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Torts - Wrongful Death Action Allowed on Behalf of Still-Born Child Who Dies as Result of Prenatal Injuries

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TORTS — WRONGFUL DEATH ACTION ALLOWED ON BEHALF OF STILL-BORN CHILD WHO DIES AS RESULT OF PRENATAL INJURIES.

State v. Sherman (Md. 1964)

Plaintiff brought a wrongful death action alleging that the defendant's negligence was responsible for the death of her child. The infant was still-born after her mother had been involved in an accident while riding in the defendant's car. This incident had taken place only a short time before the baby was to be born. The trial court denied relief on the ground that even though a child is viable, it must be born alive in order for there to be an action for prenatal injuries. By a four-to-three decision[1] the Court of Appeals *held* that an action for wrongful death caused by prenatal injuries would lie for a viable infant regardless of whether the child was born alive or not.[2] *State v. Sherman*, 198 A.2d 71 (Md. 1964).

Two cases decided over half a century ago long dominated virtually all American jurisdictions in the area of prenatal torts. The first case, *Dietrich v. Inhabitants of Northampton*,[3] denied recovery to a stillborn infant for negligently inflicted prenatal injuries, while the second, *Allaire v. St. Luke's Hosp.*,[4] forbade compensation even when an injured child was born alive. The former case is perhaps the more famous, but the latter may well have been the more influential. For the *Allaire* court reasoned that there could be no recovery since no duty was owed to an unborn infant which was still considered part of its mother. This theory prevailed until 1946 when increased medical knowledge concerning the independent existence of foetii made it difficult to sustain such a concept. In a series of cases involving negligence by an obstetrician at childbirth, the theory that no duty was owed to a child until born was considered ludicrous. Recovery was allowed for such malpractice in the case of *Bonbrest v. Kotz*.[5] Thereafter the "no duty" rationale was rejected in various state courts in rapid succession.[6] After recoveries were initially allowed in malpractice suits, they were soon granted in all areas of negligent and intentional torts causing injury to an unborn child.[7]

Unfortunately two major restrictions were placed on these actions by *Bonbrest* and subsequent cases which have continued to create difficulties

1. Henderson, J. wrote the majority opinion with the concurrence of Brune, C.J., Hammond, J., and Sybert, J., while Gray, J., specially assgn'd, and Prescott, J., filed dissenting opinions in which Marbury, J. concurred.
2. State v. Sherman, 198 A.2d 71 (Md. 1964).
3. 138 Mass. 14 (1884).
4. 184 Ill. 359, 56 N.E. 638 (1900).
5. 65 F. Supp. 138 (D.C. Cir. 1946). Actually Louisiana had permitted recovery as early as 1923 in Cooper v. Blanck, 39 So.2d 352 (La. App. 1923), but the opinion was not published until 1949.
6. For example, Verkennes v. Corniea, 229 Minn. 365, 38 N.W.2d 838 (1949).
7. The history of prenatal torts followed a curiously parallel course in the British Commonwealth. At the turn of the century the concept of such torts was rejected in Walker v. Great No. Ry. of Ireland, 28 L.R. Ir. 69 (1890), but the idea was later revived, at least with respect to injuries not resulting in death, by Montreal Tramways v. Leveille (1933) Can. Sup. Ct., 4 D.L.R. 337, which used analogies to the French civil law as a basis for recovery.

down to the present time.[8] These restrictions were that the injured child be viable[9] and be born alive. The reasons supporting the continuance of these qualifications are separate and distinct and the rejection of one restriction does not negate the usefulness of the other.[10] The requirement that the unborn child be viable has appeared in numerous cases. The instant decision avoids the viability problem as that question was not precisely before the court; however, the minority on the court clearly feared that this bar would be dropped in future actions. Indeed, despite the abundance of dicta requiring viability, the courts have refused to let it alone prevent recovery whenever the other elements of a prenatal tort were present.[11]

Proponents of viability propose two reasons for its continuance. The first is that unless the child is capable of separate existence it lacks standing as a person whom the courts can recognize and therefore grant redress for injuries. Such an argument is discounted by medical authorities who maintain that from the moment of conception a child is a separate being.[12] Furthermore, the date when an infant attains independent existence cannot be ascertained with certainty unless it is actually taken from its mother.[13] A second reason for preserving the viability requirement is the danger of fraudulent claims and the attempt to curtail litigation. This argument, which one encounters throughout the entire field of prenatal torts, is really an evidentiary problem. However, since viability has now been determined to exist somewhere between the fourth and sixth month, the entire argument could be rendered academic in all but a very few cases.[14]

The further preservation of the viability requirement would, therefore, seem to be pointless. The only function of such a restriction is to arbitrarily limit litigation. Such a solution to the overcrowded docket is hardly a desirable one. A far more difficult problem, however, is whether a child must be born alive in order to recover. The majority in the present case reason that, since an earlier Maryland decision[15] had permitted an action by a living child who had suffered prenatal injuries, the matter has been completely settled despite the fact that at least one other jurisdiction had made a distinction between living and dead infants in the face of decisions very similar to that facing this court.[16]

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8. At least two jurisdictions have elected to preserve the Dietrich case on the grounds that its narrow holding was simply that there could be no recovery because the infant was not born alive. Keyes v. Constr. Serv., Inc., 340 Mass. 633, 165 N.E.2d 912 (1960); Smith v. Brennan, 31 N.J. 353, 157 A.2d 497 (1960).

9. A viable foetus is one sufficiently developed for extra-uterine survival. STEDMAN, MEDICAL DICTIONARY 1234 (16th ed., 1946).

10. Typical of the confusion regarding the two requirements is Gullborg v. Rizzo, 331 F.2d 557 (3rd Cir. 1964), a recent case which reasoned that because Pennsylvania no longer uses the viability rule, it will almost certainly reject the born-alive requirement as well.

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

12. Comment, 110 U. PA. L. REV. 554 (1961).

13. For a judicial attempt to set up a table of viability, see Cooper v. Blanck, 39 So.2d 352 (La. App. 1923).

14. 29 N.Y.U.L. REV. 1154 (1954).

15. Damasiewicz v. Gorsuch, 197 Md. 417, 79 A.2d 550 (1951).

16. Hogan v. McDaniel, 204 Tenn. 235, 319 S.W.2d 221 (1958).

Judge Gray's dissenting opinion advances a series of arguments for limiting recovery to children born alive. The main thrust of his dissent, however, is aimed at the development of this type of action under the Wrongful Death Acts. Unfortunately this line of reasoning soon leads into a morass of statutory interpretation and the vexing question of exactly what the word "person" means in these acts. A succinct expression of Judge Gray's view is that a foetus has no rights until born alive; any rights, which an unborn child has, can be exercised only if the infant survives.

While concurring in this reasoning, Judge Prescott adds the additional argument that statutory authority on the part of the legislature is absolutely necessary for an action in this type of case. This point is not without merit since actions for injuries to unborn children later born alive are based on the common law; therefore, considerable latitude is permissible. But since wrongful death actions are based on statutes in derogation of the common law, they are subject to strict construction. Judge Prescott's dissent also quotes with approval the lower court's opinion which dismissed the action. That opinion focuses on the most important question in the area, the question of policy.[17] The thrust of *Bonbrest* and later cases was that a child should be compensated for that injury which it would have to carry through life because of the negligence of another. The emphasis then, is placed upon the child and his injuries, not on the parents and their loss. However, there can be little doubt that, regardless of what reasons are put forth, when the courts allow a wrongful death action of this kind they are seeking to compensate the parents for the emotional loss they have suffered. Such an attempt, while quite understandable, has proven unwieldy in the context of Wrongful Death Acts which seek to compensate survivors for pecuniary loss.[18] Mere loss of society and companionship, however, are classified as non-compensable.[19] The jury, therefore, is left with the problem of trying to make a purely speculative effort at determining the loss of earning power of a stillborn child. Meanwhile the same jury is told to disregard the emotional loss of the parents in being denied a child who would otherwise have been theirs.

Prior to the *Bonbrest* case, courts often alluded to the right of a mother to recover for injuries and suffering because of the loss of the child.[20] The scope of recovery in this area, however, has never been fully expanded.[21]

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17. The central and crucial issue in the area of prenatal torts is one of policy, for until an infant is born, the law can make no judgment as to its rights in this area. The question then is, who should be compensated for any injuries and in what manner. Del Tufo, *Recovery For Prenatal Torts,* 15 RUT. L. REV. 61 (1960).

18. Cullison v. Hartman, 7 Cumb. 59, 9 D.&C.2d 359 (1956).

19. Kennedy v. Byers, 107 Ohio St. 90, 140 N.E. 630 (1923).

20. Snow v. Allen, 227 Ala. 615, 151 So. 468 (1933).

21. One difficulty with such a solution is that the wrongful death remedy would still be proper where a child is born alive but dies a short time later of prenatal injuries. See Steggall v. Morris, 363 Mo. 1224, 258 S.W.2d 577 (1953), where recovery was allowed for wrongful death after a child lived only eighteen days after birth because of prenatal injuries.

Since the underlying purpose for permitting actions for prenatal injuries is to make the child whole, wrongful death actions would seem inappropriate because their sole object is to protect survivors, not to compensate for loss. A more realistic solution would be to permit a mother to sue in her own right for the loss of her child. This would confront the jury with the real issue in such cases, that is, what did the loss of the child mean to the parents in terms of physical and emotional suffering.

An alternative solution might lie in a re-examination of the rationale of wrongful death actions. This re-examination could well result in the replacement of the majority rule, that such suits are derivative in nature,[22] with the view that the person is suing as an agent of the legislature.[23] The parents of the injured child would sue in their own right and would be unaffected by the disabilities of their unborn child. Such a trend could be dangerous, however, because the use of wrongful death actions in this area is far from singular in purpose. Destroying their derivative nature in the limited area of prenatal torts could well undermine the whole concept of wrongful death recovery in situations in which the derivative aspect does have a beneficial effect.

In conclusion, it may be said that when a child is born alive its prenatal injuries are always compensable.[24] If, however, the child is stillborn a direct action at law *should* be granted to the parents. There no longer appears any basis for continuance of the vague and ineffective viability requirement.

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22. Biddy v. Blue Bird Air Serv., 374 Ill. 506, 30 N.E.2d 14 (1940).
23. Breed v. Atlanta, B.&C.R. Co., 241 Ala. 640, 4 So.2d 315 (1941).
24. *Accord*: Muschetti v. Charles Pfizer & Co., Inc., 208 Misc. 870, 144 N.Y.S.2d 235 (1955). See also, 21 OHIO ST. L.J. 677 (1960).