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Torts - Death

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TORTS — Death — Right to recover for death of a stillborn fetus.

Carroll v. Skloff, 415 Pa. 47, 202 A.2d 9 (1964).

The Pennsylvania Supreme Court, in the case of *Carroll v. Skloff,*[1] has demonstrated that what is "probable"[2] is by no means certain, and that what is certain is not always correct.

Prior to the *Carroll* case, the Third Circuit Court of Appeals had decided that Pennsylvania would "probably" allow recovery for the death of a stillborn fetus.[3] The prediction proved to be wrong, although the soundness of the *Carroll* decision is not free from doubt.

In the *Carroll* case a ten week old fetus was aborted during the course of an operation on its mother. Alleging that the abortion was caused by the negligence of the doctor, the father brought suit as the next of kin under the Pennsylvania Wrongful Death Act[4] and as executor of the estate of the dead fetus under the Survival Statute.[5] The court denied recovery, holding that these statutes do not apply to a stillborn fetus.

The court concluded that an unborn infant is not an ". . .independent life in being which could have instituted the action prior to death"[6] as required by the Survival Statute, and the Wrongful Death Act is limited by the Intestate Act of 1947[7] which does not recognize the existence of a stillborn fetus.[8] The conclusions deserve more analysis than the brief treatment accorded them by the court, and it is the purpose of this note to show that they are not entirely correct.

The Survival Statute will be considered first. The court's interpretation of that statute resulted in two conclusions: An unborn fetus is not an independent life in being, and a fetus cannot institute suit before its birth. The former conclusion is partly incorrect; the latter is completely incorrect.

The notion that an unborn infant does not have an independent life in being ignores the varying stages of fetal development beginning

1. 415 Pa. 47, 202 A.2d 9 (1964).
2. Gullborg v. Rizzo, 331 F.2d 557 (3d Cir. 1964).
3. *Id.*
4. 12 P.S. §§1601-1603.
5. 20 P.S. §§320.601-320.603.
6. Carroll v. Skloff, 415 Pa. 47, 48, 202 A.2d 9, 10 (1964).
7. 20 P.S. §§1.1-1.17.
8. Martin's Estate, 3 Pa. C.C. 212 (1887).

with conception and ending with the birth of the infant 266 days later.[9] It overlooks the fact that, at a point in its fetal development, the infant passes from a dependent to an independent existence and becomes capable of living apart from its mother.[10] At this point an independent life comes into being, and it is submitted that death resulting from negligence after this point has been reached should sustain a cause of action under the Survival Statute.

The holding that a fetus cannot institute suit before its birth ignores the obvious basis for the decision in *Sinkler v. Kneale,*[11] which the court chose to distinguish in the present case. That decision established a right to recover for prenatal injuries when the child is born alive on the theory that a child en ventre sa mere is a person with an existence separate from that of its mother and is entitled to a duty of care while in the womb.[12] Since a cause of action arises when the duty of care is breached,[13] it follows that breach of the duty to a child en ventre sa mere creates a cause of action even before the child is born. The obvious difficulty with filing suit before birth is the inability of ascertaining the extent of the injuries caused by the breach, or, even more important, whether any injury was sustained at all. Thus an unborn infant, through its parents and natural guardian, is quite capable of instituting an action before its birth.

The court's interpretation of the Wrongful Death Act is completely erroneous. Its error is in subjecting the death action to the limitations of the Intestate Act of 1947.[14] The Wrongful Death Act is not part of the Intestate Act. The provision that damages shall go to those entitled to recover ". . .in the proportion they would take. . . [the decedent's]. . . personal estate in case of intestacy"[15] has noth-

9. 5 Lawyers' Medical Cyclopedia §37.2 (1960).

10. See the dissenting opinion of Chief Justice Brogan in the case of Stemmer v. Kline, 128 N.J.L. 455, 26 A.2d 685 (1942), cited with approval in Sinkler v. Kneale, 401 Pa. 267, 164 A.2d 93 (1960). This point serves as a terminus of the legal definition of abortion. BLACK, LAW DICTIONARY (4th ed. 1951).

11. 401 Pa. 267, 164 A.2d 93 (1960).

12. "Implicit in the principle that damages for non-fatal prenatal injuries to a viable fetus are recoverable is a recognition that there exists to such an unborn child a duty of care for the breach of which the wrongdoer may be held liable." Gorke v. LeClerc, 23 Conn. Super. 256, 260, 181 A.2d 448, 451 (1962).

13. Stevens v. Reading Street Railway Co., 384 Pa. 390, 121 A.2d 128 (1956).

14. *Supra* notes 5 and 7.

15. 12 P.S. §1602.

ing to do with the provision which creates the cause of action.[16] It serves only to provide a method of distribution for damages recovered under the Wrongful Death Act. It is a reference provision, not a limiting one. If a fetus born dead has no existence according to the intestate laws, it can only mean that such fetus cannot share in a recovery for the wrongful death of some other person. In the noted case, the father, as next of kin, sued for the death of the fetus, and in this situation, the fetus' existence under the intestate laws is irrelevant to the father's right to recover.

The Wrongful Death action is for a death,[17] necessarily implying that a life[18] preceded it. *Sinkler* has established that an unborn infant has a life,[19] and it follows that if that life is wrongfully taken, then an action should lie whether or not the child was born alive.

Apparently uncertain of its conclusions, the court sought to bolster its position by mentioning "sound and persuasive reasons" for allowing recovery when the child is born alive and denying it when the child is born dead. These "reasons", however, are immaterial to the basic right of recovery. The problem of proof, one of the "reasons" advanced by the court, can be no more difficult in the case of a death en ventre sa mere than in a case where the child is born alive but dies in the first minutes following birth,[20] a case in which the court would apparently allow recovery.

Finally the court comments that the parents may be fully compensated for their loss in their own independent actions. One need only refer to *Sinkler* to point out that no loss for damages to a fetus can be recovered in an action by the parents alone since a child is considered a separate creature from the moment of conception.[21]

While the court may be correct in concluding that a fetus aborted after ten weeks of gestation cannot recover under these statutes, its rationale in denying recovery extends beyond a realistic conception

16. 12 P.S. §1601. The section provides in pertinent part:

> Whenever death shall be occasioned by . . . negligence, and no suit for damages be brought by the party injured during his or her life, . . . the personal representatives may maintain an action for and recover damages for the death thus occasioned.

17. *Ibid.*

18. It would seem to be a logical requirement, in light of the requirement under the Survival Statute, that the life must be an independent life in being.

19. Sinkler v. Kneale, 401 Pa. 267, 164 A.2d 93 (1960).

20. "In all reason and logic it can make no difference in liability whether the wrongfully inflicted injuries to the viable fetus result in death just prior to birth or in death just after birth." Gorke v. LeClerc, *supra* note 12, at 260, 181 A.2d at 451.

21. *Supra* note 19.

of prenatal development. "The real catalyst of the problem is the current state of medical knowledge on the point of the separate existence of a foetus."[22] In deciding the present case the court forgot the "catalyst". This omission caused a distorted view of the entire area of prenatal injury.

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CONSTITUTIONAL LAW—Supreme Court's Equity Decree Opens Integrated Public Schools for the First Time in Prince Edward County, Virginia.

Griffin v. County School Bd. of Prince Edward County, 84 Sup. Ct. 1226 (1964).

Does the decision in *Griffin v. County School Bd. of Prince Edward County* indicate that the Supreme Court of the United States has lost its patience? What happened in Prince Edward County, Virginia is a good example of what may result when wide latitude is given to local authorities in solving a particular problem in the area of education.

Petitioners began this action in 1951, alleging that Virginia laws requiring all white public schools denied them equal protection of the laws in violation of the fourteenth amendment. The County School Board of Prince Edward County, thereafter, attempted to circumvent any relief that might be achieved by several legal maneuvers. Prince Edward County, acting pursuant to the recently amended Virginia Constitution,[1] appropriated funds to assist students to attend nonsectarian private schools, in addition to local or state operated schools. The Supervisors of Prince Edward County refused to levy school taxes for the 1959-1960 school year which resulted in all public schools being closed since 1959. In 1960, Prince Edward's Board of Supervisors passed an ordinance providing tuition grants of $100, enabling children to attend nonsectarian private schools. Also, in that year, the Board passed an ordinance allowing property tax credits up to 25% for contributions to any non-profit nonsectarian private school in the county. Finding that the two latter measures had as their prime object the preservation of the separation of the

22. *Id.* at 272, 164 A.2d at 95.

1. In 1956 Section 141 of the Virginia Constitution was amended to authorize the General Assembly and local governing bodies to appropriate funds to assist students to go to public or to non-sectarian private schools in addition to those owned by the State or by the locality.