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Torts - Recovery for Prenatal Injuries

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useless ceremony of offering proof"[24] of good motives after his offer to prove truth was rejected. Although Justice Reed did not think that the defendant had any probability of proving the defense, he believed his evidence should have been admitted and evaluated.[25]

In upholding as constitutional, for the first time, a group libel statute, the *Beauharnais* decision seems to solve, in part, the question of whether such statutes conflict with the right of free speech. This case may, however, be limited in application by future decisions, which, by the reasoning of the majority in the instant case, must be decided in the light of the particular wording of the statute and factual situation involved.

Though the Court upheld the constitutionality of the statute, it was made clear that their finding "carries no implication of approval of the wisdom of the legislation or of its efficacy."[26] However, the decision is in line with the modern tendency to subordinate the rights of the individual where, in the Court's opinion, it seems necessary to protect the interests of a large group.

It is interesting to note that the *Beauharnais* case seems to fall into the pattern of the *Gitlow* case, in that it gives great weight to the legislative deliberations of the state rather than following the more recent trend which applies the "clear and present danger" doctrine as exemplified by the *Dennis* case. It is impossible, of course, to predict with any degree of accuracy the repercussions of this case, but it may be relied on in deciding other cases limiting individual rights in favor of group interests, and, thus, it should be closely scrutinized before being applied.

TORTS–RECOVERY FOR PRENATAL INJURIES

Plaintiff was *en ventre sa mere* during the ninth month of pregnancy when the mother fell down the stairs in defendant's multiple dwelling house. As a result of the fall, plaintiff came into this world permanently maimed and disabled. As a defense to the charge of negligence, defendant relied on a precedent in New York which had refused to allow recovery for an injury sustained before birth.[1] The New York Court of Appeals reversed a judgment in favor of defendant[2] and granted damages to plaintiff. *Woods v. Lancet,* 303 N.Y. 349, 102 N.E. 2d 691 (1951).

[24] Beauharnais v. People, 72 S. Ct. 725, 752 (1952).

[25] In 61 Yale L.J. 252, 260 (1952), is expressed the fear that "... giving the defendants the chance to argue the 'truth' of their hate canards would make the trials sounding-boards for their propaganda. Such 'prosecutions' might be warmly welcomed by professionals."

[26] Beauharnais v. People, 72 S.Ct. 725, 736 (1952).

[1] Drobner v. Peters, 232 N.Y. 220, 133 N.E. 567 (1921); cf. In re Robert's Estate, 158 N.Y. Misc. 698, 286 N.Y. Supp. 476 (Surr. Ct., 1936).

[2] Woods v. Lancet, 278 App. Div. 913, 105 N.Y.S. 2d 417 (1951).

In cases regarding property rights, a child is generally considered to be in existence from the moment of its conception for all beneficial purposes, such as taking real and personal property by will or intestacy; and the criminal law has long held that to cause the death of an unborn child which is *viable*, or capable of living, is homicide and, consequently, punishable.[3] However, not until the case of *Montreal Tramways v. Leveille*,[4] decided by the Supreme Court of Canada, was a child allowed to recover for prenatal injuries.

In the *Leveille* case, the child's mother was thrown from defendant's train due to the negligent operation thereof. Two months later the mother gave birth to a child with clubfeet. The court reasoned that if a right of action be denied the child, the child would be compelled to go through life "carrying the seal of another's fault, and bearing a very heavy burden of infirmity and inconvenience, without any compensation therefor."[5] In the opinion of the court, it was only natural justice and not sentimentality to allow recovery in such a case. The court could see no reason why a child should be considered to be in existence from conception in certain types of cases and not in cases where a denial of recovery would impose an extreme burden on the child.

In America, however, the overwhelming weight of authority does not allow recovery even though the child is born alive,[6] and courts are uniform in denying relief when the child is born dead.[7] The first case in the United States to resolve whether one may maintain a suit for damages for injuries sustained prior to birth was *Dietrich v. The Inhabitants of Northampton*.[8] The child in that case, although it was born alive, died shortly after birth. Recovery was denied in an action brought for wrongful death. The court stated that since the child was a part of its mother at the time of injury, any damage to it was recoverable by the mother unless such damage was too remote for compensation. Illinois courts have followed the *Dietrich* case and have also denied recovery on

[3] Bonbrest v. Kotz, 65 F. Supp. 138 (D.C.D.C., 1946); Tucker v. Carmichael and Sons, 208 Ga. 201, 65 S.E. 2d 909 (1951); Montreal Tramways v. Leveille, [1933] 4 D.L.R. 337; 1 Bl. Comm. **129, 130.

[4] [1933] 4 D.L.R. 337.

[5] Ibid., at 345.

[6] Berlin v. J.C. Penney Co., 339 Pa. 547, 16 A. 2d 28 (1940); Newman v. Detroit, 281 Mich. 60, 274 N.W. 710 (1937); Allaire v. St. Luke's Hospital, 184 Ill. 359, 56 N.E. 638 (1900); Dietrich v. Inhabitants of Northampton, 138 Mass. 14 (1884); Stemmer v. Kline, 128 N.J.L. 455, 26 A. 2d 489 (S. Ct., 1942); Rest., Torts § 869 (1939).

[7] Drabbels v. Skelly Oil Co., 155 Neb. 17, 50 N.W. 2d 229 (1951). Kine v. Zuckerman, 4 Pa. D. & C. 227 (1924), later overruled by Berlin v. J.C. Penney Co., 339 Pa. 547, 16 A. 2d 28 (1940), allowed recovery for prenatal injuries on the condition precedent that the child be born alive.

[8] 138 Mass. 14 (1884).

the ground that the child had no separate existence of its own when the injuries were sustained.[9]

Generally, courts advance two basic reasons for denying damages for prenatal injuries. The first and most frequently used reason is that the defendant can owe no duty to a "person" who is not yet in existence at the time of the injury.[10] Secondly, courts find a reason because of the difficulty in proving any causal connection between the negligence and the damage; these courts are fearful of speculation, conjecture, and fictitious claims.[11]

Scott v. McPheeters[12] was one of the first American cases to allow recovery for prenatal injuries. The case arose when a doctor negligently used clamps and forceps in the delivery of a baby, resulting in serious injuries to the child's brain cells and spine. Damages were allowed on the basis of a statute which provided:

> A child conceived, but not yet born, is to be deemed an existing person, so far as it may be necessary for its interests in the event of its subsequent birth.[13]

Thus, the theory that a child exists from the moment of its conception was extended to a case where a child sought damages for a prenatal injury.[14]

Prior to the *Scott* case, the Supreme Court of Wisconsin, though it denied recovery, in *Lipps v. Milwaukee Ry. and Light Company*,[15] implied that if the child had been *viable* at the time when the injury was inflicted, the defendant might have been held liable. In the *Lipps* case, plaintiff was *en ventre sa mere* in the fifth month of pregnancy when defendant's negligent conduct caused the injury. Although at the time the child was not capable of living, it was, however, subsequently born alive. The court concluded that since the child was *non-viable* at the time the damage was inflicted, the child's rights were merged with those of the mother.

Since *Scott v. McPheeters*,[16] and prior to the instant case, five juris-

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

[10] Berlin v. J.C. Penney Co., 339 Pa. 547, 16 A. 2d 28 (1940); Allaire v. St. Luke's Hospital, 184 Ill. 359, 56 N.E. 638 (1900); Dietrich v. Inhabitants of Northampton, 138 Mass. 14 (1884).

[11] Magnolia Coca Cola Bottling Co. v. Jordan, 124 Tex. 347, 78 S.W. 2d 944 (1935); Prosser, Torts § 31 (1941).

[12] 33 Cal. App. 2d 629, 92 P. 2d 678 (1939).

[13] Cal. Civil Code (1949) Div. 1, Pt. 1, § 29.

[14] Recovery was also based on a statute in Cooper v. Blanck, 39 So. 2d 352 (La. App., 1923). (The case was furnished by the court for publication in 1949.)

[15] 164 Wis. 272, 159 N.W. 916 (1916).

[16] 33 Cal. App. 2d 629, 92 P. 2d 678 (1939).

dictions have refused the argument that only the legislature could allow the granting of relief, and recovery has been sustained without statutory authorization.[17] *Williams v. Marion Rapid Transit, Inc.*,[18] represents the first decision by a state supreme court that a child, surviving birth, can bring an action for injuries incurred before birth in the absence of a statute. The court held:

> No legislative action is required to authorize recovery for personal injuries caused by the negligence of another. Such right was one existing at common law.
>
> To hold that the plaintiff in the instant case did not suffer an injury in her person would require this court to announce that as a matter of law the infant is a part of the mother until birth and has no existence in law until that time. In our view such a ruling would deprive the infant of the right conferred by the Constitution upon all persons, by the application of a time-worn fiction not founded on fact and within common knowledge untrue and unjustified.[19]

The Ohio court went on to state that medical progress has advanced to a point where it is now easier to detect the cause of the injury and that there is no longer any need to worry about suits brought in bad faith.

Supporting the reasoning advanced in *Montreal Tramways v. Leveille*,[20] two courts could see no reason why there should be any difference between a criminal suit, where the wrongful conduct of the defendant has caused the death of the unborn child, and a civil suit, where defendant's conduct has caused severe injuries to the infant.[21]

The trend of modern reasoning toward allowing recovery for prenatal injuries was originated in a dissenting opinion in the Illinois case of *Allaire v. St. Luke's Hospital*.[22] The broad language in the *Lipps* case gave impetus to the movement. Certainly, the Canadian *Leveille* case had a substantial effect on American jurisdictions. With decisions in the District of Columbia,[23] Minnesota,[24] Ohio,[25] Maryland,[26] and Geor-

[17] Bonbrest v. Kotz, 65 F. Supp. 138 (D.C.D.C., 1946); Tucker v. Carmichael and Sons, 208 Ga. 201, 65 S.E. 2d 909 (1951); Demasiewiz v. Gorsuch, 79 A. 2d 550 (Md., 1950); Jasinsky v. Potts, 153 Ohio St. 529, 92 N.E. 2d 809 (1950); Williams v. Marion Rapid Transit, Inc., 152 Ohio St. 114, 87 N.E. 2d 335 (1949); Verkennes v. Corniea, 229 Minn. 365, 38 N.W. 2d 839 (1949).

[18] 152 Ohio St. 114, 87 N.E. 2d 335 (1949).

[19] Ibid., at 128 and 340.

[20] [1933] 4 D.L.R. 337.

[21] Bonbrest v. Kotz, 65 F. Supp. 138 (D.C.D.C., 1946); Tucker v. Carmichael and Sons, 208 Ga. 201, 65 S.E. 2d 909 (1951).

[22] 184 Ill. 359, 56 N.E. 638 (1900).

[23] Bonbrest v. Kotz, 65 F. Supp. 138 (D.C.D.C., 1946).

[24] Verkennes v. Corniea, 229 Minn. 365, 38 N.W. 2d 838 (1949).

[25] Jasinsky v. Potts, 153 Ohio St. 529, 92 N.E. 2d 809 (1950); Williams v. Marion Rapid Transit, Inc., 152 Ohio St. 114, 87 N.E. 2d 335 (1949).

[26] Damasiewiz v. Gorsuch, 79 A. 2d 550 (Md., 1950).

gia,[27] it would seem that the movement was well under way even though these jurisdictions had no applicable statutes on which relief could be predicated. *Woods v. Lancet*,[28] the instant case, adds more authority to an equitable view which grants relief to a child injured *en ventre sa mere*. Furthermore, in an enlightened scientific and medical age the causal connection between the negligence and the resulting injury can be accurately traced and presented through competent medical evidence. It would seem then that to allow recovery for prenatal injuries is the better and more logical view, notwithstanding the weight of authority to the contrary.

PROPERTY—EFFECT OF MURDER AND SUICIDE ON RIGHT OF SURVIVORSHIP IN JOINT TENANCY

A husband and wife held certain real and personal property as joint tenants. The husband murdered the wife and immediately committed suicide. The Supreme Court of Wisconsin, three judges dissenting, held that even though the wife had died, under the circumstances, her status as joint tenant continued in her administrator and heirs at law, and when the husband died and his life interest ended, the entire property of the joint tenancy became the wife's estate of inheritance and passed to her administrator and heirs at law. *In re King's Estate*, 261 Wis. 384, 52 N.W. 2d 885 (1952).

The administrator of the husband's estate contended that to deprive the husband of his right of survivorship would not only be an interference by the court with the statutes of descent,[1] but would also work attainder and corruption of blood in violation of the Wisconsin Constitution[2] and the United States Constitution.[3] The contention regarding the statutes of descent was disposed of by the court's adoption of the general rule which holds that upon the death of one joint tenant, the devolution of the property is an incident of the joint tenancy, without regard to the laws of inheritance or statutes of descent.[4]

The court stated that there could be no attainder or corruption of the blood for, under the Wisconsin view of the law, the estate of the wife as joint tenant never vested in the husband, even though she had

[27] Tucker v. Carmichael and Sons, 208 Ga. 201, 65 S.E. 2d 909 (1951).

[28] 303 N.Y. 349, 102 N.E. 2d 691 (1951).

[1] Wis. Stat. (1947) c. 237.

[2] Wis. Const. Art. I, § 12.

[3] U. S. Const. Art. 1, § 9.

[4] United States v. Jacobs, 306 U.S. 363 (1939); Anson v. Murphy, 149 Neb. 716, 32 N.W. 2d 271 (1948); Hoeffner v. Hoeffner, 389 Ill. 253, 59 N.E. 2d 684 (1945); Edge v. Barrow, 316 Mass. 104, 55 N.E. 2d 5 (1944); 2 Tiffany, Real Property § 419 (3rd ed., 1939).