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Torts--Prenatal Injury--Recovery Allowed

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. . . to comprehend why a life interest in a residuary trust which at testator's death amounted to \$200,000 and a qualifying power to appoint \$100,000 out of it, or a life interest in such a trust and a qualifying power to appoint all but \$100,000 out of it, do not relate to a 'specific portion,' namely, \$100,000, quite as much as if the testator had used a fraction or a percentage with respect to the power over corpus.¹²

Furthermore, the court recognized that Congress used the phrase "specific portion" and not "fractional or percentile share" and that it had not indicated a policy that deductibility of a "specific portion" should be governed by the possibility that the spouse's portion will change in value relatively more or less than the clearly nonqualifying part.¹³

In effect, the court held that a trust will qualify for the marital deduction to the extent that the surviving spouse is entitled to a specific sum out of the entire trust, provided the other conditions requisite to the marital deduction are met.¹⁴ No portion of the trust would have qualified for the marital deduction if the invasion provision for the youngest daughter had not been limited to a specific amount.¹⁵

It is submitted that the court was justified in its holding. The marital deduction provision was designed to equalize the tax treatment of decedents in common-law states with decedents in community property states.¹⁶ In *Gelb*, the court took another step toward equalization by giving a liberal construction to the enactment.

MILAN D. KARLAN

TORTS — PRENATAL INJURY — RECOVERY ALLOWED

Seattle-First National Bank v. Rankin, 367 P.2d 835 (Wash. 1962)

Ever since the initial attack upon the citadel of non-liability for prenatal torts in the case of *Bonbrest v. Kotz*,¹ the trend toward allowing recovery for prenatal injuries has been ". . . so definite and marked so as to leave no doubt that this will be the law of the future in the United

12. *Gelb v. Commissioner*, 298 F.2d 544, 550 (2d Cir. 1962).

13. The Commissioner had also argued that a specific dollar amount does not meet the statutory test in that there is no certainty that the value of the entire corpus will be the same on the date of the surviving spouse's death as it was on the date of the decedent's death and, therefore, it fails to meet the regulation's proviso that the surviving spouse's "share must reflect its proportionate share of the increment or decline in the whole of the property in trust." *Ibid.*

14. See notes 6 and 7 *supra* and accompanying text.

15. Hull, *Fractional Test for Marital Deduction Trust Upset by CA-2*, 16 J. TAXATION 222, 224 (1962). If the invasion provision was for an indefinite amount, it would have precluded determination of the portion of the trust reserved to the surviving spouse. *Ibid.* The court ruled that the surviving spouse's qualifying power was over the entire corpus less the present value of \$5,000 multiplied by the joint expectancy of the surviving spouse and the youngest daughter, which can be actuarially determined.

16. See generally Surrey, *Federal Taxation of the Family — The Revenue Act of 1948*, 61 HARV. L. REV. 1097 (1948).

States."² In a recent Washington case,³ the court allowed recovery by an infant who was born with cerebral palsy. This condition resulted from the negligence of the physician in caring for the mother both during pregnancy and in the subsequent delivery. The court concluded that the more enlightened position allows recovery for prenatal injuries, and although this type of action ". . . is prone to present difficult causation issues Difficulty of proof does not prevent the assertion of a legal right."⁴

Today, most jurisdictions allow a foetus subsequently born alive to recover for prenatal injuries.⁵ The theory of jurisdictions denying recovery is a remnant of the common-law rule that an unborn child, being a part of the mother, is not a person in being. Thus, in the latter jurisdictions it is reasoned that the unborn child is owed no duty, and it is one in whom a cause of action cannot accrue because of its legal nonexistence.⁶ The catalyst in this overwhelming about-face of jurisdictions rejecting their former common-law non-liability position and adopting this new type of tort liability ". . . is the current state of medical knowledge on the point of the separate existence of a foetus."⁷

1. 65 F. Supp. 138 (D.D.C. 1946). *Bonbrest* is the first American decision allowing recovery. The Canadian Supreme Court in an earlier case allowed a foetus subsequently born alive to recover for its prenatal injuries. See *Montreal Tramways Co. v. Leveille*, [1933] Can. Sup. Ct. 456, [1933] 4 D.L.R. 337 (1933).

2. PROSSER, TORTS § 36 at 175 (2d ed. 1955).

3. *Seattle-First Nat'l Bank v. Rankin*, 367 P.2d 835 (Wash. 1962). One judge concurred in the result because the evidence of proximate cause was so overwhelming. However, he agreed with the two dissenting judges that there was an improper use of defendant's deposition, which he had repudiated, and that it was error to use textbooks to establish medical facts. *Id.* at 841.

4. *Id.* at 838.

5. Of the jurisdictions which have expressly ruled on this point, twenty-one states and the District of Columbia allow recovery. In five other states it is unlikely that the non-liability rule will withstand another attack. See *Annots.*, 27 A.L.R.2d 1256 (1953); 10 A.L.R.2d 1059 (1950). Michigan and Wisconsin have all but overruled their past decisions denying recovery and have strongly intimated that they will do so when the issue is next presented. See *LaBlue v. Specker*, 358 Mich. 558, 100 N.W.2d 445 (1960); *Puhl v. Milwaukee Auto. Ins. Co.*, 8 Wis. 2d 343, 99 N.W.2d 163 (1959).

6. See *Gorman v. Budlong*, 23 R.I. 169, 49 Atl. 704 (1901); *Lewis v. Steves Sash & Door Co.*, 177 S.W.2d 350 (Tex. Civ. App. 1943). This minority position was epitomized by a Texas court when it said that a 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." *Magnolia Coca Cola Bottling Co. v. Jordan*, 124 Tex. 347, 359, 78 S.W.2d 944, 949 (1935). *But see* *Woods v. Lancet*, 303 N.Y. 349, 357, 102 N.E.2d 691, 695 (1951), where the court said: "To hold, as a matter of law, that no viable foetus has any separate existence which the law will recognize is for the law to deny a simple and easily demonstrable fact. This child, when injured, was in fact, alive and capable of being delivered and of remaining alive, separate from its mother. We agree with the dissenting Justice below that 'To deny the infant relief in this case is not only a harsh result, but its effect is to do reverence to an outmoded, timeworn fiction not founded on fact and within the common knowledge untrue and unjustified.'"

7. *Sinkler v. Kneale*, 401 Pa. 267, 272, 164 A.2d 93, 95 (1960). In *PATTEN, HUMAN EMBRYOLOGY* 181 (2d ed. 1953), it is stated: ". . . a new individual must be regarded as commencing at the moment of fertilization."

A point upon which the court did not dwell, in the instant case, was whether the injury must occur when the foetus is viable.⁸ Six states,⁹ and possibly a seventh,¹⁰ now allow a foetus subsequently born alive to recover against a tortfeasor whether or not it was viable at the time of the injury. This seems to be the more rational view, for the duty owed a viable foetus should be no greater than that owed a non-viable one.¹¹ Furthermore, since there can be a comparatively wide difference of opinion as to the moment viability occurs,¹² the arbitrary viability rule causes injustices in borderline cases, unless the child is born immediately after the injury.

In law, there is an implicit recognition of an interest in a child being born alive. The law gives a foetus subsequently born alive a cause of action for the death of its father even though the foetus was not yet viable when the death occurred.¹³ Similarly, a child *en ventre sa mere*¹⁴ at the time of the death of the intestate, and subsequently born alive, is regarded as living for the purposes of the statutes of descent and distribution.¹⁵

8. A viable foetus is one which, had it been born at the time of the injury, could live apart from its mother. The period of fetal development is divided into three stages. The first two weeks are called the ovum period. From the third to the fifth week is the embryonic period in which certain rudiments of organs appear. The remainder of the prenatal life is the fetal period in which a definite human shape is acquired. Usually the foetus will become viable sometime between the twentieth and twenty-eighth week of gestation. WILLIAMS, OBSTETRICS 182-85 (11th ed. Eastman 1956).

9. Hornbuckle v. Plantation Pipe Line Co., 212 Ga. 504, 93 S.E.2d 727 (1956); Sana v. Brown, 183 N.E.2d 187 (Ill. Ct. App. 1962); 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); Sinkler v. Kneale, 401 Pa. 267, 164 A.2d 93 (1960); Von Elbe v. Studebaker-Packard Corp., 15 Pa. D. & C.2d 635 (C.P. 1958).

10. In Damasiewicz v. Gorsuch, 197 Md. 417, 441, 79 A.2d 550, 561 (1951), the court first espoused the viability theory but concluded by noting that ". . . as soon as it becomes alive it has rights which it can exercise. When it becomes alive is a medical question to be determined in each case according to the facts." From the opinion it is not clear whether the word "alive" means the time of conception or the time of viability.

11. Duty determines one's conduct before acting. Use of the viability rule necessitates a determination of one's duty after the act is completed, for the actor has no outward indicia of whether the unborn is viable or not. In effect, the viability rule does violence to fundamental tort concepts, for it applies one's duty retrospectively instead of prospectively, and one will not know whether his negligent act is actionable until a determination of viability is made.

12. In some states it is sixteen weeks. See *e.g.*, Biegun v. State, 206 Ga. 618, 58 S.E.2d 149 (1950); Sinkler v. Kneale, 401 Pa. 267, 276, 164 A.2d 93, 97 (1960) (dissenting opinion). In another state it is anytime from six to eight months. See Cooper v. Blanck, 39 So. 2d 352 (La. Ct. App. 1923). Others hold that viability occurs when the child "quickens," *i.e.*, when the mother first feels the child's movements. See, *e.g.*, Tucker v. Howard L. Carmichael & Sons, 208 Ga. 201, 65 S.E.2d 909 (1951); Damasiewicz v. Gorsuch, 197 Md. 417, 79 A.2d 550 (1951).

13. LaBlue v. Specker, 358 Mich. 558, 100 N.W.2d 445 (1960). See Quinlan v. Welch, 23 N.Y. Supp. 963 (Sup. Ct. 1893), *aff'd*, 141 N.Y. 158, 36 N.E. 12 (1894).

14. Literally translated, it means "in the mother's womb." BLACK, LAW DICTIONARY (4th ed. 1951).

15. 4 TIFFANY, REAL PROPERTY § 1127 (3d ed. 1939). See CAL. CIV. CODE § 29 (1961):

The argument of those advocating abrogation of the viability rule is that the foetus should not be treated as a legal person, but rather as a separate entity or human being from the moment of conception, having a potential personality which is not realized until birth. At birth liability becomes complete so that injuries incurred prior to birth are subject to a conditional liability so far as the child is concerned. Thus, if the personality is not achieved, there is no liability because there was no damage to a legal person.¹⁶

The argument of those who would deny recovery because of the potentialities of fraudulent claims is casuistic. The argument fails to distinguish between the right to institute suit and the subsequent ability to prove the allegations. The first should not be denied because the latter might not be susceptible of proof.

The crux of the problem is proof of causation. Though such proof may be difficult,¹⁷ scrutiny by a sedulous court will prevent any fraud. With the present advanced state of medical knowledge, there is no logical reason why the viability rule should become another example of ". . . the power of a sonorous phrase to command uncritical acceptance [which] has often been encountered in the law."¹⁸

Considering the other legal rights of the non-viable child,¹⁹ it becomes a question of whether those rights should be deemed more important than the right to be compensated for being born deformed and debilitated through the negligence of another. Repudiation of the viability rule vitiates the medico-legal limbo in which it is uncertain whether the foetus could live separately from its mother.

PAUL A. MANCINO

"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. . . ."

16. Difficulty of proving the extent of damages is one factor which adversely affects the rights of recovery for the wrongful death of a foetus in the early stages of its development. "Considering the highly speculative nature of the pecuniary value of an unborn child [born dead], even if viable, it is apparent that practically everything that could be recovered in an action for the death of an unborn child can now be recovered by the mother in connection with her own claim for general damages." *Norman v. Murphy*, 124 Cal. App. 2d 95, 99, 268 P.2d 178, 180 (Dist. Ct. App. 1954). *But cf. Wendt v. Lillo*, 182 F. Supp. 56 (N.D. Iowa 1960), and *Stidam v. Ashmore*, 109 Ohio App. 431, 167 N.E.2d 106 (1959), where actions for the wrongful deaths of unborn viable children subsequently stillborn were upheld.

17. This will allay the objection that an over-sympathetic jury will grant relief where the proof of causation is, at most, fragmentary. See, e.g., *Puhl v. Milwaukee Auto. Ins. Co.*, 8 Wis. 2d 343, 99 N.W.2d 163 (1959), where the plaintiff child failed to show by clear convincing evidence that its prenatal injuries were caused by the defendant's negligence. See also *Sinkler v. Kneale*, 401 Pa. 267, 274, 164 A.2d 93, 96 (1960) (dissenting opinion).

18. Magruder, *Mental and Emotional Disturbances in the Law of Torts*, 49 HARV. L. REV. 1033 (1936).

19. See notes 13-14, *supra* and accompanying text.