June 1969

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Wrongful Death Action for Prenatal Injury

The allowance of recovery for injuries or death of an unborn child is a comparatively recent development in tort law. The issue was first raised in a case in which damages were sought for prenatal injuries to an infant.1 The court, in an opinion written by Oliver Wendell Holmes, denied recovery, holding that the child was part of the mother and that any recovery for injuries to the child would have to be in an action by the mother2 The view expressed in this case was followed by other courts for a number of years.3 The first opinion contrary to this thinking was expressed in the dissenting opinion by Judge Boggs in Allaire v. St. Luke's Hospital.4 He expressed the view that once a baby is viable, it should be considered to be a separate person. It could survive if its mother died; therefore, to consider the mother and baby to be one person is unrealistic. Being a separate person, the baby should have a separate right of action to recover for prenatal injuries.5 This view was not adopted until 1946 in the case of Bonbrest v. Kotz.6 The overwhelming majority of courts have since adopted it.7 Some courts have extended the rule to allow recovery for prenatal injuries even if inflicted before the fetus becomes viable.8

A seemingly logical extension of allowing recovery for prenatal injuries is allowing recovery for fatal prenatal injuries. The first case allowing recovery for the wrongful death of a stillborn child was decided in 1949.9 Many other jurisdictions have subsequently adopted the view allowing recovery.10

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2 Id.
3 A listing of such cases and a more complete discussion of the Dietrich case may be found in Ruley, Recovery of Damages for Injuries Sustained by Children en Ventre sa Mere, 65 W. Va. L. Rev. 197, 199 (1963).
4 184 Ill. 359, 56 N.E. 638 (1900).
5 Allaire v. St. Luke's Hospital, 184 Ill. 359, 370-71, 56 N.E. 638, 641 (1900) (dissenting opinion). Further discussion of this case may be found in Ruley, supra note 3, at 199-200.
7 A list of these cases and a discussion of their merits may be found in Ruley, supra note 3 at 200-02.
9 Verkennes v. Corniea, 229 Minn. 365, 38 N.W.2d 838 (1949).
10 A listing and discussion of such cases may be found in Ruley, supra note 3, at 204-05. See also Todd v. Sandidge Constr. Co., 341 F.2d 75 (4th Cir. 1964); Hatala v. Markiewicz, 26 Conn. Supp. 358, 224 A.2d 406 (1966);
No decision on whether an action for the wrongful death of a stillborn child could be maintained in West Virginia had been rendered prior to 1969. The case which decided this issue as one of first impression in West Virginia was Panagopoulous v. Martin. The cause of action arose out of a collision between a motor vehicle operated by the defendant and a motor vehicle in which the plaintiff was a passenger. The plaintiff was in her eighth month of pregnancy on the date the accident occurred and delivered a stillborn child on the same day as a result of the injuries she received in the accident. The child was viable when the accident occurred. The plaintiff then brought an action under the West Virginia Wrongful Death statute for the death of the stillborn child. The defendant sought a dismissal of the complaint for failure to state a cause of action. The federal court in this case denied the defendant's motion stating that it believed that if the West Virginia Supreme Court of Appeals were to decide a similar case, it would hold that the action was maintainable.

The court in reaching its decision first examined West Virginia's Wrongful Death statute. Accordingly, it determined that a necessary prerequisite to the bringing of an action for wrongful death is the death of a person as a result of the wrongful act of another under each circumstance as would have allowed the injured person to have maintained an action to recover damages if he had survived. The court therefore found it necessary to determine if a recovery of damages for prenatal injuries would be allowed in West Virginia.

No previous West Virginia case had discussed this issue. On the basis of the trend of the decisions allowing recovery for prenatal injuries and the fact that there were no West Virginia decisions to the contrary, the court decided that the West Virginia Supreme Court of Appeals in a similar case would uphold a cause of action by a child for prenatal injuries. If this were so, the requirement of the Wrongful Death statute that the decedent would have been entitled to maintain an action if he had survived is satisfied. If

12 Id. at 1, 11, 12.
the court had decided that West Virginia would not allow recovery for prenatal injuries, this would have, of necessity, been a determination that an action for wrongful death would not be allowed.

The court next explored the question of whether or not an unborn child is a *person* as required by the Wrongful Death statute. The court stated that in order to be consistent and logical, if an unborn child is a "person" when protected from prenatal injuries, it must also be considered a "person" in relation to a wrongful death action. The court held, therefore, that a unborn child is a "person" within the meaning of the West Virginia statute. The court's resolution of this issue was the only logical possibility. If an unborn child is determined to be a person for one type of action, he should be considered to be a person in all closely related types of actions.

A last question decided by the court was whether or not it would be possible to determine what damages could be awarded in a case of a stillborn child where economic loss would be impossible to prove. The court again examined the West Virginia Wrongful Death statute. Under the statute the jury may award up to ten thousand dollars damages as "they deem fair and just" and up to one hundred thousand dollars for pecuniary loss suffered by the decedent's distributees. The court showed that previous West Virginia cases had held that the jury in relation to the first ten thousand dollars may consider sorrow, grief, and mental distress suffered by a relative. The court stated that there would be no greater problem of proof in the case of the death of an unborn child than in the case of any other death. These initial damages could, therefore, be awarded in a wrongful death action for the death of a stillborn child. The court stated further that no damages could be

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16 *Id.* at 9. It is interesting to note that the court cited the decision of Richards v. Riverside Ironworks, 56 W. Va. 510, 515, 49 S.E. 437, 438 (1904) in which it was said that "The [wrongful death] statute is remedial and should be construed liberally for the purpose of carrying out the legislative intent." (Emphasis added). Other courts in at least two states have held that an unborn child is not a person because the legislature did not intend for them to be so considered. Estate of Powers v. City of Troy, 380 Mich. 160, 156 N.W.2d 530 (1968) (statute was enacted in 1848 and at that time the normal meaning of the word "person" would not include a fetal child); Hogan v. McDaniel, 204 Tenn. 235, 319 S.W.2d 221 (1958) (legislature did not contemplate that an unborn child would be considered a "person" under the statute). The basic wrongful death statute in West Virginia was enacted in 1863.

17 W. VA. CODE, ch. 55, art. 7, § 6 (Michie 1966).

18 *Id.*
awarded for pecuniary losses for these were virtually impossible to prove. The fact that damages can be awarded under the West Virginia Wrongful Death statute for other than pecuniary losses eliminates the factor that has been decisive in most jurisdictions which have denied recovery in actions for the wrongful death of a stillborn child. In these jurisdictions damages for wrongful death are limited to pecuniary losses which in the case of a stillborn child would be too speculative.

It must be remembered that the decision in the Martin case simply denied a defendant's motion to dismiss for failure to state a cause of action. It must also be noted that this decision was reached by a federal court and not by the West Virginia Supreme Court of Appeals. It does appear, however, that the chief obstacle that blocks recovery for wrongful death of a stillborn child in most cases—the requirement of pecuniary loss—does not exist under West Virginia law.

The next extension of the doctrine allowing recovery for wrongful death may be to allow recovery for the death of a nonviable, unborn child. Some commentators have argued that this extension is only logical and conforms with modern biological theory that a fetus is a "person" at its earliest stage of development. This would, however, lead to more speculative conclusions as to the child's actual chances of eventual birth.

Allowing recovery for the wrongful death of a fetus at any stage of development would also appear to conflict with the modern trend of liberal abortion laws. It would be difficult to justify the abortion of a fetus at its early stage of development as not taking

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21 In one jurisdiction a federal court held that recovery would be allowed under the state's laws for the wrongful death of a stillborn child. Gullborg v. Rizzo, 331 F.2d 557 (3d Cir. 1964). Shortly thereafter, however, the high court of the same state denied recovery for the wrongful death of a stillborn child. Carroll v. Skloff, 415 Pa. 47, 202 A.2d 9 (1964).

22 Ruley, supra note 3, at 205-06.

the life of a “person” and at the same time declare that a fetus at a similar stage of development is a “person” so as to allow recovery for its wrongful death. This would allow intentional termination of development in the first case without adverse legal consequences yet give adverse legal consequences to what may be an unintentional termination of development in the second case. How these problems might be solved remains for future determination.

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