Washington and Lee Law Review

Volume 22 | Issue 1 Article 14

Spring 3-1-1965

Recovery For Injury Causing Death Of Unborn Child

This interpretation may have public appeal when applied to the facts in the *Saunders* case, because it would prevent the deserting wife from being treated as a deserving widow.[34]

It is submitted, however, that the legislature chose language that is clear and unambiguous. The divorce decree does not take effect until six months after its date.[35] The *Saunders* case follows the settled law of the District of Columbia. A divorce decree is ineffective to dissolve the marriage until the expiration of six months. The death of either party during the mandatory waiting period abates the divorce action, and entitles the surviving party, whether guilty or innocent, to share in the estate of the deceased.

RAYMOND HENRY VIZETHANN, JR.

RECOVERY FOR INJURY CAUSING DEATH OF UNBORN CHILD

The question whether a cause of action for the benefit of the next of kin exists for the negligently caused death of an unborn child involves problems of damages, multiple recovery, and causation. These problems are becoming more important in view of the trend towards allowing recovery under wrongful death and survival statutes for the negligently caused death of the stillborn fetus.[1] At least thirteen states have allowed such recovery in the last fifteen years.[2]

---

gressional purpose and the underlying public policy is fully satisfied without the illogical and incongruous results we now feel compelled to reach here. Except for the restraint on remarriage during the six month waiting period, the parties should be regarded for all other purposes as divorced persons." Ibid.

[34]Supra note 2. Desertion or abandonment has been held to be a complete bar to any right to share in the estate of the deceased spouse. In re Lodge's Estate, 287 Pa. 184, 134 Atl. 472 (1926).

[35]Supra note 3.

[1]Lambert, History and Future of Wrongful Death and Survivorship, in Wrongful Death and Survivorship 19 (Beall ed. 1958).

[2]In 1948 there were no cases allowing recovery for injury causing a child to be stillborn. In 1949 Verkennes v. Corniea, 229 Minn. 365, 38 N.W.2d 838 (1949) allowed such a cause of action. Since then a marked trend has developed, Prosser, Torts 357 (3d ed. 1964). Those states which have allowed recovery include: Wendt v. Lillo, 182 F. Supp. 56 (N.D. Iowa 1960); Gorke v. Le Clerc, 23 Conn. Supp. 256, 181 A.2d 448 (Super. Ct. 1962); Worgan v. Greggo & Ferrara, Inc., 50 Del. 258, 128 A.2d 557 (Super. Ct. 1956); Porter v. Lassiter, 91 Ga. App. 712, 87 S.E.2d 100 (1955); Amann v. Faidy, 415 Ill. 422, 114 N.E.2d 412 (1953); Hale v. Manion, 189 Kan. 143, 368 P.2d 1 (1962); Mitchell v. Couch, 285 S.W.2d 901 (Ky. 1955); Valence v. Louisiana Power & Light Co., 50 So. 2d 847 (La. Ct. App. 1951); State v. Sherman, 234

Two cases recently decided under Pennsylvania law illustrate some of the problems. In *Gullborg v. Rizzo*,[3] a diversity action, the United States Court of Appeals for the Third Circuit unanimously held that there are causes of action under both the Pennsylvania Wrongful Death[4] and Survival Acts[5] for the wrongful death of a viable fetus, as the result of an automobile accident.

Two months later the Supreme Court of Pennsylvania in *Carroll v. Skloff*,[6] a case similar to *Gullborg v. Rizzo*, unanimously denied recovery in a suit against a physician for negligently causing the death of a viable fetus while operating on a pregnant woman.

In both principal cases the decisions were based on whether the child had ever had a personal injury cause of action,[7] since under the Pennsylvania Wrongful Death and Survival Acts, a right to a personal action arising out of the tortious incident must have existed in the decedent prior to death.[8]

The Court of Appeals in *Gullborg* thought that the stillborn child had had a cause of action against the defendant. In an effort to follow *Erie Railroad Co. v. Tompkins*[9] it pointed out that the Pennsylvania Supreme Court had previously recognized the separate existence of the unborn child in *Sinkler v. Kneale*[10] and had allowed re-

---

Md. 179, 198 A.2d 71 (1964); Rainey v. Horn, 221 Miss. 269, 72 So. 2d 434 (1954); 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); Fowler v. Woodward, 138 S.E.2d 42 (S.C. 1964).

[3]331 F.2d 557 (3d Cir.)

[4]"Whenever death shall be occasioned by unlawful violence or negligence, and no suit for damages be brought by the party injured during his or her life, the widow of any such deceased, or if there be no widow, the personal representatives may maintain an action for and recover damages for the death thus occasioned." Pa. Stat. Ann. tit. 12, § 1601 (1953).

[5]"All causes of action or proceedings, real or personal, except actions for slander or libel, shall survive the death of the plaintiff or of the defendant, or the death of one or more joint plaintiffs or defendants." Pa. Stat. Ann. tit. 20, § 320.601 (1950).

[6]415 Pa. 47, 202 A.2d 9 (1964).

[7]In *Carroll* the court said that the wrongful death cause of action "is grounded upon an existing personal cause of action which the deceased could have had but did not institute during his or her lifetime." In *Gullborg* the court studied previous Pennsylvania decisions on whether a child has an action for prenatal injuries in an attempt to decide whether an action may exist before birth in an unborn child under Pennsylvania law.

[8]Berry v. Franklin Plate Glass Corp., 66 F. Supp. 863 (W.D. Pa. 1946); Howard v. Bell Tel. Co., 306 Pa. 518, 160 Atl. 613 (1932); Hoodmacher v. Lehigh Valley R.R., 218 Pa. 21, 66 Atl. 975 (1906); Hughes v. Delaware & H. Canal Co., 176 Pa. 254, 35 Atl. 190 (1896).

[9]304 U.S. 64 (1938).

[10]401 Pa. 267, 164 A.2d 93 (1960).

covery for prenatal injuries. *Sinkler* established that any fetus has a separate existence as a person sufficient to maintain an action for his prenatal injuries if he is born alive. The Court of Appeals reasoned that if the unborn child has a right to an action for prenatal injuries once he is born alive, this cause of action exists from the time of the injury. Without distinguishing between the live birth in *Sinkler* and the stillbirth in *Gullborg,* the Court of Appeals concluded that under Pennsylvania law an unborn child has a cause of action for personal injuries prior to birth;[11] hence the administrator of the stillborn child had a cause of action for wrongful death.

The Supreme Court in *Carroll v. Skloff* did not follow the reasoning used in *Gullborg v. Rizzo.*[12] In its opinion the court said that "the present case is patently and materially different"[13] from *Sinkler v. Kneale* in which the child was born alive. The court in *Carroll* said that the wrongful death action was derivative, and so dependent on decedent's right to a personal injury cause of action before his stillbirth. But the court concluded that the unborn child "quite obviously"[14] does not have a cause of action for personal injuries prior to birth. In effect, the Supreme Court of Pennsylvania maintained that the unborn child who is injured acquires an inchoate right to an action for personal injuries, subject to his birth alive.[15]

Additionally, the court pointed out that the Wrongful Death Act says that any amount recovered shall go to certain named heirs "in the proportion they would take his or her personal estate in case of

---

[11]The court said, "[W]e think that Sinkler has indicated that Pennsylvania would align itself with the preponderant view;" the preponderant view presumably being to allow recovery for the wrongful death of a stillborn child. Gullborg v. Rizzo, supra note 3, at 560.

[12]At the time the brief for appellant was written the *Gullborg* case was on appeal to the Court of Appeals for the Third Circuit. It was, however, mentioned frequently in appellant's belief on the basis of the District Court's decision to allow recovery.

[13]Carroll v. Skloff, supra not 6, at 10.

[14]Id. at 13. See also, Hogan v. McDaniel, 204 Tenn. 235, 319 S.W.2d 221, 225 (1958).

[15]The argument that the unborn child's rights are inchoate or conditioned upon his live birth is derived from intestacy law under which an unborn child may receive property subject to his live birth. The *Carroll* case is not the first time the "inchoate" idea has been applied in the case of an unborn child's death. In Puhl v. Milwaukee Auto. Ins. Co., 8 Wis. 2d 343, 99 N.W.2d 163, 170 (1960), the court said: "There is much that can be said for the biological theory. At least it is a more logical view. Under this theory an unborn infant is not treated as a legal person but as a separate entity or human being in the biological sense from conception having a potentiality or personality which is not realized until birth. Injuries suffered before birth impose a conditional liability on the tortfeasor. This liability becomes unconditional, or complete, upon the birth of the injured separate entity as a legal person."

intestacy...."[16] But under Pennsylvania law a stillborn fetus cannot have an estate, since a fetus *enventre sa mere* may take property by descent or devise only if subsequently born alive.[17] The inclusion in the Wrongful Death Act of this reference to the intestacy statute indicates that the legislature did not intend that a wrongful death action should exist for the negligently caused death of an unborn child.

In agreement with the generally accepted rule[18] Pennsylvania case law limits recovery in a wrongful death action to the pecuniary loss occasioned by the death.[19] Mental distress and the sentimental value of the child are not recognized as elements of damage in the wrongful death action[20] except by a small minority of states.[21]

The pecuniary loss under the Pennsylvania rule is determined by subtracting the probable cost of supporting the child from the net present value of decedent's earnings and services during his minority.[22] Under the general rule the beneficiaries might also recover those benefits which they might reasonably expect from decedent's earnings and services after his minority.[23] Specific proof of financial loss in an action for the wrongful death of a child is not necessary;[24] it is suf-

---

[16]Pa. Stat. Ann. tit. 12, § 1602 (1953).

[17]Martin's Estate, 3 Pa. County Ct. 212 (1887). See Hogan v. McDaniel, 204 Tenn. 235, 319 S.W.2d 221, 225 (1958).

[18]Annot., 14 A.L.R.2d 485, 492 (1950) lists twenty states using the pecuniary loss theory of damages. See generally 16 Minn. L. Rev. 409, 410 (1932) where it is said: "The fundamental principle upon which damages are assessed under the typical statute is that of pecuniary loss...."

[19]Vincent v. City of Philadelphia, 348 Pa. 290, 35 A.2d 65 (1944); Caldwell v. Brown, 53 Pa. 453 (1867); Pennsylvania R.R. v. Zebe, 33 Pa. 318 (1858).

[20]Vincent v. City of Philadelphia, 348 Pa. 290, 35 A.2d 65 (1944); Hyland v. Werner, 6 Sch. Reg. 210 (1940); McCormick, Damages § 101 at 355 (1935); Annot., 14 A.L.R.2d 485, 495 (1950).

[21]This minority includes four states: Miami Dairy Farms, Inc. v. Tinsley, 121 Fla. 774, 164 So. 528 (1935); Aymond v. Western Union Tel. Co., 151 La. 184, 91 So. 671 (1922); R. F. Trant, Inc. v. Upton, 159 Va. 355, 165 S.E. 404 (1932); Black v. Peerless Elite Laundry Co., 113 W. Va. 828, 169 S.E. 447 (1933).

[22]Dattola v. Burt Bros., Inc., 288 Pa. 134, 135 Atl. 736 (1927); Cosgrove v. Hay, 54 Pa. Super. 175 (1913); McCleary v. Pittsburg Rys., 47 Pa. Super. 366 (1911).

[23]Zeller v. Reid, 38 Cal. App. 2d 622, 101 P.2d 730 (1940); Williams v. Hoyt, 117 Me. 61, 102 Atl. 703 (1917); Chapman v. Terminal R.R. Ass'n, 137 S.W.2d 612 (Mo. App. 1940) (stating Illinois rule); Annot., 14 A.L.R.2d 485, 506 (1950).

[24]Burns v. Eminger, 84 Mont. 397, 276 Pac. 437 (1929); Hicks v. Love, 201 N.C. 773, 161 S.E. 394 (1931); Kurn v. Youngblood, 193 Okla. 299, 142 P.2d 983 (1943); Atrops v. Costello, 8 Wash. 149, 35 Pac. 620 (1894). There has been some uncertainty about the Pennsylvania rule on specific proof of damages caused by a child's death. Kost v. Ashland Borough, 236 Pa. 164, 84 Atl. 691 (1912) held that specific proof was necessary to sustain damages. But in Ginocchi v. Pittsburgh & L.E.R.R., 283 Pa. 378, 129 Atl. 323 (1925) the court held specific proof of damages occasioned by the young boy's death was not necessary. It now appears that the Ginocchi case is being followed. See McCleary v. Pittsburg Rys., 47 Pa. Super. 366 (1911).

ficent to show the child's age, sex, physical and mental condition, together with evidence of the parents' circumstances in life.[25]

But even these scant proofs are unavailable in the case of the stillborn child.[26] While all wrongful death actions involve speculation and uncertainty in arriving at the damages, cases involving stillborn children involve unreasonable and arbitrary speculation since there is no evidence concerning the child's capabilities and potentialities.[27] To award damages so speculative is to punish the tortfeasor rather than to compensate the plaintiff.[28] While it has been argued that the problem of speculative damages should be dealt with on a case by case basis,[29] in *Graf v. Taggert*[30] the court rejected this line of reasoning because damages resulting from the stillbirth were "uniformly" very speculative. Strong doubts have also been expressed concerning the reality of pecuniary loss to the parents caused by a child's death, since few children today earn enough money or expend enough of their services to offset the expense of maintaining them.[31]

Because pecuniary loss is rarely suffered by the parents of the stillborn child, a substantial recovery indicates that its real basis is the sentimental value to the parents and their mental distress.[32] There is some danger of duplication of recovery[33] with that obtained by the woman.[34]

In *Carroll v. Skloff* the Supreme Court of Pennsylvania mentioned

---

[25]Wierzorek v. Ferris, 176 Cal. 353, 167 Pac. 234 (1917); Williams v. Hines, 229 S.W. 414 (Mo. Ct. App. 1921); Holland v. Adams, 227 S.W. 512 (Tex. Civ. App. 1921).

[26]Graf v. Taggert, 43 N.J. 303, 204 A.2d 140 (1964); Butler v. Manhattan Ry., 143 N.Y. 417, 38 N.E. 454 (1894).

[27]Finer v. Nichols, 158 Mo. App. 529, 138 S.W. 889 (1911); Berg v. New York Soc'y, 136 N.Y.S.2d 528 (Sup. Ct. 1954).

[28]Graf v. Taggert, 43 N.J. 303, 204 A.2d 140 (1964); Carroll v. Skloff, 415 Pa. 47, 202 A.2d 9 (1964).

[29]Del Tufo, Recovery for Prenatal Torts: Actions for Wrongful Death, 15 Rutgers L. Rev. 61, 78 (1960).

[30]43 N.J. 303, 204 A.2d 140 (1964).

[31]Norman v. Murphy, 124 Cal. App. 2d 95, 268 P.2d 178, 181 (Dist. Ct. App. 1954); McCormick, Damages § 101 at 354 (1935); Comment, 22 U. Chi. L. Rev. 538, 548 (1955).

[32]In Skeels v. Davidson, 18 Wash. 2d 358, 139 P.2d 301 (1943), a case involving worngful death of a mentally and physically subnormal boy in constant need of expensive care, the court reaffirmed the pecuniary loss doctrine and then sustained a verdict of $1,125 upon the basis that defendant's negligence caused the boy's death. See Comment, 22 U. Chi. L. Rev. 538, 549 (1955).

[33]See Norman v. Murphy, 124 Cal. App. 2d 95, 268 P.2d 178 (Dist. Ct. App. 1954); Durrett v. Owens, 371 S.W.2d 433 (Tenn. 1963); Carroll v. Skloff, supra note 6.

[34]Snow v. Allen, 227 Ala. 615, 151 So. 468 (1933); Smith v. Overby, 30 Ga. 241 (1860).

"the inherent complex problems incident to causation"[35] which are involved in a wrongful death action for a stillborn child. This proof would seem to be little different from that required in a woman's action for injuries in connection with a miscarriage. Once the normalcy of the fetus, its development prior to the accident, and the shortness of the interval between the injury and external signs of miscarriage have been established, causation is usually established.[36]

The speculative nature of the damages and the possibility of duplication of recoveries seem sufficient reasons to deny a cause of action for the death of an unborn child.

JEROME TURNER

[35]Supra Note 6, at 11.
[36]Note, 110 U. Pa. L. Rev. 554, 577 (1962).