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anticipated conduct, serves the interests of society in general and the individual specifically.48

Joseph Van Walraven

TORTS: RECOVERY FOR PRENATAL INJURY AND THE WRONGFUL DEATH OF A STILLBORN FETUS

This article will consider the cause of action for the wrongful death of a stillborn fetus. In order to place this problem in its proper perspective, it is first necessary to understand the common law right of recovery for prenatal injury in cases where the injury inflicted by the wrongdoer is not severe enough to cause death of the fetus.

I.

HISTORY AND DEVELOPMENT OF THE RIGHT OF ACTION FOR PRENATAL INJURIES AT COMMON LAW

Although all jurisdictions have not directly passed on the question, it is generally accepted as the modern majority position that there is a right of action on common law principles for tortiously inflicted prenatal injuries. This, however, has not always been the majority position and is in fact a relatively recent development.1

The first American case to consider the possibility of recovery for prenatal injury was Dietrich v. Inhabitants of

48 Id. at 133; in Henry v. United States, 361 U.S. 98 (1959), the Court declared that "under our system suspicion is not enough for an officer to lay hands on a citizen. It is far better, so the Fourth Amendment teaches, that the guilty sometimes go free than that citizens be subject to easy arrest". 361 U.S. at 104.

The main thrust of Justice Holmes' opinion was that the injured fetus which died upon birth or shortly thereafter was an inextricable part of the mother and any injury suffered by it could be recovered by the mother in an action on her own behalf.

But no case, so far as we know, has ever decided that, if the infant survived, it could maintain an action for injuries received by it while in its mother's womb. . . . Taking all the foregoing considerations into account, and further, that, as the unborn child was a part of the mother at the time of the injury, any damage to it which was not too remote to be recovered for at all was recoverable by her. . . .

The Dietrich case was clearly not a perfect one in which to establish common law precedent allowing recovery for prenatal injuries. The child was not viable, there was no direct communication of the injury to the child, there is doubt whether the child experienced an extrauterine life, and the injury to the mother in the fourth or fifth month of pregnancy was communicated to the fetus without any clear chance for the wrongdoer to be aware of the existence of the fetus. A review of the cases considering this problem evidences an early reluctance on the part of common law courts to delve into the unknown world of the fetus, an area clearly within the province of medical experts. Additionally, it should be noted, while the Dietrich court cited the lack of precedent in denying the cause of action, later courts were not reluctant to cite Dietrich as authority for denying the cause of action, factual distinctions notwithstanding.

2 138 Mass. 14 (1884).
3 138 Mass. at 15, 17.
4 E.g., Allaire v. St. Luke's Hospital, 184 Ill. 359, 56 N.E. 638 (1900). Justice Holmes cited the lack of duty to the infant in the Dietrich opinion; the Allaire opinion cited Dietrich as authority for denying the action, but the action was against a hospital to which the pregnant woman had gone for prenatal care.
Despite persuasive dissents,5 some civil law decisions allowing the action,6 and actions based on specific statutes,7 not until 1949 did a decision of a court of last resort approve a cause of action for prenatal injury based on common law decisions alone.8

Williams v. Marion Rapid Transit, Inc.9 involved an action for prenatal injuries brought by a surviving child, and Verkennes v. Corniea10 involved the state wrongful death statute11 because the infant was stillborn. This difference is considered by some to be material on the ground that policy considerations are much stronger for allowing recovery to the living child whose mind or body is impaired by a prenatal injury than for allowing a cause of action to the statutory beneficiaries under a wrongful death statute in the event the infant is born dead.12

The forensic medical view followed by the court in Dietrich13 has been altered in the light of advancing medical technology, and in 1960 the court which 76 years earlier had set the American precedent denying a cause of action for prenatal injuries reconsidered its holding in light of such advances.

6 Cooper v. Blanck, 39 So.2d 352 (La. App. 1923).
8 Williams v. Marion Rapid Transit, Inc., 152 Ohio St. 114, 87 N.E.2d 334 (1949); Verkennes v. Corniea, 229 Minn. 365, 38 N.W.2d 838 (1949).
9 152 Ohio St. 114, 87 N.E.2d 334 (1949).
10 229 Minn. 365, 38 N.W.2d 838 (1949).
11 Minn. STAT. ANN. §573.02 (Supp. 1971).
12 E.g., Drabbels v. Skelly Oil Co., 155 Neb. 17, 50 N.W.2d 229 (1951); In re Logan's Estate, 4 Misc. 2d 263, 156 N.Y.S.2d 49 (1956). This policy argument was considered in Stidam v. Ashmore, 109 Ohio App. 431, 167 N.E.2d 106 (1959) upon a broad state constitutional declaration of policy affording a remedy for every wrong.
Prenatal Injuries

We think it advisable that in respect to the subject of prenatal injury the law of this Commonwealth should be in general in harmony with that of the large and growing proportion of the other States. . . . There is no need to reverse the Dietrich decision which doubtless was right when rendered but we recognize that in view of modern precedent its application should be limited to cases where the facts are essentially the same.14

With the assistance of advanced medical technology, modern courts have generally overcome their fears of the unknown world of the fetus and have allowed the infant plaintiff to bring an action in its own behalf for prenatal injuries. Dean Prosser characterized the remnants of the older rule denying the action as "... decisions not yet overruled."15

II.

The History and Nature of the Wrongful Death Action

Unlike the common law action for prenatal injury where the injured fetus is born alive, a cause of action for wrongful death is purely statutory.16 Although various reasons have been given for denial of an action at common law for the tortiously caused death of another,17 it appears the original

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17 E.g., Baker v. Bolton, 170 Eng. Rep. 1033 (K. B. 1808). Lord Ellenborough stated in denying a husband’s action for the death of his wife, “[i]n a civil court, the death of a human being [cannot] be complained of as an injury.” It has also been theorized that this concept grew from the fact that the property of a “felonious” wrongdoer escheated to the crown and this left no estate out of which to compensate the survivors. T. Plucknett, A Concise History of the
reason is buried somewhere beneath a great mass of case law. Some inroads were made on the concept that a cause of action died with the person as early as the 11th century, but these were primarily based on contract theories. The theory that a tortiously inflicted personal injury which resulted in death did not give rise to a cause of action was so deeply embedded in the common law that Parliament finally remedied the situation with the Fatal Accidents Act of 1846, more popularly cited as Lord Campbell’s Act.

Regardless of the theory to be blamed for the lack of a cause of action at common law for wrongfully caused death, it is primarily of historical interest. At the present time every jurisdiction in the common law system has made some provision either for the survival of a cause of action vested in the deceased at his death or for an original cause of action vested in specifically named individuals or the estate of the deceased.

Although a comparative analysis of the various wrongful death and survivor statutes is beyond the scope of this article, some of the more common characteristics of these acts should be noted to provide a basis of understanding for the problems encountered in the courts by the survivor or representative of the stillborn fetus.

Statutory remedies for tortiously inflicted death fall generally into two categories: either they preserve a cause of


\footnote{18} T. Plucknett, \textit{A Concise History of the Common Law}, 377 (5th ed. 1956).

\footnote{19} Id. at 378.

\footnote{20} Fatal Accidents Act of 1846, 9 & 10 Vict., c. 93.

\footnote{21} Prosser §§120, 121.

\footnote{22} For a detailed history and analysis of wrongful death statutes see Miller, \textit{Dead Men in Torts: Lord Campbell’s Act Was Not Enough}, 19 Cath. Univ. L. Rev. 283 (1970).
action vested in the deceased for his injuries at the instant of death (survivor statutes), or they create a new cause of action in a specified class of beneficiaries upon death (death statutes). Since the causes of action are creatures of statute in all jurisdictions, they vary widely. However, in general, the survivor statutes are aimed at preserving a cause of action for injuries of the deceased, including pain and suffering, at the time of death, while death statutes are aimed at compensating the beneficiaries, usually family or next of kin, for the pecuniary loss they have occasioned by the death.

In connection with the element of damages, many problems have grown out of litigation involving either type of statute, especially those classified as death statutes. Since the death statutes attempt to provide compensation for the death in the amount of pecuniary benefit the survivor would have received but for the death, there is an obvious element of speculation. This speculation is sometimes said to be greater when the decedent is a child of tender years.

III. WRONGFUL DEATH AND THE STILLBORN FETUS

In cases involving whether there is a cause of action by virtue of a given death statute for death of a fetus caused by prenatal injury, two general fact patterns are presented. In both situations the injury to the fetus is inflicted while it is en ventre sa mere. In the situation where the infant is born alive but thereafter dies as a result of the prenatal injury, absent a statutory prohibition to the contrary, the courts have

23 E.g., OKLA. STAT. tit. 12, §1051 (1961).
24 E.g., OKLA. STAT. tit. 12, §1053 (1961).
26 Damages in wrongful death actions are not alone in involving a degree of speculation. See Thomas, Medical Prophecy and the Single Award: The Problem and a Proposal, 1 Tulsa L. J. 135 (1964).
27 See part III (3) infra.
had little trouble in allowing the cause of action. The event of
birth is said to create a living person which the law will
recognize, thereby extending a right of action to a statutory
beneficiary for the death.\footnote{E.g. Drabbels v. Skelly Oil Co., 155 Neb. 17, 50 N.W.2d 229, 232 (1951). (A child born dead never became a person insofar as the law of torts is concerned.)}. In the other situation where the
fetus is injured \textit{en ventre sa mere} and is born dead, the courts
have encountered more difficulty in rationalizing the result.\footnote{It is surprising the courts have had so much difficulty with
this fact circumstance. The Supreme Court of the United
States allowed recovery in 1893 for prenatal death of calves
when the cows were injured in a train accident. N.Y., Lake

The concept of tort law is very broad, and "it is intended
to reconcile the policy of letting accidents lie where they
fall, and the reasonable freedom of others with the protec-
tion from injury."\footnote{O. Holmes, \textit{The Common Law} 115 (Howe ed. 1963).} The system is relatively loose and imaginat-	ive, and these characteristics have served the cause of justi-
tice well. The community tends to get the kind of tort law
it can afford "in dollars and cents.\footnote{Miller, \textit{supra} note 22, at 286.} Some of the problems, real or imaginary, that have been foreseen by the courts in
denying an action for the tortiously caused death of a still-
born fetus can be easily dealt with; others are not so easily
shoved aside.

As discussed earlier, the recognition of a cause of action
for tortiously inflicted prenatal injuries is a relatively new
concept in the common law. Many of the reasons given by
the former majority of jurisdictions in denying a cause of
action for such injuries have been more recently applied by
the slight minority\footnote{Comment, \textit{Wrongful Death and the Stillborn Fetus—A Cur-
tent Analysis}, 7 \textit{Houston L. Rev.} 449, 450-53.} of jurisdictions which have construed
wrongful death statutes as not applicable to the stillborn fetus.

\footnotetext[28]{E.g. Drabbels v. Skelly Oil Co., 155 Neb. 17, 50 N.W.2d 229, 232 (1951). (A child born dead never became a person insofar as the law of torts is concerned.)}
\footnotetext[29]{It is surprising the courts have had so much difficulty with this fact circumstance. The Supreme Court of the United States allowed recovery in 1893 for prenatal death of calves when the cows were injured in a train accident. N.Y., Lake Erie & W. R.R. v. Estill, 147 U.S. 591 (1893).}
\footnotetext[30]{O. Holmes, \textit{The Common Law} 115 (Howe ed. 1963).}
\footnotetext[31]{Miller, \textit{supra} note 22, at 286.}
(1) There is a lack of precedent for allowing the action.\textsuperscript{33} To this contention, Justice Stone articulated the reply:

If we search the precedents so intent upon the past that we have no eye for what is going on in the world about us, it is easy to find analogies and resemblances which will serve as superficial justification for the extension of a precedent to sets of facts whose social implications may be quite different from any which the precedents have considered. . . . If our appraisals are mechanical and superficial, the law which they generate will likewise be mechanical and superficial, to become at last but a dry and sterile formalism.\textsuperscript{84}

The novelty of an asserted right and the difficulty which might be encountered in enforcing that right should not be reasons for the denial of its existence. One of the primary attributes of the common law system is the adaptability and flexibility with which it meets the changing needs of the times and society.\textsuperscript{35} In the famous case of Woods v. Lancet\textsuperscript{36} the New York Court of Appeals in allowing an action for prenatal injuries stated:

The sum of the argument against plaintiff here is that there is no New York decision in which such a claim has been enforced. . . . We act in the finest common-law tradition when we adapt and alter decisional law to produce common-sense justice.

The same answer goes to the argument that the change we here propose should come from the Legislature, not the courts. Legislative action there could,

\textsuperscript{33} Dietrich v. Inhabitants of Northampton, 138 Mass. 14 (1884).
\textsuperscript{34} Stone, \textit{The Common Law in the United States}, 50 \textit{Harv. L. Rev.} 4, 9-10 (1936).
\textsuperscript{35} “Its principles have been determined by the needs of society and are ever susceptible to adaptation to new conditions, relations, and usages, as the progress of civilization may require.” Russick v. Hicks, 85 F. Supp. 281, 286 (W. D. Mich. 1949).
\textsuperscript{36} 303 N.Y. 349, 102 N.E.2d 691 (1951).
of course, be, but we abdicate our function, in a field peculiarly nonstatutory, when we refuse to reconsider an old and unsatisfactory court-made rule.\textsuperscript{37}

(2) The unborn child is not a separate person to whom a duty of care is owed under the law.\textsuperscript{38} Medical fact and reason do not support this position. This rationale for denial of an action was set forth as early as Dietrich.\textsuperscript{39} The Massachusetts court has since recognized the advancement of medical science and altered its position accordingly.\textsuperscript{40} In his dissent in Stemmer v. Kline:\textsuperscript{41} Justice Brogan set forth a summary of the physiological facts concerning the fetus:

While it is a fact that there is a close dependence by the unborn child on the organism of the mother, it is not disputed today that the mother and the child are two separate and distinct entities; that the unborn child has its own system of circulation of the blood separate and apart from the mother; that there is no communication between the two circulation systems; that the heart beat of the child is not in tune with that of the mother but is more rapid; that there is no dependence by the child on the mother except for sustenance.\textsuperscript{42}

Indeed, the child is dependent on the mother for sustenance, but most parents would testify to the fact that this dependence does not end at birth; it continues for many years thereafter.

Duty is a concept in the law of torts which involves a legally recognized standard of reasonable conduct owed by an individual to the entire world.\textsuperscript{43} On the issue of duty, as far as the concepts of time are involved, a factual alteration

\textsuperscript{37} Id. at 694.
\textsuperscript{38} White, The Right of Recovery for Prenatal Injuries, 12 La. L. Rev. 383, 400 n.86 (1952).
\textsuperscript{39} 138 Mass. 14 (1884).
\textsuperscript{41} 128 N.J.L. 455, 26 A.2d 489 (1942).
\textsuperscript{42} 26 A.2d. at 687.
\textsuperscript{43} PROSSER §53.
of the now-famous McPherson v. Buick Motor Co.\textsuperscript{44} case would give a shorthand illustration of the point. If the plaintiff in the case had been a child of tender years who had not been conceived before the defective automobile was sold to the retailer, it is submitted the results would have been the same by the application of a fiction of continuing negligence. In fact there was but a single act of negligence, a single violation of a standard of care to which all must answer, but the violation resulted in the harm just the same. The Dietrich\textsuperscript{45} decision referred to the fact that the mother was only in the fourth or fifth month of pregnancy, and the wrongdoer had no chance to be aware of the fetus' existence. It is submitted if a wrongdoer negligently crashed into a panel truck the legal standard of care owed to the contents of the truck would vary little whether it was loaded with china, children, or pregnant cows.\textsuperscript{46}

(3) The child is a part of the mother, and any wrong done to it will be remedied in a suit by her.\textsuperscript{47} This line of reasoning is closely related to that in (2) above. The problem with this rationale is "[n]o decision has permitted a mother's recovery for injury to that 'part of her' which was the unborn child."\textsuperscript{48} Clearly there is an element of speculation in every wrongful death action, and the younger (or for that matter the more aged and infirm) the decedent, the greater part the element of speculation plays. In this regard, it should be noted that the concept of damages in wrongful death actions is largely judicially created. A new measure of damages was announced in Wycko v. Gnadtke\textsuperscript{49} which has been readily

\textsuperscript{44} 217 N.Y. 382, 111 N.E. 1050 (1916).
\textsuperscript{45} 138 Mass. 14 (1884).
\textsuperscript{46} See O. Holmes, supra note 30.
\textsuperscript{47} Note, Torts: Possible Recoveries for Prenatal Injuries, 13 Okla. L. Rev. 92, 96 (1960).
\textsuperscript{48} Del Tufo, Recovery for Prenatal Torts: Actions for Wrongful Death, 15 Rut. L. Rev. 61, 67 (1960).
\textsuperscript{49} 361 Mich. 331, 105 N.W.2d 118 (1960).
accepted by some writers on the subject,\textsuperscript{50} and has a great
deal of common-sense appeal. In considering an appeal on the
issue of damages for the wrongful death of a 14-year-old child
the court first noted there was no statute which required the
measure of damages previously adopted.\textsuperscript{51} Then, in comment-
ing on the earlier rule\textsuperscript{52} the court stated:

\begin{quote}
The rulings reflect the philosophy of the times, its
ideals and its social conditions. It was the generation
of the debtor's prisons, of some 200 or more capital
offenses, and of the public flogging of women. It was
an era when ample work could be found for the agile
bodies and nimble fingers of small children. . . .

This, then, was the day . . . when employment of
children of tender years was the accepted practice and
their pecuniary contributions to the family both sub-
stantial and provable. (footnote omitted).\textsuperscript{53}
\end{quote}

The court then announced a new criterion for determining
the economic detriment suffered by the survivors due to the
wrongful death of a family member.

\begin{quote}
Just as with respect to a manufacturing plant, or
industrial machine, value involves the costs of acquisi-
tion, emplacement, upkeep, maintenance service, re-
pairs, and renovation, so, in our context, we must con-
sider the expenses of birth, of food, of clothing, of
 medicines, of instruction, of nurture and shelter. Moreover, just as an item of machinery forming part
of a functioning industrial plant has a value over and
above that of a similar item in a showroom, awaiting
purchase, so an individual member of a family has a
value to others as part of a functioning social and
economic unit. The value is the value of mutual so-
ciety and protection, in a word, companionship. (foot-
notes omitted).\textsuperscript{54}
\end{quote}

\begin{footnotes}
\item[50] \textit{Prosser} §121. \\
\item[51] 105 N.W.2d at 120-21. \\
\item[52] The so-called "economic benefit" rule. \\
\item[53] 105 N.W.2d at 120-21. \\
\item[54] \textit{Id.} at 122.
\end{footnotes}
In conclusion the court stated:

The fiction now employed as the measure of pecuniary loss should be abandoned. It perpetuates an attitude toward the value of a child's life completely repudiated by modern legislation and the enlightened child-welfare policies of this jurisdiction. It does violence to the intent of the act, which is to grant a recovery whenever a death 'of a person' is caused by the wrongful act of another.\(^55\)

The Michigan court announced a measure of damages more in keeping with the times by allowing some recovery for the social value of a human life. It is a generally accepted fact that a child is an economic burden rather than an economic benefit, but it would appear the policy and social interest in compensating the family for its loss of a member should be considered along with the purely economic loss. It is suspected that such factors have been considered by courts and juries alike, and a realistic measure of damages as announced by the Michigan court would spare both courts and juries endless rationalization in allowing recovery for the wrongful death of a young child or infant.

(4) Suits for the wrongful death of a stillborn fetus would promote fraudulent claims, result in a flood of litigation, and involve conjecture and speculation.\(^56\) The fears of speculation, conjecture and even fraudulent claims are not wholly unwarranted, but such fears seem to be the result of a confusion of evidentiary problems and the right of action.\(^57\) If the basic proposition that the decedent was a person at the time of the injury is accepted, the right of action could be enforced regardless of the procedural and technical problems.\(^58\) It is an unsound result to allow the difficulty of proof to destroy a

\(^{55}\) Id. at 124.

\(^{56}\) E.g., Magnolia Coca Cola Bottling Co. v. Jordan, 124 Tex. 347, 78 S.W.2d 944, 950 (1935).

\(^{57}\) Del Tufo, supra note 48, at 78.

legal right. Further, the evidentiary questions which would arise in an action for the wrongful death of a stillborn fetus would not be more difficult than evidentiary questions faced in "thousands of other negligence cases."\(^{59}\)

Why not allow the action, relegating to the evidentiary process its normal function of establishing causal sequence and screening out spurious claims? To do otherwise is to emasculate the remedial powers of tort law and to weaken the confidence of our society in the ability of the courts to provide redress for wrongful conduct.\(^{60}\)

**IV.**

**THE VIABILITY REQUIREMENT**

A viable fetus is one which has reached that stage of fetal development at which it may survive independent of its mother and thus has the capacity to live even if she dies.\(^{61}\) Once fetal life is recognized as worthy of the protection of the courts, the viability limitation becomes an invalid and objectionable restriction, leading to "absurd" results.\(^ {62}\)

The viability issue served the courts by giving them added security in the early cases recognizing fetal existence and traces its beginning in the field of prenatal injury to the dissent of Justice Boggs in *Allaire v. St. Luke's Hospital*.\(^ {63}\)

If the evidentiary requirements were utilized properly, the plaintiff's burden would automatically become greater the more remote in point of time from full-term the injury

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\(^{62}\) Jasinsky v. Potts, 153 Ohio St. 529, 536, 92 N.E.2d 809, 812 (1950).

\(^{63}\) 184 Ill. 359, 56 N.E. 638, 641 (1900).
was inflicted, and there would be no arbitrary cut-off point as in cases which adopt the viability requirement.\textsuperscript{64}

V.

STATUS OF THE STILLBORN FETUS IN OKLAHOMA

Oklahoma is aligned with the slight minority in holding that there is no right of action which vests in the representative of the stillborn fetus. In \textit{Howell v. Rushing},\textsuperscript{65} a case of first impression in Oklahoma, the Oklahoma Supreme Court held there was no right of action for the wrongful death of an infant \textit{en ventre sa mere}, and adopted the rule and rationale of Drabbels \textit{v. Skelly Oil Co.}\textsuperscript{66} In Drabbels, the Supreme Court of Nebraska affirmed a judgment sustaining the defendant's demurrer to the plaintiff's petition. The demurrer was couched in language urging that the decedent was dead when born and, therefore, not an existing person within the contemplation of the state wrongful death statute.\textsuperscript{67} The Drabbels court stated the right of action created by the statute exists only in cases wherein the injured "person" could have himself maintained an action for damages had he lived.\textsuperscript{68} Citing the then numerical weight of authority for denying recovery for prenatally inflicted injuries in the event the child lived and the rationale of \textit{Magnolia Coca Cola Bottling Co. v. Jordan},\textsuperscript{69} the court dismissed the plaintiff's contentions that the criminal or civil law had a bearing on the law of torts and concluded "an unborn child is a part of the mother until birth and, as such, has no juridical existence."\textsuperscript{70} The court noted the great

\textsuperscript{64} "'Separate Existence' is not a necessary theoretic component to recognizing a right in the infant." Del Tufo, \textit{supra} note 48, at 72.
\textsuperscript{65} 261 P.2d 217 (Okla. 1953).
\textsuperscript{66} 155 Neb. 17, 50 N.W.2d 229 (1951).
\textsuperscript{67} Neb. Rev. Stat. §30-809 (1943).
\textsuperscript{68} 50 N.W.2d at 230.
\textsuperscript{69} 124 Tex. 347, 78 S.W.2d 944 (1935).
\textsuperscript{70} 50 N.W.2d at 232.
advance in medical technology since the Dietrich case, but stated such facts had no effect on the legal rights of the child.\textsuperscript{71}

The Drabbels case left the possibility of recovery for prenatal injuries by the surviving but injured infant in doubt, but it is unlikely that the cause of action would have been allowed had the question been before the court.\textsuperscript{72}

The most recent Oklahoma Supreme Court decision regarding an action for the wrongful death of a stillborn fetus\textsuperscript{73} affirmed the Howell decision and held an Oklahoma statute providing “a child conceived, but not born is to be deemed an existing person so far as may be necessary for its interest in the event of its subsequent birth”\textsuperscript{74} contemplated the subsequent “live” birth of the child.\textsuperscript{75} The Oklahoma court continued its reliance on the Drabbels decision in distinguishing the purpose of the criminal law,\textsuperscript{76} cited by plaintiffs, and the law of torts.

The law relating to the possibility of recovery for prenatal injuries is not settled in Oklahoma since neither case which considered a prenatal tort required the court to pass directly on the question. Oklahoma may confine its statute\textsuperscript{77} providing for the interests of a child conceived and subsequently born to property concepts only. California did not

\textsuperscript{71} “Medical science may accelerate the birth of a viable child and thereby accelerate the time it came into juridical existence as a person independent of the mother.” \textit{Id.}

\textsuperscript{72} The opinion emphasized the numerical weight of authority denying an action for prenatal injuries at common law. 50 N.W.2d at 230.

\textsuperscript{73} Padillow v. Elrod, 424 P.2d 16 (Okla. 1967).

\textsuperscript{74} OKLA. STAT. tit. 15, §15 (1961).

\textsuperscript{75} 424 P.2d at 18.

\textsuperscript{76} OKLA. STAT. tit. 21, §§713, 714 (1961). (Prohibiting the killing of an unborn quick child and procuring the destruction of an unborn child.)

\textsuperscript{77} OKLA. STAT. tit. 15, §15 (1961).
so confine a nearly identical statute and allowed recovery for prenatal injuries by a surviving but maimed infant in 1939. In this connection, California subsequently was called on to consider the Scott v. McPheeters holding in conjunction with the state wrongful death statute which specifically refers to minors. The court determined the wrongful death statute, which is not derivative, contemplated three classes of persons: minor persons, adult persons, and unborn persons. The court, in effect, strictly construed the statute and found only the death of adult persons or minor persons gave rise to a cause of action.

Two Oklahoma decisions stand in the way of recovery for the tortiously caused death of a fetus. Possibly, as lawyers, who are traditionally adept at “weaving much law from thin materials,” become more concerned with the status of the stillborn fetus, the case law in Oklahoma can be altered before any further solidification takes place. Unless the court limits Oklahoma’s statutory enactments relating to minors strictly to property concepts, there is ample statutory authority to avoid the distinctions in classes of persons developed in California. Oklahoma’s wrongful death statute is derivative, and minor persons are not mentioned as a class. Additionally, all persons who are not minors by statute are adults.

78 CAL. CIV. CODE §29 (West 1954).
80 CAL. CIV. PRO. CODE §377 (West 1954).
83 Miller, supra note 22, at 288.
86 “... if the former [deceased] might have maintained an action had he lived. ...” OKLA. STAT. tit. 12, §1053 (1961).
87 Generally, males under 21 years and females under 18 years. OKLA. STAT. tit. 15, §13 (1961).
88 “All other persons are adults.” OKLA. STAT. tit. 15, §14 (1961).
Although Oklahoma has adopted the Drabbels\(^{89}\) view that the criminal law does not affect tort law\(^{90}\) there is evidence of a legislative intention in the criminal statutes\(^{91}\) to protect the unborn fetus. The Constitution of Oklahoma provides that the “right of action” to recover damages for wrongful death “shall never be abrogated.”\(^{92}\) The state constitution further provides “[a]ll persons have the inherent right to life. . . .”\(^{93}\) “[t]he courts of justice of the State shall be open to every person. . . ; and right and justice shall be administered without sale, denial, delay, or prejudice.”\(^{94}\) The Supreme Court of Oklahoma has stated, “[f]rom the language of this section of the Bill of Rights [art. 2, §6], it appears to us that the framers of our Constitution clearly intended to open the courts of justice to every person, no matter whom, for redress of wrongs and for reparation for injuries.”\(^{95}\) In addition to the broad constitutional declaration of an “open door” policy for the courts, the constitution further provides any provision of a contract which attempts to waive any of the benefits of the constitution “shall be null and void.”\(^{96}\)

It is respectfully submitted that there is ample authority for the Supreme Court of Oklahoma “to act in the finest tradition of the common law”\(^{97}\) in bringing the law of the state into harmony with the current majority view which recognizes a right of action under wrongful death statutes for the tortiously caused death of a stillborn fetus.

\(^{89}\) 155 Neb. 17, 50 N.W.2d 229 (1951).
\(^{90}\) 424 P.2d at 18.
\(^{91}\) OKLA. STAT.tit. 21, §§713, 714 (1961).
\(^{92}\) OKLA. CONST. art. 23, §7.
\(^{93}\) OKLA. CONST. art. 2, §2.
\(^{94}\) OKLA. CONST. art. 2, §6.
\(^{95}\) Fiedeer v. Fiedeer, 42 Okla. 124, 140 P. 1022, 1024 (1914).
\(^{96}\) OKLA. CONST. art. 23, §8.
VI. CONCLUSION

To attempt to reconcile the varied and conflicting decisions regarding the existence of any right of recovery for prenatal torts would be a futile endeavor. Any distinction for the purposes of a wrongful death action, absent a clear legislative expression to the contrary, between an infant born injured and an infant stillborn would be the result of abstract, mechanical, and technical reasoning. In effect it would reward a wrongdoer who injured a fetus severely enough to cause its immediate death. In recognizing the stillborn fetus for the purposes of wrongful death statutes, the courts would not be throwing the door wide-open to all claims regardless of their merit. Through existing and traditionally recognized evidentiary principles the courts could maintain proper scrutiny to avoid unjust results. Evidentiary considerations and the right of action itself too often have been confused. The law, particularly the law of torts, should be more than “practical;” it should remain flexible and adaptable in the finest common law tradition to serve the social and economic needs of the community.

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