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Torts--Liability for Prenatal Injuries (Verkennes v. Corniea, 38 N.W.2d 838 (Minn. 1949))

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services was upheld for income tax purposes.[12] A bona fide gift to a wife which she invested in a partnership without services on her part was held not enough to support a partnership.[13]

Since the decision by the Supreme Court in this case, the Tax Court has been applying this test: "If . . . it is found that the partners joined together in good faith to conduct a business, having agreed that the services or capital to be contributed presently by each is of such value to the partnership that the contributor should participate in the distribution of profits, that is sufficient." [14] So that even where capital invested had been withdrawn, the court found a bona fide intent to continue the partnership.[15] Minor capital invested and unessential services rendered by the wife were considered along with the method of distribution of profit in determining the bona fides of a family partnership.[16] Even where the wife worked conscientiously and for long hours, and her services were vital, the partnership was not recognized since the court found no bona fide *intent* on her part to become a partner.[17] No formal agreement is necessary, if there is a bona fide *intent* to form the partnership.[18] Where the wives of the present partners were brought into the partnership to bolster the credit standing and the wives performed no services and contributed no capital, the court held that there was a valid partnership because the intent to form the partnership was present.[19]

The trend appears to require an *intent* of the parties to render present service to, or investment in, the alleged partnership. The factors of capital and services are part of the yardstick and no longer the major consideration in accepting or rejecting the partnership for income tax purposes.

P. H., JR.

TORTS—LIABILITY FOR PRENATAL INJURIES.—The personal representative of an unborn viable child brought an action for the wrongful death [1] of such child caused by the alleged negligence of defendant hospital. The complaint stated that while the infant's mother was in

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[12] Runyon v. Commissioner, 8 T. C. 350 (1947).
[13] Sandberg v. Commissioner, 8 T. C. 423 (1947).
[14] Commissioner v. Culbertson, 337 U. S. 744, 745 (1949).
[15] Wilson v. Commissioner, 13 T. C. — #57 (1949).
[16] Cobb v. Commissioner, 13 T. C. — #66 (1949).
[17] Funai v. Commissioner, 13 T. C. — #90 (1949).
[18] Matuszewski v. Commissioner, 13 T. C. — #96 (1949).
[19] Delchamps v. Commissioner, 13 T. C. 281 (1949).

[1] MINN. STAT. ANN. § 573.02. "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 of omission."

defendant hospital giving birth to the infant, she suffered a ruptured uterus and died of hemorrhages resulting therefrom, that due to defendant's negligence she died undelivered and that in the exercise of reasonable care on the part of defendant such infant would have been born alive. The lower court sustained a demurrer to the complaint holding that a cause of action was not stated. *Held,* reversed. A recovery may be had for prenatal injuries caused by the negligent acts of defendant. *Verkennes v. Corniea,* 38 N. W. 2d 838, — Minn. —, 38 N. W. 2d 838 (1949).

This was a case of first impression in Minnesota and, therefore, the court was unfettered by binding precedent. The authorities from other jurisdictions were reviewed and it was found that the vast weight of authority refused liability for prenatal injuries.[2]

The leading case on the subject in the United States is *Dietrich v. Inhabitants of Northhampton*[3] wherein Holmes, J., stated, ". . . the unborn child was a part of the mother at the time of the injury . . ."[4] The court there reasoned that an infant *en ventre sa mere* is not a separate person in contemplation of law, not a human being *in esse* but rather a part of its mother and, therefore, possesses no right of immunity from harm, for no duty of care is owed.[5] The lack of precedent at common law was cited to substantiate this decision[6] while it was also deemed an expedient result in view of the great difficulty of proof.[7] The overwhelming weight of authority, including

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[2] Dietrich v. Inhabitants of Northhampton, 138 Mass. 14 (1884); Allaire v. St. Luke's Hospital, 184 Ill. 359, 56 N. E. 638 (1900); Drobner v. Peters, 232 N. Y. 220, 133 N. E. 567 (1921); Buel v. United Ry. of St. Louis, 248 Mo. 126, 154 S. W. 71 (1913); Gorman v. Budlong, 23 R. I. 169, 99 Atl. 704 (1901); Lipps v. Milwaukee Elec. Ry. and Light Co., 164 Wis. 272, 159 N. W. 916 (1916); Magnolia Coca Cola Bottling Co. v. Jordan, 124 Tex. 347, 78 S. W. 2d 944 (1935); Newman v. City of Detroit, 281 Mich. 60, 274 N. W. 710 (1937); Berlin v. J. C. Penney Co., 339 Pa. 547, 16 A. 2d 28 (1940); Stemmer v. Kline, 128 N. J. L. 455, 26 A. 2d 489 (1942); Smith v. Luckhardt, 299 Ill. App. 100, 19 N. E. 2d 446 (1939); Sanford v. St. Louis-San Francisco Ry., 214 Ala. 611, 108 So. 566 (1926).

[3] 138 Mass. 14, 52 Am. Rep. 242 (1884).

[4] *Ibid.,* 52 Am. Rep. at 245.

[5] It should be noted that in the *Dietrich* case the court was dealing with injuries to a non-viable infant. Later cases applied the reasoning of that decision to instances where the injuries were incurred by a viable infant. *But see* Williams v. The Marion Rapid Transit, Inc., *infra* note 21, wherein this extension was bitterly assailed, and Lipps v. Milwaukee Elec. Ry. and Light Co., *supra* note 2, where liability was denied for injuries to a non-viable infant, but which indicates that a cause of action would be allowed for injuries to a viable infant.

[6] 52 Am. Rep. 242, 243 (1884): ". . . the plaintiff, . . . can hardly avoid contending that a pretty large field of litigation has been left unexplored until the present moment."

[7] Stemmer v. Kline, 128 N. J. L. 455, 26 A. 2d 684, 687 (1942) (dissenting opinion) ". . . the real reasons for these holdings, and it is not at all concealed in some of the opinions, is a rule of convenience. . . . the principles involved in this case should be decided on rules of reason and not of convenience or lack of authority."

New York, has followed the reasoning of this court and liability has been denied. The leading case in New York on the subject, *Drobner v. Peters,*[8] rejected statements of a contrary nature made by a lower court in a prior decision.[9] The Court of Appeals while recognizing the harshness and inequity resulting from a denial of liability, nevertheless, felt constrained to follow the rule established at common law and refused to judicially legislate the matter.

The Restatement of Torts [10] follows the majority rule and expressly denies a cause of action for injuries or wrongful death effected by negligent acts committed before birth. But in a *caveat* added thereto it is stated that the institute takes no position as to liability for injuries caused by intentional or reckless acts committed against the mother or the infant.[11]

The rule adhered to by the majority of American jurisdictions has, nevertheless, not been without critics who attack the harshness and inequity of the doctrine.[12] Why, these critics ask, is an infant *en ventre sa mere* regarded as a part of its mother for purposes of tort liability and yet given the attributes of a separate existence under the criminal law [13] and the law of property.[14] It has been said that the infant is regarded as a separate person in the latter instance by virtue of a legal fiction ". . . as a rule of property for all purposes beneficial to the infant after his birth but not for purposes working to his detriment." [15] This naturally prompts the question, is not the right to immunity from personal harm more sacred than the right to enjoy property? If the public interest protects unborn infants from intentional injuries,[16] why should it not also protect against negligent injuries?

The court in the principal case chose to disregard the overwhelming weight of American authority and, in effect, adopted the rule of the Civil Law [17] which allows recovery for prenatal injuries. The court cited with approval statements made in decisions of both American and foreign jurisdictions, an analysis of which only serves to indicate the widespread adherence to the majority view by states

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[8] Drobner v. Peters, *supra* note 2.

[9] Nugent v. Brooklyn Heights R. R., 154 App. Div. 667, 139 N. Y. Supp. 367 (2d Dep't 1913).

[10] RESTATEMENT, TORTS § 869 (1934).

[11] Why this distinction between negligent and reckless acts?

[12] See PROSSER, TORTS 188 (1941) and authors cited therein.

[13] N. Y. PENAL LAW §§ 80-82, 1050; N. Y. CODE CRIM. PROC. §§ 500-503.

[14] Matter of Halthausen, 175 Misc. 1026, 26 N. Y. S. 2d 144 (Surr. Ct. 1941) (an infant *en ventre sa mere,* begotten prior to the death of the testator, was deemed to be alive and in being for all purposes of estate law); Cooper v. Heatherton, 65 App. Div. 561, 73 N. Y. Supp. 14 (2d Dep't 1901) (a testamentary provision relating to a youngest son was held to apply to a child conceived before but born after the father's death).

[15] Drobner v. Peters, 232 N. Y. 220, 222, 133 N. E. 567, 568 (1921).

[16] See notes 11 and 13 *supra.*

[17] Montreal Tramways v. Leveille, 4 Dom. L. R. 337 (Canada 1933).

following the common law.[18] The court also cited with approval a recent federal case,[19] where as here the question was one of first impression. There the court in a forceful opinion criticized the majority rule and found liability for prenatal injuries. It is interesting to note that only one month prior to the decision of the principal case, the Supreme Court of Ohio,[20] also deciding the question for the first time, held that the infant had a cause of action for injuries incurred prior to birth.[21] The two later cases, therefore, taken in conjunction with the principal case show an increasing dissatisfaction with the harsh majority rule.[22] To the contention that there exists no precedent, it is answered that the law is not ". . . an arid and sterile thing, and is anything but static and inert." [23] To the argument that there is a great difficulty of proof and possibility of fraud it is answered, "The law is presumed to keep pace with the sciences and medical science certainly has made progress since 1884." [24]

It is respectfully submitted that the reasoning advanced by the principal case is more in keeping with logical consistency and abstract justice. "Why a part of the mother under the law of negligence and a separate entity and person in that of property and crime?" [25] It thus seems absurd that the law will protect the infant's property interests through a legal fiction and yet offer no protection for its outstanding and most important interest, immunity from bodily harm. It offends reasoning and conscience to deny liability if the injury occurs one minute before birth and to allow liability if the injury occurs one minute after birth. The effects of injuries in the

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[18] Stemmer v. Kline, 19 N. J. Misc. 15, 17 A. 2d 58 (1942), *rev'd*, 128 N. J. L. 455, 26 A. 2d 489, 684 (Ct. Err. & App. 1942). Kline v. Zuckerman, 4 Pa. Dist. & Co. R. 227 (1924). *Contra:* Berlin v. J. C. Penney, *supra* note 2; Lipps v. Milwaukee Elec. Ry. and Light Co., *supra* note 5 (the court by *obiter dicta* stated that a recovery might be allowed if the infant were viable at the time of the injury); Cooper v. Blank, 39 So. 2d 352 (La. 1923); Montreal Tramways v. Leveille, *supra* note 17. In the latter two cases the courts recognized the rule adhered to by states following the common law but adopted the contrary rule in keeping with their Civil Law backgrounds.

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

[20] Williams v. The Marion Rapid Transit, Inc., 152 Ohio St. 114, 87 N. E. 2d 334 (1949).

[21] An unborn viable child is a person within the meaning of the State Constitution which entitles ". . . every person, for an injury done his person to a remedy by due course of law." OHIO CONST. Art. I, § 16.

[22] It should be noted, however, that the principal case went further than any case found wherein recovery was allowed. In all such cases the child proved its capacity to survive by actually surviving apart from its mother, even if for only a short time. Here the infant died in its mother's womb, not having lived separate and apart from her for even the shortest period.

[23] Bonbrest v. Kotz, *supra* note 19 at 142.

[24] *Ibid.* In reference to the date of the *Dietrich* case, *supra* note 3.

[25] *Ibid.*

latter case are just as patently burdensome and oppressive as those of the former.[26]

Despite these moving considerations it is felt that the law of New York is too well settled to be changed except by legislation. California is the only state found wherein such a statute has been enacted. The highest court of that state has construed [27] the statute [28] as changing the common law rule and allowed a recovery for prenatal injuries. There the case hinged on the interpretation of the word interests, as found in the statute. The court held that the right to immunity from harm was one of the interests protected.

A. T. L.

WILLS—MULTIPLE EXECUTION—PRESUMPTION OF REVOCATION —BURDEN OF PROOF.—Respondents objected to the issuance of letters of administration, alleging that the decedent left a will. To succeed they must produce the will of the decedent.[1] Respondents propounded two copies of a will executed by the decedent in triplicate and offered no explanation concerning the third copy which the decedent possessed prior to his death. *Held,* issuance of letters of administration granted. Where the will is executed in multiple, all copies must be produced or their absence accounted for or a presumption will arise that the decedent destroyed the will *animo revocandi* particularly when the instrument was in the decedent's possession prior to his death. In re *Rinder's Estate,* 196 Misc. 657, 92 N. Y. S. 2d 320 (Surr. Ct. 1950).

Each executed copy of the will constitutes a part of the whole [2] and a destruction *animo revocandi* of a part revokes the whole will.[3] Such a presumption arises when a will or any part thereof was possessed by the decedent and a diligent search of the decedent's effects

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[26] Stemmer v. Kline, *supra* note 3, wherein the mother's pregnancy was diagnosed as a tumor and she was treated with X-rays. Child born deaf, dumb, blind and paralyzed. No recovery allowed.

[27] Scott v. McPheeters, 33 Cal. App. 2d 629, 92 P. 2d 678 (1939).

[28] CAL. CIV. CODE § 29: "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 subsequent birth."

[1] N. Y. SURR. CT. ACT § 144.

[2] Crossman v. Crossman, 95 N. Y. 145 (1884). One copy is probated as the entire will and the other admitted as evidence, unless each has different provisions in which case both will be admitted to probate. Matter of Froman's Will, 54 Barb. 274 (N. Y. Sup. Ct. 1869). The codicil and will are considered one for the purpose of construction, but when the codicil is destroyed the will may stand if enough of it was unrevoked by the codicil to allow it to stand alone. Osborn v. Rochester Trust and Safe Deposit Box Company, 152 App. Div. 235, 136 N. Y. Supp. 859 (4th Dep't 1912).

[3] Matter of Kennedy, 167 N. Y. 163, 60 N. E. 442 (1901); Crossman v. Crossman, 95 N. Y. 145 (1884).