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Death - Action for Causing Death - Wrongful Death of Viable Fetus

Paul M. Beeks

DEATH—ACTION FOR CAUSING DEATH—WRONGFUL DEATH OF VIABLE FETUS—Plaintiff brought an action under the Kansas wrongful death statute for the death of her stillborn child as a result of prenatal injuries. The Kansas Supreme Court *held*, two justices dissenting, that the parent of an unborn, viable child may maintain an action for its death. *Hale v. Manion*, 368 P.2d 1 (Kan. 1962).

At common law the right to recover damages for personal injuries was extinguished with the death of the injured person.[1] Under a wrongful death statute, the heirs or personal representative of a decedent have a cause of action for his death, if the decedent would have had a right of action for his injuries.[3] Thus the question arises; did the viable[3] infant have a cause of action for its injuries? The early cases held in the negative, the rationale being that until birth an infant was a part of the mother, not a separate entity, and was unable to sue.[4]

The first breakthrough came in 1946 when an infant was allowed to recover for prenatal injuries which it suffered at the hands of the delivering doctor.[5] Recovery is based on the idea that a viable child is in fact a separate person and thus would have a right to recover for prenatal injuries had it survived.[6] That there will be no remedy for the wrong should recovery be denied is another reason advanced.[7]

In 1949 the Minnesota Court allowed recovery under its wrongful death statute to the parents of an infant that was born dead as a result of prenatal injuries.[8] This case has since

1. Norman v. Murphy, 124 Cal. App. 2d 95, 268 P.2d 178, 179 (1954) (dictum); Drabbels v. Skelly Oil Co., 155 Neb. 17, 50 N.W.2d 229, 230 (1951) (dictum); Drabner v. Peters, 232 N.Y. 220, 133 N.E. 567, 568 (1921) (dictum).
2. **E. g.,** Kansas Gen. Stat. Ann. § 60-3203 (Supp. 1961) which allows the personal representative to bring the action; Minn. State. Ann. § 573-02 (Supp. 1961) which allows the personal representative to bring the action; N.D. Cent. Code ch. 32-21 (1961) which permits certain lineal heirs to bring the action and if they refuse the personal representative may do so.
3. West v. McCoy, 233 S.C. 369, 375, 105 S.E.2d 88, 90-91 (1958) in which viable fetus is defined as meaning that ". . . the child has reached a stage of development where it can live outside the female body as well as within it. A fetus generally becomes a viable child between the sixth and seventh month of existence."
4. **E. g.,** Allaire v. St. Luke's Hospital, 184 Ill. 359, 56 N.E. 638 (1900); Dietrich v. Inhabitants of Northampton, 138 Mass. 14, 52 Am. Rep. 242 (1884); Gorman v. Budlong, 23 R.I. 169, 49 Atl. 704 (1901).
5. Bonbrest v. Kotz, 65 F. Supp. 138 (D.D.C. 1946) which followed Montreal Tramways v. Leville, 4 Dom. L. Rep. 337 (1933) wherein recovery was allowed against a negligently operated tramway for injuries sustained; **cf.** Cooper v. Blanck, 39 So. 2d 352 (La. 1923) (Case decided under civil law; not reported until 1949).
6. Smith v. Brennan, 31 N.J. 353, 157 A.2d 497 (1960) **overruling** Stemmer v. Kline, 128 N.J.L. 455, 26 A.2d 684 (1942); Woods v. Lancet, 303 N.Y. 349, 102 N.E.2d 691 (1951); Jasinsky v. Potts, 153 Ohio St. 529, 92 N.E.2d 809 (1950); Mallison v. Pomeroy, 205 Ore. 690, 291 P.2d 225 (1955).
7. Bonbrest v. Kotz, 65 F. Supp. 138 (D.D.C. 1946).
8. Verkennes v. Corniea, 229 Minn. 365, 38 N.W.2d 838 (1949).

been followed by a number of other courts,[9] including the court in the instant case, thus establishing a trend.[10]

There are however a number of recent decisions which deny recovery.[11] The theory advanced in these cases is that the wrongful death statutes are in derogation of the common law and to permit recovery is to indulge in judicial legislation.[12] It is reasoned that there is no person in being at the time of the injury to whom the defendant owes a duty of care.[13] It has also been pointed out that if the action can be maintained, it would necessarily follow that an infant could recover against its own mother for injuries occasioned by her negligence while pregnant with it.[14]

The question has not yet arisen in North Dakota. It is submitted that where independent existence is possible and life is destroyed through a wrongful act, a cause of action arises under our wrongful death statute. This view is in accord with a growing trend and seems to be supported by the better reasoning.

PAUL M. BEEKS

DIVORCE—DEFENSES—CONDONATION—THE IMPORTANCE OF FORGIVENESS—The plaintiff, husband, filed suit for divorce on the ground of extreme cruelty. The defendant filed a motion to dismiss the case on the ground that the parties had resumed cohabitation during pendency of the suit. During this period the defendant moved her personal effects back into the abode and the parties occupied the same double-bed and indulged in sexual intercourse. The defendant appealed from the court's granting of a divorce. On appeal the Florida Supreme Court *held*, one justice dissenting, that resumption of cohabitation during pendency of suit was not condonation requiring dismissal of the suit, where the element of forgiveness was lacking. The dissent argued that under the circumstances condonation appeared as a matter of law and was re-

9. Porter v. Lassiter, 91 Ga. 712, 87 S.E.2d 100 (1955); Mitchell v. Couch, 285 S.W.2d 901 (Ky. 1955); Poliquin v. MacDonald, 101 N.H. 104, 135 A.2d 249 (1957); Stidam v. Ashmore, 109 Ohio App. 431, 167 N.E.2d 106 (1959).
10. PROSSER, TORTS, § 36 (2d ed. 1955); 9 Kan. L. Rev. 343 (1961).
11. Norman v. Murphy, 124 Cal. App. 2d 95, 268 P.2d 178 (1954); Drabbels v. Skelly Oil Co., 155 Neb. 17, 50 N.W.2d 229 (1951); Howell v. Rushing, 261 P.2d 217 (Okla. 1953); Hogan v. McDaniel, 204 Tenn. 235, 319 S.W.2d 221 (1958).
12. See Norman v. Murphy, 124 Cal. App. 2d 95, 268 P.2d 178 (1954); Hogan v. McDaniel, 204 Tenn. 235, 319 S.W.2d 221 (1958).
13. See West v. McCoy, 233 S.C. 369, 105 S.E.2d 88 (1958).
14. Gorman v. Budlong, 23 R.I. 169, 49 Atl. 704, 707 (1901) (dictum).