hymers, 101 N.H. 483, 147 A.2d 108 (1958); Smith v. Brennan, 31 N.J. 353, 157 A.2d 497 (1960); Sinkler v. Kneale, 401 Pa. 267, 164 A.2d 93 (1960); Wendt v. Lillo, 182 F.Supp. 56 (N.D. Iowa 1960).

[3] 59 Wn.2d 288, 291, 367 P.2d 835, 838.

[4] 303 N.Y. 349, 102 N.E.2d 691 (1951).

[5] 59 Wn.2d 288, 291, 367 P.2d 835, 838.

proof inherent in a cause of action for prenatal injuries in no way affected the legal right asserted. The opinion then discussed the evidentiary factors significant in the case at bar, concluding that the case had been properly sent to the jury.

Recognition of a cause of action for a prenatal tort has developed in the past two decades. It was not until 1949 that an American court of highest jurisdiction allowed such an action in absence of a statute.[6] The majority position clearly was contrary, twelve states having refused to permit such a cause of action.[7] This denial of tort recovery for a prenatal injury evolved mainly from the decision rendered by Mr. Justice (then Judge) Holmes in *Dietrich v. Inhabitants of Northampton,*[8] which is generally cited as the first case in a common law jurisdiction to present the precise issue.[9] In this early Massachusetts case the administrator under a wrongful death statute sought to recover for the death of a child, born as a result of a miscarriage. The mother, more than four months pregnant, had fallen on a defective highway of the defendant town. Mr. Justice Holmes denied recovery, holding that the child was not a "person" within the meaning of the statute.

[6] Williams v. Marion Rapid Transit, Inc., 152 Ohio St. 114, 87 N.E.2d 334 (1949) commented on by Taylor, *Liability for Negligent Injury to the Unborn,* 36 DICTA 323, 325 (1959) and Yearick, *The Viable Child,* INS. L.J., Dec. 1949, p. 885. Note, however, that in 1946 in Bonbrest v. Kotz, 65 F.Supp. 138 (D.D.C. 1946), the federal court for the District of Columbia allowed a right of action to an infant for injuries suffered when it was viable, relying only upon the common law for its reasoning. A cause of action for prenatal injury had been allowed in California under a statute, Scott v. McPheeters, 33 Cal.App.2d 626, 92 P.2d 678, *rehearing denied,* 93 P.2d 562 (1939), and in Louisiana under its civil law, Cooper v. Blanck, 39 So.2d 352 (La. App. 1923). Canada, under the influence of the civil law, had also allowed a recovery. Montreal Tramways v. Leveille, Can. Supp. Ct. 456, 4 D.L.R. 337 (1933).

[7] Annot., 10 A.L.R.2d 1059, 1060 (1950) states, "The rule, as supported by the numerical weight of authority, is that a child or its personal representative, in the absence of statute, has no right of action for prenatal injuries." The editor then cites cases from Alabama, Illinois, Massachusetts, Michigan, Missouri, New Jersey, New York, Ohio (observed to be limited by the *Williams* decision, *supra* note 6), Pennsylvania, Rhode Island, Texas, Wisconsin and Ireland supporting this rule. Three years later, in Annot., 27 A.L.R.2d 1256, 1256-59 (1953), it is noted that Massachusetts and Pennsylvania have reaffirmed their earlier position denying recovery; Nebraska has expressly reserved the question of whether a child born alive can maintain an action for prenatal injuries; New York has allowed recovery, limiting its holding to viable children; Maryland and Georgia have considered the problem and allowed a cause of action; and Ohio has permitted recovery under a wrongful death statute. At page 1259 the editor states, "It appears worthy to note that at the present time there are ten jurisdictions in which a right of action for prenatal injuries has been denied and seven in which such an action has been recognized. However, the fact that six jurisdictions out of seven in the past several years have recognized such an action indicates a definite trend away from the more orthodox view."

[8] 138 Mass. 14, 52 Am. Rep. 242 (1884).

[9] See White, *The Right of Recovery for Prenatal Injuries,* 12 LA. L. REV. 383 (1952); Reed, *Pre-Natal Injuries: Development of the Right of Recovery,* 10 DEFENSE L.J. 29 (1961); Comment, *Tort Actions for Injuries to Unborn Infants,* 3 VAND. L. REV. 282 (1950). Taylor, *supra* note 6 at 324, calls it the "first American case."

Dietrich was soon followed by a case in Illinois[10] and by a case in Ireland.[11] "These three cases formed the pattern into which the cases of the next half century were to fall."[12]

In 1939 this majority position was set out in the Restatement of Torts: "A person who negligently causes harm to an unborn child is not liable to such child for the harm."[13] However, as Dean Prosser stated in 1941, "All writers who have discussed the problem have joined in condemning the existing rule, in maintaining that the unborn child in the path of an automobile is as much of a person in the street as the mother, and urging that recovery should be allowed upon proper proof."[14]

This nonrecognition of the child's rights for purposes of prenatal tort was anomalous in view of the protection generally extended to the unborn child in other areas,[15] notably the law of property[16] and of crimes.[17]

The several reasons which have been asserted to support the rule

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[10] Allaire v. St. Luke's Hosp., 184 Ill. 359, 56 N.E. 638 (1900), *affirming* 78 Ill. App. 491 (1898). Plaintiff's mother had entered defendant hospital for pre-delivery care and was severely injured in the hospital elevator, due to negligence in its operation. Plaintiff was born four days later and also suffered from these injuries. Recovery was denied on the ground that for purposes of tort action the infant was not regarded as in being at the time of the injury, but was still a part of the mother. A vigorous dissent by Justice Boggs set forth what in effect is the majority reasoning today. 56 N.E. at 641.

[11] Walker v. Great Northern Ry., 28 L.R. Ir. 69 (Q.B. 1891). Here the mother was injured while a passenger on defendant's trolley, and the plaintiff child, later born alive, was also injured. Recovery was denied on the theory that no duty was owed to the plaintiff child, there being only a duty existing to the mother because the contract of carriage was only with the mother and made in ignorance of the child's existence. Dicta to the effect that there could be no recovery for a prenatal injury can be attributed only to two members of the bench.

[12] Comment, *supra* note 9 at 284.

[13] RESTATEMENT, TORTS § 869 (1939).

[14] PROSSER, TORTS § 31, at 190 (1941).

[15] "The common law, while it recognized and protected the rights and interests of an unborn child in some respects, flatly denied them in others, most obviously where a tort was concerned. The rationale most relied upon seemed to be that an unborn child was but a part of the mother, and had no existence or being which could be subject to injury. This view in the field of torts was flatly contradictory of recognition given the rights of an infant en ventre sa mere in other branches of law." *Note*, 14 MONT. L. REV. 128 (1953).

[16] Taylor, *supra* note 6 at 324, expresses it this way: "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."

[17] For example, RCW 9.48.070 provides: "The wilful killing of an unborn quick child, by any injury committed upon the mother of such child, is manslaughter." See also RCW 9.48.080, 9.48.090 and RCW chapter 9.02. White, *supra* note 9 at 396, states, "It has been held to be murder if a child is born alive but later dies from injuries feloniously inflicted before birth, and abortion is made a crime by statute in practically all jurisdictions."

of nonrecognition[18] may be summarized as 1) lack of precedent; 2) stare decisis; 3) lack of duty owing to the unborn infant since it is a part of its mother; 4) supposed conjecture and speculation in ascertaining the causation factor; and 5) fear of fictious claims and excessive litigation.

The major counter-arguments favoring recovery[19] are that 1) a viable child capable of separate existence should be regarded as a separate entity; 2) property law and criminal law recognize and protect the rights of the unborn child; 3) natural justice requires a recognition of these rights;[20] 4) if the right is not recognized the wrong inflicted admits of no remedy; and 5) a lack of precedent is not a valid reason to deny recovery when a wrong has been committed. Denial of the child's existence as a being separate from its mother is untenable in light of modern medical knowledge.[21] The Washington court logically meets the causation factor argument for denying recovery:[22]

> We are not unmindful of the fact that a claim for prenatal injuries is prone to present difficult causation issues. This, however, is no reason to deny the sufficiency of the pleading. Difficulty of proof does not prevent the assertion of a legal right.

The fear of a flood of litigation has not been borne out by the experience of courts which early allowed recovery. Dean White succinctly meets this argument of potential increased and fictious litigation by

[18] Annot., 10 A.L.R.2d 1059, 1062 (1950); Ramsey, *Liability for Prenatal Injuries,* INS. L.J., March 1956, p. 151, 151-52; *Note,* 9 W. RES. L. REV. 499, 501 (1958).

[19] Annot., 10 A.L.R.2d 1059, 1065; Ramsey, *id.* at 154.

[20] This may perhaps be best illustrated by the case of Korman v. Hagen, 165 Minn. 320, 206 N.W. 650 (1925), where a child was allowed to recover for injuries resulting from malpractice in the course of its delivery. White, *supra* note 9 at 387, points out this case, noting that it seems to have been overlooked by other writers in the area. He says, "Clearly the child had not been born at the time the injuries were inflicted, but apparently the point did not occur to either counsel or the court. It might very well be argued that this case demonstrates what the natural instincts of justice and the common sense of the situation produces [sic] when the court is not distracted by decisions reached under less appealing circumstances."

[21] In Smith v. Brennan, 31 N.J. 353, 157 A.2d 497, 502 (1960), speaking for a unanimous court Judge Proctor says, "The third reason for the rule denying recovery was the theory that an unborn child was a part of the mother, and therefore not a person in being to whom a duty of care could be owed. All the courts that have permitted recovery for prenatal injuries have disagreed with this theory. They have found that the existence of an infant separate from its mother begins before birth.... Medical authorities have long recognized that a child is in existence from the moment of conception, and not merely a part of its mother's body. See 1 BECK, MEDICAL JURISPRUDENCE, 683 et seq. (1931); CORNER, OURSELVES UNBORN, 69 (1944); HERZOG, MEDICAL JURISPRUDENCE 277 (11th ed. 1860); PATTEN, HUMAN EMBRYOLOGY, 181 (1946); MALOY, LEGAL ANATOMY AND SURGERY, 716 et seq. (2d ed. 1955)."

[22] 59 Wn.2d 288, 292, 367 P.2d 835, 838. For an excellent discussion of the problems of proof see Note, *The Impact of Medical Knowledge on the Law Relating to Prenatal Injuries,* 110 U. PA. L. REV. 554, 586-600 (1962).

pointing out that abuses could be effectively restrained by several methods.[23] These include a cautious, case-by-case approach by courts, a conservative approach in evaluating the evidence to determine if there is an issue for the jury, and, in final resort, corrective measures by the legislature if they should become necessary.

This brief analysis is offered to explain the recent trend of American courts toward recognition of a cause of action for prenatal injuries. The growth and change in the area is described by Dean Prosser:[24]

> Beginning with a decision in the District of Columbia in 1946, a series of cases, many of them overruling former holdings, have held than an infant born alive may maintain an action for prenatal injuries, and that an action for wrongful death will lie where it dies as a result of such injuries after birth. The reversal is so definite and marked as to leave no doubt that this will be the law of the future in the United States. The cases thus far have involved viable infants, capable of independent life at the time of the accident, and have rather carefully limited their rule to such situations. There appears to be no good reason for the distinction, which will inevitably involve difficult questions of proof; and there has been some indication of a willingness to extend the recovery even to the non-viable infant if satisfactory medical evidence as to causation should ever be available.

As indicated, the cases arise in four situations, dependent upon whether the injury was fatal or non-fatal, and whether the child was viable or nonviable at the time of injury. A fatal injury may be the basis of a wrongful death action,[25] while a nonfatal injury may give rise to a tort claim by the infant for prenatal injuries. Added to these factors is the variable of viability. A viable fetus is one which is capable of living independently of the mother.[26] The fetus is generally acknowledged to reach this stage of development at approximately the

[23] White, *supra* note 9 at 402-06.

[24] PROSSER, TORTS § 36, at 175 (2d ed. 1955). See also 2 HARPER & JAMES, TORTS § 18.3 (1956).

[25] It is generally recognized that even under wrongful death statutes recovery is conditioned upon the decedent's right to have recovered for the injury. See Comment, *supra* note 9 at 294 and Annot., 10 A.L.R.2d 1059 at 1069. The right of action under Washington's wrongful death statute is set forth in RCW 4.20.010: "When the death of a person is caused by the wrongful act, neglect or default of another his personal representative may maintain an action for damages against the person causing the death; and although the death shall have been caused under such circumstances as amount, in law, to a felony."

[26] MALOY, MEDICAL DICTIONARY FOR LAWYERS 706 (3d ed. 1960), defines viable in the following way: "Not born dead, capable of living, said of a fetus that can live outside of the uterus." It is defined in DORLAND, ILLUSTRATED MEDICAL DICTIONARY 1528 (23d ed. 1957) as, "Capable of living; especially said of a fetus that has reached such a stage of development that it can live outside of the uterus." Distinguish this from the "quick" fetus. MALOY, *id.* at 598, defines quickening as "The first movements of the fetus in the uterus felt by the mother, usually occurring about the middle of

twenty-sixth week of pregnancy; it is apparent, however, that this standard is impossible of completely accurate application since this would require exactness in determining the time of conception. The earlier decisions allowing recovery for prenatal injury attach some weight to the viability factor, but the courts have begun to allow recovery regardless of a determination that the injury was inflicted upon the infant when it was clearly nonviable. A survey of the latest decisions in the area reveals that twenty-five[27] jurisdictions have indicated favor toward the recognition of a cause of action for prenatal injuries in some combination of the variables.[28] A state by state determination is set out in the appendix; the reader is also referred to an excellent summary in the Defense Law Journal,[29] a recent comment discussing these decisions[30] and a comprehensive article on the background of the law in this area in the commonwealth and other nations.[31]

The decision in *Rankin* indicates a definite trend. The court, however, did not provide an extensive rationale for its conclusions nor did it indicate the limitations, if any, to the scope of the decision. This course is perhaps the wisest, for as Dean White has stated, "One of the oldest judicial techniques is to proceed cautiously in a new area, pricking out the law case by case."[32]

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pregnancy—from the sixteenth to the twentieth week." DORLAND, *supra*, at 1145, gives as the third definition of "quick" the following: "Pregnant and able to feel the fetal movements," and defines quickening as "The first recognizable movements of the fetus in utero appearing from the sixteenth to the eighteenth week of pregnancy."

[27] Into this number were counted the favorable attitudes recently expressed by the Michigan and Wisconsin courts. Also calculated separately were the federal court holdings in the District of Columbia case and the Iowa district court case. See the appendix for further reference.

[28] It should be noted that policy considerations become of vital importance in this area. Undoubtedly the easiest factual pattern for the court will be that in the *Rankin* type case—a prenatal injury to an unborn viable infant which is later born alive and sues for recovery in its own right. The viability factor seems to be of importance in smoothing the road of proof of causation, since injury to a nonviable fetus inherently presents extremely difficult proof problems. However, as indicated earlier, the difficulty of proof should not be determinative on the issue of existence of a cause of action. More difficult situations face the court in cases involving stillborn infants. Allowance of recovery for injuries to a child born dead appears to constitute an award to the parents for grief and suffering, whereas recovery to a living person serves an easily recognizable social utility. Courts are influenced by these considerations and the decisions must be analyzed with this in mind. For example, in West v. McCoy, 233 S.C. 369, 105 S.E.2d 88 (1958) the court held that an action did not lie for the wrongful death of an unborn child which was "quick" but not viable at the time of injury. The court states, 105 S.E.2d at 91, "The policy considerations which call for a right of action when a child survives do not necessarily apply in absence of survival."

[29] Reed, *supra* note 9 at 36-41.

[30] Proctor, *Prenatal Injuries—"Killing or Maiming Is Excused in Texas, If the Victim Doesn't Own a Birth Certificate,"* 6 So. TEX. L.J. 102 (1962).

[31] Winfield, *The Unborn Child,* 4 U. OF TORONTO L.J. 278 (1942).

[32] White, *supra* note 9 at 404.

Appendix

This appendix attempts to set out what is believed to be the current position in the state and federal jurisdictions in which the issue of prenatal injury has been presented. For other cases and the history in this area, see 20 A.L.R. 1505 (1922); 97 A.L.R. 1524 (1935); 10 A.L.R.2d 1059 (1950); 27 A.L.R.2d 1256 (1953). See also Brief for Respondent, Appendix, pp. 1-12, Seattle-First National Bank v. Rankin, 59 Wn.2d 288, 367 P.2d 835 1962.

* = Cause of action denied; † = Cause of action recognized.

FEDERAL:			
Bonbrest v. Kotz[33]	Viable	Prenatal injury	†
Wendt v. Lillo[34]	Viable	Wrongful death	†
Sox v. United States[35]	Viable	Prenatal injury	†
Turnknett v. Keaton[36]	——	Prenatal injury	*
STATE:			
Alabama			
Stanford v. St. Louis-San Francisco Ry.[37]	Viable	Wrongful death	*
California			
Scott v. McPheeters[38]	Viable	Prenatal injury	†
Norman v. Murphy[39]	Nonviable	Wrongful death	*
Colorado[40]			

[33] 65 F.Supp. 138 (D.D.C. 1946).

[34] 182 F.Supp. 56 (N.D. Iowa 1960).

[35] 187 F.Supp. 465 (E.D. S.C. 1960). See also cases cited notes 73 and 74 *infra.*

[36] 266 F.2d 572 (5th Cir. 1959). See also note 76 *infra.*

[37] 214 Ala. 611, 108 So. 566 (1926).

[38] 33 Cal.App.2d 629, 92 P.2d 678, *rehearing denied,* 93 P.2d 562 (1939). The action was based on a statute providing "A child conceived, but not yet born, is to be deemed an existing person, so far as may be necessary for its interests in the event of its subsequent birth."

[39] 124 Cal.App.2d 95, 268 P.2d 178 (1954). The unborn infant had been carried more than four and one-half months when the accident and resulting miscarriage occurred.

[40] There is no holding in this state, but Taylor, *supra* note 6 at 328 notes this settlement: "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. 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 Williams v. Marion Rapid Transit, Inc. [See note 6 *supra.*] No decision was rendered. The case was settled."

Connecticut			
Tursi v. New England Windsor[41]	Viable	Prenatal injury	†
Prates v. Sears, Roebuck & Co.[42]	Viable	Wrongful death	†
Delaware			
Worgan v. Greggo & Ferrara, Inc.[43]	Viable	Wrongful death	†
Georgia			
Tucker v. Howard L. Carmichael & Sons[44]	Viable	Prenatal injury	†
Porter v. Lassiter[45]	"Quick"	Wrongful death	†
Hornbuckle v. Plantation Pipe Line Co.[46]	Nonviable	Prenatal injury	†
Illinois			
Amann v. Faidy[47]	Viable	Wrongful death	†
Rodriguex v. Patti[48]	Viable	Prenatal injury	†
Iowa[49]			
Kansas			
Hale v. Manion[50]	Viable	Wrongful death	†
Kentucky			
Mitchell v. Couch[51]	Viable	Wrongful death	†
Louisiana			
Cooper v. Blanck[52]	Viable	Wrongful death	†
Maryland			
Damasiewicz v. Gorsuch[53]	"Quick"	Prenatal injury	†

[41] 19 Conn. Supp. 242, 111 A.2d 14 (1955).
[42] 19 Conn. Supp. 487, 118 A.2d 633 (1955).
[43] 50 Del. 258, 128 A.2d 557 (1956).
[44] 208 Ga. 201, 65 S.E.2d 909 (1951).
[45] 91 Ga. App. 712, 87 S.E.2d 100 (1955). The infant was stillborn.
[46] 212 Ga. 504, 93 S.E.2d 727 (1956).
[47] 415 Ill. 422, 114 N.E.2d 412 (1953).
[48] 415 Ill. 496, 114 N.E.2d 721 (1953).
[49] The Iowa state courts have not rendered a decision in this area. However, a federal district court sitting in that state has allowed recovery. The case is cited at note 34 *supra*.
[50] 368 P.2d 1 (Kan Sup. Ct. 1962).
[51] 285 S.W.2d 901 (Ky. Ct. App. 1955). The infant was stillborn.
[52] 39 So. 2d 352 (La. Ct. App. 1923). This was reaffirmed in Valence v. Louisiana Power & Light Co., 50 So.2d 847 (La. Ct. App. 1951) involving a stillborn infant. However, the evidence was held not sufficient to attribute the stillbirth to the accident.
[53] 197 Md. 417, 79 A.2d 550 (1951).

Massachusetts			
Keyes v. Constr. Serv. Inc.[54]	Viable	Wrongful death	†
Michigan			
Newman v. City of Detroit[55]	Viable	Wrongful death	*
Minnesota			
Verkennes v. Corniea[56]	Viable	Wrongful death	†
Mississippi			
Rainey v. Horn[57]	Viable	Wrongful death	†
Missouri			
Steggall v. Morris[58]	Viable	Wrongful death	†
Nebraska			
Drabbels v. Skelly Oil Co.[59]	Viable	Wrongful death	*
New Hampshire			
Poliquin v. MacDonald[60]	Viable	Wrongful death	†
Bennett v. Hymers[61]	Nonviable	Prenatal injury	†
New Jersey			
Smith v. Brennan[62]	Nonviable	Prenatal injury	†
New York			
Woods v. Lancet[63]	Viable	Prenatal injury	†
In re Logan's Estate[64]	Nonviable	Wrongful death	*
Kelly v. Gregory[65]	Nonviable	Prenatal injury	†
Ohio			
Williams v. Marion Rapid Transit, Inc.[66]	Viable	Prenatal injury	†

[54] 340 Mass. 633, 165 N.E.2d 912 (1960). The court indicated that if the child had been stillborn, no right of action would have been recognized. The parent case in the common law jurisdiction, Dietrich v. Inhabitants of Northampton, *supra* note 8, is sharply limited and distinguished.

[55] 281 Mich. 60, 274 N.W. 710 (1937). But note La Blue v. Specker, 358 Mich. 558, 100 N.W.2d 445 (1960). There an infant sued to recover damages under the Liquor Control Act for the death of his alleged father. The suit was allowed, although at the time of death of the alleged parent, the infant was a nonviable fetus. The precise issue of prenatal injuries was not in the suit, but the court indicated that it was favorable toward the modern trend recognizing a right of action to exist for prenatal injury.

[56] 229 Minn. 365, 38 N.W.2d 838 (1949).

[57] 221 Miss. 269, 72 So.2d 434 (1954). The infant was stillborn.

[58] 363 Mo. 1224, 258 S.W.2d 577 (1953).

[59] 155 Neb. 17, 50 N.W.2d 229 (1951). The infant was stillborn. The court reserved the question of whether a child born alive could maintain an action for prenatal injuries.

[60] 101 N.H. 104, 135 A.2d 249 (1957). The infant was stillborn.

[61] 101 N.H. 483, 147 A.2d 108 (1958).

[62] 31 N.J. 353, 157 A.2d 497 (1960).

[63] 303 N.Y. 349, 102 N.E.2d 691 (1951).

[64] 3 N.Y.2d 800, 156 N.Y.S.2d 49, *affirmed* 156 N.Y.S.2d 152, 144 N.E.2d 644 (1957). The infant was born dead.

[65] 125 N.Y.S.2d 696 (App. Div. 1953).

[66] 152 Ohio St. 114, 87 N.E.2d 334 (1949).

Jasinsky v. Potts[67]	Viable	Wrongful death	†
Stidmane v. Ashmore[68]	Viable	Wrongful death	†
Oklahoma			
Howell v. Rushing[69]	——	Wrongful death	*
Oregon			
Mallison v. Pomeroy[70]	Viable	Prenatal injury	†
Pennsylvania			
Sinkler v. Kneale[71]	Nonviable	Prenatal injury	†
Rhode Island			
Gorman v. Budlong[72]	Viable	Wrongful death	*
South Carolina			
Hall v. Murphy[73]	Viable	Wrongful death	†
West v. McCoy[74]	"Quick"	Wrongful death	*
Tennessee			
Hogan v. McDaniel[75]	Viable	Wrongful death	*
Texas			
Magnolia Coca Cola Bottling Co. v. Jordan[76]		Wrongful death	*
Washington			
Seattle-First Nat'l Bank v. Rankin[77]	Viable	Prenatal injury	†
Wisconsin			
Lipps v. Milwaukee Elec. Ry. & Light Co.[78]	Nonviable	Prenatal injury	*

[67] 153 Ohio St. 529, 92 N.E.2d 809 (1950). The infant was born alive but later died as result of prenatal injuries.

[68] 109 Ohio App. 431, 167 N.E.2d 106 (1959). The infant was stillborn.

[69] 261 P.2d 217 (Okla. Sup. Ct. 1953). The infant was born dead.

[70] 205 Ore. 690, 291 P.2d 225 (1955).

[71] 401 Pa. 267, 164 A.2d 93 (1960).

[72] 23 R.I. 169, 49 Atl. 704 (1901).

[73] 236 S.C. 257, 113 S.E.2d 790 (1960). The infant lived four hours after birth.

[74] 233 S.C. 369, 105 S.E.2d 88 (1958). The infant was born dead. For a decision of the federal district court sitting in South Carolina see note 35 *supra.*

[75] 204 Tenn. 235, 319 S.W.2d 221 (1958). The infant was stillborn.

[76] 124 Tex. 347, 78 S.W.2d 944 (1935). See also Lewis v. Steves Sash & Door Co., 177 S.W.2d 350 (Tex. Civ. App. 1943) and Turnknett v. Keaton, *supra* note 36, prenatal injury cases which adhere to the *Magnolia* case rule. Special attention is given to the Texas situation in the article cited at note 30 *supra.*

[77] 59 Wn.2d 288, 367 P.2d 835 (1962).

[78] 164 Wis. 272, 159 N.W. 916 (1916). The court reserved opinion as to prenatal injury suffered by a viable unborn child. In Puhl v. Milwaukee Auto. Ins. Co., 8 Wis.2d 343, 99 N.W.2d 163 (1960), the court indicated it was favorable to recovery for prenatal injury. However, in that case it was found unnecessary to determine if the infant plaintiff had such a cause of action for prenatal injuries sustained when she was nonviable, since there was insufficient evidence to prove that the accident in which plaintiff's mother was involved had caused plaintiff to be born a Mongoloid.