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Torts—New Action for "Wrongful Life"

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the tenancy that the survivor shall receive the interest of the tenant who predeceases him. W. Va. Code ch. 36, art. 1, § 20 (Michie 1961). Alabama has similar statutory provisions. Ala. Code tit. 47, § 19 (Michie 1958). The reason for these statutes is to protect the unwary so that he will obtain an inheritable estate unless it appears that he should have known he was not obtaining an inheritable estate. Brown, Some Aspects of Joint Ownership of Real Property in West Virginia, 63 W. Va. L. Rev. 207, 227 (1961); see generally Brown, supra; Merricks, Joint Estates in Real Property in West Virginia, 61 W. Va. L. Rev. 101 (1958).

In Wartenburg v. Wartenburg, 143 W. Va. 141, 100 S.E.2d 562 (1957), lots were conveyed to the husband and wife, "for and during their natural lives, as joint tenants with remainder in fee to the survivor," and, "as joint tenants with the right of survivorship." The West Virginia court held that the husband and wife took title to the land as joint tenants. There was vested in each an undivided one-half interest in the properties conveyed, subject to the survivorship rights of each other. The action in the Wartenburg case was brought by the husband for the purpose of making partition of the land which he and his wife held as joint tenants. The West Virginia court held that partition of real estate may be compelled where one or more of the owners hold as joint tenants.

The principal case probably would have been decided differently according to West Virginia law, because the language used in the deed would not create interests in remainder in land located in West Virginia.

John I. Rogers, II

Torts—New Action for "Wrongful Life"

P's mother, a patient in a New York state mental institution, was raped as a result of the alleged negligence of the institution in failing to protect her from attack. As a consequence, P was conceived and brought this action in tort against the institution for suffering the stigma of illegitimacy, being deprived of property rights and for lack of support and rearing. The state moved to dismiss for failure to state a claim. Held, motion denied. An actionable tort was committed upon the infant P simultaneously
with conception. The novelty and lack of precedent is not a bar to such a ruling. *Williams v. State*, 46 Misc. 2d. 824, 260 N.Y.S.2d 953 (Ct. Cl. 1965).

The problem of whether to recognize a cause of action for injury to an unborn child has plagued the courts for years. The decision in the principal case goes further in recognition of an action by one not born at the time of the tortious act than any decision to date. In a similar case, *Zepeda v. Zepeda*, 41 Ill. App. 2d 240, 190 N.E.2d 849 (1963), *cert. denied*, 379 U. S. 945 (1964), *P* sued his natural father who had fraudulently induced the mother to have sexual intercourse on the pretext of a promise of marriage when in fact the father was already married. *P* was conceived and born an illegitimate. He sought damages for deprivation of the right to have a normal home, to have a legal father, to inherit property and to be legitimate. The Illinois court recognized that a wrong had been committed but denied relief. The court reasoned that to permit this action, which lacked precedent, would open the flood gates to a multitude of related claims. This decision is difficult to reconcile with the Illinois constitutional provision that for every wrong there is a remedy. ILL. CONST. art. II, § 19. On the other hand, if the courts were to permit such actions, infants might be encouraged to sue their parents when they are born into an environment which they consider adverse. One born with a hereditary disease, or of a certain race or into a low income family might seek to better himself with the aid of the courts. *Zepeda v. Zepeda*, supra.

Although the court in *Zepeda* concluded that providing such a remedy would overcrowd the dockets with “wrongful life” cases, the court in the principal case stated that this reasoning was unrealistic, illogical and unsupportable.

Perhaps the principal decision is to stand for a comparatively narrow proposition. In the typical case of this type it would seem that the putative father should be the defendant. It is unclear as to how broad an application the New York Court of Claims intended this decision to have. Will there be standing to sue only third parties who are negligent? If the mother is not to maintain and care for the child, should she also be subject to a suit by the child where she consented to the illicit intercourse? 18 STAN. L. REV. 530, 535 (1966).
It is unfortunate that the Williams decision is so narrow; many questions are left unanswered. The Illinois court would leave these questions to be determined by the legislature. Zepeda v. Zepeda, supra at 262. Had the New York court heard the Zepeda case, it probably would have found for the plaintiff because the lack of precedent did not present a problem in finding for the infant plaintiff in the Williams case.

Other courts undoubtedly will have to wrestle with this problem in the future. There is little precedent upon which to rely, although a proper analogy may be afforded by the prenatal injury cases. The issue was first raised about eighty years ago. In Dietrich v. Northampton, 138 Mass. 14 (1884), recovery to the child was refused after it was negligently injured as a fetus of five months. The court held that it was not a person and therefore had no standing to sue. 63 W. Va. L. Rev. 83 (1960).

Nearly fifty years later a Canadian court allowed a child injured as a fetus to recover for the negligence of a third party which caused him to be born with club feet. Montreal Tramways v. Leveille, 4 D.L.R. 337 (1933). The court's rationale was that there would be a wrong without a remedy if recovery were not permitted.

Applying the viability theory, the court in Bonbrest v. Kotz, 65 F. Supp. 138 (D.D.C. 1946), held that the child could recover if born alive and capable of a separate existence from that of the mother at the time of the injury. On the other hand, the New Jersey Supreme Court concluded that the viability theory was not a good criterion in Smith v. Brennan 31 N.J. 353, 157 A.2d 497 (1960). The court reasoned that legal separability begins at conception. The lack of precedent for allowing infants to recover has not troubled courts so much in recent decisions. Bonbrest v. Kotz, supra. The reasoning in finding that legal separability begins at conception seems to be valid. As pointed out in Bennett v. Hymers, 101 N.H. 483, 147 A.2d 108 (1958), for descent and distribution purposes a child was considered a being from the time of conception. Why should not the same legal existence be recognized in tort law? It may be of interest to West Virginia lawyers that no West Virginia case dealing with prenatal injuries has been found.

It seems only natural that the court's decision in the principal case should sustain the infant's pleadings. From 1884 to the present, the trend has been to allow redress for torts on infants injured as
a fetus irrespective of their longevity of gestation. At this writing
no appeal by the state of New York had been taken.

The question of damages also is inherent in "wrongful life" cases. They must necessarily be prospective. In fact, it may be impossible
to determine in advance whether an injury will ever take place. 66 COLUM L. REV. 127 (1965). The illegitimate infant, for example,
may never have the ridicule and stigma of "bastard" directed
toward him. He may be adopted and never learn of his early
background, or his parents may subsequently marry, eliminating
most of his problems.

Assuming him to be in a disadvantaged position, however, shall
his recovery be based upon what the status of an average legitimate
child would be? Or shall it depend upon the alleged father's
station in life? Still another problem is raised by the suggestion
that the rights of an illegitimate child should rise no higher than
those of a legitimate child. A legitimate child who is deprived of
a suitable home life with parental love and affection has no stand-

Legislation in many states has mitigated the harshness of the
status of the illegitimate. Kehn v. Mainella, 40 Misc. 2d 55, 242
N.Y.S.2d 732 (Family Ct. 1963). He may get a birth certificate
with no indication of illegitimacy, 26 BROOKLYN L. REV. 45 (1959);
may inherit from his mother, W. VA. CODE ch. 42, art. 1, § 5
(Michie 1961); and in some states from his putative father. He
also may get support money and other benefits from the govern-
ment. A judgment in a "wrongful life" action conceivably could
amount to a windfall.

Another problem arises when an attempt is made to separate
the harm done from the benefit conferred. In the area of trespass
quare clausum fregit, courts traditionally have held that damages
were mitigated to the extent that the trespasser conferred benefits
upon the property owner. Mile v. Glenn, 38 Mo. App. 98 (1889).
There is a presumption that it is better to have lived than never to
have existed. 49 IOWA L. REV. 1005 (1964). This is where the
difficulty arises. It is questionable whether a measurable value
can be placed on life itself, or upon certain intangible rights,
so as to award damages. How much has the infant benefited and
how much harm has been done to him? The principal case did not
deal with damages. Perhaps in later cases some acceptable guidelines will be established.

There is an inconsistency in recognizing a wrong but not providing a remedy. It has been suggested that living with this dilemma will do less harm to society than providing a solution in the courts. 18 Stan. L. Rev. 530 (1966). Nevertheless, the court in the principal case seems to have provided a realistic remedy in that particular factual situation.

David Ray Rexroad

Torts—Unavoidable Accident

P was a passenger in an automobile driven by his brother which was involved in a collision with an automobile driven by D. Evidence indicated that both automobiles entered an intersection on a green light. P brought an action against D for personal injuries. The trial court entered a “take nothing” judgment. Held, affirmed. The evidence, including testimony that both drivers properly entered the intersection on a green light, supported a jury finding that neither driver was negligent and justified giving an instruction concerning unavoidable accident. Bolling v. Clay, 144 S.E.2d 682 (W. Va. 1965).

The question of when an instruction of unavoidable accident is proper in this jurisdiction is one that has not been easy to answer in the past. The court in the principal case has taken a step toward clarifying the position of West Virginia in an area which has been frustrating and confusing to the most experienced lawyer. An unavoidable accident as defined by the court in the principal case, “is one which occurs while all persons concerned are exercising ordinary care, that is, one not caused by the fault of any of the persons; if the accident producing the injury could have been prevented by either person by means suggested by common prudence it is not deemed unavoidable.” The principal case, Bolling v. Clay, supra at 688.

There is much confusion as to when an instruction concerning an unavoidable accident may be given. In the majority of jurisdictions, the basic rules applicable to instructions apply. Most jurisdictions require that there be evidence in the record which