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Comments on Fowler vs. Woodward

COMMENTS ON FOWLER v. WOODWARD

On September 14, 1964, the Supreme Court of South Carolina in Fowler v. Woodward held that recovery would be allowed under the Wrongful Death Statute for the death of an unborn, viable infant. Because of the impact of this case on South Carolina tort law, the Editors invited several attorneys and law professors to comment upon the decision. These comments follow a reprint of the official report.

Fowler v. Woodward, __ S.C. __, *138 S.E.2d 42 (1964)*

BRAILSFORD, A. J.: This is an appeal from an order of the circuit court overruling a demurrer to the complaint. The action is for damages for the wrongful death of an unborn, viable infant. The complaint alleges that the infant, while in the eighth month of gestation, perished with its mother in an automobile collision, and ensuing fire, which was caused by the negligent and willful misconduct of the defendant. The demurrer is for insufficiency of facts to state a cause of action and for lack of legal capacity to sue, in that, the complaint fails to allege that the infant "was born alive and thereafter died as a result of the actions and injuries alleged and complained of."

The action is brought under the wrongful death statute, Section 10-1951, *et sequa*, Code, 1962, and the controlling issue is whether the facts alleged state a case for recovery under the statute, which we quote:

"Whenever the death of a person shall be caused by the wrongful act, neglect or default of another and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, the person who would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured * * * *."

Until 1958, no case had come before this court involving prenatal injury as a ground of action, either for the benefit of the child or for its wrongful death. Many cases had been decided in this country, most of them, until comparatively recently, following the view expressed by Mr. Justice Holmes in Dietrich v. Inhabitants of Northhampton, 138 Mass. 14, 52 Am. Rep. 242, that is "* * * * (A)s the unborn child was a part of the mother at the time of the injury, any damage to it, which was not too

remote to be recovered at all, was recoverable by her * * * *." This rule, that injuries inflicted before birth could never support an action, was conducive of harsh results and has been abandoned by most courts. The unborn child, certainly after viability, is recognized as a distinct being capable of sustaining a legal wrong. We need not review these developments in the law, because that has been done in our own recent, 1960, case of Hall v. Murphy, 236 S.C. 257, 113 S.E. (2d) 790*; in which a prenatal injury to a viable child resulted in her death, some four hours after birth. We held that an action for the wrongful death of the child would lie, and, also, an action for personal injuries to the infant.

In the earlier, 1958, case of West v. McCoy, 233 S.C. 369, 105 S.E. (2d) 88, we denied recovery for the death of a non-viable child, whose mother suffered a miscarriage as the result of injuries negligently inflicted upon her. The opinion in that case recognized the departure of most courts from the old rule denying recovery for prenatal injuries regardless of circumstances, but refused to go to the extent of allowing recovery for wrongful death in the case of a non-viable, stillborn child.

Neither of these decisions is strictly controling of the issue before us because of the factual differences which have been stated. However, we think that the rationale of the *Hall* case, in the light of the statute, clearly points to affirmance here.

An action for wrongful death will lie, under the terms of the statute, when the death of a *person* is caused by the act, neglect or default of another and the *act is such* as would, if death had not ensued, have entitled the party injured to maintain an action.

The *Hall* case, supra, is plenary authority that a viable fetus, "having reached that period of prenatal maturity where it is capable of independent life apart from its mother is a *person* and if such a child is injured, it may after birth maintain an action for such injuries. * * * *

"Having concluded that had (the child) lived, she could have maintained an action for any prenatal injury caused by defendant's negligence, it follows that the two actions (personal injury and wrongful death) now under consideration could be brought by her administrator." (Interpolation ours.) 236 S.C. 263, 113 S.E. (2d) 793.

* See also the learned opinions in Woods v. Lancet, 303 N.Y. 220, 102 N.E. (2d) 691, 27 A.L.R. (2d) 1250, and Amann v. Faidy, 415 Ill. 422, 114 N.E. (2d) 412, and many others cited in *Hall*.

Since a viable child is a *person* before separation from the body of its mother and since prenatal injuries tortiously inflicted on such a child are *actionable*, it is apparent that the complaint alleges *such an "act, neglect or default"* by the defendant, to the injury of the child, as would have entitled the child "to maintain an action and recover damages in respect thereof * * * * if death had not ensued." By the very terms of the statute, this is the test of the right of an administrator to maintain an action for wrongful death.

Some judges have taken the view that if a child should survive a prenatal injury, it could not, before birth, bring an action for damages; therefore, it is urged, such a case does not meet the requirement of the statute in this respect. We disagree.

Once the concept of the unborn, viable child as a person is accepted, we have no difficulty in holding that a cause of action for tortious injury to such a child arises immediately upon the infliction of the injury. It is beside the point that the extent of damages might be difficult, or even impossible, to establish prior to birth. Indeed, the injurious consequences of a prenatal injury might not become manifest until long after birth, but this would not affect the existence of the cause of action from the time of the wrong, nor the character of the wrongful act as one entitling the child to recover damages therefor.

The act of the defendant, as alleged in the complaint, was such as would have entitled the infant to maintain an action and recover damages in respect thereof if death had not ensued. Death having ensued, the right of action for wrongful death vested in the administrator under the terms of the statute. We quote from the decision in State, etc. v. Sherman, Md., 198 A. (2d) 71, 72, a case of parallel facts, which reached the Maryland court after it had decided in Damasiewicz v. Gorsuch, 197 Md. 417, 79 A. (2d) 550, that a child, after birth, could maintain an action for prenatal injuries.

> "We think the decision of this Court in Damasiewicz is virtually controlling here. We there recognized that, at least in the case of a viable child, such child had a cause of action when born alive, arising out of prenatal injury due to the negligent act of a third person. *The cause of action arose at the time of the injury and we see no more reason why it should be cut off because of the child's death before birth, than if it died thereafter.* The wrongful act would

> have entitled the 'party injured to maintain an action * * * * if death had not ensued,' and under the plain words of the death statute we think the action survives, or permits the parents to recover, notwithstanding the death of the child." (Emphasis added.)

The Sherman case, supra, decided in March, 1964, is the most recent of a number of cases in which the courts of nine states have followed the landmark decision in Verkennes v. Corniea, 229 Minn. 365, 38 N.W. (2d) 838, 10 A.L.R. (2d) 634, decided in August, 1949, to the conclusion which we have indicated on similar facts. During the same period, the courts of five states held that these facts would not support an action for wrongful death. In the most recent decision which has come to our attention, Gullborg v. Rizzo, 3 Cir., 331 F. (2d) 557, decided April 14, 1964, the United States Court of Appeals, Third Circuit, Pennsylvania law being applicable, decided that recovery may be had for the wrongful death of a stillborn, viable fetus. We adopt this view for the reasons already stated and refrain from giving the citations, pro and con, because all of them are set forth in State, etc. v. Sherman, supra, 198 A. (2d) 71 and in Gullborg v. Rizzo, supra, 331 F. (2d) 557.

The challenge to plaintiff's capacity to sue is upon the ground that the appointment of an administrator was not justified. The argument is that in the absence of a live birth "no rights vested, supporting either a cause of action, or the appointment of an administrator." Consistently with our conclusion that the complaint states a cause of action, the exception raising this question is overruled.

Affirmed.

TAYLOR, C. J., MOSS, LEWIS, and BUSSEY, JJ., concur.

ROBERT McC. FIGG*

Since 1946, according to Dean Prosser, "a series of more than thirty cases, many of them expressly overruling prior holdings, have brought about the most spectacular abrupt reversal of a well settled rule in the whole history of the law of torts."[1]

This "well settled rule" was recognized and stated by the Supreme Court of South Carolina in *West v. McCoy*[2] as follows:

> An expectant mother sustaining personal injuries as a result of which her child is born dead has no cause of action for the death of the child, the child not being regarded as a person until born alive. * * * Under common law the child had no right to recover damages for prenatal injuries and the parents had no right to recover damages either before or after birth; therefore, if the right to recover money by way of damages exists, it exists perforce by way of Statute.[3]

The court held that an action for alleged wrongful death would not lie in the case of an unborn baby whose mother suffered a tortiously caused miscarriage after 5½ months pregnancy. It did not appear, observed the court, that the child was viable at the time of injury or delivery, and the question "whether an action may be maintained by a child injured while En Ventre Sa Mère and born alive" was expressly reserved. The court stated: "The policy considerations which call for a right of action when a child survives do not necessarily apply in the absence of survival."[4]

The question thus reserved, "whether a child who, while viable and capable of existing independenly of its mother, suffers a prenatal injury through the alleged negligence of another, may after its birth maintain a cause of action against such other for damages on account of the injury sustained," was decided in *Hall v. Murphy*.[5]

Reviewing the cases which denied recovery for prenatal injuries, noting the later trend away therefrom, and listing many of the cases following such trend, the court said that it had "no

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1. PROSSER, TORTS 355-56 (3rd ed. 1964).
2. 233 S.C. 369, 105 S.E.2d 88 (1958).
3. *Id.* at 374, 105 S.E.2d at 90 (1958).
4. *Id.* at 375, 105 S.E.2d at 91 (1958).
5. 236 S.C. 257, 259, 113 S.E.2d 790, 791 (1960).

difficulty in concluding that a foetus having reached that period of prenatal maturity where it is capable of independent life apart from its mother is a person and if such a child is injured, it may after birth maintain an action for such injuries."[6] It limited the decision to "liability for prenatal injuries to a viable child born alive."

In *Fowler v. Woodward*[7] the complaint alleged that a child, in the eighth month of gestation, perished with its mother in an automobile collision and ensuing fire. Citing *Hall v. Murphy* as plenary authority that a viable foetus is a person which after birth may maintain an action for prenatal injuries, the court held that its death before birth from prenatal injury came within the provisions of the wrongful death statute,[8] as being the death of a person entitled to maintain an action if death had not ensued. The court added that it had "no difficulty in holding that a cause of action for tortious injury to such a child arises immediately upon the infliction of the injury."[9]

Almost on the same day as the filing of the opinion in *Fowler v. Woodward*, the Court of Appeals for the Fourth Circuit, Judge Haynsworth dissenting, reached the same conclusion as to the South Carolina law,[10] and reversed the district court which had held that the death of an unborn child, though viable, would not sustain a cause of action under the wrongful death statute. The dissent forcefully contended that the child's action for prenatal injury should depend upon live birth, not viability, and expressed the view that such a condition to recovery would best serve the relevant "social and legal considerations which lie upon either side of the problem." The majority opinion relied upon *Hall v. Murphy* as according to the viable foetus the status of a person *in esse*, and held that logic would then constitute its wrongful death a cause of action under the wrongful death statute. The court said that a rule fixing survival as the determinant, rather than viability, would have the appeal of simplicity, which, however, might "aid the judiciary but hardly justice," and that while additional word from the Supreme Court of South Carolina would have been a welcome guide, "we believe we are pursuing its policy." *Fowler v. Woodward* evidenced that they were.

6. *Id.* at 263, 113 S.E.2d at 793.
7. 138 S.E.2d 42 (S.C. 1964).
8. S.C. Code §§ 10-1951 thru 10-1956 (1962).
9. Fowler v. Woodward, 138 S.E.2d 42, 44 (S.C. 1964).
10. Todd v. Sandridge Constr. Co. __F.2d__ (1964).

While one may be permitted to wonder whether Lord Campbell, and the many legislators who adopted his legislation, would recognize and welcome the prenatal additions to the content of the word "person" as used by them, or whether the employment of the wrongful death statute to confer by indirection benefits upon the parent or parents of a stillborn child denied to them by the courts in direct actions having at least equal appeal in justice, no one who believes in "a system of law wherein liability is adjusted to the ends which law should serve"[11] can do other than applaud the holding that the common law should and can afford relief to one condemned by tortious prenatal injury to the life of a cripple, or a blind or a deformed person.

What the courts have been doing in the prenatal injury field is strikingly articulated by the Court of Appeals of New York in *Woods v. Lancet*,[12] in which the court, overruling an earlier decision, held that an infant, born permanently maimed and disabled by injuries received while in his mother's womb during the ninth month of her pregnancy, was entitled to maintain a cause of action for damages for such injuries. *Woods v. Lancet* was referred to (somewhat more than in passing) in each of the South Carolina prenatal injury cases.

After an extensive review of the prior law, the court said:

> Negligence law is common law, and the common law has been molded and changed and brought up-to-date in many another case. Our court said, long ago, that it had not only the right, but the duty to re-examine a question where justice demands it. * * *
>
> The sum of the argument against plaintiff here is that there is no New York decision in which such a claim has been enforced. Winfield's answer to that, (see U. of Toronto L. J. article, *supra*, p. 29) will serve: "if that were a valid objection, the common law would now be what it was in the Plantagenet period." * * * We act in the finest common law tradition when we adapt and alter decisional law to produce common-sense justice. * * *
>
> Legislative action there could, of course, be, but we abdicate our own function, in a field peculiarly nonstatutory,

11. CARDOZO, THE GROWTH OF THE LAW, 101 (1924).
12. 303 N.Y. 349, 102 N.E.2d 691, 27 A.L.R.2d 1250 (1951).

when we refuse to reconsider an old and unsatisfactory court-made rule.[13]

Although the South Carolina court had no difficulty "in adapting and adjusting decisional law" to afford a remedy for prenatal injuries, a majority of the court, in *Page v. Winter*,[14] declared a similar function to be beyond its power in considering whether a wife may recover for loss of consortium resulting from personal injuries to her husband tortiously inflicted, although the unity concept of the common law has been altered by Statute.[15]

After stating that recovery by the wife for loss of consortium resulting from negligent misconduct of a third person was not permitted at common law, the majority opinion said:

> It is not for this court to repudiate the common law rule because we may think it illogical or undesirable. We do not have the right "to repeal, alter, modify, or change the law of the land, even when it plainly appears that the law in force may be wrong." *O'Hagan v. Fraternal Aid Union*, 144 S.C. 84, 141 S.E. 893, 57 A.L.R. 397.[16]

The court stated that, without legislative action, "we must be governed by the policy of the common law," and buttressed its conclusion with the following quotation:

> "It is often the function of the courts by their judgments to establish public policy where none on the subject exists. But overthrow by the courts of existing public policy is quite another matter. That its establishment may have resulted from decisional, rather than statutory, law, is in our opinion, immaterial. Once firmly rooted, such policy becomes in effect a rule of conduct or of property within the State. In the exercise of proper judicial self-restraint, the courts should leave it to the people, through their elected representatives in the General Assembly, to say whether or not it should be revised or discarded." *Rogers v. Florence Printing Co.*, 233 S.C. 567, 106 S.E.2d 258.[17]

In *Woods v. Lancet*, the court, as to prenatal injuries, replied to this view thus:

13. *Id.* at 354-55, 102 N.E.2d at 694.
14. 240 S.C. 516, 126 S.E.2d 570 (1962).
15. *Cf.* PROSSER, *op. cit. supra* note 1, at 903, 916 *et seq.*
16. Page v. Winter, 240 S.C. 516, 518, 126 S.E.2d 570, 571 (1962).
17. *Id.* at 518-19, 126 S.E.2d at 572.

> Of course, rules of law on which men rely in their business dealings should not be changed in the middle of the game, but what has that to do with bringing to justice a tort-feasor who surely has no moral or other right to rely on a decision of the New York Court of Appeals?[18]

In a field as nonstatutory as that of tort liability, do tort feasors gain vested interests in *Stare decisis?* Must the judicial branch of the government, having acted, look to the legislature to alter its precedents, which it may come to view as unfortunate or unjust? Do not the Justices of the Supreme Court of South Carolina, like the Judges of the Court of Appeals of New York, sit as successors of common law judges, and "act in the finest common-law tradition" in adapting and altering decisional law "to produce commonsense justice"?

The cases of *State v. Sellers*[19] and *State v. Charleston Bridge Company*,[20] which are cited for support in *O'Hagan v. Fraternal Aid Union*, *supra*, do not warrant or require a negative answer.

In *State v. Sellers* the court referred to the common law as a "system of jurisprudence" which "obtains in this state until it is altered, modified, or repealed by enactment of the law-making body."[21] It did not doubt, or even refer to, the power of the judges to alter judge-made common law.

In *State v. Charleston Bridge Company* the question was whether the common law was of force in this state, the 1712 statute whereby the common law was first adopted not having been included in the 1912 Code of Laws. After stating that such statute was merely declaratory in its nature, the court held:

> In the case of *Shecut v. McDowel*, 1 Tread. Const. 35, the principle is thus correctly stated by Nott, J.:
>
> "The first question * * * is whether * * * this Court is to be governed by the principles of the common law, as settled in England. * * * As to the first point, our act of Assembly, passed in the year 1712, says the common law of England shall be in as full force and virtue in this State as in England. And, even if it did not, I do not know by what other law we should be governed; for the common

18. Woods v. Lancet, 303 N.Y. 349, 354, 102 N.E.2d 691, 694, 27 A.L.R.2d 1250 (1951).
19. 140 S.C. 66, 134 S.E. 873 (1926).
20. 113 S.C. 116, 101 S.E. 657 (1919).
21. 140 S.C. 66, 73, 134 S.E. 873, 875 (1926).

law is as much the law of this country as of England. I do not mean to say that we are bound by every decision made by the Courts of England. We have a right to take our own view of the common law."[22]

22. 113 S.C. 116, 126, 101 S.E. 657, 660 (1919).

N. L. BARNWELL*

In essence, the decision in *Fowler v. Woodward* is an extension of the rule established in *Hall v. Murphy*[1] in which recovery of damages for wrongful death was conditioned on the child being born alive. The *Fowler* case eliminates this condition and now the test is the viability of the child at the time of the injury.

Interestingly, this question was also presented to the Fourth Circuit Court of Appeals in *Todd v. Sandidge Construction Co.*,[2] a case arising from South Carolina, and this court in a two to one decision arrived at the same conclusion later reached by the South Carolina Supreme Court in *Fowler*. The majority opinion of the Court of Appeals reversed the district judge's action in dismissing the complaint. Judge Martin, in the district court, based his decision in particular on *West v. McCoy*[3] where our supreme court had ruled that while policy considerations favored a right of action where the child survived, that these considerations "do not necessarily apply in the absence of survival." In a trenchant dissent, Judge Clement Haynesworth of South Carolina reviewed prior South Carolina law and concluded that the case law of South Carolina pointed to no recovery unless there was live birth.

The rationale of the *Fowler* case apparently is in holding that the viable fetus is a "person" within the contemplation of our Wrongful Death Statute. In so holding, South Carolina has now aligned itself with Connecticut,[4] Kentucky,[5] Iowa,[6] New Hampshire,[7] Mississippi,[8] Minnesota,[9] and Ohio[10] where the following interesting question was posed:

> Suppose viable unborn twins suffered simultaneously the same prenatal injury of which one died before and the other after birth. Shall there be a cause of action for the death of one and not for the death of the other? Surely logic requires

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1. 236 S.C. 257, 113 S.E.2d 790 (1960).
2. _ F.2d _ (4th Circ. 1964).
3. 233 S.C. 369, 105 S.E.2d 88 (1958).
4. Gorke v. LeClerc, 181 A.2d 448 (1962).
5. Mitchell v. Couch, 285 S.W.2d 901 (1955).
6. Wendt v. Lillo, 182 F.Supp. 56 (N.D. Iowa 1960).
7. Poliquin v. McDonald, 101 N.H. 104, 135 A.2d 249 (1957).
8. Rainey v. Horn, 221 Miss. 269, 72 So.2d 434 (1954).
9. Verkennes v. Corniea, 229 Minn. 365, 38 N.W.2d 838 (1949).
10. Stidam v. Ashmore, 109 Ohio App. 431, 167 N.E.2d 106 (1959).

recognition of causes of action for the death of both, or for neither.

Recently, Maryland has also followed suit.[11]

The opposite point of view, which rejects the viability test but insists on *live birth* as the starting point is reflected in the decisions of the supreme court of Massachusetts,[12] Illinois,[13] New York,[14] and Tennessee.[15]

Another line of cases apparently reject both the *born alive* test and the *viability test.*[16]

The late Pennsylvania case of *Carroll v. Skloff*,[17] decided July 1, 1964, is interesting in that the Pennsylvania Supreme Court refused to be "second guessed" by the Third Circuit Court of Appeals in *Gullborg v. Rizzo*[18] which held that the Pennsylvania Wrongful Death Statute permitted recovery by parents of a still-born child. The *Carroll* case held, however, that there is no right of recovery under the state's Wrongful Death Act and Survival Statute by the administrator of an estate on behalf of an infant aborted, *en ventre sa mere*, as the result of a direct trauma.

Until *Fowler*, the courts of other jurisdictions had placed South Carolina in the column of states which predicated recovery on the condition that the child must be born alive.[19] The Massachusetts Court says: "Recent decisions against recovery are found in . . . West v. McCoy, 1958, 233 S.C. 369, 105 S.E.2d 88 . . . ." In the case of *Mace v. Jung* the District Court of Alaska says: "The more recent decisions indicative of the 'more liberal and realistic approach to the problem,' urged by plaintiff, support the view that a viable unborn child may, *after birth* maintain an action for such injuries."[20] The Alaska court cited *West v. McCoy* and *Hall v. Murphy.*

11. State v. Sherman, 198 A.2d 71 (1964).
12. Keyes v. Construction Service, Inc., 340 Mass. 633, 165 N.E.2d 912 (1960).
13. Amann v. Faidy, 415 Ill. 422, 114 N.E.2d 412 (1953).
14. Woods v. Lancet, 303 N.Y. 349, 102 N.E.2d 691, 27 A.L.R.2d 1250 (1951).
15. Shousha v. Matthews Drivurself Service, Inc., 358 S.W.2d 471 (1962). Hogan v. McDaniel, 204 Tenn. 235, 319 S.W.2d 221 (1958).
16. Drabbels v. Skelly Oil Co., 155 Neb. 17, 50 N.W.2d 229 (1951). Howell v. Rushing, 261 P 2d 217 (Okla. 1953). Norman v. Murphy, 268 P.2d 178 (Calif. 1954). Gorman v. Budlong, 23 R.I. 169, 49 A. 704 (1901). Magnolia Coca Cola Bottling Co. v. Jordan, 124 Tex. 347, 78 S.W.2d 944 (1935).
17. ... Pa. ... 202 A.2d 9 (1964).
18. 331 F.2d 557 (3rd Cir. 1964).
19. See, Keyes v. Construction Service, Inc., 340 Mass. 633, 165 N.E.2d 912, 914, (1960) (dictum); Mace v. Jung, 210 F. Supp. 706, 707 (D.C. Alaska 1962) (dictum).
20. 210 F. Supp. at 707.

If there is any criticism of the *viability* test announced by the court in *Fowler*, it seems that there would be two logical grounds of attack. One is that an unborn child is not a person within the contemplation of the Wrongful Death Statute and hence not entitled to recovery. Our court has attempted to answer this argument by quoting certain language from *Hall v. Murphy*. It is further interesting to note, however, that when this exact question was presented to the Tennessee Supreme Court in *Hogan v. McDaniel*,[21] that court, in interpreting the very similar Tennessee Wrongful Death Statute[22] concluded that a viable child *en ventre sa mere* was not a "person", the basis of the court's conclusion being that the Tennessee legislature did not intend to declare that an unborn child is a "person" within the contemplation of Tennessee's Wrongful Death Statute.

The other criticism of the viability test is a practical one. Where do you draw the line? Live birth is a logical starting point. Whether an unborn child is "quick", however, (with no recovery under *West*) or "viable" (with recovery under *Fowler*) can be an intriguing subject for medical experts. Thus another appellant (or respondent) can argue that there is really no logical distinction between the last stages of "quickness" and the first stages of "viability". In effect, therefore, has not the *Fowler* case drastically limited the doctrine of *West v. McCoy*, and in particular the following statement: "The policy considerations which call for a right of action when a child survives do not necessarily apply in the absence of survival"?

21. *Supra*, Note 15.
22. TENN. CODE ANN. § 20-607 (1955).

FRANK L. TAYLOR*

In *Fowler v. Woodward* the South Carolina Supreme Court was faced with the question of whether an administrator may be appointed and may bring an action under our wrongful death act [1] to recover damages for the prenatal destruction of a viable fetus. In other words, plaintiff's (administrator's) intestate was a viable fetus born dead by reason of prenatal injuries inflicted by defendant's negligent and willful conduct.

In the interest of painting just a little background (no effort will be made to trace the development of the law on the problems involved in the case under study, since the opinions in the three South Carolina cases mentioned herein do that quite well), it is interesting to note the South Carolina Supreme Court's 1958 decision in *West v. McCoy*.[2] In that case the court said: "In the instant case, we are not concerned with death after birth, neither does it appear that the child was viable at the time of injury or delivery. . . ," and also: "We are, therefore, not concerned here with whether an action may be maintained by a child injured while En Ventre Sa Mere and born alive, and intimate no opinion thereabout. . ."[3] After stating the problem to be one of a non-viable fetus at the time of injury which was stillborn, the court gave its answer in these words: "Under the facts as heretofore stated, we are of opinion that an action will not lie under Section 10-1951, Code of Laws of South Carolina, 1952, that the Order should be reversed and the demurrer sustained. . ."[4]

The painting of the next section of the background involves the opinion in *Hall v. Murphy*,[5] decided in 1960, which disposed of two cases then pending before the court. In this opinion the supreme court stated the problem as follows: "So the decisive question in each of these cases is whether a child who, while viable and capable of existing independently of its mother, suffers a prenatal injury through the alleged negligence of another, may after its birth maintain a cause of action against such other for damages on account of injury sustained."[6] After thusly stating

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1. S.C. CODE § 10-1951 thru 10-1956 (1962).
2. 233 S.C. 369, 105 S.E.2d 88 (1958).
3. *Id.* at 375, 105 S.E.2d at 90-91.
4. *Id.* at 377, 105 S.E.2d at 91.
5. 236 S.C. 257, 113 S.E.2d 790 (1960).
6. *Id.* at 259, 113 S.E.2d at 791.

the problem, the court said by way of answer: "We think the reasons assigned by the courts for holding that a child after birth may not maintain an action for prenatal injuries are unsound, illogical and unjust,"[7] and also: "We have no difficulty in concluding that a foetus having reached that period of prenatal maturity where it is capable of independent life apart from its mother is a person and if such a child is injured, it may after birth maintain an action for such injuries."[8] Refusing to concern itself with questions not presented by the facts of the cases then before it, the court stated: "Our decision is limited to liability for prenatal injuries to a viable child born alive."[9]

Against this background, then, in 1964, the supreme court of this state was presented in *Fowler* with the problem of the viable fetus which is allegedly destroyed by prenatal injuries and, therefore, is stillborn.

Incidentally, it would appear that there is one further variation which can arise. We are dealing with an "equation" in which there are two variable factors. Consequently, there are four possible variations:

(1) non-viable fetus at the time of injury PLUS stillbirth EQUALS no action allowed in the *West* case;

(2) viable fetus at the time of injury PLUS live birth EQUALS action allowed in the *Hall* case;

(3) viable fetus at the time of injury PLUS stillbirth EQUALS action allowed in the *Fowler* case; and

(4) non-viable fetus at the time of injury PLUS live birth EQUALS question yet to be answered by our supreme court.[10]

The late Chief Justice Stukes (then Justice) said, in *Ballenger v. Southern Worsted Corp.*:[11] "Legal proximate cause is determined upon mixed considerations of logic, common sense and experience, policy, and precedent." One wonders if Justice Stukes did not, perhaps unintentionally, provide a definition for "the law" in explaining one of its component parts. In the judgment of the writer, these same considerations should govern the develop-

7. *Id.* at 262, 113 S.E.2d at 793.
8. *Id.* at 263, 113 S.E.2d at 793.
9. *Ibid.*
10. See Hornbuckle v. Plantation Pipeline Co., 212 Ga. 504, 93 S.E.2d 727 (1956) for a case allowing recovery in such a situation.
11. 209 S.C. 463, 466, 40 S.E.2d 681, 684 (1946).

ment of the law as a whole and should be the basic determining guidelines when the fourth varient of the problem—injury to a non-viable fetus subsequently born alive—is presented to the court.

The inevitability of the decision in *Fowler*, after the court held as it did in *Hall*, was clear. In the language of Justice Brailsford in *Fowler*: "Once the concept of the unborn, viable child *as a person* is accepted, we have no difficulty in holding that a cause of action for tortious injury to such a child arises immediately upon the infliction of the injury"[12] (without regard to whether or not the child's life is then and there terminated). [Emphasis added]

The rationale of *Fowler*, and its foundation, *Hall*, is unimpeachable. That (i.e., a fetus) which is alive and capable of an existence independent of any other living person (i.e., the mother) is *a person*—if not, what else? A person has rights under our laws among which we must number the right to be free from harm by the tortious conduct of others. To say otherwise would be saying that one who lives temporarily in the house of another, rather than in his own house, is not a private citizen and has no private rights. For every right there is a correlative duty. The violation of these rights will give rise to an action to recover damages—either an action by or on behalf of the person himself or an action by those who, by their relation to the injured person, are damaged by his injury. "All Courts shall be public, and every person shall have speedy remedy therein for wrongs sustained."[13]

It would be a sad commentary on the law if a defendant who had negligently and willfully injured a person (i.e., a viable fetus) could avoid liability under the Wrongful Death Act by saying: "The person I injured died." The proper answer to this is: "Yes, he did—that is why you are being sued and should be sued." Such an argument on the part of a defendant puts one in mind of the story of the young man who killed both of his parents and, at his trial, threw himself on the mercy of the court on the ground that he was an orphan.

Although the opinion itself does not mention this fact, a study of the briefs in *Fowler* reveals that the plaintiff (administrator) was the only statutory beneficiary. His wife was killed in the

12. Fowler v. Woodward, 138 S.E.2d 42, 44 (S.C. 1964).
13. S.C. CONST. art. I, § 15 (1895).

same collision that resulted in the death of the child (i.e., the viable fetus), and he had no other children. The damages sustained by the beneficiary through the wrongful death of the plaintiff's intestate are obvious. Sometimes hard cases make *good* law.

In any event, as Justice Brailsford pointed out: "It is beside the point that the extent of damages might be difficult, or even impossible, to establish prior to birth. . .; this would not affect the existence of the cause of action. . . ."[14] I am sure that plaintiff's attorneys all over the country appreciate the solicitude of those defendant's counsel who have argued the difficulty of plaintiffs proving damages when they contested the existence of a cause of action in cases like *Hall* and *Fowler*. How gracious of them to want to spare us the arduous task of proving damages in a case where we, who bear the burden under the law, would find it difficult—with friends like these, plaintiffs attorneys need no enemies. However, as Justice Brailsford said, this is "beside the point."

It is the opinion of the writer that the decision of the court in *Hall* and *Fowler* will be conducive to just and equitable results. It should never be forgotten that the imposition of liability is one of the sure deterents to tortious conduct. But more important—aside from considerations of the promotion of the best interests of society as a whole—if in a given situation an individual can prove damages, there should be a cause of action by which he can recover. If damages are not provable by accepted standards to the satisfaction of a jury, the prospective defendants have no cause for concern. There are, of course, situations which are, and should be, *damnum absque injuria*. However, in those situations there are overriding considerations which compel the conclusion that no actionable wrong exists even though damage has resulted, e.g., sovereign immunity. But no such overriding considerations in favor of an ordinary tortfeasor exist where he has inflicted injury upon a viable fetus by his tortious conduct.

Of course, the court has already answered in *West* the question of "action or no action" on account of injury to a non-viable fetus which is stillborn. The writer will not address himself to whether or not he agrees with that decision. Applying to that decision the criterion which may be distilled from the brew

14. Fowler v. Woodward, 138 S.E.2d 42, 44 (S.C. 1964).

of "mixed considerations of logic, common sense and experience, policy, and precedent," there are certain things which may be said in its favor. The decision holds "no action" only under circumstances where: (a) there never was, and never will be, "a person" as that term is used in *Hall* and *Fowler*; (b) it probably would be impossible to prove that an embryo would have become viable but for the injury (especially so if the injury occurs in the early stages of pregnancy); and (c) where no child is born malformed and afflicted for life. In spite of Justice Brailsford's language in *Fowler* to the effect that neither difficulty nor impossibility of proving damages should bear on the question of whether a cause of action exists, perhaps difficulty of proof is one thing and impossibility of proof is another. For, if we are talking about the impossibility of proving damages, the law should never require anyone to do a useless thing—such as defend against an action in which one essential element could not possibly be proven by the plaintiff.

It is interesting to speculate on how the court will hold when presented with a case involving injuries to a non-viable fetus later born alive and disabled for life. Will the court feel that the question of whether the plaintiff was "a person" *at the time of the injury* is the pivotal one? We are, of course, talking now about a case where the embryo is injured but later becomes viable and is born alive and brings its own lawsuit, albeit by a guardian ad litem, i.e., where he is a "person" at the time of suit.

The closest analogy which occurs to the writer is the situation where a defendant causes injury to a piece of property during the ownership of the plaintiff's predecessor in title, and the property later passes into the ownership of the plaintiff, who brings an action to recover for the damages. In this situation, the plaintiff does not have standing to recover for the earlier injury to the property; instead, the plaintiff's predecessor in title must bring an action to recover, for the injury was an offense to his ownership and not the later ownership of the plaintiff. Actually, however, this is not a good analogy. On the one hand, the plaintiff must live with the damage (just as the injured non-viable fetus which is later born alive but disabled must live with his disability). On the other hand, the analogy breaks down, in that in the property situation the wrongdoer must answer to someone—the plaintiff's predecessor in title. In the other situation there is no predecessor in title to the misshapen

body of the disabled child, so the defendant goes free from the consequences of his wrong. Furthermore, a plaintiff in a property situation has a choice of buying or refusing to buy the damaged property; our disabled child has no choice in the matter.

As stated above, it is interesting to speculate how the court will hold if and when this last situation is presented for decision in an actual case. Should the writer be involved in the case, he would choose to be "Attorney for the Plaintiff."

GEORGE D. HAIMBAUGH, JR.*

The recognition for the first time by the South Carolina Supreme Court, in *Fowler v. Woodward*, of the right to recover for the wrongful death of an unborn, viable infant raises the question of the definition of an appropriate measure of damages in such a case.

In a search for answers to the question, *Hall v. Murphy*,[1] a case with strong analogies to *Fowler*, may serve as a point of departure. The actions in *Hall* included one for a wrongful death which was alleged to have resulted some four hours after birth from a prenatal injury to a viable child. Judge Grimball's charge to the jury included the following:

> I charge you, Mr. Foreman and gentlemen, that you may award such damages as you find the plaintiff is entitled to recover in this action as you may think proportioned to the injuries resulting from such death of the plaintiff's intestate, and that the elements of damage in this action for wrongful death include pecuniary loss, mental pain and suffering, wounded feelings, grief and sorrow, loss of companionship and deprivation of the use and comfort of the intestate's society.
>
> I charge you that where the law presumes a pecuniary loss to the beneficiary, substantial damages may be recovered without proof of any special pecuniary loss . . .
>
> Mr. Foreman and gentlemen, the plaintiff would not be entitled to conjectural or speculative damages in any event but if you find that the plaintiff is entitled to a verdict for actual damages, it should include such future or prospective damages, if any, as the evidence renders it reasonably certain will of necessity result in the future for the alleged wrongful death of the intestate. Such future or prospective damages, if any, must be reduced to their present cash value. Now the burden rests upon the plaintiff to establish the amount of his damages by preponderance of the evidence.
>
> This does not mean the plaintiff must prove the same to a mathematical certainty or that plaintiff must adduce evi-

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1. In this case the trial judge's orders overruling demurrers in actions for wrongful death and for pain and suffering by the infant during its four hours of life were affirmed by the South Carolina Supreme Court in Hall v. Murphy, 236 S.C. 257, 113 S.E.2d 790 (1960).

dence as to the precise amount therefor. It does mean that the evidence adduced by the plaintiff must be such as to enable the jury to determine what amount is fair and just and reasonable.[2]

Loss of support less cost of upbringing without compensation for the grief of the parents was the damage formula of an earlier agrarian era in actions for wrongful death of a child.[3] The elements of damage listed by Judge Grimball typify the attempt of modern courts to justify substantial damages to bereft parents in a day when the cost of raising children is greater and their opportunity to earn is less. In *Hall*, the jurymen had no occasion to dispose of the plaintiff's request for $100,000 in the light of the charge as they returned a verdict for the defendant. *Mock v. Atlantic Coast Line R. Co.*,[4] another wrongful death case in which the parents of a 12 year old boy were awarded $50,000 actual and $15,000 punitive damages by a jury operating under a damage charge similar[5] to that in *Hall*, may be useful in a consideration of whether or to what extent the elements of damage enumerated in *Hall* and *Mock* are appropriate in a case like *Fowler*.

Essentially, the repetitions of the modern formula for damages in wrongful death actions may be resolved into two elements: the parents' grief and their pecuniary loss of the child's potential earnings. Large recoveries[6] have been approved without evidence as to actual earnings and on the basis of such "imponderables as mental anguish, grief and loss of companionship."

2. The charge to the jury by Judge John Grimball in the case of *Hall v. Murphy* in the Court of Common Pleas of Anderson County, South Carolina.

3. See opinion of Judge Holtzoff in Hord v. National Homeopathic Hospital, 102 F. Supp. 792 (D.D.C. 1952).

4. 227 S.C. 245, 87 S.E.2d 830 (1955).

5. In the case of *Mock v. Atlantic Coast Line R. Co.* in the Common Pleas Court of Charleston County, Judge Steve C. Griffith's charge to the jury included the following: "The plaintiff alleges as damages that they have suffered pecuniary loss; mental shock; and suffering; wounded feelings; grief and sorrow; loss of his love companionship; and have been deprived of the use and comfort and the society of the deceased, in addition to his ability to earn money to assist in the support, maintenance and care of his parents; all to their damage. Now I charge you that all of those elements are proper elements of damage in a case of this kind. And if the plaintiff is entitled to recover, you will consider all of such elements as may be established by the evidence and the greater weight thereof." 395 *Supreme Court of South Carolina: Cases Heard and Submitted, November Term 1953*, record of the Mock case, Pg. 431.

6. In recent South Carolina cases parents have recovered $30,000 actual and $5,000 punitive damages each for the deaths of two daughters, aged 18 and 13, Smith v. Hardy, 228 S.C. 112, 88 S.E.2d 865, (1955); and $30,000 damages for the death of a 4 year old child, Hicklin v. Jeff Hunt Machinery Co., 226 S.C. 484, 85 S.E.2d 739, (1955).

The South Carolina Supreme Court unanimously affirmed the trial court's decision in favor of the plaintiff in *Mock*, but Chief Justice Baker, with Justice Stukes concurring, dissented with regard to the amount of the verdict. "The verdict," he objected, "is, in my opinion, wholly disproportionate to the measurable damages sustained, and it is the duty of this court to set it aside." Noting that it did not appear "that [young Mock] had any earning capacity or that he had ever done work for financial gain," the Chief Justice concluded that it could not "be assumed that [the parents] suffered any pecuniary loss in his passing."[7] The majority of the court, however, were unwilling to join in striking this element of damage, apparently viewing the testimony "that the deceased was a lad twelve years old, healthy, of good habits, of sound mind and ability, [and] a fifth grade student" as possible evidence of future earning capacity. Such evidence as to the actual industry or prodigality of *unborn* decedents, however, would be unavailable; and, therefore, any assumption as to earning power much more speculative than in *Mock*.

The willingness of the court to make assumptions with regard to the parent-child relationship is exemplified in *Mock* where the supreme court "assumed that [the deceased child] was held in loving esteem by his parents and that they experienced the natural feelings of grief in the loss of a loving son."[8] Such evidence as to the actual industry or prodigality of unborn decedents would be unavailable and, therefore, any assumption as to earning power more nearly speculative than in *Mock*. But, in a case like *Fowler*, not even this type of evidence would be available, and it is difficult to see how assumptions as to the parent-child relationship could be other than conjectural.

The greater seriousness of the wrongful death of a child or adult as compared to the wrongful death of an unborn, viable infant, may be suggested by analogy with the penal law. In South Carolina, for example, the penalty for murder is death or, if mercy is recommended by the jury, life imprisonment at hard labor.[9] The penalty for abortion, however, is a fine of $1,000 and/or not more than two years confinement for the

7. 227 S.C. 245, 267.
8. Chief Justice Baker reduces the elements of damage in Mock to "such mental shock and suffering, wounded feelings, grief and sorrow, loss of companionship and deprivation of the use and comfort of intestate's society as the beneficiaries may have sustained as the result of the death of the intestate."
9. S.C. CODE § 16-52 (1962).

mother[10] and from five to twenty years imprisonment for anyone, other than the mother, found guilty in such a case.[11] And although there is no statute of limitation in the case of murder, there is a two year statute in the case of abortion.[12]

If a jury in *Fowler* should find for the plaintiff, it would be faced with the decision of whether to award the $100,000 claimed or indeed, any substantial sum. Such a determination would require the jurymen to decide whether they could allow damages for future earnings or parental grief without entering the forbidden realm of speculation and conjecture. If so, they would then have to decide whether they could award a sum comparable to those given in ordinary wrongful death actions without ignoring the sense of the legislature as expressed in the criminal code provisions concerning murder and abortion.

If the courts are to allow substantial damages to be awarded in cases of wrongful death of unborn, viable infants, they might include in the damage formula a more down-to-earth element—an element for which a young lady in the class of Professor Willard Pedrick at Northwestern suggested the term "cost of reproduction!"

10. S.C. CODE § 16-84 (1962).
11. S.C. CODE § 16-82 (1962).
12. S.C. CODE § 16-86 (1962).