Torts -- Unborn Child -- Right of Action for Prenatal Injury

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NOTES AND COMMENTS

5. Evidence of tax avoidance motive may still be fatal.\(^{46}\)

6. Generally the courts have caught the spirit of Culbertson remarkably well. Although numerical weight settles nothing, it may be noted that the majority of decisions since Culbertson have been favorable to the taxpayer; decidedly the opposite was true previously.

Two cases which seem to prescribe typically the limits under Culbertson deserve special notice. The court in Morrison v. Commissioner\(^{47}\) denied validity where, though the formalities of agreement were indulged in, the taxpayer retained domination over the business, providing no separation of earnings nor power of ostensible partners to draw checks on the account. In Ginsberg v. Arnold\(^{48}\) the interest of the son was a direct gift; the father exercised control over the writing of checks; the son was in the Army during the tax years. Yet on rehearing the circuit court found an intent to create a partnership for the benefit of the business.

In order to encourage this socially desirable method of perpetuating the family business; in order to reduce the inequality in the effect given intra-family transfers within corporations and in partnerships;\(^{49}\) in order to recognize the very real consequences of a genuine commercial partnership, perhaps parent-child partnership will be viewed more favorably by the courts under the impetus of the Culbertson case.\(^{50}\)

Hubert B. Humphrey, Jr.

Torts—Unborn Child—Right of Action for Prenatal Injury

A search through the North Carolina Digest, Reports, and Annotated General Statutes has disclosed no North Carolina case in which an action has been brought by or on behalf of a child for prenatal injuries. A probable reason for this situation is that, by the decided preponderance of case authority, no right of action has been recognized for


\(^{49}\) There is evidence, however, of the beginnings of a movement to reduce the transfer rights within a corporation to the partnership level. See Alexandre, The Corporate Counterpart of the Family Partnership, 2 Tax L. Rev. 493 (1947).

\(^{50}\) Congressional action has been suggested to tax the income of parents and minor children as a unit or to deal with the family partnership problem as a whole. See Wales, The 1949 Relevance of the Revenue Bill of 1948, 62 Harv. L. Rev. 957, 972-74 (1949).
physical disability\(^4\) or wrongful death\(^2\) of a child for injuries received before birth. Legal writers, however, who have discussed the problem have been almost unanimously in favor of recognizing such a right of action.\(^3\) The purpose of this note is to summarize briefly the law on this subject in the light of recent decisions, and to consider the possible effect of these decisions on the law of North Carolina.

The Supreme Court of Ohio has recently held that a viable\(^4\) child which is injured while  
\textit{en ventre sa mere} and which survives the injury has an action for personal disability suffered by reason of the negligence of another.\(^5\) The Supreme Court of Minnesota, in a decision handed down two days later, held that the personal representative of an unborn viable child whose death is alleged to have been caused by the wrongful acts or omissions of the physician in charge of the mother and of the hospital in which she was confined may maintain an action therefor, under the wrongful death statute\(^6\) of that state, on behalf of the next of kin of such deceased child.\(^7\)

Two reasons are usually advanced by those courts which refuse to allow recovery by the child. First, there is no person in existence at the time of the injury to whom the defendant owes a duty of care.\(^8\) Second, there seems to be a widespread fear of fraudulent suits because of the difficulty of proof of any causal connection between the tortious act and the resulting damage.\(^9\)


\(^4\)"And it is easy to see on what a boundless sea of speculation in evidence this new idea would launch us." Walker v. Great Northern Ry., 28 L. R. Ir. 69 (1891).
An examination of the first reason indicates that it is not well founded from the standpoint of medical science, especially if a distinction is made between a nonviable child and a viable child. A viable child is more than just a "part" of the mother. It has its own bodily form and members, manifests all the anatomical characteristics of individuality, possesses its own circulatory, vascular and excretory systems, and is at the time of the injury capable of being ushered into the visible world.10 From the legal standpoint, other fields of law have long recognized the rights of an unborn infant. The criminal law regards it as a separate entity.11 A posthumous child has been allowed to participate in the recovery for the wrongful death of its father,12 and in the law of property it is considered in esse for all purposes beneficial to it.13 If an unborn child is, in contemplation of law, considered a human being for these purposes, consistency would seem to require that it be considered a human being for the more important purpose of redressing wrongs committed against it.

Turning to the second reason advanced, difficulty of medical proof in cases of this nature must be recognized. Pathologists readily admit that it is impossible in many instances for medical science to establish with any degree of certainty the causal connection between prenatal injury and subsequent physical disability or death. However, at least in some cases, this connection can be definitely established.14 It is elementary that if a wrong has been committed, there should be a remedy. A high standard of medical proof would preclude any justifiable fear of fraudulent suits, and at the same time permit recovery in those cases where a causal connection can be shown with reasonable certainty.

It would seem then that the Supreme Courts of Ohio and Minnesota have adopted the better view. They have definitely followed the modern trend.15 The cases in both courts were decided on demurrer and uphold a right of action in the unborn child for prenatal injuries. The opinions of both cases indicate that the courts were concerned primarily with the

11 Clarke v. State, 117 Ala. 1, 23 So. 671 (1898); State v. Walters, 199 Wis. 68, 225 N. W. 167 (1929).
legal rights involved and that neither the fear of fraudulent suits nor the difficulty of medical proof has influenced these decisions.

The Ohio Court found that an unborn infant is a person within the meaning of Section 16 of Article I of the Ohio Constitution, which requires that "all courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay." Once this conclusion is reached, there is no need for legislative action to confer on the child a right to sue in tort for prenatal injuries. The North Carolina Constitution has precisely the same provision as that relied on by the Supreme Court of Ohio.\textsuperscript{20}

The Minnesota Court recognizes that an unborn viable child is a person by allowing the personal representative of such child to sue under the Minnesota wrongful death statute. That statute provides in part: "When death is caused by the wrongful act or omission of any person or corporation, the personal representative of the decedent may maintain an action therefor if he might have maintained an action, had he lived, for an injury caused by the same act or omission." The Court expresses the view that "it seems too plain for argument that where independent existence is possible and life is destroyed through a wrongful act a cause of action arises under the statutes cited." The North Carolina wrongful death statute is very similar in its terms to that of Minnesota.\textsuperscript{21}

The unborn child is far from a nonentity in North Carolina. The abortion statute\textsuperscript{18} was designed to protect the child \textit{en ventre sa mere}. In property law it may take by deed\textsuperscript{10} or by descent.\textsuperscript{20} A trustee must be appointed to protect the interest of the child \textit{en esse} in the sale of a remainder.\textsuperscript{21} The Supreme Court of North Carolina has recognized that an unborn infant may be regarded as having a separate existence. Mr. Justice Winborne states, "The question then arises as to how far the pregnancy should be advanced before the child is capable of being destroyed. The general rule is that the child with which the woman is pregnant must be so far advanced as to be regarded in law as having a separate existence—a life capable of being destroyed."\textsuperscript{22}

It is to be noted that the Ohio case decides only that an unborn child

\textsuperscript{10}N. C. CONST. Art. I, §35.
\textsuperscript{17}N. C. GEN. STAT. §28-173 (1943).
\textsuperscript{18}N. C. GEN. STAT. §14-44 (1943); State v. Jordon, 227 N. C. 579, 42 S. E. 2d 674 (1947).
\textsuperscript{19}N. C. GEN. STAT. §41-5 (1943); Campbell v. Everhart, 139 N. C. 503, 52 S. E. 201 (1905); Heath v. Heath, 114 N. C. 547, 19 S. E. 155 (1894).
\textsuperscript{20}Deal v. Sexton, 144 N. C. 157, 56 S. E. 691 (1907).
\textsuperscript{21}N. C. GEN. STAT. §41-11 (1943); Butler v. Winston, 223 N. C. 421, 27 S. E. 2d 124 (1943); McAfee v. Green, 143 N. C. 411, 55 S. E. 828 (1906).
\textsuperscript{22}State v. Forte, 222 N. C. 537, 538, 23 S. E. 2d 842, 843 (1943) quoting with approval Foster v. State, 182 Wis. 298, 196 N. W. 233 (1923) to the effect that "it is obvious that no death of a child can be produced where there is no living child."
may recover for injuries to it if it was capable of living at the time of
the injury and has demonstrated its capacity to survive by surviving.
The Minnesota case goes further in allowing an action for the wrongful
death of the child. Talks with pathologists have indicated that proof
that the injury caused the death of the child would be no more difficult
than proof that the injury caused subsequent physical damage. In the
latter case, the additional problem arises of determining whether or not
the child was viable at the time of the injury; that is, was the child
capable of surviving outside the womb so as to bring it within the defi-
nition of a person? That problem is not insurmountable, and consistent
judicial reasoning would seem to require that there be a right of action
for the wrongful death of the child as well as for physical disability.

Medical proof, or the absence of medical proof, must eventually de-
termine whether or not there can be a recovery for physical disability
or wrongful death from prenatal injuries. In spite of the fact that on
many occasions a causal connection undoubtedly will be impossible defi-
nitely to establish, it is submitted that an unborn child which has reached
the viable stage in the pregnancy period is more than just a part of the
mother but has a separate existence, and that it should not be denied
the right to go into the Courts of North Carolina or of any other juris-
diction to claim redress for personal injuries inflicted on it before birth.

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