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RECENT DEVELOPMENTS

TORTS—WRONGFUL DEATH—UNBORN CHILD—The Estate of an Unborn Child Has a Cause of Action for Wrongful Death—O’Neill v. Morse

Mrs. Carol Pinet, eight months pregnant, was struck by an automobile; she and her unborn son were injured. The child was later stillborn. An administrator for his estate brought suit against the two drivers involved under the Michigan wrongful death act then in force. The trial court granted summary judgment for the defendants on the ground that an unborn child was not a "person" in terms of the act. This ruling was supported by Estate of Powers v. City of Troy, in which the Michigan supreme court had held that statutory reference to the wrongful "death of a person" meant "person" in the ordinary sense of the word when the act was first written in 1848, and did not include the concept of a fetal child. In appealing the decision, plaintiff O’Neill argued that such a holding deprived the unborn child of due process and equal protection under both the United States and Michigan Constitutions. The appellate court af

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   (1) Liability of tortfeasor. Whenever the death of a person or injuries resulting in death shall be caused by wrongful act, neglect or default, 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, then and in every such case, the person who, or the corporation which would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony. All actions for such death, or injuries resulting in death, shall be brought only under this section.

   (2) Persons entitled to sue; damages, distribution. Every such action shall be brought by, and in the names of, the personal representatives of such deceased person, and in every such action the court or jury may give such damages, as, the court or jury, shall deem fair and just, with reference to the pecuniary injury resulting from such death, to those persons who may be entitled to such damages when recovered and also damages for the reasonable medical, hospital, funeral and burial expenses for which the estate is liable and reasonable compensation for the pain and suffering, while conscious, undergone by such deceased person during the period intervening between the time of the inflicting of such injuries and his death. Such person or persons entitled to such damages shall be of that class who, by law, would be entitled to inherit the personal property of the deceased had he died intestate. . . .

   For a discussion of the 1971 amendment, see text accompanying note 112 infra.


4. 380 Mich. at 170, 156 N.W.2d at 592.

5. U.S. Const. amend. XIV, § 1; Mich. Const. art. 1, §§ 2, 17. Cf. Ohio Const. art. 1, § 16 ("All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law . . . ."), which has
firmed the dismissal, inferring from Powers that like the statute, neither Constitution included unborn children as "persons." From this holding, further appeal was taken to the Michigan supreme court.

Before O'Neill was decided, however, the Michigan high court had already made a fundamental revision of its attitude toward prenatal torts. Michigan had been one of the few jurisdictions still adhering to the view originally expressed in Dietrich v. Northampton, followed in Michigan in Newman v. City of Detroit, that no person, even if he survived birth, had an action at common law for prenatal injuries. This was the position of the overwhelming majority of the courts that had considered the issue at the time Newman was decided in 1937. Only two years later this position began to erode, with California and the District of Columbia leading what was soon to become a popular trend. The opportunity to overrule Newman came last year with Womack v. Buchhorn, a common-law negligence

been held to include an unborn child as a "person." Williams v. Marion Rapid Transit, Inc., 152 Ohio St. 114, 87 N.E.2d 334 (1949).


7. 138 Mass. 14 (1884). In Dietrich, the child was born when the mother was injured in her fourth month of pregnancy, and there was testimony that the child had lived for a few moments before death. The court found it unnecessary to decide whether there was live birth, but it did note that the infant was "too little advanced in foetal life to survive its premature birth." 138 Mass. at 15.


10. Scott v. McPheeters, 33 Cal. App. 2d 629, 92 P.2d 678, appeal denied, 33 Cal. App. 2d 640, 92 P.2d 562 (1939), relying in part on what is now Cal. Civ. Code § 29 (West 1970), which provides: "A child conceived, but not yet born, is to be deemed an existing person, so far as may be necessary for its interests in the event of its subsequent birth ... ."


action brought on behalf of an eight-year old surviving child for brain injuries suffered in an automobile accident during the fourth month of his mother's pregnancy. In a unanimous opinion reversing a summary judgment for the defendant, the Michigan supreme court relied primarily on the almost total shift in the position of the common law as interpreted in other jurisdictions, including the reversal of all but two of the cases cited by Newman. Determining that the duty to re-examine questions of common law overrode the principle of stare decisis, the court adopted the reasoning and result of Smith v. Brennan that "justice requires . . . that a child has a legal right to begin life with a sound mind and body." The court limited its holding in Womack to the prenatal injury of a surviving child in a negligence action given by common law, but the overruling of Newman opened the way for the court to look at the possibility of a statutory action for the wrongful death of an unborn child.

In a five-to-two decision, the O'Neill court held that there was a cause of action for the unborn child wrongfully killed, overruling Powers on indistinguishable facts. The majority perceived in the wrongful death act a purpose to provide an action for death "whenever, if death had not ensued, there would have been an action for damages," and found the statutory wrongful death action "co-extensive with the common law right of action for damages." Since Womack provided an action for damages, it would be anomalous not to allow an action for prenatal wrongful death.

That rationale, as a matter of statutory construction, might have disposed of the case. But the reasoning of Powers, and a point strongly urged by Justice Black in his dissenting opinion in O'Neill, was that the legislature did not use "person" to include an unborn child, and since the wrongful death action is created by statute, there could

14. An earlier decision, LaBlue v. Specker, 358 Mich. 558, 100 N.W.2d 445 (1960), allowing a posthumous child to sue under the dramshop act for the death of his father, had cast doubt on the vitality of Newman. The court had also been invited to reconsider Newman in Powers, but declined, limiting express discussion in the latter case to whether an unborn child was a "person" in terms of the statute. Nevertheless, two concurring justices (Brennan, J., 380 Mich. at 171, 156 N.W.2d at 533, and Souris, J., 380 Mich. at 176, 156 N.W.2d at 535) as well as the dissent (T. M. Kavanagh, J., 380 Mich. at 185, 156 N.W.2d at 545) indicated that Newman might be overruled in an appropriate case. Powers, inasmuch as it involved a statutory cause of action rather than one at common law, was felt to be an appropriate case only by the dissent.
17. 384 Mich. at 720-23, 187 N.W.2d at 220-22, thoroughly reviewing authorities to date. See authorities cited in note 12 supra.
19. 385 Mich. at 133, 188 N.W.2d at 785 (emphasis original).
20. 385 Mich. at 134, 188 N.W.2d at 786.
21. 385 Mich. at 139, 144-46, 149-50, 188 N.W.2d at 789, 793, 795.
be no action for prenatal wrongful death regardless of what is allowed at common law. Justice Brennan, speaking for the majority, responded to this criticism with two basic arguments. Referring to the dissenting opinion of Justice Boggs in \textit{Allaire v. St. Luke's Hospital}, he expanded on the capacity of the unborn child for independent and separate life—a point only alluded to in \textit{Womack}. Since the fetus was an independent life in fact, it should be an independent person in law:

If the mother can die and the fetus live, or the fetus die and the mother live, how can it be said that there is only one life? If tortious conduct can injure one and not the other, how can it be said that there is not a duty owing to each?

\[\ldots\]

\[\ldots\text{ A fetus living within the mother's womb is a living creature; it will not die when separated from her unless the manner, the time or the circumstances of separation constitute a fatal trauma.}\]

The fact of life is not denied.

In addition to this biological argument, the majority found support in the "legislative recognition of the personhood of the unborn," manifested in a recent statute providing for the appointment of a guardian ad litem for "unborn persons." The court reasoned that if the law protected the property rights of unborn persons, it should also protect their "right to life." In contrast to the dissent, the majority saw nothing in the language of the wrongful death act, as it then stood, or in the related portions of the probate code dealing with the distribution of damages, to preclude an action for the wrongful death of an unborn child. The wrongful death act then in force allowed compensation only for the "pecuniary injury" caused to the "dependents" of the decedent; the court noted that this would not be easy to prove, but the allegation of such damage in the complaint was sufficient for disposition of

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22. 184 Ill. 359, 368, 55 N.E. 638, 640 (1900), overruled by Amann v. Faidy, 415 Ill. 422, 114 N.E.2d 412 (1953).
23. 385 Mich. at 135-37, 188 N.W.2d at 787-88.
24. 385 Mich. at 137, 188 N.W.2d at 788 (emphasis original).
   (1) If in an action or proceeding, other than in probate court, it appears that a person not in being may become entitled to a property interest, real or personal, legal or equitable, involved in or affected by the action or proceeding, and the interest of the unborn person is not or cannot otherwise properly be represented and protected, the court, upon its own motion, or upon the motion of any party, may appoint a suitable person to appear and act as guardian ad litem of the unborn person... See text accompanying note 142 infra.
26. 385 Mich. at 138, 188 N.W.2d at 788.
defendants’ motion for summary judgment. 28 Justice Black further
dissentcd on the issue of statutory construction and suggested that
the common law, through trespass on the case, could provide a remedy
whenever it saw an unredressed wrong, but that Womack, involving
injury to a surviving child, could not be used to alter what he found
to be the plain meaning of the legislature in enacting the statute. 29

Justice Black was correct in distinguishing the factual situation in
Womack, for the problem in O’Neill is indeed different. Not only
does the latter depend on statute rather than the common law, but its
decision also requires the abandonment of birth as the sine qua non
of life and of legal protection. An analysis of the question whether
these distinctions should have led to a different result may therefore
begin with a look at both the peculiar nature of wrongful death and
the ambivalent and often contradictory attitudes of the law toward
unborn children.

At common law, it was generally accepted that “in a civil Court,
the death of a human being could not be complained of as an in­
jury.” 30 In the United States, this position was first accepted by the
influential Massachusetts court, 31 and thereafter adopted in most other
jurisdictions. 32 Criticism of the rule revolved around two pro­
positions: it was anomalous for the law to provide an action for injury
but no action for death, thereby rendering the wrongdoer less ac­
countable when he killed rather than merely injured his victim; 33
and it was unjust to allow the family and dependents of the decedent
to go uncompensated after having been deprived of his support. 34
The common-law rule has now been changed by statute in every juris­
diction. 35 In a few states, survival statutes have been interpreted not
only to allow the action for injury to survive the victim’s death, but
also for additional liability of the tortfeasor for the death itself. 36
More common as a source of a death action are specific wrongful

29. 385 Mich. at 149-50, 188 N.W.2d at 794-95.
C.J.).
32. See generally S. SPEISER, RECOVERY FOR WRONGFUL DEATH § 1:3 (1966); Smedly,
U.S. 1 (1912); Gorke v. LeClerc, 23 Conn. Supp. 256, 181 A.2d 448 (1962); W. Prosser,
supra note 12, § 127, at 902 &: n.43; SPEISER, supra note 32, § 1:5.
34. E.g., Rowe v. Richards, 35 S.D. 201, 151 N.W. 1091 (1915); W. Prosser, supra
note 12, § 127, at 902.
35. See S. SPEISER, supra note 32, at 778-1004, collecting and comparing statutes. See
also 2 F. HARPER & F. JAMES, THE LAW OF TORTS, § 24.2 (1956); Rose, Foreign Enforce­
ment of Actions for Wrongful Death, 33 Mich. L. Rev. 545 (1935); Note, Wrongful
36. See, e.g., Kling v. Torello, 87 Conn. 301, 87 A. 987 (1919), interpreting what is
death acts,\textsuperscript{37} based generally on Lord Campbell's Fatal Accidents Act\textsuperscript{38} and directed toward the compensation of families of persons killed by creating new actions by or on behalf of the beneficiaries. Wrongful death acts in the United States have variant provisions concerning the proper plaintiff, the proper beneficiaries, and the types and distribution of damages.\textsuperscript{39} Compensation for the beneficiaries is frequently limited to their "pecuniary injury" from loss of decedent's services, ultimately based in some way on his earning capacity.\textsuperscript{40} In addition to the beneficiaries' recovery, the decedent's estate itself may be compensated for his actual pain and suffering before death, and the medical, funeral, and burial expenses for which the estate is liable.\textsuperscript{41} Each court must apply a statute which language and prior case law make virtually unique to the jurisdiction. When the issue is complicated by a prenatal child as the decedent, the decision often turns on these narrow distinctions.\textsuperscript{42} This situation has probably hindered the development of a clear trend on prenatal wrongful death to complement the almost complete reversal on prenatal injury.

The attitude of the law toward the unborn child has differed according to the area involved and its underlying concepts and policy. It has been settled since Blackstone's day that the property rights of an unborn child are protected by the law,\textsuperscript{43} subject to the require-


\textsuperscript{38} 9 & 10 Vict., c. 98 (1846).

\textsuperscript{39} See statutes collected in S. Speiser, supra note 32, § 11:16, at 636-37 (plaintiff and beneficiaries); § 3:1, at 54-63 (damages).


\textsuperscript{42} See, e.g., Norman v. Murphy, 124 Cal. App. 2d 95, 97, 268 F.2d 178, 179 (1954), which held that an unborn child was not a "minor child" for wrongful death purposes on the basis of a statutory provision (now Cal. Civ. Code § 25 (West 1970)), which provided for determining the age of minors from "the first minute of the day on which persons are born." Compare Gullibor v. Rizzo, 331 F.2d 557 (3d Cir. 1964), applying Pennsylvania law and allowing prenatal wrongful death recovery on the basis of the case law of prenatal injury, with Carroll v. Sklof, 415 Pa. 47, 202 A.2d 9 (1964), subsequently interpreting Pennsylvania law to deny the action on the ground, \textit{inter alia}, of statutory requirements for distribution of damages by way of decedent's estate and the inability of an unborn child to pass such an estate. Cf. 385 Mich. at 199, 188 N.W.2d at 789 (Black, J., dissenting).

\textsuperscript{43} 1 Blackstone, Commentaries, § 175 (Jones ed. 1915). See generally Brodie, \textit{The
ments that he be born alive 44 and that considering him legally existent while en ventre sa mere be to his benefit.45 Legal recognition was accorded "for the purpose of providing for and protecting the child, in the hope and expectation that it will be born alive and be capable of enjoying those rights which are thus preserved for it in anticipation."46 In this context, the live-birth requirement is not surprising. The injustice of depriving a posthumous child of an inheritance is apparent only if the child is alive and disinherited. Property law had early developed the idea of inchoate rights vesting upon some future date, and the property rights of the unborn child, though not precisely identical to any kind of future interest, are susceptible of the same analysis.47 Future interests themselves may be created for the benefit of persons not yet conceived, as well as those en ventre sa mere.48 But those rights could not be passed by a stillborn child, on the logic that since he had not yet actually lived, he could not die.49 After some vacillation, it was also settled that such inchoate rights might arise at any time during the period of gestation.50 There is some indication, however, that to take property, the child must have been born alive and viable; a child born so prematurely that it was obvious he would soon die was treated as if he had been born dead.51

Contrariwise, the courts have been wary of extending criminal sanctions to punish the killing of an unborn child. Killing an unborn quick child was at most a misdemeanor at common law, while killing the fetus before it had quickened was no crime.52 The degree of homi-


47. 1 American Law of Property § 4.68 (A. J. Casner ed. 1952).
48. Id. at § 4.67.
49. The court was persuaded by an argument to this effect in Marsellis v. Thalhimer, 2 Paige 55 (N.Y. 1830). See 2 Paige at 38 (appellee's brief).
51. Tomlin v. Laws, 301 Ill. 616, 134 N.E. 24 (1922) (dictum); Marsellis v. Thalhimer, 2 Paige 55 (N.Y. 1830) (dictum based on the civil-law doctrine).
cide has been increased to manslaughter in some jurisdictions, with the requirement that the child be quick usually retained.\textsuperscript{63} Infanticide could be punished as murder only after the prosecution had proved live birth, the presumption being that the child had been born dead.\textsuperscript{64} Although the live-birth requirement led to a good deal of unresolved debate on how it was to be established, it remained unaltered. The strict construction of criminal law, with its corollary that there may be no punishment unless clearly authorized by law, has thwarted any judicial tendency to treat as murder the killing of a child not yet born.\textsuperscript{56}

Paralleling the common law of homicide was that of abortion. The latter constituted a misdemeanor if the child was quick, but no crime otherwise.\textsuperscript{56} The idea that an unborn child was less deserving of protection before quickening drew some adverse comment, particularly when compared with the protection of property rights throughout gestation,\textsuperscript{67} and statutes were eventually passed broad enough to outlaw abortion at any stage of pregnancy.\textsuperscript{58} Indeed the definition of abortion has been expanded in some cases to include an attempt to cause a miscarriage, dispensing entirely with the need for an existing fetus at any level of development. Thus a conviction for abortion could be sustained even though the woman was not pregnant,\textsuperscript{59} or when pregnancy was required by the statute, even if the

Note, 46 Notre Dame Law. 349, supra note 43; Note, 2 Suffolk L. Rev. 228, supra note 43.

53. See, e.g., Mich. Comp. Laws Ann. § 750.322 (1968), which provides: "The willful killing of an unborn quick child by any injury to the mother of such child, which would be murder if it resulted in the death of such mother, shall be deemed manslaughter." See also R. Perkins, supra note 52, at 29.


55. Thus, in Keefer v. Superior Court, 2 Cal. 3d 619, 470 P.2d 617, 87 Cal. Rptr. 481 (1970), the court was constrained to hold that a child in the process of being born is not a "human being" in terms of the homicide statute, primarily on the ground that to hold otherwise would be a violation of due process: the accused could not have known that his act constituted the crime of murder. This decision was overruled by the legislature in an amendment (Assembly Bill 816, 1970 Reg. Ses.) to Cal. Penal Code § 187 (West Supp. 1968) declaring feticide to be murder. See Cal. Penal Code § 187 (West Supp. 1971). This legislative response is discussed in Comment, Is the Intentional Killing of an Unborn Child Homicide? California's Law To Punish the Willful Killing of a Fetus, 2 Pac. L.J. 170 (1971).


58. R. Perkins, supra note 52, at 141.

fetus was dead. While the prohibition of abortion at common law could be considered a protection of the unborn child's right to life, the effect of these later decisions has been to make the mother rather than the fetus the victim of the crime. In any case, the penalty was never as severe for an abortion as for a postnatal homicide, and the right of the fetus to life was always subordinated to the life, and in most cases to the health, of the mother.

The law of prenatal torts has developed against this common-law background, but has presented special problems of its own. Three different factual situations may be distinguished. The first is represented by Womack: an unborn child is injured en ventre sa mere, is born, and then brings suit for his injuries through a guardian. With the exception of Alabama, every United States jurisdiction that has considered the issue now allows recovery on these facts. The second situation involving a tortious prenatal injury arises when the child is born but subsequently dies from the effects of the injury. This is a straightforward wrongful death situation, except that the original injury is prenatal. The child would have had an action for personal injuries had he lived; since he was born alive and lived for at least some time after birth, there is little hesitation in allowing suit for his wrongful death. Third, in the prenatal wrongful death situation as in O'Neill, the child is stillborn as a result of defendant's tortious act; the death occurs before birth. It is here that the cases split, although a majority of jurisdictions now allow recovery.

61. In re Vickers, 371 Mich. 114, 117, 123 N.W.2d 253, 254 (1963); State v. Thompson, 56 N.J. Super. 498, 444, 153 A.2d 364, 367 (1959). One factor promoting this change of attitude has been the justification of abortion law as protecting women from serious injury or death from improperly administered abortions. For a criticism of this view as the sole justification, see Note, 46 Notre Dame Law. 349, supra note 43.
62. R. PERKINS, supra note 52, at 145-47.
63. See notes 7-18 supra and accompanying text.
do must not merely treat the unborn child as susceptible to injury but also find birth irrelevant to whether he is a person who can be wrongfully killed within the terms of the statute.

When courts first began to allow recovery for prenatal wrongful death, it was natural for them to draw primarily on the developing law and commentary of the related tort of prenatal injury. The analogy was particularly apt in the earliest cases, which involved obstetrical malpractice actions against attending physicians who negligently destroyed the infants in the process of delivery. Not only could a court simplify the problem of the defendant’s duty of due care toward the unborn child, since the doctor certainly knew the mother was pregnant, but the act also occurred immediately before birth was due, making the requirement of live birth seem particularly arbitrary. In such a case, one court found it “too plain for argument that where independent existence is possible and life is destroyed through a wrongful act a cause of action arises under the [wrongful death] statutes cited.” The court did not discuss the role of birth in establishing a person whom the law could recognize as having been wrongfully killed, and it has been criticized for ignoring this point. Nevertheless, the action has gained considerable acceptance, and the O'Neill decision follows that trend in recognizing the unborn as persons for at least some purposes. How far this acknowledgment goes is not made entirely clear, but the answer is important not only to tort law but also to other legal treatment of the unborn, particularly

Two courts, while denying recovery on the particular facts presented, intimated that the action would be allowed under proper circumstances. Alaska: Mace v. Jung, 210 F. Supp. 706 (D. Alas. 1962) (not viable); Missouri: Acton v. Shields, 386 S.W.2d 369 (Mo. 1965) (not viable; beneficiaries collateral relatives, not parents).


Since allowing an action for prenatal injury does not necessarily imply that a court will allow an action for prenatal wrongful death (see notes 72-75 infra and accompanying text), the question must be regarded as open where it has not been specifically resolved.

66. Rainey v. Horn, 221 Miss. 269, 72 S.2d 434 (1954); Verkennes v. Cornien, 229 Minn. 405, 38 N.W.2d 838 (1949).
to the current trend in abortion reform, which appears to be headed in the opposite direction.69

In finding that birth is irrelevant to recovery, O'Neill makes a major departure from the property and criminal law concepts, where live birth is of fundamental importance. Indeed, it diverges even from the prenatal injury cases like Womack, in which the victim has survived to bring his own action and his legal existence at the time of the lawsuit is not disputed. The real problem in the past in such cases was whether at the time of the injury the fetus was a person to whom a tort duty was owed.70 To support an affirmative conclusion, the courts have used two basic rationales. One is based on the causal relationship: if the natural process of gestation is disrupted "resulting in harm to the child when born, it is immaterial whether before birth the child is considered a person in being."71 This approach is consonant with the established proposition in the law of torts that if a chain of causation can be established, the tort occurs when the harm occurs, notwithstanding that defendant's own act or omission has been completed.72 Under this reasoning, the harm completing the tort is not the fetal trauma but the suffering caused by the tort victim's continuing disablement and attendant medical expenses. Under this reasoning there is damage, and hence a cause of action, only after birth. Even when the wrongful death statute is coextensive with the common law, as held by the O'Neill case, no wrongful death action would arise unless the child had first acquired a personal injury cause of action.73 Thus, a court may allow recovery for postnatal

69. The current attack on the statutes broadly prohibiting abortion (see notes 56-62 supra and accompanying text) is based not on the proposition that the fetus has no rights, but that the laws are an invasion of the mother's right to privacy, Babbitz v. McCann, 310 F. Supp. 293 (E.D. Wis. 1970), vacated and remanded on other grounds, 402 U.S. 903 (1970); that the laws are unconstitutionally vague, People v. Belous, 71 Cal. 2d 954, 48 P.2d 194, 80 Cal. Rptr. 354 (1969), cert. denied, 397 U.S. 915 (1970); or both, Roe v. Wade, 314 F. Supp. 1217 (N.D. Tex. 1970), appeal pending, 402 U.S. 941 (1971). Defense of such statutes, however, might be based on the proposition that the unborn child is constitutionally protected. See Noonan, supra note 43.

70. See, e.g., Magnolia Coca Cola Bottling Co. v. Jordan, 124 Tex. 347, 360, 78 S.W.2d 944, 949-50 (1935), overruled by Leal v. C.C. Pitts Sand & Gravel, Inc., 419 S.W.2d 820 (Tex. 1967); Dietrich v. Northampton, 138 Mass. 14, 16 (1884). There is little doubt now that the unborn are owed a duty. 2 F. Harper & F. James, supra note 35, § 18.3, at 1030: "[T]he improper canning of baby food today is negligence to a child born next week or next year, who consumes it to his injury. The limitation of the Palsgraf case contains no requirement that the interests within the range of peril be known or identified in the actor's mind, or even be in existence at the time of the negligence." See also Gordon, supra note 12, at 597-600. Duty and foreseeability problems have been subsumed into the larger question of the status of the unborn child in tort law and are rarely discussed in recent prenatal injury or wrongful death cases. But see Leal v. C.C. Pitts Sand & Gravel, Inc., 419 S.W.2d 820 (Tex. 1967), overruuling Magnolia Coca Cola Bottling Co. v. Jordan, 124 Tex. 347, 78 S.W.2d 944 (1935).


72. W. Prosser, supra note 12, § 30, at 143-44.

wrongful death, even if resulting from a prenatal injury, but can allow no recovery without a live birth.\textsuperscript{74} Womack, adopting the causation reasoning of Smith,\textsuperscript{75} did not require the result reached in O'Neill, and this theory has left jurisdictions free to give recovery for prenatal injury but to deny it for prenatal wrongful death.

To justify recovery in O'Neill, the Michigan court used a different approach to prenatal torts, based on the biological arguments of Justice Boggs' dissent in Allaire.\textsuperscript{76} The crux of that prenatal injury case, if recovery were to be allowed as Justice Boggs thought, was to find the unborn child a separate being, rather than merely a part of the mother to whom defendant was not separately liable.\textsuperscript{77} He had the additional task of distinguishing Dietrich, on which the majority had principally relied. His response was to turn to medical science as authority for the proposition that the unborn child, at least after it became viable, enjoyed an independent existence.\textsuperscript{78} Since the unborn child could survive even if his mother had died, his life was no longer directly dependent on hers, and he could be treated as a separate person. Thus birth became irrelevant to the unborn child's separate identity as a tort victim. With the increased knowledge of the prenatal causes of postnatal problems, it is natural, at least in medicine, to think of birth not as the beginning of life, but as the culmination of gestation: an infant can be defined as simply a "viable fetus which has been born."\textsuperscript{79} The entire process of gestation and the early postnatal life become one continuum in which birth is no more than an incident. An actionable claim for prenatal injury would arise as soon as this separate biological entity is injured.\textsuperscript{80}

The choice of theories makes no practical difference in a prenatal injury case when the child is born alive, but is decisive when the child is stillborn. Technically, if the prenatal injury is complete and actionable at the instant of fetal trauma, a subsequent death creates a death action immediately, without requiring an intervening live birth for the prenatal injury action to "accrue."\textsuperscript{81} This theory is


\textsuperscript{75} See text accompanying notes 13-18 supra.

\textsuperscript{76} See text accompanying note 22 supra. See also Gordon, supra note 12, at 589-90.

\textsuperscript{77} Mrs. Allaire was injured in an elevator accident, which left her subsequently born child permanently crippled. She settled with the hospital for her own injuries.


\textsuperscript{79} J. Greenhill, PRINCIPLES AND PRACTICE OF OBSTETRICS 7 (13th ed. 1965).

\textsuperscript{80} State ex rel. Odham v. Sherman, 234 Md. 179, 184, 198 A.2d 71, 73 (1964).

especially inviting under the wording of the Michigan wrongful death statute, which gives recovery for death “in every such case” in which there would have been an action at law. The idea of an unborn child capable of independent life as a “person” for personal injury might naturally lead to the assumption that he is the same “person” as is mentioned in the wrongful death statute.

On either theoretical basis, however, the very existence of the prenatal injury action has eliminated many of the practical arguments that could be made against prenatal wrongful death. It is no longer possible to state flatly that the child is part of its mother. While it is not required that medical concepts be incorporated into the law, the courts have shown a willingness to adopt them if necessary to remedy what was, at least in prenatal injury cases, a clear injustice. Fear of fraudulent claims and the difficulty of proving causal connection have not been allowed to stand in the way of a prenatal injury action. Neither should they prevent the recognition of an action for prenatal wrongful death. There does not seem to be any significant difference in the proof of cause and effect in a wrongful death action than in a miscarriage action. The latter is admittedly susceptible of arousing the improper sympathy of the jury by the nature of the harm, while providing only indefinite indications of how the defendant brought the injury about. But this specter has not prevented the courts from recognizing that a miscarriage is a real injury to the mother and permitting damages to be recovered, with improper or speculative evidence eliminated by the trial judge. The same should be true for prenatal wrongful death. It is not the function of appellate courts to proscribe otherwise meritorious causes of action because of difficulty of proof in some cases. Rather the courts should be responding to those medical advances that provide increasingly more reliable proof of causation.

84. See Gordon, supra note 12, at 592.
88. Cf. 2 F. Harper & F. James, supra note 35, at 1023, in reference to prenatal injury: A categorical prohibition of attempts at proof must here be justified upon an assumption that false but legally sufficient evidence will not only be offered but also accepted by the tribunal, in cases of this kind, more often than true evidence will
The essential differences between prenatal injury and prenatal wrongful death must, however, be kept in mind. Every person—at least after birth—has a practical interest in his own continued existence, as well as his bodily integrity. This is not the interest protected by wrongful death statutes, for they vindicate the rights of the decedent’s family and dependents to the continued benefits of his existence. Likewise, what is really being vindicated in O’Neill is the right of the unborn child’s parents to recover for their loss. The concept of the unborn child as a juridical person should not be lifted out of the context of prenatal injury and imputed into the wrongful death statute just because it exists. But this idea, like the different treatments of the unborn child in property and criminal law, is there if the court needs it. The judicial attitude to prenatal wrongful death has now resulted in an approximately even split of jurisdictions, and a choice of reasonably coherent legal theories that justify either result without impairing the validity of the accepted common-law negligence suit for prenatal injuries to a surviving child. The courts’ choice of results must therefore turn to a greater extent on the policies of the law, and specifically those furthered by wrongful death.

The most perplexing problem in this regard has been the nature of the loss to be compensated. In cases of prenatal injury, the damage is clear. The plaintiff himself, for the rest of his life, “bears the seal of another’s fault.” The obvious necessity for giving compensation for this injury has been important in overriding the more technical considerations that the injury was inflicted before plaintiff’s birth. But for the wrongfully stillborn child, the reasons for giving compensation to his parents are less compelling. There can be no doubt that the parents have suffered a loss of some kind. They have been deprived of their prospective child with the companionship and services that he could have provided. They are also deprived of his present society and his influence on the family. The problem is whether any of this admitted loss is compensable by law. The wrongful death statute applicable to O’Neill, like many others still in force, would limit recoverable damages to the “pecuniary injury” suffered by the beneficiaries. Under such a statute, plaintiff must not only

be. Such an assumption not only shows a cynical lack of faith in the ability of our courts and juries to sift the true from the false, but it is a highly questionable one in fact.

92. See note 1 supra.
show that an injury has been suffered; he must do so by sufficient evidence so that the verdict is not based on mere speculation and a desire to punish the wrongdoer. The inability of plaintiff to offer proofs that are not "uniformly speculative" has been instrumental in the denial of the action, and the importance of this problem is confirmed by the fact that three of the jurisdictions that have allowed recovery did so on the ground that the relevant wrongful death statute provided nonpecuniary damages. Because the plaintiffs in O'Neill had appealed from a summary judgment, their allegations of pecuniary loss were taken at face value; they would stand or fall in the trial court. But in reference to the loss suffered, the court cited Breckon v. Franklin Fuel Co. which had put a narrow construction upon what would constitute pecuniary loss. It then drew by analogy from In re Olney's Estate the measure of damages: "[P]arents are entitled to the net value of their children's services; these are pecuniary injuries with respect to which the parents stand in the capacity of dependents . . . ." In holding that prenatal wrongful death results in calculable pecuniary loss, O'Neill is in a minority of the jurisdictions that have considered prenatal wrongful death.

The earlier Michigan case of Wycko v. Gnodtke had rejected the net-value-of-services measure of damages for the death of a minor child and proposed instead the use of an investment-in-child theory, under which plaintiff could recover for the expenses of birth, food, clothing, medicine, instruction, nurture, and shelter, and, in addition, the "value of mutual society and protection, in a word, companionship" of the decedent. Constrained by the wrongful death statute, Wycko necessarily considered companionship a pecuniary loss. Breckon, however, was devoted to the "identification and elimination of all of Wycko's unnecessary dicta," and left standing little more than its bare holding that damages of $14,000 for the death of a fourteen-year-old boy were not excessive. It repudiated the value of companionship as an element of pecuniary loss and rejected plaintiff's argument that minor amendments to the wrongful death statute

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95. 385 Mich. at 139, 188 N.W.2d at 783.
97. 309 Mich. 65, 14 N.W.2d 574 (1944) (damages to husband for wrongful death of wife).
98. 385 Mich. at 139, 188 N.W.2d at 783.
100. 361 Mich. at 339-40, 105 N.W.2d at 122.
101. 383 Mich. at 271, 174 N.W.2d at 843.
in 1965 had constituted a legislative endorsement of Wycko. Even under the Breckon interpretation of the statute, the O'Neill court concluded that pecuniary loss could be found in a prenatal case.102

The proof of pecuniary loss as so interpreted is indeed difficult, but not impossible. It differs from the problems of damages for the death of minor children more in degree than in kind. The most common standard for damages is essentially the earning capacity of the decedent, less the expenses of upbringing.103 For the death of a child, earning capacity and family services are usually considered only for the time of his minority,104 although probable support of his parents in their old age is sometimes taken into account.105 When a very young child has demonstrated no actual earning capacity, a damage recovery is usually still allowed, based on his prospective earnings, as well as his present capacity for services.106 The fact that the earnings of a stillborn child are necessarily prospective should not by itself defeat recovery. The problem lies in the scarcity of elements from which they can be computed. For the young child, the jury is usually allowed to consider items such as the child's age, sex, ambition, physical and mental characteristics, the parents' social and economic status, and the employment of other children in the family.107 This framework naturally allows considerable latitude for discretion of the jury but is not considered reason to bar the action.108

102. In so far as Wycko stands for the lost-investment theory, it was properly rejected by O'Neill. This approach justifies a larger recovery for the death of a minor child than the traditional pecuniary measure of net value of services. As applied in Wycko, it upheld a jury verdict of $14,000 plus funeral expenses against the trial judge's remittitur ordered on the ground that no boy of fourteen could have an earning capacity justifying a verdict of more than $7500. The parents' investment in the prenatal child is necessarily minimal. Even if all the expenses of pregnancy were considered to be such an investment, including the mother's general medical expenses and possibly lost earnings from leaving employment, a recovery based on that theory would be considerably less than under the normal standard. It does have the advantage of certainty of proof, and stripped of the element of loss of companionship, it is a legitimate measure of damages under a pecuniary-loss type statute. See Haupt v. Yale Rubber Co., 29 Mich. App. 223, 185 N.W.2d 161 (1970), appeal granted, 384 Mich. 813 (1971). But it bears little relation to the real injury involved. Comment, Developments in the Law of Prenatal Wrongful Death, 69 Dick. L. Rev. 258, 267 (1965).

103. S. Speiser, supra note 32, § 3:1, at 60, § 4:20, at 332.

104. S. Speiser, supra note 32, § 4:20, at 332.


In the case of the stillborn child, fewer of these elements are present, but the child’s sex, to some extent his physical characteristics, and the family’s position in life can still be determined, and from these it would seem that a jury could find the pecuniary value of his life to his parents with no more speculation than is normal in the case of infant death. The law allows recovery in the latter case because it accepts that the life of an infant has some value. The law should allow the same for prenatal death unless it is prepared to say that the life of an unborn child has no value at all.

Indeed, this problem also comes down to the relevance of birth as a place to draw the line, or the relevance of any line. But even if the biological view of life as a continuum is rejected when considering the child, the issue here is the parents and their loss. Birth may be relevant to the nature of the companionship and society of the child, but it is hardly relevant to the existence of the pecuniary loss suffered by the parents. As the issue is primarily one of sufficiency of evidence, the Michigan court was correct in leaving its determination to the trial judge, rather than deciding it on a motion for summary judgment.

At any rate, future plaintiffs in similar Michigan cases will have less of a problem. Only twenty-one days after the O’Neill decision, the legislature approved an amendment to the wrongful death statute deleting all references to “pecuniary” loss and specifically providing recovery “for the loss of the society and companionship [sic] of the deceased.” While the precise effect of the amended statute is unclear, it does provide an element of damages not limited by the difficult proof of pecuniary loss. Damages for loss of companionship may themselves be somewhat speculative in application, but they surely correspond more closely with the actual loss suffered and the difficulty of proof should not deter the courts. Their association with the

109. In Hord v. National Homeopathic Hosp., 102 F. Supp. 792 (D.D.C. 1952), affd. per curiam, 204 F.2d 397 (D.C. Cir. 1953), damages of $17,000 were allowed for the death of an infant three days after birth from the effects of a delivery room accident. It is difficult to think of any item of proof of pecuniary loss present in such a case that was not present, for example, in Rainey v. Horn, 221 Miss. 269, 72 S.2d 434 (1954), where the obstetrician negligently killed the baby shortly before it would otherwise have been normally born. The only distinction is that the first child proved his ability to survive birth. But the chance that a child would have died from other causes shortly after defendant actually killed him is always present, and has never been considered to make damages more speculative. Inasmuch as the elements of evidence focus on the actual characteristics of the child, they will naturally be more difficult to prove as the wrongful death occurs earlier in pregnancy, and this factor will contribute to the diminution of the recovery, reflecting what the jury in any case would probably consider to be the pecuniary value of the unborn child’s life. See generally Del Tufo, Recovery for Prenatal Torts: Actions for Wrongful Death, 15 Rutgers L. Rev. 61 (1960).

110. Gordon, supra note 12, at 593-94.

111. See Del Tufo, supra note 109, at 76-78.

112. Pub. Act No. 65 was enacted July 28, 1971, and became effective ninety days after end of session. O’Neill was decided on July 7, 1971.

“investment” theory of Wycko would suggest that they apply to present rather than prospective companionship. But the companionship of an unborn child is felt by the family, psychologically as well as physically. This is particularly true after quickening, and to this extent it seems probable that recovery would be higher for fetal loss later in pregnancy than earlier. But companionship undeniably exists before birth, and if it is lost through the tortious act of another, the loss can be compensated under the statute.

By viewing the action in terms of the parents’ loss, rather than the harm done to the unborn child itself, the court can avoid the complex problem of the nature of the injury. The Michigan court speaks of the law’s solicitude for “the first unalienable right of man—the right to life itself.” But the Michigan wrongful death statute does not and never did directly protect that right; rather it protects the rights of specified persons not to be deprived of the services—and now companionship—of the unborn child. In this respect, the prenatal wrongful death action is fundamentally different from the prenatal injury action, which protects the child’s “right to begin life with a sound mind and body,” and even more different from the problem of abortion, which concerns the unborn child’s right to life. Since prenatal wrongful death is an action on behalf of the parents, if the Michigan Legislature were to decide that abortion is neither criminal nor against public policy, the mother’s consent to abortion, by ordinary standards of tort law, would prevent conflict with the right of recovery for prenatal wrongful death. In practice, the wrongful death action does vindicate the child’s right to be born, but in a more limited context than the laws currently making abortion criminal. There is obviously a special relation between the mother and the unborn child that cannot be treated by the courts either as though there were two fully independent persons or as though the child were merely a part of the mother. The abortion issue involves the resolution of the mother’s rights as against the child’s when the two are in conflict. Whatever may be the deter-

cannot shirk this difficult problem of valuation. In the cases coming to us a life has been taken and it is our duty, as best we can, to put a fair valuation on it.”

114. See generally A. & L. Colman, supra note 91.
115. 385 Mich. at 158, 188 N.W.2d at 788.
mination of the rights in that context, this special relation gives a third-party tortfeasor no comparable rights. In decriminalizing abortion under certain limited conditions, the legislatures are saying that under those circumstances, abortion is not a wrongful death. Where, as in Michigan, the conscious solicitude of the law is for the parents' rights to the services and companionship of their children, born or unborn, the fact that some parents might choose to forgo these rights need not preclude recovery by those who do not.

In practice, the jury may award damages based on the gravity of the wrong, despite the requirement that they be compensatory only, and this suggests that the prenatal wrongful death action gives a windfall to the beneficiaries and punishes the tortfeasor. But to the extent that the action does vindicate the rights of the unborn child, such a result is not entirely unwarranted. Most commentators today reject the penal nature of tort law, though the wrongful death statutes of a few states are admittedly punitive, while others allow noncompensatory damages without requiring that loss be shown. One of the rationalizations for this scheme has been that it should not be made more profitable for the tortfeasor to kill his victims than injure them. The same anomaly is present in the law of prenatal torts, since an action for injury exists almost everywhere, but is not always matched by a comparable action for prenatal death. In fact, there is a double anomaly, since not only can the tortfeasor foreclose his own liability by doing more serious harm, but liability further turns on the fortuitous circumstance of whether


121. E.g., 2 F. HARPER & F. JAMES, supra note 35, §§ 12.1, at 746; W. PROSSER, supra note 12, § 2, at 9. This view has not always been accepted. See J. SALMOND, LAW OF TORTS § 6, at 29 (15th ed. 1952).


124. See note 33 supra and accompanying text.

125. Kwaterski v. State Farm Mut. Auto. Ins. Co., 34 Wis. 2d 14, 20, 148 N.W.2d 107, 110 (1967), notes that a doctor or a midwife whose negligent acts in delivering a baby produced the baby's death would be legally immune from a lawsuit. However, if they badly injured the child they would be exposed to liability. Such a legal rule would produce the absurd result that an unborn child who was badly injured by the tortious acts of another, but who was born alive, could recover while an unborn child, who was more severely injured and died as the result of the tortious acts of another, could recover nothing.

This was the essential situation present in Verkennes v. Cornies, 229 Minn. 365, 36 N.W.2d 838 (1949), and the precise facts of Rainey v. Horn, 221 Miss. 269, 72 S.2d 434 (1954), both of which allowed recovery. Neither case, however, gave that explicit justification.
or not birth—even traumatic birth—occurs before death. Courts allowing recovery have construed the wrongful death act to eliminate this problem, a not surprising result when it is considered that the act was originally passed to eliminate the analogous distinction between postnatal injury and death.

A defect in this argument is that killing the unborn child may not be as great a harm as injuring him. Therapeutic abortion statutes frankly recognize that some unborn children are better off dead, although the courts have been more reluctant to admit this. As far as the tortfeasor himself is concerned, his financial liability for injury may indeed be far greater than for death, even if the death action is allowed. But regardless of whether the wrong is greater or lesser, if the unborn child does have a right to be born alive (conditional on the mother’s consent), justice is not served by refusing to place a value on his life and his parents’ loss.

A different problem arises from the relation of the new action for prenatal wrongful death to the existing action of the mother for miscarriage. The physical harm involved in either action is essentially the same. Although the miscarriage action focuses on the mother’s injury, and prenatal wrongful death on the unborn child’s, the recovery from the second action is on behalf of the parents and naturally benefits the mother if she survives. This result leads to the possibility of a double recovery by the mother. Technically, compensation is given for two separate interests: the bodily injury of the mother, with immediately resulting mental distress, on the one hand, and her pecuniary or societal loss from the unborn child’s death on the other. In practice, however, the jury is likely to consider the totality of the wrong done whatever the legal theory involved.

The great majority of jurisdictions deny the mother in a mis-

131. W. PROSSER, supra note 12, § 55, at 338; Comment, supra note 102, at 297.
carriage action any recovery for the loss of the child itself but allow compensation for the attendant emotional distress at the time, which undoubtedly reflects the particular nature of the injury. In the few exceptions to this rule, the recovery edges toward the loss-of-companionship damages for prenatal wrongful death. The close relationship between the nature of the two actions suggests that a solution to the prenatal wrongful death problem might be to expand the action for miscarriage to include compensation for the loss of the child. While this proposal has not gained nearly the acceptance that the wrongful death approach has, it is apparent that the nature of prenatal wrongful death requires a re-examination of the miscarriage limitation. In the leading Michigan case, Tunnicliffe v. Bay Cities Consolidated Railway Co., plaintiff sought damages for loss of "the society, enjoyment, and prospective services of the child." The state supreme court denied recovery on the ground that such damage was too speculative for proof. Through the combined result of the O'Neill decision and the amendment to the wrongful death statute, all the damages that were sought and refused in Tunnicliffe can now be obtained in a suit for the wrongful death of the unborn child. Some courts have been disturbed by the prospect of converting every miscarriage action into a suit for wrongful death. In practice, the judicial workload would not be changed, although the legal theories might prove confusing to a jury, especially since such an action would probably be consolidated for trial with the mother's suit for her injuries or her beneficiary's suit for her wrongful death.


133. In Valence v. Louisiana Power & Light Co., 50 S.2d 847, 848 (La. App. 1951), the court was prepared to allow recovery for the "mental anguish, disappointment and grief caused by the present and future loss of companionship of the expected child," but plaintiff failed to prove causation. 50 S.2d at 850-52. In Snow v. Allen, 227 Ala. 615, 618-19, 151 S. 468, 471-72 (1933), the court made the distinction that "no recovery of damages is sought on account of the death of the child, but for the pain and anguish suffered by the mother on account of its death," and allowed the latter. These cases are distinguishable from prenatal wrongful death cases in that they do not allow recovery for the loss of the child itself under any method of valuation, and distinguishable from other miscarriage cases in that they allow damages for mental anguish caused by the loss of the child as well as damages for mental anguish caused by the mother's physical trauma.

134. Comment, supra note 102, at 269.

135. 102 Mich. 624, 61 N.W. 11 (1894).

136. 102 Mich. at 629, 61 N.W. at 12.

137. 102 Mich. at 631, 61 N.W. at 12.

138. E.g., Hogan v. McDaniel, 204 Tenn. 235, 243, 319 S.W.2d 221, 224-25 (1958).

139. See Mich. Cr. (Civ.) R. 505. In almost all situations the injury resulting in prenatal wrongful death would result in some separate harm to the mother compensable as a miscarriage. Prenatal wrongful death might be the only possible action if the
Yet even if the miscarriage action were to be expanded to allow damages for the loss of the child, it would not be appropriate in all fact situations, and it neglects the fact that some loss of companionship, if not all the pecuniary loss, is felt by the father as well. In the present state of the law, the action for miscarriage does not give a recovery for the loss of the child, and the prenatal wrongful death action will at least partially fill this gap in the law.

Since most courts must turn to a wrongful death statute to give recovery for the loss of the unborn child, the immediate issue becomes a matter of statutory construction, i.e., the statutory meaning of “person.” The Michigan wrongful death statute does not refer to the wrongfully stillborn child, and the wording of the statute, not to mention the ordinary use of the word “person” when the statute was written or even now, makes it unlikely that the legislators had this problem in mind when the statute was first written. The majority in O’Neill does not meet this issue squarely. It does offer for consideration the guardian ad litem statute as evidence that the legislature in 1968 did recognize property rights in “unborn persons,” but the analogy from property law is particularly inapposite. Recognition of the unborn child as a “person” whose rights must be protected in litigation is an established part of the common law; in fact, the guardian ad litem statute essentially parallels one originally enacted in 1899 as part of the Probate Code, but limited to the Probate Court. As noted above, the common law has always qualified its protection of property rights in the unborn with the requirement that they be born alive, precisely the requirement that the court must escape in allowing an action for prenatal wrongful death.

The “unborn child” in property law need not even be a biological entity en ventre sa mere; he may be the yet unconceived beneficiary of some future interest, but his property rights are not affected by his lack of biological being. The specific statutory reference to “unborn persons” might even be indicative of the fact that when the mother’s suit is barred by contributory negligence, such was the case in Mace v. Jung, 210 F. Supp. 706 (D. Alas. 1962), but the court rejected recovery for the wrongful death of a nonviable fetus and did not reach the issue. In Nevada, a community property state, contributory negligence of the father-beneficiary does not bar prenatal wrongful death recovery by the mother. White v. Yup, 85 Nev. 527, 458 P.2d 617 (1969).

140. E.g., the obstetrical malpractice situation of Rainey v. Horn, 221 Miss. 269, 72 S.2d 434 (1954). See note 125 supra.

141. 385 Mich. at 122-48, 188 N.W.2d at 790-94 (Black, J., dissenting).

142. See note 25 supra and accompanying text.


144. See text accompanying notes 49-51 supra.

legislature wants to refer to unborn persons, they make it explicit, and thus that lack of such reference means unborn persons are to be excluded.\textsuperscript{146}

Other ways have been sought to circumvent this problem of legislative intent. It was pointed out in \textit{Powers} that since unborn children may be beneficiaries under wrongful death acts by traditional property concepts,\textsuperscript{147} to deny the action would be to construe "person" to include unborn persons when used to describe the beneficiary but not when used in the same act to refer to the decedent.\textsuperscript{148} This view, of course, requires that "person" for purposes of tort law and property law be given the same meaning and assumes the conclusion. The Maryland supreme court could avoid the entire problem of the meaning of "person" since the Maryland statute uses the words "person" and "party" interchangeably to refer to the being whose death is the subject of the action.\textsuperscript{149} In the context of prenatal wrongful death, such constructions do not do violence to the legislative intent. The wrongful death act is remedial and should not be defeated by strained interpretations.\textsuperscript{150} Its purpose is to compensate the survivors for their loss, and perhaps also to vindicate the life destroyed by the defendant's wrongful act. A loss to the survivors was undoubtedly sustained, and \textit{O'Neill} suggests that such a life was destroyed.

The biological approach provides a ready-made definition for "person" as it appears in the statute. The destruction of prenatal life is encompassed within the broad legislative language, and it is submitted that the statute covers death even though live birth is no longer possible.

A question left undecided by \textit{O'Neill}, however, is whether subsequent actions for prenatal wrongful death will be limited to the precise facts of that case, which involved a viable infant, or whether the case permits an action for the wrongful death of all unborn persons, regardless of their stage of development. On the one hand, \textit{O'Neill} bases the action for wrongful death on the existence of a common-law action for injury,\textsuperscript{151} and there is little doubt that on the strength of \textit{Womack} such a prenatal injury action will lie for injury inflicted at any level of gestation. On the other hand, \textit{O'Neill} emphasizes, as the biological approach requires it to do, that at the time

\textsuperscript{146} Norman v. Murphy, 124 Cal. App. 2d 95, 98, 266 P.2d 178, 180 (1954).

\textsuperscript{147} E.g., LaBlue v. Specker, 353 Mich. 558, 562-63, 100 N.W.2d 445, 447 (1960) (dramshop act); Boise Fayette Lumber Co. v. Larsen, 214 F.2d 373 (9th Cir. 1954); Texas & Pac. Ry. v. Robertson, 82 Tex. 657, 17 S.W. 1041 (1891).

\textsuperscript{148} 380 Mich. at 194-95, 156 N.W.2d at 545 (T.M. Kavanagh, J., dissenting).


\textsuperscript{151} 385 Mich. at 194, 188 N.W.2d at 785.
of the wrongful death of that infant, he was able to live independently, and notes that the complaint referred to the infant as "viable." In the current state of medicine, this is undoubtedly true of the eight-month old fetus in O'Neill, but not of the four-month old fetus in Womack, and thus there is some indication that the court might still limit the wrongful death action to the viable unborn child. This interpretation of the O'Neill decision is reinforced by the fact that all but one of the sixteen other courts allowing recovery for prenatal wrongful death did so in cases involving a viable fetus. The single exception is Georgia, where recovery was permitted for an unborn child who was quick, but not yet viable. While the viability distinction for prenatal wrongful death actions is rarely an explicit holding, it appears to be generally considered an essential element in this type of action.

The viability requirement was part of the original biological justification for giving legal personality to the unborn, as enunciated by Justice Bogg's dissent in Allaire. Since his opinion was largely responsible for the continuing protest against the position of no recovery for prenatal injury, the viability requirement was retained, at least by dicta, when recovery was at last allowed. The issue was felt to be not whether the child had lived after birth, but whether

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152. 385 Mich. at 133-39, 188 N.W.2d at 785-88.
153. 385 Mich. at 132, 188 N.W.2d at 785. See note 78 supra.
154. After about twenty-two weeks of pregnancy, a fetus may live for a few hours after birth, but has virtually no chance of survival. The lungs are the last major organ to develop sufficiently to sustain life. This usually occurs at about twenty-six weeks, and a child born then has a chance to survive to adulthood. His chances of survival become increasingly greater with each added week of uterine life, and after twenty-eight weeks the child can be considered medically viable. See R. Nesbitt, Perinatal Loss in Modern Obstetrics 65 (1957); E. Taylor, Beck's Obstetrical Practice 1-39 (8th ed. 1966). Continued medical progress may create additional problems in defining independent existence. See generally Brodie, supra note 43.
155. See authorities cited in note 65 supra.
158. Mace v. Jung, 210 F. Supp. 706 (D. Alas. 1962), refused recovery for the wrongful death of a nonviable fetus but indicated the result might have been different had it been viable. See also Acton v. Shields, 386 S.W.2d 363 (Mo. 1965).
159. 184 Ill. at 368, 56 N.E. at 640. Since the majority in Allaire had relied upon Dietrich, which involved a nonviable fetus, by emphasizing viability Justice Bogg could distinguish Dietrich on its facts as well as overcome the duty problem. 184 Ill. at 372-73, 56 N.E. at 642.
he was viable at the time of the injury that caused his harm or stillbirth.161 Since viability was thought to determine a legal personality valid for all tort purposes, the effect was merely to use established concepts of tort law in a situation where the inception of legal personality had been moved back from birth to the time when the unborn child became viable. While claims for prenatal wrongful death were being rejected by some courts on the ground that the child was not born alive and therefore never became a person,162 other courts faced with children injured before viability who survived birth began to eliminate viability as a requirement.163 The causation approach to prenatal injury was consistent with both these developments, since it allowed recovery for tortious acts causing harm to a fetus whenever injured, provided there was live birth, but did not require finding the unborn child to be a person.164

The viability limitation is difficult to justify for either action. It is naturally much easier to think of a fully developed child ready to be born as a person than to impute the same quality to an embryo.165 This factor was undoubtedly involved in the early wrongful death actions against attending physicians when the fully developed child was ready to be born.166 But if birth itself is "merely a change in the form of life,"167 the time when the fetus becomes viable is even less of an event. Life is a continuum, and each prenatal event builds on previous ones going back ultimately to conception. The fetus, if left to develop normally, is a separate entity with an inherent capacity for independent life168 and an increasing probability of survival. This development may be altered by his injury or cut off by his death. In either case, there has been a loss, to the child directly if he is injured and born, or to the family if he is killed. Not only has

167. 385 Mich. at 135, 188 N.W.2d at 787.
viability nothing to do with the existence of the fetus, but practically speaking it is impossible to determine the time when viability is reached. The date of conception itself cannot be determined with certainty, and the rate at which the fetus develops is influenced by the child's genetic heritage, its physical characteristics, the mother's health, and other unique factors. The unborn child's ability to survive birth, the only sure determinant of viability, becomes a moot point if in fact the child is stillborn through another's tort.

Experience with the viability criterion for prenatal injury actions in other jurisdictions has led to its rejection as only frustrating the policies served by personal injury law and precluding recovery for some plaintiffs because of the fortuitous circumstance that they were not viable at the time of the injury. While the essential problems of wrongful death are different, they too are frustrated if viability is required. To the limited extent that the wrongful death action actually vindicates the rights of the unborn, it makes no more sense to hinge defendants' liability on viability than on birth. Even in Michigan where the punitive nature of the wrongful death action is rejected, the plain language of the statute requires the incorporation of the common-law liability for injury as the basis for the liability for death. Although the legislature in 1848 could not have foreseen all the changes in the common law, they surely knew that the common law was not static but subject to development by the courts. As the court pointed out in O'Neill in the context of birth, "It would be anomalous if we were to have two co-existing bodies of common law tort liability ... one static and frozen ... for wrongful death and one living and growing to apply in other cases."

The viability distinction is rendered even less meaningful when the purpose of wrongful death is viewed as that of giving recovery for the loss suffered by decedent's survivors. Whether or not they have suffered loss is unrelated to viability. Their difficulties of proof will increase as the loss occurs earlier in pregnancy, but this should not lead the court to say that such loss is nonexistent before

169. J. Greenhill, supra note 79, at 7.
170. Conception is assumed to occur two weeks after the last normal menses. Because of the difficulty of actually dating conception, plus differences in terminology between lunar (28 day) and calendar (28-31 day) months, an "eight months baby" has an age uncertainty that approaches one month. See generally J. Greenhill, supra note 79, at 3-5.
173. See text accompanying note 82 supra.
174. 385 Mich. at 134, 188 N.W.2d at 786.
175. Del Tufo, supra note 109, at 78.
the fetus becomes viable, any more than such loss is nonexistent before birth.

The retention of the viability distinction might serve several practical purposes, however. There is now significant authority to the effect that a viable unborn child is a person for the purposes of wrongful death.\(^{176}\) It is undoubtedly easier to consider the viable child as a person than to attribute the same quality to a fetus incapable of surviving birth, and hence it is easier in theory and in fact to define "person" as it appears in the wrongful death acts to mean "any viable human being, whether born or not." Since the wrongful death action is statutory, courts are required to consider the specific wording used by the legislature, and the viability distinction makes for a more palatable "one step at a time" approach. But this reasoning should not hide the fact that if the legislators did not consciously think about birth, they certainly did not think about viability as a characteristic of the entity for whose death they created the action.

A second possible use of the viability distinction is to reconcile the trend toward prenatal wrongful death recovery with the trend toward abortion reform. While several states now allow abortion for any fetus, regardless of age, upon approval of a panel of doctors,\(^{177}\) others permit the operation only up to a given fetal age,\(^{178}\) with the implication that beyond that age the fetus is protected by law.\(^{179}\) Analogies to other areas of the law can be deceptive, and since tort law, unlike criminal law, does not really protect the fetal right to life, but rather compensates it for injury if born or its parents if not, consistency with criminal and property law is not necessarily required. If identical treatment of the unborn is at all desirable, it should at least be achieved in tort law, where the issue is the relation of the killed or injured infant to a negligent tortfeasor, and the resulting harm to it or to the parents, rather than the quite different legal relation of the fetus to the mother.

It is doubtful that either of the above rationales justifies limiting recovery to the viable unborn child. On the other hand, such considerations suggest that it would not be unwise to seek an alternative way to compensate for the stillbirth or miscarriage of a nonviable fetus. The present advantage of a wrongful death action over a mis-

\(^{176}\) See cases cited in note 65 supra.


carriage action is that the former compensates in some measure for the loss of the child—a real loss suffered by the family. This naturally gives plaintiffs an incentive to use this action in addition to the action for miscarriage. The difficulties in proof will limit the number of actions brought when the strict pecuniary loss standard is followed. Where companionship is an element of damages, plaintiffs' somewhat easier burden of proof will be balanced with the relative difference in the effects on the family between the fetus felt to be alive and the mere knowledge of pregnancy. The unborn child does have a value to its parents, and its loss should be compensated. If the biological theory behind wrongful death will not suffice to allow the action for a nonviable fetus, recovery should at least be given in the miscarriage action, allowing the same damages for loss of society and companionship as provided in the amended Michigan wrongful death statute. In either case, O'Neill should serve as precedent for recovery for the death of an unborn child in any stage of development.