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Recovery for Prenatal Injuries: Michigan Exorcises Its Ghosts of the Past

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RECOVERY FOR PRENATAL INJURIES: MICHIGAN EXORCISES ITS "GHOSTS OF THE PAST"

Judicial recognition of the right of recovery for prenatal injuries is a relatively recent development in tort law.[1] Until 1946, American courts, with only minor exceptions,[2] consistently denied recovery for such injuries. These denials were highly dependent upon common law which held that an unborn child or a child *en ventre sa mere* was a part of the mother. In other words, if the unborn infant was harmed by a negligent injury to his mother, he could not recover because the mother was the only "person" who had been injured.[3] The focal point of this note will be the growth of this right of recovery for prenatal injuries, with primary emphasis on an examination of recent Michigan judicial and legislative changes.[4]

I. Historical Background

The first consideration by American courts of prenatal injury recovery came in 1884 in the landmark case of *Dietrich v. Inhabitants of Northampton,*[5] in which the court reiterated the common law doctrine of no recovery. The next reported case on the subject was brought in 1891—the Irish case of *Walker v. Great Northern Railway Co.*[6] Like *Dietrich,* the court there also found that the unborn fetus was merely a part of the mother, and thus found that there was no duty of care owed to it.[7]

Both *Dietrich* and *Walker* were widely cited as precedent in subsequent cases involving prenatal injuries[8] and the courts generally stated their denials

1 For a thorough and contemporary treatment of the rights of the unborn, see Note, *The Law and the Unborn Child: The Legal and Logical Inconsistencies,* 46 NOTRE DAME LAWYER 349 (1971).

2 Kine v. Zuckerman, 4 Pa. D.&C. 227 (C.P. 1924), *overruled by* Berlin v. J.C. Penney Co., 339 Pa. 547, 16 A.2d 28 (1940); Scott v. McPheeters, 33 Cal. App. 2d 629, 92 P.2d 678 (Dist. Ct. App.), *aff'd per curiam,* 93 P.2d 562 (1939) (decision based on statute); Cooper v. Blanck, 39 So. 2d 352 (La. Ct. App. 1923) (civil-law decision); Korman v. Hagen, 165 Minn. 320, 206 N.W. 650 (1925) (child allowed recovery for injuries resulting from malpractice in the course of its delivery).

3 This belief was prevalent despite Lord Coke's argument to the effect that if a woman is quick with child and a man beats her, and the child is born alive but dies of the battery, a murder has been committed. 3 COKE, INSTITUTES *50 (1797). Similarly, the property rights of unborn infants were solicitously guarded by allowing them a legacy, an assignment of a guardian, and an estate limited to their use. W. BLACKSTONE, COMMENTARIES *130.

4 *See* MICH. COMP. LAWS § 600.2922 (Supp. 3, 1971); O'Neill v. Morse, 385 Mich. 130, 188 N.W.2d 785 (1971), *aff'g* 20 Mich. App. 697, 174 N.W.2d 575 (1970); Womack v. Buchhorn, 384 Mich. 718, 187 N.W.2d 218 (1971).

5 138 Mass. 14 (1884).

6 28 L.R. Ir. 69 (Q.B. 1891).

7 It is a little noted fact that three justices dissented, one being Chief Justice O'Brien who succinctly summarized the injustice of the decision by stating:

> But as there was a germ of life *in esse* at the time of the occurrence, so it is thought there are to be bound, in the principles and propositions of the law, the germs of the legal creation which for the first time professional integrity has produced. The pity of it is as novel as the case—that an innocent infant comes into the world with the cruel seal upon it of another's fault and has to bear the burthen of infirmity and ignominy throughout the whole passage of life. *Id.* at 81.

8 Prior to 1946, at least seventeen jurisdictions denied recovery for prenatal injuries: *Alabama:* Stanford v. St. Louis-San Francisco Ry., 214 Ala. 611, 108 So. 566 (1926); *Illinois:* Allaire v. St. Luke's Hosp., 184 Ill. 359, 56 N.E. 638 (1900); *Iowa:* Kansz v. Ryan,

within the framework of (1) the lack of precedent (*stare decisis*); (2) a fear of fraudulent and fictitious claims due to the relatively underdeveloped state of medical science; and (3) the absence of a separate "person in being" to whom a legal duty was owed.[9]

In the midst of the windfall of denials, Judge Boggs of the Illinois Supreme Court questioned the basis of such dispassionate decisions. In a dissenting opinion in *Allaire v. St. Luke's Hosp.*,[10] he boldly asserted that the lack of precedent should not control the granting of a cause of action to the prenatally injured child. He also stated that the fetus should be considered a separate entity when it reaches the prenatal stage of viability[11] and recalled the pronouncements of Coke and Blackstone that at common law, property law and criminal law recognized the unborn child as a "person."[12]

Despite this cogent dissent, it was over a quarter of a century before any major court allowed recovery for prenatal injuries.[13] The turnabout came in *Montreal Tramways v. Leveille*,[14] when a Canadian court held in allowing recovery:

> If a child after birth has no right of action for pre-natal injuries, we have a wrong inflicted for which there is no remedy. . . . [I]t will be compelled, without any fault on its part, to go through life carrying the seal of another's fault and bearing a very heavy burden of infirmity and inconvenience without any compensation therefor. [I]t is but natural justice that a child . . . should be allowed to maintain an action in the Courts for injuries wrongfully committed upon its person while in the womb of its mother.[15]

The net effect of the *Montreal Tramways* case, Judge Boggs' dissent and the incisive criticism of commentators[16] was the "most spectacular abrupt reversal of a well settled rule in the whole history of the law of torts."[17] This

51 Iowa 232, 1 N.W. 485 (1879); *Massachusetts:* Dietrich v. Northampton, 138 Mass. 14 (1884); *Michigan:* Newman v. City of Detroit, 281 Mich. 60, 274 N.W. 710 (1937); *Missouri:* Buel v. United Ry., 248 Mo. 126, 154 S.W. 71 (1913) (wrongful death statute); *Montana:* Hosty v. Moulton Water Co., 39 Mont. 310, 102 P. 568 (1909); *New Hampshire:* Prescott v. Robinson, 74 N.H. 460, 69 A. 522 (1908); *New Jersey:* Stemmer v. Kline, 128 N.J.L. 455, 26 A.2d 489 (1942); *New York:* Drobner v. Peters, 232 N.Y. 220, 133 N.E. 567 (1921); *Ohio:* Mays v. Weingarten, 82 N.E.2d 421 (Ohio 1943); *Pennsylvania:* Berlin v. J.C. Penney Co., 339 Pa. 547, 16 A.2d 28 (1940); *Rhode Island:* Gorman v. Budlong, 23 R.I. 169, 49 A. 704 (1901); *Texas:* Magnolia Coca Cola Bottling Co. v. Jordan, 124 Tex. 347, 78 S.W.2d 944 (1935) (wrongful death for stillbirth); *Utah:* Webb v. Snow, 102 Utah 435, 132 P.2d 114 (1942); *Vermont:* Bovee v. Danville, 53 Vt. 183 (1880); *Wisconsin:* Lipps v. Milwaukee Elec. Ry. & Light Co., 164 Wis. 272, 159 N.W. 916 (1916).

9 Annot., 10 A.L.R.2d 1059, 1062 (1950); *see also* Drobner v. Peters, 232 N.Y. 220, 133 N.E. 567 (1921).

10 184 Ill. 359, 56 N.E. 638 (1900).

11 A viable infant is one which has reached such a stage of development that it can live outside of the uterus. 2 SCHMIDT'S ATTORNEY'S DICTIONARY OF MEDICINE § 900.88 (1971).

12 *See* note 3 *supra.*

13 *See* note 2 *supra.*

14 4 D.L.R. 337 (1933).

15 *Id.* at 345.

16 Frey, *Injuries to Infants En Ventre Sa Mere,* 12 ST. LOUIS L. REV. 85 (1927); Straub, *Right of Action for Prenatal Injuries,* 33 LAW NOTES 205 (1930). Both stated that to deny prenatal injury recovery was against public policy and a rejection of advancements in medical knowledge.

17 W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 55, at 336 (4th ed. 1971).

culmination took place in 1946 with *Bonbrest v. Kotz*,[18] when a federal district court reviewed the existing precedent and distinguished the "rather anomalous doctrine" of *Dietrich*. Rejecting the tenet that the unborn child was merely part of its mother as a "contradiction in terms," the court held that the unborn viable fetus was not a part of the mother "in a constituent sense" and that "modern medicine is replete with cases of living children being taken from dead mothers."[19] As to the virtual lack of precedent, the court commented that it:

> [S]hould afford no refuge to those who by their wrongful act, if such be proved, have invaded the right of an individual. . . . And what right is more inherent, and more sacrosanct, than that of the individual in his possession and enjoyment of his life, his limbs and his body?[20]

The ultimate import of *Bonbrest* was the establishment of viability as the starting point for an infant's recovery for prenatal injuries.[21] However, this minimum standard may be attacked as unjust. The argument may be raised that if a child is born after an injury was sustained during any stage of its prenatal life, and he can prove the causal effect of a tort upon him, then it is unjust to premise recovery on the infant's viability. Whether viable or not, the child sustains the same harm after birth.[22]

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18 65 F. Supp. 138 (D.D.C. 1946).

19 Id. at 140.

20 *Id.* at 142.

21 The following jurisdictions seemingly hold viability as a precondition to recovery: *Connecticut:* Tursi v. New England Windsor Co., 19 Conn. Supp. 242, 111 A.2d 14 (Super. Ct. 1955); *District of Columbia:* Bonbrest v. Kotz, 65 F. Supp. 138 (D.D.C. 1946); *Iowa:* Wendt v. Lillo, 182 F. Supp. 56 (D.C. Iowa 1960) (applying Iowa law); *Ohio:* Williams v. Marion Rapid Transit, Inc., 152 Ohio St. 114, 87 N.E.2d 334 (1949); *South Carolina:* Hall v. Murphy, 236 S.C. 257, 113 S.E.2d 790 (1960). The following jurisdictions allow recovery for prenatal injuries inflicted at any time after conception, regardless of viability at the time of the injury: *Georgia:* Hornbuckle v. Plantation Pipe Line Co., 212 Ga. 504, 93 S.E.2d 727 (1965) (one month); *Illinois:* Daley v. Meier, 33 Ill. App. 2d 218, 178 N.E.2d 691 (1961) (one month); *Maryland:* Damasiewicz v. Gorsuch, 197 Md. 417, 79 A.2d 550 (1951); *Massachusetts:* Torigian v. Watertown News Co., 352 Mass. 446, 225 N.E.2d 926 (1967) (3½ months); *Michigan:* Womack v. Buchhorn, 384 Mich. 718, 187 N.W.2d 218 (1971); *New Hampshire:* Bennett v. Hymers, 101 N.H. 483, 147 A.2d 108 (1958) (non-viable); *New Jersey:* Smith v. Brennan, 31 N.J. 353, 157 A.2d 497 (1960) (six months); *New York:* Kelly v. Gregory, 282 App. Div. 542, 125 N.Y.S.2d 696 (1953) (three months); *Pennsylvania:* Sinkler v. Kneale, 401 Pa. 267, 164 A.2d 93 (1960) (one month); *Rhode Island:* Sylvia v. Gobeille, 220 A.2d 222 (R.I. 1966) (non-viable); *Texas:* Delgado v. Yandell, 468 S.W.2d 475 (Texas 1971) (2½ months); *Wisconsin:* Puhl v. Milwaukee Auto. Ins. Co., 8 Wis.2d 343, 99 N.W.2d 163 (1959) (viability would not matter but the case was dismissed for lack of proof that injuries received by fetus at third month of pregnancy caused him to be born a Mongoloid idiot).

22 Furthermore, the difficulty with the viability test lies in actually determining the status of viability. One medical authority determines viability in terms of the weight of the unborn infant, drawing the dividing line at 400 grams (slightly less than one pound). D. DANFORTH, OBSTETRICS & GYNECOLOGY 310 (1966). Another prefers to determine viability by the gestational age, placing the dividing line 20 weeks. J. WILSON, C. BEECHAM AND E. CARRINGTON, OBSTETRICS & GYNECOLOGY 4 (4th ed. 1971). As a general rule, however, once it is determined that the unborn infant is over 400 grams or past the twentieth week, viability is conclusively established, since it is a theoretical term not to be determined retrospectively. (Whether or not the infant does, in fact, survive is not determinative of the issue of viability. The "capability" of extra-uterine life is a conjectural test at best and if the child is viable but does not survive, recovery should be allowed under the viability rule.) As to the chances of survival of such young fetuses, one study showed that 15% of infants weighing less than 1000 grams (about 1¾ pounds) at birth survive. J. GREENHILL, PRINCIPLES & PRACTICE OF OBSTETRICS 796 (10th ed. 1951). Another authority states that there is a 10% chance of survival if the baby is 1000 grams or less or 28 weeks old or less. 5 LAWYERS' MEDICAL CYCLOPEDIA § 37.17

Nevertheless, such criticism has not diminished the net effect of *Bonbrest* as a landmark decision. For as *Dietrich* and *Walker* were vanguards in denying prenatal injury recovery, *Bonbrest* has proven to be of overwhelming precedental importance in reversing the tides. In fact, to date there are thirty American jurisdictions which allow recovery[23] and favorable dictum in another.[24] Only nine jurisdictions deny recovery,[25] while eleven have no reported cases on the subject.[26]

Prenatal injuries also give rise to wrongful death actions when the child dies either before or after birth. In examining the wrongful death decisions, a distinction must be made between postnatal deaths and stillbirths. The former situation has presented less of a problem to the courts because the remedy of the wrongful death statutes is generally "derivative" in nature, that is, the statutory beneficiaries have a right of action if, and only if, the deceased would have had a cause of action had he survived.[27]

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at 420 (1960). *See also* 5 GRAY, ATTORNEYS' TEXTBOOK OF MEDICINE § 307.37 at 307-22 (3rd ed. 1970).

23 *California:* Scott v. McPheeters, 33 Cal. App. 2d 629, 92 P.2d 678 (Dist. Ct. App.) *aff'd per curiam,* 93 P.2d 562 (1939); *Connecticut:* Tursi v. New England Windsor Co., 19 Conn. Supp. 242, 111 A.2d 14 (Super. Ct. 1955); *Delaware:* Worgan v. Greggo & Ferrara, Inc., 50 Del. 258, 128 A.2d 557 (1956); *District of Columbia:* Bonbrest v. Kotz, 65 F. Supp. 138 (D.D.C. 1946); *Georgia:* Tucker v. Howard L. Carmichael & Sons, Inc., 208 Ga. 201, 65 S.E.2d 909 (1951); *Illinois:* Amann v. Faidy, 415 Ill. 422, 114 N.E.2d 412 (1953); *Iowa:* Wendt v. Lillo, 182 F. Supp. 56 (D.C. Iowa 1960); *Kansas:* Hale v. Manion, 189 Kan. 143, 368 P.2d 1 (1962); *Kentucky:* Mitchell v. Couch, 285 S.W.2d 901 (Ky. 1955); *Louisiana:* Cooper v. Blanck, 39 So. 2d 352 (La. Ct. App. 1923); *Maryland:* Damasiewicz v. Gorsuch, 197 Md. 417, 79 A.2d 550 (1951); *Massachusetts:* Keyes v. Construction Service, Inc., 340 Mass. 633, 165 N.E.2d 912 (1960); *Michigan:* Womack v. Buchhorn, 384 Mich. 718, 187 N.W.2d 218 (1971); *Minnesota:* Verkennes v. Corniea, 229 Minn. 365, 38 N.W.2d 838 (1949); *Mississippi:* Rainey v. Horn, 221 Miss. 269, 72 So. 2d 434 (1954); *Missouri:* Steggall v. Morris, 363 Mo. 1224, 258 S.W.2d 577 (1953); *Nevada:* White v. Yup, 458 P.2d 617 (Nev. 1969); *New Hampshire:* Poliquin v. MacDonald, 101 N.H. 104, 135 A.2d 249 (1957); *New Jersey:* Smith v. Brennan, 31 N.J. 353, 157 A.2d 497 (1960); *New York:* Woods v. Lancet, 303 N.Y. 349, 102 N.E.2d 691 (1959); *Ohio:* Williams v. Marion Rapid Transit, Inc. 152 Ohio St. 114, 87 N.E.2d 334 (1949); *Oregon:* Mallison v. Pomeroy, 205 Ore. 690, 291 P.2d 225 (1955); *Pennsylvania:* Sinkler v. Kneale, 401 Pa. 267, 164 A.2d 93 (1960); *Rhode Island:* Sylvia v. Gobeille, 220 A.2d 222 (R.I. 1966); *South Carolina:* Hall v. Murphy, 236 S.C. 257, 113 S.E.2d 790 (1960); *Tennessee:* Shousha v. Matthews Drivurself Serv., Inc., 210 Tenn. 384, 358 S.W.2d 471 (1962); *Texas:* Leal v. C.C. Pitts Sand & Gravel, Inc., 419 S.W.2d 820 (Tex. 1967); *Washington:* Seattle-First Nat'l Bank v. Rankin, 59 Wash. 2d 288, 367 P.2d 835 (1962); *West Virginia:* Panagopoulous v. Martin, 295 F. Supp. 220 (D.C. W.Va. 1969); *Wisconsin:* Kwaterski v. State Farm Mut. Auto. Ins. Co., 34 Wis. 2d 14, 148 N.W.2d 107 (1967). Similarly, compensation for prenatal injuries was allowed under the Federal Tort Claims Act in *Sox v. United States,* 187 F. Supp. 465 (E.D. S.C. 1960).

24 *North Carolina:* Stetson v. Easterling, 274 N.C. 152, 55, 161 S.E.2d 531, 34 (1968). The North Carolina Supreme Court stated that the prenatally injured child "if he had lived, could have maintained an action to recover damages on account of injuries negligently inflicted upon him when *en ventre sa mere,*" but held no cause of action because the state's wrongful death statute required proof of "pecuniary injury" and there was insufficient proof in the case for recovery.

25 *Alabama:* Stanford v. St. Louis-San Francisco Ry., 214 Ala. 611, 108 So. 566 (1926); *Alaska:* Mace v. Jung, 210 F. Supp. 706 (D.C. Alaska 1962) (applying Alaska law to wrongful death action); *Florida:* Stokes v. Liberty Mut. Ins. Co., 213 So. 2d 695 (Fla. 1968); *Montana:* Hosty v. Moulton Water Co., 39 Mont. 310, 102 P. 568 (1909); *Nebraska:* Drabbels v. Skelly Oil Co., 155 Neb. 17, 50 N.W.2d 229 (1951); *Oklahoma:* Howell v. Rushing, 261 P.2d 217 (Okla. 1953); *Utah:* Webb v. Snow, 102 Utah 435, 132 P.2d 114 (1942); *Vermont:* Bovee v. Danville, 53 Vt. 183 (1880); *Virginia:* Lawrence v. Craven Tire Co., 210 Va. 138, 169 S.E.2d 440 (1969).

26 Arizona, Arkansas, Colorado, Hawaii, Idaho, Indiana, Maine, New Mexico, North Dakota, South Dakota, and Wyoming.

27 *See, i.e.,* Panagopoulous v. Martin, 295 F. Supp. 220, 22 (D.C. W.Va. 1969).

Once the tort right of recovery for prenatal injuries by a surviving infant is recognized, the right of recovery by statutory beneficiaries for postnatal deaths is easily recognized. In fact, all of the jurisdictions which presently allow for tortious prenatal injury recovery also permit postnatal wrongful death actions.[28]

Recovery for wrongful death resulting from prenatal injuries when an infant is stillborn has not been as well received. Although the cause of action is fundamentally the same and the infant is not any less dead, the courts have been hampered in their efforts to determine the damages, if any, which result.[29] At the present time, seventeen states allow the parents or survivors to maintain a wrongful death action when the child is stillborn[30] and three jurisdictions have indicated in dicta that they might allow such an action.[31]

II. *Newman v. City of Detroit:* Michigan's Denial

Newman v. City of Detroit[32] was the first Michigan case involving prenatal injuries. The action was brought by an administrator under the Michigan Survival Act[33] for the deceased viable infant who allegedly suffered prenatal

28 *See* cases cited in notes 32 and 33 *supra.* All of the jurisdictions listed in note 32 allow recovery. North Carolina denies recovery as cited in note 33.

29 Since the general rule is that damages are recoverable on the basis of the loss of services to the party bringing the action, the proof of actual loss in a stillbirth situation is rather difficult. It has been stated that such claims are vague, conjectural and speculative and that if damages are awarded they are generally prompted by sentimentality rather than actual damages suffered. *See* W. PROSSER, *supra* note 17, § 127, at 908; *cf.* Lane v. Hatfield, 173 Ore. 79, 143 P.2d 230 (1943).

In response to these accusations, some jurisdictions have left the entire matter of damages to the discretion of the jury. *See* National Homeopathic Hospital v. Hord, 204 F.2d 397 (D.C. Cir. 1953). More recently, the trend has been to change the statutory enactment and achieve a similar result. *See* Michigan's recently amended wrongful death act: MICH. COMP. LAWS § 600.2922 (Supp. 3, 1971), discussed *infra.*

30 *Connecticut:* Hatala v. Markiewicz, 26 Conn. Supp. 358, 224 A.2d 406 (1966); *Delaware:* Worgan v. Greggo & Ferrara, Inc., 50 Del. 258, 128 A.2d 557 (1956); *Georgia:* Porter v. Lassiter, 91 Ga. App. 712, 87 S.E.2d 100 (1900); *Iowa:* Wendt v. Lillo, 182 F. Supp. 56 (D.C. Iowa 1960); *Kansas:* Hale v. Manion, 189 Kan. 143, 368 P.2d 1 (1962); *Kentucky:* Mitchell v. Couch, 285 S.W.2d 901 (Ky. 1955); *Louisiana:* Valence v. Louisiana Power & Light Co., 50 So. 2d 847 (La. App. 1951); *Maryland:* State *ex rel.* Odham v. Sherman, 234 Md. 179, 198 A.2d 71 (1964); *Massachusetts:* Torigian v. Watertown News Co., 352 Mass. 446, 225 N.E.2d 926 (1967); *Michigan:* O'Neill v. Morse, 385 Mich. 130, 188 N.W.2d 785 (1971); *Minnesota:* Verkennes v. Corniea, 229 Minn. 365, 38 N.W.2d 838 (1949); *Nevada:* White v. Yup, 458 P.2d 617 (Nev. 1969); *New Hampshire:* Poliquin v. MacDonald, 101 N.H. 104, 135 A.2d 249 (1957); *Ohio:* Stidam v. Ashmore, 109 Ohio App. 431, 167 N.E.2d 106 (1959); *South Carolina:* Fowler v. Woodward, 244 S.C. 608, 138 S.E.2d 42 (1964); *West Virginia:* Panagopoulous v. Martin, 295 F. Supp. 220 (D.C. W. Va. 1969); *Wisconsin:* Kwaterski v. State Farm Mut. Auto. Ins. Co., 34 Wis. 2d 14, 148 N.W.2d 107 (1967). Additionally, Mississippi, in *Rainey v. Horn,* 221 Miss. 269, 72 So. 2d 434 (1954) allowed recovery for the stillbirth of a viable infant who was fatally injured. This viability prerequisite was underscored in *Occhipinti v. Rheem Manufacturing Co.,* 252 Miss. 172, 172 So. 2d 186 (1965). The Indiana Court of Appeals has also recently permitted recovery for the wrongful death of a viable infant. Britt v. Sears, 40 U.S.L.W. 2467 (Ind. App. Ct. Dec. 29, 1971).

31 Three jurisdictions have indicated in dicta that given the proper circumstances they would allow wrongful death actions when the infant is stillborn. In *Mace v. Jung,* 210 F. Supp. 706 (D.C. Alaska 1962) and *Rapp v. Hiemenz,* 107 Ill. App. 2d 382, 246 N.E.2d 77 (1969) the courts wrote that while there could be no recovery on behalf of a non-viable stillborn child, recovery might be allowed in a wrongful death action on behalf of a viable infant who was injured and subsequently stillborn. In *Acton v. Shields,* 386 S.W.2d 363 (Mo. 1965) the court suggested that if a wrongful death action had been brought by a parent of the stillborn infant instead of by the aunt or uncle, it might allow recovery.

32 281 Mich. 60, 274 N.W. 710 (1937).

33 MICH. COMP. LAWS §§ 14040-60 (1929).

injuries as the result of an accident which occurred while his mother was a passenger on the defendant's streetcar. The infant decedent was born twenty-two days after the accident but succumbed to the injuries approximately three months after birth.

The defendant moved to summarily dismiss on the grounds that the decedent, an unborn child, was unable to contract or become a passenger for hire. It was argued that neither under common law nor under the state statute could there be liability to an infant for prenatal injuries[34]—to find such would be "judicial legislation" on the part of the court.

To the contrary, the plaintiff administrator contended that there was liability under the criminal law for the willful killing of an unborn quick[35] child by an injury to its mother and as there was no statute governing civil liability, an analogy should be drawn in the case at bar.[36] He also cited the Michigan Survival Act[37] which provided that an action for personal injuries should survive the death of an injured person. Finally, it was contended that the common law is flexible—where a wrong exists for which there is no remedy, the court may devise appropriate relief.

The court, in deciding the case, simply said that the "overwhelming weight of authority" was opposed to allowing recovery for prenatal injuries (citing the *Dietrich* and *Walker* cases among others).[38] It stated that in order for an action to survive a person's death, the cause of action must have existed at the time of his death. Since a viable fetus was not considered a "person" under the survival act there could be no recovery. Thus, the court concluded its brief opinion with the holding: "Plaintiff has no cause of action under the common law or any statute."[39]

While *Newman* may have been in accord with other jurisdictions in their denial of prenatal injury recovery, the decision was nonetheless unsound. To begin with, survival acts by their very nature proceed upon the theory of preserving the cause of action vested in the decedent at the moment of death. When the *Newman* court impliedly established the beginning of the status of a "person" at birth in its interpretation of the Michigan Survival Act, it was engaging in unjust semantics. As the infant decedent was *alive* at the time injured and was viable or capable of living outside of its mother's womb, he should have been acknowledged as a "person" for purposes of the statute. Indeed, a person is not any less dead nor is life any less terminated simply because fatal injuries are

34 The fact pattern of *Newman* as well as the defendant's argument are very similar to those in *Walker*, which is cited in *Newman*.

35 "Quick" is described as movements of the fetus inside the womb which are perceptible to the mother. Such movements usually occur between the eighteenth and twentieth weeks of pregnancy although there have been cases of this occurring in the tenth week. J. WILLIAMS, OBSTETRICS 276 (12th ed. 1961).

36 While there was no precedent for recovery on the basis of such reasoning, at present there are a few jurisdictions which allow recovery if the child is quick at the time of injury or death, *e.g., Georgia:* Porter v. Lassiter, 91 Ga. App. 712, 87 S.E.2d 100 (1900); *New York:* Kelly v. Gregory, 28 App. Div. 542, 125 N.Y.S.2d 696 (1953). The difference between the viability requirement and the quick one is that the latter presents an earlier point in time at which the child may recover.

37 MICH. COMP. LAWS §§ 14040-60 (1929).

38 281 Mich. at 63-64, 274 N.W. at 711.

39 *Id.* at 64, 274 N.W. at 711.

suffered at one point in life instead of another. Nor should birth—the purely physical act of separating the fetus from the mother's body—control the conferral of the status of "personhood" upon the living infant. The infant which is dead in the womb will not come alive when born, nor will an infant which is seriously injured in the womb be any less injured when born.

Moreover, *Newman*'s denial of the plaintiff's common law argument that where there is a wrong, there should be a remedy was equally unjust. Unlike the statutory cause of action previously discussed under the survival act, a common law action of recovery for personal injuries leaves the court free to alter the law when justice demands and to take advantage of the common law fiction, which Michigan itself acknowledged, that a fetus may be regarded as a person whenever to do so will benefit the child later born.[40]

Finally, the court's reliance on out of state precedent was a slender reed on which to rest the denial of the administrator's action. As was noted by the United States Supreme Court just two years before *Newman, stare decisis* is a discretionary doctrine which courts may follow after they have weighed all the issues presented.[41] The mere fact that there was a lack of precedent allowing prenatal injury recovery should not have deterred the *Newman* court from granting relief, for as one jurist has stated:

> [A]n adjudicated case is not indispensable to establish a right to recover under the rules of common law. Lord Mansfield declared: "The law of England would be an absurd science were it founded upon precedents only."[42]

III. Indicia of Change

It was not until 1960 that the Michigan Supreme Court hinted that it might be amenable to a review of the status of the unborn infant.[43] This took place in an indirect manner in *LaBlue v. Specker*[44] in which the court held that an infant *en ventre sa mere,* although not viable, would be considered a "person" and possessed the right to recover for lost support under Michigan's dram shop act.[45] In so holding, the *LaBlue* court, unlike that in *Newman,* expressed its willingness to go beyond a strict interpretation of the statute and cited with approval *Eddy v. Courtright*:[46]

> This court has always construed this statute [Dram Shop Act] liberally, and

40 McLain v. Howald, 120 Mich. 274, 279, 79 N.W. 182, 183 (1899). The court there stated that "for all purposes of construction, a child *en ventre sa mere* is considered as a child *in esse,* if it will be for its benefit to be so considered."

41 Humphrey's Executor v. United States, 295 U.S. 602 (1935).

42 Allaire v. St. Luke's Hosp., 184 Ill. 359, 369, 56 N.E. 638, 640 (1900).

43 One possible reason for the reconsideration of *Newman* was a complete change in the court personnel. The Justices who decided *Newman* were: Fead (C.J.), Bushnell, Butzel, Chandler, North, Potter, Sharpe and Weist. The Justices who were seated on the Supreme Court of Michigan in 1960 were: Dethmers (C.J.), Black, Carr, Edwards, Kavanagh, Kelly, Smith and Voelker.

44 358 Mich. 558, 100 N.W.2d 445 (1960).

45 MICH. COMP. LAWS § 436.22 (1948).

46 91 Mich. 264, 51 N.W. 887 (1892).

> has not deemed that the true legislative intent was to be ascertained by any strained or narrow construction of the words employed.[47]

However, the court seemed troubled by the simultaneous existence of *Newman* and its present holding and therefore cited numerous decisions from other jurisdictions allowing prenatal injury recovery as precedent. In regard to *Newman,* Justice Kavanagh, speaking for the court, offered the dictum that while the holding corresponded to the "overwhelming weight of authority" in 1937, "the situation with respect to the law has changed considerably."[48]

The ill feeling of the court toward *Newman* and its narrow statutory construction is highlighted when it is realized that dram shop acts may be regarded as penal in nature and as such are generally subject to strict interpretation.[49] Nevertheless, the *LaBlue* opinion cursorily dismissed the issue and proceeded along a diametrically opposed line of beneficially construing the statute in favor of the unborn infant. Accordingly, the scales of justice seemed to have tipped against *Newman.*

This liberal interpretation soon came to an abrupt halt. *Estate of Powers v. City of Troy*[50] involved an action before the Michigan Court of Appeals in which an unborn infant was negligently injured and subsequently stillborn. The decedent's administrator argued that the *LaBlue* decision had implicitly overruled *Newman* and that a liberal reading should be afforded the wrongful death act's use of the word "person"—as was done for the dram shop act. However, the court felt bound to follow *Newman,* writing: "We are constrained by *stare decisis* to adhere to this view."[51] As for *LaBlue,* it was stated that the interpretation given the dram shop act to mean that a fetus was a "child or other person" could not be extended to cover a similar reading of the wrongful death act.[52]

But conjunctively, the court of appeals did indicate its dissatisfaction with the inherent injustice of denying prenatal injury wrongful death actions by noting:

> To balance the right of action upon whether the child, fatally injured by the negligence of another, is born dead or alive seems not only an artificial demarcation but unjust as well. To illustrate, if the trauma is severe enough to kill the child, then there could be no recovery; but if less serious, allowing the child to survive, there might be recovery.[53] [Citations omitted.]

Having thus exposed its true feelings on the issue, the court attempted to justify its disregard of *LaBlue* by commenting that the object of the dram shop act was to "save the public from the burden of having the named persons,

47 358 Mich. at 568, 100 N.W. at 450.
48 *Id.* at 570, 100 N.W.2d at 451.
49 *See* Howlett v. Doglio, 402 Ill. 311, 83 N.E.2d 708 (1949).
50 4 Mich. App. 572, 145 N.W.2d 418 (1966), *aff'd,* 380 Mich. 160, 156 N.W.2d 530 (1968).
51 4 Mich. App. at 574, 145 N.W.2d at 419.
52 *Id.* at 574-75, 145 N.W.2d at 419-20.
53 *Id.* at 576, 145 N.W.2d at 420.

injured through the illegal furnishing of intoxicants, dependent on public welfare."[54]

Such a distinction was a feeble one at best. More accurately, it illustrated the fact that the lower court was respectfully committed to following the precedent of the supreme court, while realizing the gross error of that body's judgment.

On appeal, *Powers* was affirmed,[55] but like the lower court, the supreme court's decision seemed strained and plagued with doubts.[56] This became immediately apparent when the majority opinion began with the unusual statement that the court was not considering the "theological or philosophical status of the fetal child" but was confining itself to the meaning of "person" within the wrongful death statute.[57] It then succinctly stated that it rejected "the contention that *LaBlue* overruled *Newman* either expressly or by implication."[58] Instead, it proceeded to qualify *LaBlue* by remarking that the child was not injured in the sense that it was injured in the present action. Rather, it said, "*LaBlue* was closer to the family of cases recognizing a posthumous child as a dependent for inheritance purposes."[59] The majority then concluded that the legislature never conceived the term "person" to mean anything other than its "ordinary signification"—which excluded an unborn infant. Thus:

> Considering the plain import of the word "person" at the time of the enactment of our statute and *its uniform interpretation through the years,* we feel obligated to accord to the term its "ordinary signification" when legislatively employed.[60] [Emphasis added.]

This rationale, however, was technically unsound. While it is clear that the legislature may limit statutory terms as it deems necessary, when it uses such a generic term as "person" without giving it a special definition, it seems completely arbitrary for the courts to hold the meaning of the word to the date of the enactment. On the contrary, it would appear more reasonable to hold that the legislature expects the courts to give the term a meaning relative to other aspects of the law. Analyzed in this light, the fact that *LaBlue* was analogized to inheritance cases becomes totally irrelevant—for on whatever grounds *LaBlue* is substantiated it still indicates the judiciary's inherent power to update such terms.

Furthermore, the theory that the term "person" as used in the wrongful death statute had been uniformly interpreted through the years to preclude an unborn fetus was substantively faulty. Such a "uniform interpretation" consisted of one case—*Newman*. As one member of the court curtly remarked, he too felt obligated to:

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54 *Id.*
55 380 Mich. 160, 156 N.W.2d 530 (1968).
56 An illustration of this is the fact that along with the majority opinion which was written by Judge O'Hara, three Judges submitted separate but concurring opinions (Brennan, Souris, and Black) and Judge Kavanagh dissented.
57 380 Mich. at 167, 156 N.W.2d at 531.
58 *Id.* at 168, 156 N.W.2d at 532.
59 *Id.* at 169, 156 N.W.2d at 532.
60 *Id.* at 170, 156 N.W.2d at 533.

> [A]ccord the term "its ordinary signification" when legislatively employed, giving the term "person" the same construction the Michigan Supreme Court has given it in workmen's compensation cases, in descent and distribution of property cases, including the dram shop statute. In all instances, save the *Newman Case,* "person" has been interpreted to include a child from the time of conception. In all of the above mentioned instances this Court has found that the legislature used the word "person" to include a fetus from the time of conception. Clearly, the legislature used the word "person" with the same meaning in drafting the Michigan wrongful death act.[61]

But, in lieu of construing the wrongful death act's use of the word "person" to include a stillborn child, an attempt was made to obviate the apparent harshness of the holding by noting that Michigan did recognize the right of the mother to recover damages for pain and suffering resulting from a stillbirth.[62] While such damages were not commensurate with the loss suffered, Justice Souris saw hope in the offing for a more "realistic measure of damages" in the tort actions of the injured parents in two recent decisions of the court, *Wycko v. Gnodtke*[63] and *Montgomery v. Stephan,*[64] which generally expanded the pecuniary damages recoverable to include the loss of society and companionship. In light of this alternative, it was suggested:

> [T]hat sort of development of our common law is preferable to adding still another fiction to the law—that for negligently inflicted prenatal injuries which result in stillbirth, the wrongful death act provides a legal remedy for the "benefit" of the child born dead.[65]

In fact, a recent decision, *Currie v. Fiting,*[66] had authorized the recovery and distribution of damages for the loss of society and companionship to *non-dependent survivors of the decedent* in a wrongful death action.

On the other hand, this trend had been assailed as representing the "insatiable demands for unconstitutional legislation" by the court, far surpassing the two "mutually conceived" and interconnected wrongful death acts passed by the Michigan legislature in 1939[67]—one creating an action for wrongful death

61 *Id.* at 194-95, 156 N.W.2d at 544-45 (dissenting opinion).

62 *Id.* at 178, 156 N.W.2d at 536 (J. Souris concurring).

63 361 Mich. 331, 105 N.W.2d 118 (1960). The case involved a fifteen thousand dollar award for the wrongful death of a fourteen year old boy. The court found that such an award was not extravagant and held that while recoverable damages must be based upon the "pecuniary" value of the life, this value was to be measured by the functioning value of the human being as a part of the family, that is, society and companionship.

64 359 Mich. 33, 101 N.W.2d 227 (1960). This case allowed a separate recovery for a wife's action for loss of consortium with her negligently injured husband.

65 380 Mich. at 178, 156 N.W.2d at 536 (J. Souris, concurring). Judge Souris had previously commented:

> Someday we may overrule *Newman* in a case which requires our reexamination of *Newman*'s holding. Until we do, I believe it is premature to hold, as we are asked to do today, that a stillborn child's administratrix can sue under the wrongful death act for damages for negligently inflicted prenatal injuries which caused the stillbirth. In short, I believe we are being asked to decide too much, too quickly; to move too far, too swiftly; to take two full steps ahead instead of only one at a time. *Id.* at 176-77, 156 N.W.2d at 535-36.

66 375 Mich. 440, 134 N.W.2d 611 (1965).

67 The acts referred to by Judge Black in his concurring opinion were P.A. 297, §§ 1, 2, MICH. COMP. LAWS §§ 691.581, 82 (1948) and P.A. 288, § 115, MICH. COMP. LAWS § 702.115 (1948).

and the other providing for the distribution of the damages recovered—neither of which authorized recovery for the loss of society and companionship to dependents or non-dependents of the decedent.[68] Any comparison of out of state wrongful death statutes which allowed for stillbirth recovery with the Michigan enactments was criticized on the basis that the latter acts had authorized recovery "only to those persons who were dependents of the decedent":[69]

> A fetus cannot be deemed a "person" or "decedent" within our unique acts of 1939. . . . All the skilled research clerks of Lansing, laboring unitedly without food or drink, could not possibly come up with any judicially interpreted out state statutory provisions which correspond with our acts of 1939.[70]

Thus, the legal rights of the unborn infant who is subsequently stillborn were denied on the basis of the fact that he could not have anyone dependent on him.

The true gist of the matter, however, which was evaded by this principle and by the court in general, was that, nonetheless, there had been a wrongful taking of a life. Since the primary purpose of wrongful death acts was to change the common law so that negligent tortfeasors who killed rather than injured their victims would not escape liability,[71] the *Powers* court should not have defeated the purpose by a strained construction of the Michigan statute. Similarly, while "skilled research clerks" may investigate the laws, judges do not perform such academic functions. They are compelled by their position to take the law and apply it in such fashion that the ends of justice may be met. In other words, their mandate when an injustice exists is *fiat justitia ruat caelum* (let justice be done though the heavens fall).[72] This the *Powers* court failed to do. The judges who argued for affirmance in *Powers,*[73] were largely preoccupied with their own theories of denial in interpreting the wrongful death statute so as to preclude an action for stillbirth and never considered the fact that the legislature had not spoken on the subject. Indeed, as the supreme court had previously interpreted the various legislative acts to include unborn infants in their use of the term "person," the legislature stood idly by. While such legislative silence may sometimes be seen as acquiescence, here it is at best ambiguous.[74] With such ambiguity present, the court should have opted for a clear and uniform interpretation of all the statutes to include the unborn infant.

68 *See* 380 Mich. at 179, 156 N.W.2d at 537 (J. Black concurring).
69 *Id.* at 182, 156 N.W.2d at 539.
70 *Id.* at 184, 156 N.W.2d at 539.
71 *Id.* at 197, 156 N.W.2d at 546 (J. Kavanagh dissenting).
72 Ellison v. Georgia R. R., 87 Ga. 691, 696, 13 S.E. 809, 810 (1891).
73 Judge Brennan also wrote a concurring opinion in which he too objected to the *Wycko* holding for the reason that he believed it impossible to ascertain the "pecuniary damages", if any, suffered by the loss of life of a stillborn infant. He also advocated *Newman*'s reversal, stating:

> Newman is bad law and some day should be overruled. But the overruling should come in a proper case, either brought by a living plaintiff who alleges an injury to him while he was yet in his mother's womb or brought by the personal representative of a decedent, whose death was caused by the prenatal injury, and on account of whose death actual pecuniary losses can be shown. 380 Mich. at 172, 156 N.W.2d at 533.

74 Michigan Nat'l Bank v. Sheppard, 348 Mich. 577, 599, 83 N.W.2d 614, 623 (1957).

Finally, while the uniqueness of the Michigan wrongful death acts of 1939 cannot be denied, it should be pointed out that the act which provides for the descent and distribution of recovered damages uses the term "person" to include the unborn.[75] Thus, if it is presumed that the legislature used the term in these "mutually conceived" acts in identical fashion—the general rule of statutory construction being that "identical language should receive identical construction when found in the same act"[76]—the word "person" as used in the act creating an action for wrongful death should have been similarly construed in the act providing for distribution of the proceeds thereof.

In view of this rather unsound opinion, it is not surprising that one year later the Michigan Court of Appeals, when faced with another prenatal injury recovery suit, decided to take a more definitive stand than it had in the *Powers* case. In *Marlow v. Krapek*,[77] a case involving an action on behalf of a nine-month-old fetus who was born eight hours after the accident in which he was injured, the court boldly asserted that Michigan's cases were against the overwhelming weight of authority on prenatal injuries and that the time had come for the overruling of *Newman*. Prompted, perhaps, by the close proximity of the time of injury and the time of birth, the court concluded its decision with the caustic statement:

> [U]ntil that time [the overruling of *Newman*], persons suffering from prenatal injuries caused by the negligent conduct of others will go uncompensated, their only consolation being the fact that prenatal injuries were not actionable at common law.[78]

Indeed, such consolation is of little value. At common law neither liberal "products liability" recovery nor recovery for invasions of privacy existed, but were later formulated and assimilated into that body of law.[79] With these actions and others as precedent, the Michigan Supreme Court should have had no problem protecting the rights of the unborn infant, yet, it had been delinquent in doing so.

IV. Reversal

A. *Prenatal Injury Recovery*

It was *Womack v. Buchhorn*[80] which finally relegated *Newman* to a dead hand of the past. The case involved a woman who was four months pregnant when she received injuries in an automobile accident. As a result of the accident, the child which she was bearing suffered permanent incapacitating brain damage. The lower court granted summary judgement for the defendant on the basis of the controlling precedent of *Newman*. On appeal, the Michigan Sup-

75 380 Mich. at 195, 156 N.W.2d at 545 (dissenting opinion).
76 *Id.*
77 20 Mich. App. 489, 174 N.W.2d 172 (1969).
78 *Id.* at 491, 174 N.W.2d at 173.
79 *See* Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).
80 384 Mich. 718, 187 N.W.2d 218 (1971).

reme Court held that a common law negligence action could be brought on behalf of the surviving child, thus overruling *Newman*.

In arriving at its decision, the court posed the question in very definite terms when it said:

> This court must therefore face forthrightly whether the law of *Newman* should continue to stand on the basis of *stare decisis* or whether Michigan should recognize what present day science, philosophy and the great weight of the law in this country consider the better and sound rule.[81]

The court seemed to be strongly influenced in its decision by the fact that seven of the nine jurisdictions relied on as precedent by the court in *Newman* had since changed their positions,[82] and that at the time of the trial of *Womack,* twenty-nine jurisdictions allowed recovery for prenatal injuries.[83]

However, the importance of *Womack* was not simply in its overruling of *Newman*. It also appears that, indirectly, the Michigan court decided to place itself in the forefront of the movement for allowing prenatal injury recovery. Unlike the cases which limited recovery to "viable infants,"[84] *Womack* made no reference to the term and one is led to believe that the court aligned itself with the contemporary attitude that, whether viable or not, the infant sustains the same harm after birth. Instead of a viability standard, the court opted for a causation approach similar to that which was originally advanced by the plaintiff in *Newman*.[85] This is apparent from the court's adoption of the New Jersey Supreme Court's reasoning in *Smith v. Brennan*:[86]

> [J]ustice requires that the principle be recognized that a child has a legal right to begin life with a sound mind and body. If the wrongful conduct of another interferes with that right, and it can be established by competent proof that there is a causal connection between the wrongful interference and the harm suffered by the child when born, damages for such harm should be recoverable by the child.[87] [Citations omitted.]

However, in adopting the causation standard, the Michigan court may have lifted the lid of Pandora's Box and exposed itself to a plethora of problems. The plaintiff has the burden of proof on the issue of causation in a negligence action —he must establish by the weight of his evidence that there is a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a substantial factor in bringing about the injury. Where the conclusion is not one within the common knowledge of laymen, expert testimony may provide a sufficient basis for it.[88]

81 384 Mich. at ——, 187 N.W.2d at 222.
82 Brief for Plaintiff-Appellant at 4, 5, Womack v. Buchhorn, 384 Mich. 718, 187 N.W.2d 218 (1971).
83 *Id.* at 5, 6.
84 *See* note 21 *supra.*
85 281 Mich. at 63, 274 N.W. at 711.
86 31 N.J. 353, 157 A.2d 497 (1960).
87 384 Mich. at ——, 187 N.W.2d at 222.
88 *See* Gordon, *The Unborn Plaintiff,* 63 MICH. L. REV. 579 (1965); Note, *The Impact of Medical Knowledge on the Law Relating to Prenatal Injuries,* 110 U. PA. L. REV. 554 (1962).

There thus seems to be little doubt that doctors will be called upon to substantiate causation in prenatal injuries cases. However, a doctor's view of "cause" may differ from the lawyer's. Doctors usually envision causation in light of the scientific method which means proof beyond a reasonable doubt—anything less is not acceptable. The lawyer's view, however, is broader and under the guise of the traditional "preponderance of the evidence test" it is only necessary that a defendant's conduct be a "substantial" or "material" factor in bringing about the injury or damage.[89] In trying to reconcile these two standards, the Michigan courts may be called upon to weigh evidential concepts which they are not prepared to handle.[90]

Interwoven with the previous problem is another which occurs when the limits of medical knowledge on embryology are approached. As one moves closer to the time of conception, medical proficiency and hence medical testimony become less reliable. Therefore, proof of causation results in increased speculation rather than reliance on proven medical concepts. Because of this, the courts should proceed cautiously instead of blindly accepting questionable medical opinions which may be advanced in such cases where causation is in issue.[91]

B. *Stillbirth, Wrongful Death Statutes & Damages*

In the *Estate of Powers* case, an additional unarticulated factor may have encouraged the court to give the term "person" its restricted meaning. This may have been the apparent anomaly of allowing an action for the wrongful death of a stillborn child where statutory law precluded a personal injury action by a child born alive who was injured prior to birth—the statute being limited to actions where the wrongful act was such as would, *"if death had not ensued,* have entitled the party to maintain an action."[92] [Emphasis added.]

In light of the resolution of the above problem by *Womack,* it is not surprising that shortly thereafter[93] the Michigan Supreme Court went a step further when it was confronted with a wrongful death action resulting from prenatal injuries. In *O'Neill v. Morse,*[94] the facts were identical to the earlier *Estate of Powers* case. It was alleged by the administrator (father) of the decedent's estate that the decedent was an eight month old viable infant *en ventre sa mere* at the

89 Gordon, *supra* note 88, at 600-01; Note, *supra* note 88 at 586-94.

90 The problem is well illustrated by *Sinkler v. Kneale,* 401 Pa. 267, 164 A.2d 93 (1960) and *Puhl v. Milwaukee Auto. Ins. Co.,* 8 Wis. 2d 343, 99 N.W.2d 163 (1959). In each case there was traumatic injury to the mother in the early stages of pregnancy and the child was born a Mongoloid. The Pennsylvania court, on the pleadings, held that a cause of action was stated. The Wisconsin court, after trial, held that the burden of proof for causation had not been sustained.

91 One leading medical journal, after examining numerous prenatal injury suits, stated that there appeared to be an "incredible distortion of medical concepts upon which judgements appear to have been rendered." Culiner, M.D., *Trauma to the Unborn Child,* 5 TRAUMA 1:5 at 1:119 (June, 1963).

92 MICH. COMP. LAWS § 600.2922 (1948).

93 *Womack* was decided on June 1, 1971 and the court rendered its decision in *O'Neill v. Morse,* 385 Mich. 130, 188 N.W.2d 785 (1971), *rev'g* 20 Mich. App. 697, 174 N.W.2d 575 (1969) on July 7, 1971.

94 *Id.*

time of the fatal injury which caused stillbirth. It was also contended that the decedent was a "person" within Michigan's Wrongful Death Act.[95]

The importance of *Womack* as precedent for the court's decision emerged when it held that "the statutory wrongful death action is coextensive with the common law right of action for damages."[96] Speaking quite frankly in its holding for recovery, the court said:

> A fetus having died within its mother's womb is dead; it will not come alive when separated from her. 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 to be denied.
>
> Neither is the wisdom of the public policy which regards unborn persons as being entitled to the protection of the law.[97]

With such an emphatic declaration, it appeared that all the stumbling blocks raised in *Powers* had gone by the boards.

Moreover, having gone one step beyond *Womack* in allowing recovery for fatal prenatal injuries, the *O'Neill* court confronted the damages question which had been treated in *Powers*. Since that discussion, a new twist in the law had taken place in *Breckon v. Franklin Fuel Co.*,[98] where the court took a fresh look at the question of recoverable damages in wrongful death actions. It held that its previous references to companionship in considering "pecuniary injury" in situations where the wrongful death of a child was at issue were *gratis dicta,* because the only real issue of these cases was whether the excessiveness of otherwise valid verdicts was based upon proof of "pecuniary injury" suffered by the decedents' parents. In thus overruling the decisions of *Wycko, Currie,* and others,[99] which the court mentioned created at most doubtful precedent, it stressed that recovery in wrongful death actions would henceforth be strictly limited to *actual pecuniary losses suffered*—such as conscious pain and suffering, and reasonable medical, hospital, funeral and burial expenses—and that these losses were only distributable to those survivors who were *pecuniarily dependent upon the decedent.*

In light of this new precedent, the *O'Neill* court emphasized that it had never restricted "dependents of the decedent" to those who received actual support and maintenance from the decedent during his lifetime—as had been argued in *Powers*. Thus, it dismissed the damages argument rather readily by stating:

> Admittedly in the case of very young or stillborn children, the value of prospective filial service is not very easy to prove. *** But pecuniary injuries are alleged in this cause, and no issue has been made of it. . . .[100]

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95 MICH. COMP. LAWS § 600.2922 (1948).
96 385 Mich. at ——, 188 N.W.2d at 786.
97 *Id.* at ——, 188 N.W.2d at 787-88.
98 383 Mich. 251, 174 N.W.2d 836 (1970).
99 Heider v. Michigan Sugar Company, 375 Mich. 490, 134 N.W.2d 637 (1965); Reisig v. Klusendorf, 375 Mich. 519, 134 N.W.2d 634 (1965); Wilson v. Modern Mobile Homes, Inc., 376 Mich. 342, 137 N.W.2d 144 (1965).
100 385 Mich. at ——, 188 N.W.2d at 788.

For one member of the court (Justice Black), however, the question was not so easily dismissed. While sympathetic with the majority, he submitted that "an unborn or stillborn fetus simply could not and cannot succeed in leaving a 'widow,' a 'wife,' a 'spouse,' or 'next of kin who suffered such pecuniary injury.' "[101] Due to the apparent conflict between the majority's holding and the Michigan statute, he called for a revision of the statute; a revision which, if ordered, "would render eligible thereunder suits by appointed fiduciaries of the unborn or stillborn to recover damages for 'pecuniary injury' on behalf of what necessarily must be newly designated beneficiaries."[102]

The response to this plea was not long in coming. Only three weeks after *O'Neill* and less than two months after *Womack,* the Michigan legislature passed an amended version of the wrongful death act which deleted all reference to "pecuniary injury" or "pecuniary loss" and provided that damages could be awarded "under all circumstances . . . that the court and jury may deem just."[103]

It should be noted that, in taking such action, the legislature apparently undercut the *Breckon* holding which had placed heavy reliance on the term "pecuniary injury." At the same time, while not commenting on the status of an unborn infant as a "person," but heeding the summons of *O'Neill,* it seemingly approved that holding. Thus, this enactment, when taken in conjunction with the *Womack* decree that an action can be brought on behalf of a surviving prenatally injured child, and the decision in *O'Neill* that the unborn child is considered a "person" under the wrongful death statute, virtually assured that there would be recovery for prenatal injuries which result in death after birth. Although no case presenting the issue has arisen in the Michigan courts since these developments, it is very likely that they will follow the trend of other states which have allowed recovery in such circumstances.[104]

V. Conclusion

While late in allowing prenatal injury recovery, it appears that Michigan has come full circle and is now a vanguard in the field. The process was begun by *Womack v. Buchhorn,* in which the injustices of *Newman v. City of Detroit* were finally remedied. *O'Neill v. Morse* and the recent legislative revision of the wrongful death statute served to complete the circle by permitting actions for stillbirths and postnatal deaths.

By so doing, Michigan has avoided the pitfalls of such problem areas as viability and the inability to discern damages under the wrongful death statutes.

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101 385 Mich. at ——, 188 N.W.2d at 793 (J. Black dissenting).

102 385 Mich. at ——, 188 N.W.2d at 794 (J. Black dissenting).

103 MICH. COMP. LAWS § 600.2922 (Supp. 3, 1971), which now reads:

> (1) 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. . . .

104 *See* cases cited in notes 32 and 33 *supra.* All of the jurisdictions listed in note 32 allow recovery and North Carolina denies recovery as cited in note 33.

In its grand-slam approach of changing almost thirty-five years of precedent in less than two months, Michigan has only to face the previously discussed obstacle of causation with respect to recovery for prenatal torts. But as medical science expands its horizons in embryology and obstetrics, such an obstacle will become like any other which must be hurdled in a successful negligence suit.

In conclusion, it is apparent that, at least for Michigan, the complete doctrine of denial of prenatal injury recovery has been relegated to Lord Atkin's "ghosts of the past standing in the path of justice clanking their medieval chains" through which the judge must pass undeterred.[105]

Joseph P. Paonessa

105 Brief for Plaintiff-Appellant at 10, Womack v. Buchhorn, 384 Mich. 718, 187 N.W.2d 218 (Citations omitted).