Infants—Prenatal Injuries—A Nonviable Fetus May Recover for Personal Injuries. *Delgado v. Yandell*, 468 S.W.2d 475 (Tex. Civ. App. —Fort Worth 1971, writ ref'd n.r.e.).

Isabel Delgado, who was 2 ½ months pregnant, was involved in an automobile collision with a vehicle driven by Michael Yandell. Six and one-half months later she gave birth to Elizabeth Delgado, whose father, Vincent H. Delgado, brought this action as her next friend alleging that the child had sustained permanent and disabling injuries as a result of the collision. The trial court granted Yandell's motion for summary judgment holding that no right of action existed for personal injuries sustained by a nonviable fetus. The court of civil appeals reversed the trial court's decision and remanded for a trial on the merits.

The general rule of the early cases involving the question of prenatal injuries was to deny a right of recovery.[1] The reasons for denying that right included no duty of care to an unborn child[2] and the difficulty of establishing causation with reasonable certainty.[3] In addition, the courts noted a lack of precedent[4] and the possibility of fictitious and fraudulent claims.[5]

Texas followed the general rule in 1935, when the commission of appeals denied a right to recover for prenatal injuries.[6] The court held that, in the absence of an applicable statute, prenatal injuries could not be the basis for a cause of action. The court's rationale was based on a lack of precedent allowing recovery—no court of last resort had yet allowed recovery for a child tortiously injured while *en ventre sa mere*.[7] The court also reasoned that because a nonviable fetus cannot exist apart from its mother, the fetus is not a separate person with separate rights, and under tort law its rights are merged with those of the mother. In 1943 another Texas case followed the general rule, and said that to deny recovery for a prenatal injury was in accordance with the "overwhelm-

1. Stanford v. St. Louis-S.F. Ry., 214 Ala. 611, 108 So. 566 (1926); Allaire v. St. Luke's Hosp., 184 Ill. 359, 56 N.E. 638 (1900); Dietrich v. Northampton, 138 Mass. 14 (1884).
2. Dietrich v. Northampton, 138 Mass. 14 (1884); Drobner v. Peters, 232 N.Y. 220, 133 N.E. 567 (Ct. App. 1921); Magnolia Coca-Cola Btlg. Co. v. Jordan, 124 Tex. 347, 78 S.W.2d 944 (1935).
3. Stanford v. St. Louis-S.F. Ry., 214 Ala. 611, 108 So. 566 (1926); Magnolia Coca-Cola Btlg. Co. v. Jordan, 124 Tex. 347, 78 S.W.2d 944 (1935).
4. Allaire v. St. Luke's Hosp., 184 Ill. 359, 56 N.E. 638 (1900); Smith v. Luckhardt, 299 Ill. App. 100, 19 N.E.2d 446 (1939); Dietrich v. Northampton, 138 Mass. 14 (1884).
5. Magnolia Coca-Cola Btlg. Co. v. Jordan, 124 Tex. 347, 78 S.W.2d 944 (1935).
6. *Id.*
7. The phrase *en ventre sa mere* means in the womb of the mother.

ing weight of authority."[8] However, as a result of the legal recognition of the fetus as a separate entity and of advances in medical science making it possible to establish causation, the general rule soon began to change.

Recovery for prenatal injuries was first allowed in 1923,[9] but the trend away from the early decisions did not begin until 1946[10] and was well established by 1955.[11] The Texas policy, however, did not change until 1967 when the Texas Supreme Court, in *Leal v. C.C. Pitts Sand & Gravel, Inc.*,[12] had its first opportunity since 1943 to rule on the issue of prenatal injuries.[13] *Leal* overruled previous Texas cases which had denied recovery and noted that its decision was in line with the current weight of authority. Today only one state has failed to reject the common law rule which disallows recovery for prenatal injuries.[14]

Two theories of recovery developed to allow an infant a cause of action for injuries tortiously inflicted upon him before birth: the viability theory and the conception theory. Under the viability theory the infant has a right of action only after it has reached the stage of its development where it is capable of life independent from its mother. Under the conception theory a fetus is protected from the time of conception.[15] The viability theory was used by courts for 30 years before the question of the nonviable fetus' right to recover arose.[16] When the conception theory was first advanced, it met opposition similar to that met by the viability

8. Lewis v. Steves Sash & Door, 177 S.W.2d 350 (Tex. Civ. App.—El Paso 1943, writ ref'd). Cases against the weight of authority at this time were: Scott v. McPheeters, 33 Cal. App. 2d 629, 92 P.2d 678 (1939); Cooper v. Blanck, 39 So. 2d 352 (La. Ct. App. 1923); Montreal Tramways v. Leveille, [1933] 4 D.L.R. 337 (1933).

9. Cooper v. Blanck, 39 So. 2d 352 (La. Ct. App. 1923).

10. Bonbrest v. Kotz, 65 F. Supp. 138 (D.D.C. 1946). *Bonbrest* was primarily responsible for changing the early rule because Cooper v. Blanck, 39 So. 2d 352 (La. Ct. App. 1923), was not reported until 1949. Scott v. McPheeters, 33 Cal. App. 2d 629, 92 P.2d 678 (1939), was based on statute and Montreal Tramways v. Leveille, [1933] 4 D.L.R. 337 (1933), was based on civil law concepts. *Bonbrest* was the first to be based solely on common law. The first American case was Williams v. Marion Rapid Transit, Inc., 152 Ohio St. 114, 87 N.E.2d 334 (1949).

11. By 1955, thirteen states had allowed recovery. Sinkler v. Kneale, 401 Pa. 267, 164 A.2d 93 (1960).

12. 419 S.W.2d 820 (Tex. 1967).

13. The Texas case preceding *Leal* was Lewis v. Steves Sash & Door, 177 S.W.2d 350 (Tex. Civ. App.—El Paso 1943, writ ref'd).

14. The state is Alabama. Stetson v. Easterling, 274 N.C. 152, 161 S.E.2d 531 (1968). The controlling Alabama case is Stanford v. St. Louis-S.F. Ry., 214 Ala. 611, 108 So. 566 (1926).

15. *See* Jacobson, *Development of the Remedy for Prenatal Torts*, 26 KAN. CITY L. REV. 26, 27 (1958).

16. Time elapsed from Cooper v. Blanck, 39 So. 2d 352 (La. Ct. App. 1923), to Kelly v. Gregory, 282 App. Div. 542, 125 N.Y.2d 696 (1953).

theory.[17] Opposition to the conception theory was overcome by an argument similar to the one used by proponents of the viability theory.[18] A plaintiff should not be precluded from a cause of action simply because he may have difficulty meeting his burden of persuasion. Moreover, if an infant is born alive with injuries or deformities which can be medically proven to have occurred *en ventre sa mere*, he should be allowed to recover just as his mother is allowed to recover for her injuries.[19]

There are other areas of law which have always considered the fetus to be a distinct entity from the moment of conception. "Children" as used in testamentary dispositions may include children *en ventre sa mere;*[20] under rights of inheritance, posthumous children are regarded as *in esse* from the time of conception;[21] one who feloniously injures an unborn child who is born alive but later dies from the injury is chargeable with homicide, just as he would be if he had killed any other human being.[22] If the fetus cannot be legally deprived of its life or its property, neither should its life be tortiously impaired. Current medical and legal authorities recognize that a child is in existence from the moment of conception, and if medical proof can establish causation, a nonviable fetus should be allowed to recover for personal injuries.[23] Acceptance of the conception theory is indicated by the fact that "no jurisdiction which has approved recovery for injury to a viable fetus has later denied recovery to a child who survived an injury suffered before it was viable."[24]

Since 1953 several jurisdictions have thoroughly explored the reasons for and against distinguishing the rights of the fetus, nonviable at the time of injury and later born alive, from those of a fetus which was viable when injured.[25] All of these have favored allowing a cause of

17. *See, e.g.*, Hornbuckle v. Plantation Pipeline Co., 212 Ga. 504, ____, 93 S.E.2d 727, 729 (1956) (dissenting opinion); Sinkler v. Kneale, 401 Pa. 267, ____, 164 A.2d 93, 97 (1960) (dissenting opinion).

18. Cases at note 18 *supra*.

19. Bennett v. Hymers, 101 N.H. 483, 147 A.2d 108 (1958).

20. *E.g.*, Tomlin v. Laws, 301 Ill. 616, 134 N.E. 24 (1922); Kelly v. Gregory, 282 App. Div. 542, 125 N.Y.S.2d 696 (1953).

21. *E.g.*, Deal v. Sexton, 144 N.C. 157, 56 S.E. 691 (1907); Kimbro v. Harper, 113 Okla. 46, 238 P. 840 (1925); Nelson v. Galveston, H. & S.A. Ry., 78 Tex. 621, 14 S.W. 1021 (1890).

22. *E.g.*, Clarke v. State, 117 Ala. 1, 23 So. 671 (1898); Harris v. State, 28 Tex. Crim. 308, 12 S.W. 1102 (1889).

23. W. PROSSER, LAW OF TORTS § 55 (4th ed. 1971).

24. Smith v. Brennan, 31 N.J. 353, ____, 157 A.2d 497, 504 (1960).

25. *See* Hornbuckle v. Plantation Pipeline Co., 212 Ga. 504, 93 S.E.2d 727 (1956); Daley v. Meier, 33 Ill. App. 2d 218, 178 N.E.2d 691 (1961); Bennett v. Hymers, 101 N.H. 483, 147 A.2d 108 (1958); Smith v. Brennan, 31 N.J. 353, 157 A.2d 497 (1960); Kelly v. Gregory, 282 App. Div. 542, 125 N.Y.S.2d 696 (1953); Stetson v. Easterling, 274 N.C. 152, 161 S.E.2d 531 (1968); Sinkler v. Kneale, 401 Pa. 267, 164 A.2d 93 (1960).

action to the fetus regardless of its stage of development; in at least one instance, recognition of the child as an entity from the time of conception has been allowed simply because it was for the benefit of the child to be so considered.[26] Further, the difficulty in proving causation and the danger of fictitious claims are no greater problems than are present in other matters requiring medical proof of causation.[27] The viability test also has been considered too arbitrary because there is no reliable way to determine in a borderline case whether a fetus is viable at the time of injury;[28] therefore, the viability rule is incapable of being applied accurately. As a result of this arbitrariness, one case has resorted to a more "tangible and concrete" test, such as being born alive.[29] Moreover, the decisions favoring the conception theory basically feel that a child will suffer the same harm regardless of viability and, therefore, should have the same opportunity for recovery.

In *Delgado*[30] the Texas court followed the trend of recent cases by extending the theory set forth in *Leal*[31] to apply to the nonviable fetus. In *Leal* the supreme court supported its allowance of the wrongful death action by citing *Nelson v. Galveston, H. & S.A. Ry.*,[32] in which the plaintiff's mother was 3 months pregnant when the injuries were sustained. The *Nelson* case, therefore, furnishes support for *Delgado*, in which the mother was only 2½ months pregnant at the time of the accident. The court's reasoning in the *Delgado* case brings the Texas policy in line with other jurisdictions currently following the conception theory. *Delgado* agrees that an infant has a legal right to be born with a sound mind and body, and if the tortious actions of another prevent the enjoyment of that right and causation can be established by competent proof, then damages should not be denied.

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26. Hornbuckle v. Plantation Pipeline Co., 212 Ga. 504, 93 S.E.2d 727 (1956).

27. Bennett v. Hymers, 101 N.H. 483, 147 A.2d 108 (1958).

28. Smith v. Brennan, 31 N.J. 353, 157 A.2d 497 (1960).

29. Daley v. Meier, 33 Ill. App. 2d 218, 178 N.E.2d 691 (1961). The child was born alive in all cases cited which have allowed recovery. It would, therefore, appear that being born alive is a requirement before a right to recover in a wrongful death action for the child's injuries exists.

30. Delgado v. Yandell, 468 S.W.2d 475 (Tex. Civ. App.—Fort Worth 1971, writ ref'd n.r.e.).

31. Leal v. C.C. Pitts Sand & Gravel, Inc., 419 S.W.2d 820 (Tex. 1967).

32. 78 Tex. 621, 14 S.W. 1021 (1890). In this case the father of the plaintiff was killed when the mother was about 3 months pregnant. The court held that a posthumous child was entitled to damages for the death of his father proximately caused by another's negligence. *Delgado* is also going to affect wrongful death actions in Texas, because under TEX. REV. CIV. STAT. ANN. art. 4671, § 8 (1952), a wrongful death action cannot be maintained unless the decedent could have maintained an action for damages for his injury had he survived. Therefore, allowing an infant a cause of action for injuries sustained before he became viable will provide the parents with a cause of action if the infant is born alive but later dies as a result of the tortiously inflicted injuries.