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of privilege. An additional statute calling for compulsory liability insurance as a condition precedent to the registration of a car owned by a minor is also found in some states.⁵¹ Where both of these statutes have been enacted, such as in New York, the victim of a youthful driver would find his chances of compensation to be at least as good as those of the victim of an adult.

WILLIAM R. BAIRD

Injuries to the Unborn—A Legal Medical Problem

One of the criticisms often leveled at the law is that it allows itself to become stagnated in a morass of precedent and stare decisis, while reality passes it by. The fallacy of this accusation is strikingly brought out in considering the development of the law relating to injuries to the unborn. Here one finds the law proceeding with caution, but keeping pace with changing and expanding medical knowledge.

Before considering the legal aspects of this problem, certain pertinent terms to be used hereafter should be defined. A fetus is the developing young in the female uterus after the end of the second month of pregnancy. Before this time it is called an embryo.¹ A viable child is one as yet unborn but capable of independent life; a fetus that has reached such a stage of development that it can live outside of the uterus.²

In the following discussion we will be dealing with two separate causes of action; wrongful death and prenatal injuries. The action for prenatal injuries is one brought on behalf of the infant for injuries which become evident after birth and are attributed to an accident involving the mother during pregnancy. Wrongful death actions may arise factually in two ways. First, there is the possibility that the child may be born alive, but die shortly thereafter, allegedly as a result of an accident in which the mother was involved. Secondly, the child may be delivered dead.

The scope of this note is to trace the development of the law in this area and to consider some of the problems remaining. Essentially, these problems concern application of medical knowledge to the legal doctrines involved.

DEVELOPMENT OF THE LAW PRIOR TO 1946

The first reported case in the English language concerning injury to an unborn child was *Dietrich v. Inhabitants of Northampton*,³ an ac-

⁵¹ See, for example, N.Y. VEHICLE & TRAFFIC LAW § 11-a.

tion for wrongful death, arising in Massachusetts in 1884. Justice Holmes, in denying recovery, held there was no precedent for maintaining such a suit. His second reason for the denial of recovery was that the unborn child was a part of the mother at the time of the accident. The legal implications of this statement of mother-child unity were weakened by the fact that the accident occurred when the mother was approximately 4-5 months pregnant, and the child prematurely delivered "was too little advanced in fetal life to survive."⁴ This fact has been considered by later cases, which have distinguished the *Dietrich* case as one not involving a viable child.

The first case directly on the question of the right of a child to recover for a prenatal injury arose in Illinois.⁵ In denying recovery, the Illinois Supreme Court adopted the opinion of the court of appeals, which was basically founded on a consideration of the *Dietrich* case. While this case is important, in that it was followed by a long line of decisions in other jurisdictions, its greatest significance lies in a searching dissent by Justice Boggs. He argued that the majority was sacrificing medical fact for legal fiction, and that when a child reaches a point of independent life he is not, and should not be considered to be simply a part of the mother.⁶ Although disregarded for many years, this view represents the existing law in a majority of jurisdictions.

In the next ten years Wisconsin⁷ and New York⁸ refused recovery in actions for prenatal injuries, while Rhode Island⁹ and Missouri¹⁰ likewise turned aside suits for wrongful death. In each of these cases determinative weight was given to the preceding cases.

By 1923 six states were firmly committed to a doctrine denying recovery for accidents to an unborn child.¹¹ Opposed to this there existed one Pennsylvania lower court decision¹² allowing recovery for a prenatal

¹ DORLAND'S ILLUSTRATED MEDICAL DICTIONARY, p. 50 (23d ed. 1957).

² *Id.* at 1529.

³ 138 Mass. 14 (1884).

⁴ *Ibid.*

⁵ *Allaire v. St. Luke's Hospital*, 184 Ill. 359, 56 N.E. 638 (1900).

⁶ *Id.* at 362.

⁷ *Lipps v. Milwaukee Elec. Ry. & Light Co.*, 164 Wis. 272, 159 N.W. 916 (1916).

⁸ *Drobner v. Peters*, 232 N.Y. 220, 133 N.E. 567 (1921).

⁹ *Gorman v. Budlong*, 23 R.I. 169, 49 Atl. 704 (1901).

¹⁰ *Buel v. United Ry. Co. of St. Louis*, 248 Mo. 126, 154 S.W. 71 (1913).

¹¹ *Allaire v. St. Luke's Hospital*, 184 Ill. 359, 56 N.E. 638 (1900); *Dietrich v. Inhabitants of Northampton*, 138 Mass. 14 (1884); *Buel v. United Ry. Co. of St. Louis*, 248 Mo. 126, 154 S.W. 71 (1913); *Drobner v. Peters*, 232 N.Y. 220, 133 N.E. 567 (1921); *Gorman v. Budlong*, 23 R.I. 169, 49 Atl. 704 (1901); *Lipps v. Milwaukee Elec. R. & Light Co.*, 164 Wis. 272, 159 N.W. 916 (1916).

¹² *Kine v. Zuckerman*, 4 Pa. D. & C. 227 (1924). Actually, there was another de-

injury; a decision subsequently overruled by the Pennsylvania Supreme Court.¹³ From this point, the weight of authority continued to build in the manner of a house of cards, each case relying on that before it for its foundation, with the greatest weight being accorded the cases of *Allaire v. St. Luke's Hospital*¹⁴ and *Drobner v. Peters*.¹⁵

The only break in the chain of authority occurred in 1939, when a California court of appeals allowed recovery for a prenatal injury in a malpractice action.¹⁶ While the decision ostensibly hinges on the construction of a section of the California Civil Code, it is perfectly apparent that the court was prepared to allow recovery on the merits, but was fortunate enough to have the statute on which it could base the holding.

As of 1946, California was still a voice crying in the wilderness; for opposed to this single appellate decision there stood the holdings of the courts of twelve other states denying recovery for injuries to the unborn.¹⁷

The principal reasons advanced for the denial of recovery by the various courts were as follows: 1) lack of precedent 2) stare decisis 3) too conjectural as to causation 4) the mother-child unity 5) possibility of fictitious claims. One by one these objections have fallen at the hands of courts armed with modern medical opinion.

DEVELOPMENT OF THE LAW FROM 1946

In 1946 the District of Columbia became the first jurisdiction to squarely hold that a child had a right to recover for prenatal injury.¹⁸ In a very cogent opinion the district court set forth its views that the medical profession has proved a viable child to be an independent being, and it should be treated as such in law. It dismissed the argument that this would foster fictitious claims, stating that this is an inherent danger everywhere in the law.

cision allowing recovery for a prenatal injury, *Cooper v. Blanck*, 39 So.2d 352, (La. Ct. App. 1923), but it was unreported until 1948, and cannot be considered as authority until that time.

¹³ *Berlin v. J.C. Penny Co.*, 399 Pa. 547, 16 A.2d 28 (1940).

¹⁴ 184 Ill. 359, 56 N.E. 638 (1900).

¹⁵ 232 N.Y. 220, 133 N.E. 567 (1921).

¹⁶ *Scott v. McPheeters*, 33 Cal. App.2d 629, 92 P.2d 678 (1939).

¹⁷ *Alabama-Stanford v. St. Louis-San Francisco Ry. Co.*, 214 Ala. 611, 108 So. 566 (1926); *Illinois-supra*, note 5; *New Jersey-Stemmer v. Kline*, 128 N.J.L. 455, 26 A.2d 684 (1942); *Massachusetts-supra*, note 3; *Michigan-Newman v. City of Detroit*, 281 Mich. 60, 274 N.W. 710 (1937); *Missouri-supra*, note 10; *New York-supra*, note 8; *Ohio-Mays v. Weingarten*, 82 N.E.2d 421 (Ohio Ct. App. 1943); *Pennsylvania-supra*, note 13; *Texas-Magnolia Coca Cola Bottling Co. v. Jordan*, 124 Tex. 347, 78 S.W.2d 944 (1935); *Wisconsin-supra*, note 7.

¹⁸ *Bonbrest v. Kotz*, 65 F. Supp. 138 (D.C. 1946).

1949 saw the first state supreme court cases allowing recovery. The Minnesota court in the case of *Verkinnes v. Corniea*,¹⁹ held that there may be recovery in wrongful death. The Ohio high court allowed an action for prenatal injury in *Williams v. Marion Rapid Transit Inc.*²⁰ The following year Ohio allowed recovery in an action for wrongful death, becoming the first state to directly recognize both causes of action.²¹ In 1951 a monumental breakthrough occurred, as New York reversed the *Drobner* case.²² The court stated, in retrospect, that the decision in the *Drobner* case was basically brought about by a lack of precedent, but, "if that were a valid objection the common law would now be what it was in the Plantagenet period."²³ In the same year Georgia,²⁴ Louisiana,²⁵ and Maryland²⁶ adopted rules allowing recovery for prenatal accidents, the opinion of the Supreme Court of Maryland being one of the most exhaustive and cogent in the field.

By this time the tide was clearly turning, and the weight of authority shifting to a view favoring recovery. This trend was considerably strengthened in 1953 when Illinois²⁷ and Missouri²⁸ both reversed their prior position, and allowed recovery in suits for prenatal injury and wrongful death. Both opinions recognized the advances made in relation to this problem, and discarded their prior decisions as obsolete. Since then there has been virtually unanimous agreement that an action lies for prenatal injuries. The jurisdictions which have had the problem as one of first impression have adopted the modern view,²⁹ but Massachusetts³⁰ and Pennsylvania³¹ have clung to their previous holdings as precious relics of a revered past.

The recent development of the law pertaining to wrongful death has had a few peculiar twists. While the majority of courts have adopted

¹⁹ 229 Minn. 365, 38 N.W.2d 838 (1949).

²⁰ 152 Ohio St. 114, 87 N.E.2d 334 (1949).

²¹ *Jasinsky v. Potts*, 153 Ohio St. 529, 92 N.E.2d 809 (1950).

²² *Woods v. Lancet*, 303 N.Y. 349, 102 N.E.2d 691 (1951).

²³ *Winfield, The Unborn Child* 4 U. TORONTO L. J. 285, 292 (1942).

²⁴ *Tucker v. Howard L. Carmichael & Sons Inc.* 208 Ga. 201, 65 S.E.2d 909 (1951)

²⁵ *Valence v. Louisiana Power & Light Co.*, 50 S.2d 847 (La. Ct. App. 1951).

²⁶ *Damasiewicz v. Gorush*, 197 Md. 417, 79 A.2d 550 (1951).

²⁷ *Amann v. Faigy*, 415 Ill. 422, 114 N.E.2d 412 (1953).

²⁸ *Steggall v. Morris*, 363 Mo. 1224, 258 S.W.2d 577 (1953).

²⁹ *Connecticut-Tursi v. New England Windsor Co.*, 19 Conn. Supp. 242, 111 A.2d 14 (1955); *Oregon-Mallison v. Pomeroy*, 205 Ore. 690, 291 P.2d 225 (1955).

³⁰ *Cavanaugh v. First Nat'l Stores Inc.*, 329 Mass. 179, 107 N.E.2d 307 (1952).

³¹ *Morgan v. United States* 143 F. Supp. 580 (D.C.N.J. 1956).

a rule allowing recovery,³² California³³ and New York³⁴ both rejected such actions, while allowing suits for prenatal injury. This seeming divergence may be attributed to the fact that in both cases in which liability was denied there appeared to be considerable doubt as to the viability of the child involved, whereas the decisions relating to prenatal injury had been rather strongly restricted to viable children. Notwithstanding these two decisions, the weight of authority sustains recovery in wrongful death.

As of the time of this writing, the alignment of the states in this area is as follows. Nine jurisdictions have squarely allowed actions for prenatal injury,³⁵ while six have denied it.³⁶ Of these six, only two³⁷ have ruled on the question in the past fifteen years. Ten jurisdictions allow an action to be maintained³⁸ for wrongful death, while five deny

³² Connecticut-Prates v. Sears Roebuck & Co., 19 Conn. Supp. 487, 118 A.2d 633 (1955); Delaware-Worgan v. Greggo & Ferrara Inc., 128 A.2d 557 (Del. Super. Ct. 1956); Georgia-Porter v. Lassiter, 91 Ga. App. 712, 87 S.E.2d 100 (1955); Kentucky-Mitchell v. Couch, 285 S.W.2d 901, (Ct. App. 1955); Louisiana-Valance v. Louisiana Power & Light Co., 50 So.2d 847 (La. Ct. App. 1951); Mississippi-Rainey v. Horn, 221 Miss. 72 So.2d 434 (1954); Missouri-Steggall v. Morris, 363 Mo. 1224, 258 S.W.2d 577 (1953); New Hampshire-Poliquin v. Macdonald, 135 A.2d 249 (N.H. Sup. Ct. 1957). *Contra*: Drabbels v. Skelly Oil Co., 155 Neb. 17, 50 N.W.2d 229 (1951).

³³ Norman v. Murphy, 268 P.2d 178 (Cal. Ct. App. 1954).

³⁴ Muschetti v. Charles Pfizer & Co., 144 N.Y.S.2d 235 (Sup. Ct. 1955).

³⁵ California-Scott v. McPheeters, 33 Cal. App.2d 629, 92 P.2d 678 (1939); Connecticut-Tursi v. New England Windsor Co., 19 Conn. Supp. 242, 111 A.2d 14 (1955); District of Columbia-Bonbrest v. Kotz, 65 F. Supp. 138 (D.C. Dist. Ct. 1946); Georgia-Tucker v. Howard L. Carmichael & Sons Inc., 208 Ga. 201, 65 S.E.2d 909 (1951); Illinois-Amann v. Faigy, 415 Ill. 422, 114 N.E.2d 412 (1953); Maryland-Damasiewicz v. Gorsuch, 197 Md. 417, 79 A.2d 550 (1951); New York-Woods v. Lancet, 303 N.Y. 349, 102 N.E.2d 691 (1951); Ohio-Williams v. Marion Rapid Transit Inc., 152 Ohio St. 529, 87 N.E.2d 334 (1949); Oregon-Mallsion v. Pomeroy, 205 Ore. 690, 291 P.2d 225 (1955).

³⁶ Alabama-Stanford v. St. Louis-San Francisco Ry. Co., 214 Ala. 611, 108 So. 566 (1926); Massachusetts-Cavanaugh v. First Nat'l Stores Inc., 329 Mass. 179, 107 N.E.2d 307 (1952); New Jersey-Stemmer v. Kline, 128 N.J.L., 455, 26 A.2d 489, (1942); Pennsylvania-Berlin v. J.C. Penney Co., 399 Pa. 547, 16 A.2d 28 (1940); Texas-Magnolia Coca-Cola Bottling Co. v. Jordan, 124 Tex. 347, 78 S.W.2d 944 (1935); Wisconsin-Lipps v. Milwaukee Elec. Ry. & Light Co., 164 Wis. 272, 159 N.W. 916 (1916).

³⁷ Massachusetts and Pennsylvania, *supra* notes 30 and 31.

³⁸ Connecticut-Prates v. Sears Roebuck & Co., 19 Conn. Supp. 487, 118 A.2d 533 (1955); Delaware-Worgan v. Greggo & Ferrara Inc., 128 A.2d 557 (Del. Super. Ct. 1956); Georgia-Porter v. Lassiter, 91 Ga. App. 712, 87 S.E.2d 100 (1955); Kentucky-Mitchell v. Couch, 285 S.W.2d 901 (Ct. App. 1955); Louisiana-Valance v. Louisiana Power & Light Co., 50 So.2d 847 (La. Ct. App. 1951); Minnesota-Verkinnes v. Corniea, 299 Minn. 365, 38 N.W.2d 838 (1949); Mississippi-Rainey v. Horn, 221 Miss. 268, 72 So.2d 434 (1954); Missouri-Steggall v. Morris, 363 Mo. 1224, 258 S.W.2d 577 (1953); New Hampshire-Poliquin v. Macdonald, 135 A.2d

any recovery.³⁹ Of the ten jurisdictions recognizing a suit for wrongful death, six⁴⁰ have not yet ruled directly on actions for prenatal injury, but it is fairly safe to assume that all would allow such an action. Therefore, we can say that today fifteen jurisdictions⁴¹ would grant recovery for prenatal injuries, while six⁴² in the past have denied such an action.

How has this modern trend met the objections of the older decisions? The arguments countering lack of precedent and possibility of fictitious claims have already been considered. The *stare decisis* doctrine was effectively answered when it was stated, "Precedents are valuable so long as they do not obstruct justice or destroy progress."⁴³

The question of conjectural causation has been overridden on the theory that difficulty of proof should not be a bar to an action, but rather make its granting more liberal.⁴⁴ Finally, the objection based on "oneness" of mother and child has been turned into the foundation of the modern view. The fact that medical science has proved to the satisfaction of the courts that an unborn child can be capable of life on its own, and is not just a part of the mother, is now the basic reason for allowing recovery for injuries to, or the death of, such a child.⁴⁵

PROBLEMS FOR THE FUTURE

Despite the basic doctrinal shift previously outlined, there still are major problems as yet unanswered. There exists distinct, though related, questions as to both prenatal injuries and wrongful death actions.

In both we have the basic jurisprudential question as to the propriety of the action itself. As to the action for prenatal injuries, one cannot doubt its social justification when it is realized that the victim faces life from its inception with a permanent disability. On the other hand, there may be a valid basis for questioning an action brought for the death of one who really never lived. However, the judges who have ruled on this matter must surely have encountered this objection and found it insuf-

249 (N.H. Sup. Ct. 1957); *Ohio-Jasinsky v. Potts*, 153 Ohio St. 529, 92 N.E.2d 809 (1950).

³⁹ *California-Norman v. Murphy*, 268 P.2d 178 (Cal. Ct. App. 1954); *Michigan-Newman v. City of Detroit*, 281 Mich. 60, 274 N.W. 710 (1937); *Nebraska-Drabfels v. Skelly Oil Co.*, 155 Neb. 17, 50 N.W.2d 229 (1951); *New York-Muschetti v. Charles Pfizer & Co.*, 144 N.Y.S.2d 235 (Sup. Ct. 1955); *Rhode Island-Gorman v. Budlong*, 23 R.I. 169, 49 Atl. 704 (1901).

⁴⁰ Delaware, Kentucky, Louisiana, Minnesota, Missouri, and New Hampshire.

⁴¹ Those jurisdictions cited *supra* notes 35 and 40.

⁴² *Supra*, note 36.

⁴³ *Scott v. McPheeters*, 33 Cal. App.2d 629, 92 P.2d 678 (1939).

⁴⁴ *Ibid.*

⁴⁵ *Mitchell v. Couch*, 285 S.W.2d 901 (Ky. Ct. App. 1955).

ficient. We must bear in mind that any action in wrongful death is statutorily defined, and while generally the aim of the law is to repair in a pecuniary way the losses sustained by the beneficiaries of the action,⁴⁶ many states allow recovery for various other elements of damage. In some jurisdictions there may be recovery of funeral expenses,⁴⁷ while others will allow recovery for loss of society and companionship,⁴⁸ while still others allow compensation for the grief, bereavement, anxiety and distress, or mental pain and suffering of the beneficiary.⁴⁹ Definitely these are properly recoverable in an action for the death of an unborn child, even though there may be no basis for the action on the broad ground of pecuniary loss. It would thus appear that the grant or denial of recovery could well rest on the elements of damage which the individual state provides for wrongful death, and no general theory will suffice.

The remaining questions are medico-legal and bear on the actual foundation in fact of the injuries under consideration.

One of the first shortcomings that must be corrected is a tendency of the courts to objectify viability as a static condition, arbitrarily considered to commence at about the seventh month of pregnancy.⁵⁰ Medically, this is incorrect, and viability is a fact, not a rule. As evidence of this, there was recently reported a case of a child delivered late in the fifth month of pregnancy which is developing normally at this time.⁵¹

Pertaining to wrongful death actions, the troublesome area relates to death of the fetus caused by external force to the mother. Medically, this would be classified as either traumatically caused abortion or intra-uterine death.⁵² In an extensive survey, two eminent physicians found only one true case of traumatic abortion among 1,000 case histories of spontaneous abortion in general.⁵³ They further cited the findings of seven doctors with an aggregate of 157 years practicing experience who between them had only witnessed six bona fide traumatically caused abortions. Thus it is apparent that while such a death is possible, its

⁴⁶ 16 AM. JUR., *Death* § 177 (1938).

⁴⁷ *Id.* § 193.

⁴⁸ *Id.* § 199.

⁴⁹ *Id.* § 200.

⁵⁰ As with every rule, there is an exception, and an excellent discussion of medical viability is to be found in *Cooper v. Blanck*, 39 So.2d 352 (La. Ct. App. 1923).

⁵¹ CLEVELAND PLAIN DEALER, April 19, 1948, p. 1, col. 2.

⁵² Traumatic abortion occurs when the accident causes premature expulsion of the fetus, and the child so delivered is incapable of life due to its lack of development. Intra-uterine death occurs when the fetus dies within the uterus but is not prematurely expelled.

⁵³ Hertig and Sheldon, *Minimal Criteria Required to Prove Prima Facie Case of Traumatic Abortion or Miscarriage*, 117 ANNALS OF SURGERY 596 (1943).

incidence is slight.⁵⁴ Therefore, the following stringent requirements have been suggested before one attributes an abortion (wrongful death) to an accident involving the pregnant mother:

- 1) The course of the pregnancy before the accident must have been normal.
- 2) Pathological examination of the abortus (dead fetus) must reveal no evidence of abnormal development.
- 3) The time between the accident and the onset of bleeding or other signs of inevitable abortion must have been a matter of minutes, or at least a few hours.⁵⁵

As to intra-uterine death, the same author says:

Intra-uterine death of a fetus may be caused by external injury, but to attribute it to that cause there must be real evidence, such as bruises on the fetus, or evidence of severe injury to the mother. In addition, there must be intra-uterine evidence of a cause of death.⁵⁶

If recovery is to be allowed in actions of this nature, a strict burden of proof, in conformity with medical fact, should be adopted.

Actions for prenatal injury present an even more vexing problem than do those for wrongful death. There is no surer way to elicit a jury's sympathy, possibly even to the extent that a verdict may be founded solely upon it, than to exhibit before it a deformed or mentally crippled child. While the idea that a cause of action must be denied because of the possibility of unfounded claims, everything within our power to deter them must be done.

The answer to this problem would seemingly lie in the medical province, with information relating to the susceptibility to injury of the fetus in the various stages of development. Unfortunately, a paucity of medical writing exists on this vital question. That which does shed some light on the subject indicates that the medical profession has considerable doubt as to the possibility of an injury to the mother resulting in deleterious effects to the developing child.⁵⁷ While not denying the possible causal connection, the writers tend to hedge on it. If this school of thought truly represents the consensus of medical experts, as it seems to do, then it is incumbent upon the medical profession to delve deeper into the problem and come forth with documented material relating to the susceptibility of the unborn child to injury. Only in this way will

⁵⁴DR. CARL JAVERT, in his book, *SPONTANEOUS AND HABITUAL ABORTION* (1957), reported only a 0.35% incidence of traumatic abortion.

⁵⁵McNeil, *Accident Injuries to Women — Obstetrical and Gynecological Problems Associated with Damage Claims*, 83 CAL. MED. 30 (1955).

⁵⁶*Id.* at 31.

⁵⁷Klees, *Intra-uterine Injuries of the Fetus Caused by Trauma During Pregnancy*, 73 ZENTRALBLATT FUER GYNAEKOLOGIE 1294 (1951); Diddle, *Trauma and Interruption of Pregnancy*, 44 TEXAS STATE JOURNAL OF MEDICINE 520 (1948).

the law be able to arm itself against the unfounded action. As matters stand today, we must grope along as best we can, trusting to the sensibilities of the jury to keep such suits within bounds. But, as stated before, in such an emotive area this may prove to be a very poor safety factor.

There is one further problem with which we must deal. The great bulk of the cases seemingly have adopted a "viability test" in governing the action for prenatal injuries.⁵⁸ That is to say, the action will only be allowed to proceed if the injury to the mother occurred at a time when the child was viable. Actually, this is little more than a retention of the mother-child unity theory, which these cases have purported to reject. On turning to the medical authorities it is found that a fetus can suffer severe injury as early as the second or third month of its development.⁵⁹ In fact, there is some thought that to cause permanent malformations, a traumatic injury must occur in the early stages of pregnancy.⁶⁰ Clearly then, independence of life cannot be considered a valid criteria when actual injury exists. Thus, if the law is to be truly scientific in its approach, the "viability test" must be discarded, and one based more soundly on medical knowledge adopted. But again the stumbling block of lack of documented medical authority is encountered, and we may only repeat the urgent plea for aid from our brethren in the Hippocratic profession. Until such information is forthcoming, upon which one might hope to formulate a possible limiting rule of law based on a statistical incidence of injury susceptibility during fetal growth,⁶¹ we should adopt a broader test based on knowledge that is presently available, and not be restricted by an outmoded concept, such as is presently in vogue.

CONCLUSION

In summary, certain considerations stand out quite clearly. First, the

⁵⁸ The only general exception would appear to be *Georgia-Hornbuckle v. Plantation Pipe Line Co.*, 212 Ga. 504, 93 S.E.2d 727 (1956).

⁵⁹ Dr. Klees, in his article *Intra-uterine Injuries to the Fetus Caused by Trauma During Pregnancy*, 73 ZENTRALBLATT FUER GYNAEKOLOGIE 1294 (1951), discussed cases involving injuries which may have resulted from accidents as early as the second, third and fourth months of pregnancy.

⁶⁰ Mayer, *Malformations Caused by Intra-uterine Trauma and the Interruption of Pregnancy*, 135 GYNAECOLOGIA 122 (1953). This article and the one by Dr. Klees were originally published in German, and were translated for the author by B. Alexander Ristau, a senior at Western Reserve University School of Law.

⁶¹ The type of rule contemplated would be based on the statistical incidence of injury during fetal growth. It is shown that there is a much smaller tendency to injury prior to a certain stage, then it might be the wise course of action to adopt as a matter of law an automatic cut-off as of that time, or at least formulate a rebuttable presumption of the same nature. While this might preclude a few exceptional cases which should be compensated, it would, in all probability, bar a much greater number of unfounded claims.

law in general is experiencing a shift from non-liability to liability, for both wrongful death and prenatal injury. Second, the evidentiary criteria for sustaining either action must be strict, and in conformity with the best medical information presently available. Third, the rule limiting recovery for prenatal injury to viable children should be abandoned. Finally, but actually foremost, the law must speedily be implemented with greater medical data as to the realities of causation, if we are to avoid creating a morass of sentimentality in this socially significant area.

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