CAUSE OF ACTION FOR WRONGFUL DEATH OF VIABLE FETUS

Stidam v. Ashmore
109 Ohio App. 431, 167 N.E.2d 106 (1959)

Plaintiff commenced an action for wrongful death alleging that she was administratrix of a stillborn child and that while it was a viable fetus the defendant's negligence caused its death. Demurrer sustained. The Court of Appeals for Madison County reversed, holding "that plaintiff's petition stated a valid cause of action. . . ."[1]

Actions for wrongful death are statutory in character. "At common law no action could be founded upon the death of a human being. The rule . . . has been altered . . . by statutes, the first of which, known as Lord Campbell's Act, was passed in England in 1846."[2] Ohio's wrongful death statutes, patterned after the English act, were originally enacted in 1851[3] and last amended in 1953.[4] They have, however, been subject to considerable judicial interpretation.[5]

The court in the instant case relied heavily upon two Ohio cases[6] which, while following the minority rule,[7] are part of a trend which has been applauded by legal critics.[8] The Ohio Supreme Court adopted the minority rule in according a tort action to a child for prenatal *injuries* in

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1 Wiseman, P. J., dissenting at page 435.

2 Prosser, Torts 705 (2d ed. 1955).

3 Hirsch, "What Elements of Damage Survive Under § 11-235, General Code," 33 Ohio L. Rep. 551 (1931).

4 Ohio Rev. Code § 2125.01 (1953) "When the death of a person is caused by wrongful act, neglect, or default which would have entitled the party injured to maintain an action and recover damages if death had not ensued . . . the person who would have been liable if death had not ensued, . . . shall be liable to an action for damages, not withstanding the death of the person injured. . . ."

Ohio Rev. Code § 2125.02 (1953) "An action for wrongful death . . . shall be for the exclusive benefit of the surviving spouse, the children, and other next of kin of the descendent. The jury may give such damages as it thinks proportional to the pecuniary injury resulting from such death to the persons, respectively, for whose benefit the action was brought. . . ."

5 The amount of damages recoverable for death by wrongful act must be limited to the pecuniary loss sustained by the beneficiaries. Kennedy v. Byers, 107 Ohio St. 90, 140 N.E. 630 (1923); Cincinnati St. Ry. v. Altemeier, 60 Ohio St. 10, 53 N.E. 300 (1899); Russell v. Sunbury, 37 Ohio St. 372 (1881); Steel v. Kurtz, 28 Ohio St. 191 (1876).

However, there is a presumption that pecuniary loss exists in favor of those legally entitled to services or support from the decedent. Immel v. Richards, 154 Ohio St. 52, 42 Ohio Op. 128 (1950); Karr v. Sixt, 146 Ohio St. 527, 67 N.E.2d 331 (1946).

6 Jasinsky v. Potts, 153 Ohio St. 529, 92 N.E.2d 809 (1950); Williams v. Marion Rapid Transit, Inc., 152 Ohio St. 114, 87 N.E.2d 334 (1949).

7 Prosser, Torts 175 (2d ed. 1955); 10 A.L.R.2d 1059, 1060 (1950).

8 Prosser, Torts 175 (2d ed. 1955); 10 A.L.R.2d 1059, 1064 and 1071 (1950).

Williams v. Marion Rapid Transit, Inc.[9] The *Williams* doctrine was extended to cover an infant *dying after birth* of prenatal injuries by permitting its administrator to bring an action for wrongful death in *Jasinsky v. Potts.*[10] The *Williams* court was primarily concerned with determining whether an infant was entitled to be heard in court under the Ohio Constitution[11] when its injury occurred prenatally. The court said that:

> In accordance with the general rule as to the rights of unborn children, it is stated in 21 Ohio Jurisprudence 864, Section 3: "It is a well settled rule of law relative to succession, and to most other cases in relation to infants, that a child en ventre sa mere, as to every purpose for the benefit of the child, is to be considered in esse, though this rule is not to be applied unless the benefit of the child will thereby be promoted."[12]

The *Williams* court discussed two cases[13] which held that a cause of action exists for prenatal injury. The discussions included quotations disclosing that those courts applied the "benefit" test quoted above.[14] It is apparent that enabling an infant to bring an action for his prenatal injuries is beneficial to him. The wrongful death statutes create a cause of action for death (after birth due to prenatal injuries) and even though the deceased infant is not benefitted by an award for his wrongful death, the test is met because he *could* have brought a tort action *"if death had not ensued."*[15] Thus both *Williams* and *Jasinsky* followed the liberal trend which accords an infant a cause of action *"subsequent to his birth,"*[16] for injury while a viable fetus.[17]

When applying the "benefit" test to the instant case it is difficult to envision how a stillborn child can be benefitted by being considered a person since the wrongful death statutes are for the benefit of the next of kin of the deceased person.[18] The court in the instant case admittedly disregarded

[9] *Supra* note 6; 10 Ohio St. L.J. 409 (1949).

[10] *Supra* note 6; 19 U. Cinc. L. Rev. 526 (1950).

[11] "Injuries wrongfully inflicted upon an unborn viable child capable of existing independently of the mother are injuries 'done him in his . . . person' within the meaning of Section 16, Article 1 of the Constitution and, subsequent to his birth, he may maintain an action to recover damages for the injury so inflicted." Williams v. Marion Rapid Transit, Inc., *supra* note 6, syllabus 2.

[12] Williams v. Marion Rapid Transit, Inc., *supra* note 6, at 118, 87 N.E.2d at 336. Black, Law Dictionary (4th ed. 1951) defines "en ventre sa mere" as "In its mother's womb" and "in esse" as "In being. Actually existing."

[13] Scott v. McPhetters, 93 P.2d 562 (Cal. 1939) *affirming* 33 Cal. App. 2d 629, 92 P.2d 678 (1939) which applied the California statutory "benefit" test; Montreal Tramways v. Le Veille, 4 D.L.R. 337 (Supreme Court of Canada 1933).

[14] Williams v. Marion Rapid Transit, Inc., *supra* note 6, at 125, 126, 87 N.E.2d at 339.

[15] See *supra* note 4.

[16] See *supra* note 11.

[17] "The word, 'viable,' is defined in the New Century Dictionary as, 'Capable of living; physically fitted to live; of a fetus, having reached such a stage of development as to permit continued existence, under normal conditions, outside of the womb.'" Williams v. Marion Rapid Transit, Inc., *supra* note 6 at 117, 87 N.E.2d at 335.

[18] See *supra* note 4.

dicta in *Williams* which indicated that the child must survive birth for a cause of action to arise.[19] Quoting *Jasinsky* the court also gave short shrift to the contention that the "benefit" test ought to be applied.[20] However, as previously discussed, the "benefit" test is consistent with the result in *Jasinsky*. The court also emphasized a portion of *Williams*, where it appears that the supreme court may consider a viable fetus a person.[21] In lieu of the "benefit" test the court used logical arguments favoring a cause of action for prenatal deaths.[22] Those arguments are convincing and it seems best to concede on the policy level that *a cause of action ought to exist* for negligently caused prenatal deaths.

The question remaining is whether the next of kin of a stillborn child may properly be compensated for its loss through an action for *wrongful death*.[23] Considering the speculative nature of pecuniary loss to the beneficiaries[24] for the loss of an infant and the failure of the "benefit" test when applied to prenatal deaths, the result in the instant case is undesirable absent a legislative revision.[25] Moreover, the requirement that the infant be viable[26] when injured is unsupportable scientifically[27] and unwarranted by the benefit test.[28] Nevertheless, recoveries for prenatal death ought to be permitted and revision of the wrongful death statutes to allow recoveries would be in accord with the liberal trend.

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19 Stidam v. Ashmore, 109 Ohio App. 431, 434, 167 N.E.2d 106, 108 (1959).

20 *Id.*

21 "'Was the plaintiff *at the time of her injury* a person within the meaning of Section 16, Article 1 of the Constitution?' (Emphasis added.)" Stidam v. Ashmore, *supra* note 19 at 433, 167 N.E.2d at 107 *quoting* Williams v. Marion Rapid Transit, Inc., *supra* note 6, at 127, 128, 87 N.E.2d at 340.

22 "Suppose, for example, viable unborn twins suffered simultaneously the same prenatal injury of which one died before and the other after birth. Shall there be a cause of action for the death of the one and not for that of the other? Surely logic requires recognition of causes of action for the deaths of both, or for neither. Inasmuch as the Supreme Court has already determined that there is a cause of action in the case of the one, we can see no valid reason for denying it in the other." Stidam v. Ashmore, *supra* note 19, at 434, 167 N.E.2d at 108.

23 Prosser, Torts 175 (2d ed. 1955).

24 *Supra* note 4. *But see* Prosser, Torts 714 (2d ed. 1955).

25 Cases from seven other jurisdictions with similar statutes have allowed a cause of action in the situation at bar. See 10 A.L.R.2d 639 and 1 A.L.R.2d Supp. Service 690 (1960). See also Prosser, Torts 719 (2d ed. 1955).

26 The Ohio cases, *supra* notes 6 and 19, have required that the infant be viable.

27 See "Recovery Allowed For Injury To Non-Viable Fetus," 20 Ohio St. L.J. 365.

28 The "benefit" test applies to all unborn children regardless of viability.