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Developments in the Law of Prenatal Wrongful Death

Thomas L. Wenger

COMMENT

DEVELOPMENTS IN THE LAW OF PRENATAL WRONGFUL DEATH

Recovery for wrongful death arising from injuries received prior to birth has been a subject of recent controversy in the courts. Originally waged over the basic issue of prenatal injury, the discussion now centers over the subordinate questions of prenatal wrongful death, *i.e.*, whether a cause of action should be allowed for the wrongful death of an unborn foetus; and viability,[1] *i.e.*, whether viability at the time of injury should be a prerequisite for recovery for prenatal injury and/or prenatal death. The purpose of this Comment is to explore the area of prenatal wrongful death, touching upon its historical development as it bears on the present state of the law and its probable future course.[2]

Two recent Pennsylvania cases, *Gullborg v. Rizzo*[3] and *Carroll v. Skloff*,[4] present opposing views on the question of prenatal wrongful death recovery and illlustrate the unsettled state of the present law.

Gullborg v. Rizzo arose out of an automobile collision which caused the stillbirth of the Gullborg foetus, a viable, fully formed female of seven months' development, riding *en ventre sa mere*. The father, as administrator of the foetus' estate, sought recovery under the Pennsylvania wrongful death[5] and survival[6] statutes. In affirming recovery for the plaintiff, the circuit court of appeals held that Pennsylvania law permitted recovery for the wrongfully caused death of a viable, unborn foetus.

Carroll v. Skloff presents a substantially different factual situation. Defendant, a physician, in the course of an operation upon the decedent's mother which required cutting the uterus, discovered a foetus of ten weeks gestation. Defendant surgically removed the foetus thereby causing its death. The father, acting as administrator for the estate of the stillborn foetus, brought survival and wrongful death actions. As in *Gullborg*, the Carroll foetus was alleged to be viable, although here it is not certain whether the court accepted

1. A viable foetus is one which has attained such form and development of organs as to be normally capable of living outside the uterus. See WEBSTER, THIRD INTERNATIONAL DICTIONARY 2548 (1963); see also viability, 2 BOUVIER, LAW DICTIONARY 3399 (8th ed. 1914).
2. See generally Gordon, *The Unborn Plaintiff*, 63 MICH. L. REV. 579 (1965).
3. 331 F.2d 557 (3d Cir. 1964).
4. 415 Pa. 47, 202 A.2d 9 (1964).
5. PA. STAT. ANN. tit. 12, § 1601, 1602 (1953).
6. PA. STAT. ANN. tit. 20, §§ 320.601—03 (1950).

the allegation. The Pennsylvania Supreme Court denied recovery for prenatal death as a matter of law.

The gap between *Carroll* and *Gullborg* reflects the judicial uncertainty which has attended the development of prenatal injury law. The earliest leading American case, *Dietrich v. Northampton*,[7] involved an infant who died shortly after birth because of prenatal injuries. The court, in an opinion written by Mr. Justice Holmes, denied recovery on the theory that the foetus constituted a part of the mother and was not a separate being in its own right. Therefore, any injury suffered by the foetus was actually an injury to the mother for which she could maintain a cause of action. The law retained this concept of foetal development long after it was discarded by the medical profession, using it as a ground for denying recovery for prenatal injury.[8] As time weakened the logic of *Dietrich*, courts frequently employed the following arguments to bolster their position: (1) lack of precedent (2) stare decisis (3) lack of duty to the foetus, since it was a part of the mother and not a person itself (4) fear of injustice arising from difficulty of proof and (5) fear of fictitious claims.[9]

In 1946, however, *Bonbrest v. Kotz*[10] repudiated the doctrine of *Dietrich* as being contrary to natural justice and modern medical knowledge. *Bonbrest* held that there was a cause of action for prenatal injury if the foetus was viable at the time of the injury. Since 1946 the rule of *Bonbrest v. Kotz* has virtually replaced the *Dietrich* doctrine.[11] As the basic question of recovery for prenatal injury was resolved, the issues of viability and prenatal wrongful death came to the fore.

A survey of the various jurisdictions does not disclose a satisfactory explanation for the allowance of prenatal wrongful death recovery. Although ten jurisdictions have permitted actions for prenatal wrongful death,[12] none

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7. 52 Am. Rep. 242 (Mass. 1884).

8. See Note, 110 U. PA. L. REV. 554, 564 & n.65 (1962) referring to the biological concept only with regard to liability.

9. Note, 38 WASH. L. REV. 390, 393 (1963).

10. 65 F. Supp. 138 (D.C. Cir. 1946).

11. See PROSSER, TORTS § 56 (3d ed. 1964).

12. Fowler v. Woodward, 138 S.E.2d 42, (S.C. 1964); Odham v. Sherman, 243 Md. 179, 198 A.2d 71 (1964); Gorke v. LeClerc, 23 Conn. Supp. 256, 181 A.2d 448 (1962); Hale v. Manion, 189 Kan. 143, 368 P.2d 1 (1962); Stidam v. Ashmore, 109 Ohio App. 431, 167 N.E.2d 106 (1959); Poliquin v. MacDonald, 101 N.H. 104, 135 A.2d 249 (1957), rule modified as to viability by Bennett v. Hymers, 101 N.H. 483, 147 A.2d 108 (1958); Worgan v. Greggo, 128 A.2d 556 (Del. 1956); Mitchell v. Couch, 285 S.W.2d 901 (Ky. 1955); Rainey v. Horn, 221 Miss. 269, 72 So.2d 434 (1954); Verkennes v. Corneia, 229 Minn. 365, 38 N.W.2d 838 (1949). These cases should be distinguished from decisions where death actions were allowed for infants who have been primarily injured and have died subsequent to birth. In such cases, the court in essence is merely recognizing a cause of action for prenatal injury. *Cf.* Hall v. Murphy, 236 S.C. 257, 113 S.E.2d 790 (1960);

of the cases offer a compelling argument in favor of recovery. The leading case, *Verkennes v. Corniea*,[13] recognized a cause of action for the stillbirth of a viable foetus. However, the opinion dwelt almost exclusively on the subject of prenatal injury. Since no distinction was made between prenatal death and prenatal injury, the implication is that the court equated the two. Five of the ten jurisdictions permitting the action for wrongful death cite *Verkennes* as controlling. Moreover, none of these jurisdictions had previously recognized a right of recovery for prenatal injury. It is submitted that this propensity to discuss the death issue in terms of prenatal injury may reflect the courts' desire to disassociate themselves from the unpopular and crumbling rule of *Dietrich v. Northampton*. The courts may have merely utilized the factual situation of prenatal death as a vehicle to join the growing trend in support of recovery for prenatal injuries.

Three of the four remaining jurisdictions which had previously permitted actions for prenatal injury, also followed the general rationale of *Verkennes v. Corniea*. These courts, however, relied primarily on prenatal injury cases which had been decided within their respective jurisdictions.[14] The tenth jurisdiction, Connecticut, in *Gorke v. LeClerc*,[15] recognized the death action on the theory that it was unjust to permit recovery where the infant survives for only a few minutes and deny recovery where the infant dies just before birth. In essence, *Gorke* ruled that birth is an arbitrary and inappropriate limitation upon the right to recovery.[16]

Seven jurisdictions, excluding Pennsylvania, have denied actions for prenatal death.[17] Two cases, *Drabbels v. Skelly Oil Co.*[18] and *Howell v.*

Amann v. Faidy, 415 Ill. 422, 114 N.E.2d 412 (1953); Jasinsky v. Potts, 153 Ohio St. 529, 92 N.E.2d 809 (1950).

13. 229 Minn. 365, 38 N.W.2d 838 (1949). See Annot., 10 A.L.R.2d 634 (1949).

14. See Fowler v. Woodward, 33 U.S.L. Week 2169 (S.C. 1964), citing Hall v. Murphy, 236 S.C. 257, 113 S.E.2d 790 (1960); Odham v. Sherman, 243 Md. 179, 198 A.2d 71 (1964), citing Damasiewicz v. Gorsuch, 197 Md. 417, 79 A.2d 550 (1951); Stidam v. Ashmore, 109 Ohio App. 431, 167 N.E.2d 106 (1959), citing Williams v. Marion Rapid Transit Co., 152 Ohio St. 114, 87 N.E.2d 334 (1949).

15. 23 Conn. Supp. 256, 181 A.2d 448 (1962).

16. Other cases occasionally cited in favor of recovery for prenatal wrongful death are: Mace v. Young, 210 F. Supp. 706 (Alaska 1962); Wendt v. Lillo, 182 F. Supp. 56 (Iowa 1960); Porter v. Lassiter, 91 Ga. App. 712, 87 S.E.2d 100 (1955); Valence v. Louisiana Power and Light Co., 50 So. 2d 847 (La. 1951).

17. See Graf v. Taggert, 43 N.J. 303, 204 A.2d 140 (1964); Hogan v. McDaniel, 204 Tenn. 235, 319 S.W.2d 221 (1958); Durrett v. Owens, 212 Tenn. 614, 371 S.W.2d 433 (1963); Muschetti v. Pfizer, 208 Misc. 870, 144 N.Y.S.2d 235 (1955); *In re* Logan's Estate, 4 Misc.2d 283, 156 N.Y.S.2d 49 (1956), *aff'd*, 2 App. Div. 2d 842, 156 N.Y.S.2d 152 (1956), *aff'd*, 3 N.Y.2d 800, 166 N.Y.S.2d 3 (1957); Norman v. Murphy, 124 Cal. App. 2d 95, 268 P.2d 178 (1954); Howell v. Rushing, 261 P.2d 217 (Okla. 1953); Drabbels v. Skelly Oil Co., 155 Neb. 17, 50 N.W.2d 229 (1951); Keyes v. Construction Serv. Inc., 340 Mass. 633, 165 N.E.2d 912 (1960) (dicta); West v. McCoy, 233 S.C. 369, 105 S.E.2d 88 (1958), limited to non-viable foetuses by Fowler v. Woodward, 138 S.E.2d 42 (S.C. 1964).

18. 155 Neb. 17, 50 N.W.2d 229 (1951).

Rushing,[19] followed the outmoded rule of *Dietrich v. Northampton*, holding that the foetus constituted a part of the mother and therefore, had no separate existence prior to birth. A third jurisdiction, Tennessee, in *Hogan v. McDaniel*,[20] decided the case on grounds similar to *Drabbels*, but later modified the rule by allowing recovery for prenatal injuries,[21] while retaining the rule against actions for prenatal wrongful death.[22]

California, having previously permitted recovery for prenatal injury,[23] denied the death action on the grounds that a foetus was not a person within the meaning of the wrongful death statute.[24] Massachusetts, the jurisdiction of *Dietrich v. Northampton*, has accepted the trend in favor of actions for prenatal injuries in the case of *Keyes v. Construction Service Co.*[25] In dicta, however, the Massachusetts court specifically retained the rule against recovery for prenatal wrongful death.

New York presents a situation similar to the present one in Pennsylvania. That jurisdiction, having permitted recovery for injuries to both viable[26] and pre-viable[27] foetuses, nevertheless denied a cause of action for prenatal wrongful death in the case of *Muschetti v. Pfizer*.[28] The *Muschetti* opinion offers scant support for the decision, merely stating that an infant must be born alive in order for a cause of action to accrue. The seventh jurisdiction, New Jersey, having also allowed recovery for prenatal injury,[29] has recently denied recovery for prenatal wrongful death.[30]

In summary the decisions in favor of recovery are based primarily on either the law of prenatal injury, or else the arbitrariness of birth as a limitation to liability. The cases denying recovery rely on *Dietrich v. Northampton*, failure to meet statutory prerequisites, or sheer reluctance on the part of the court to extend liability in the uncertain area of prenatal death.[31]

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19. 261 P.2d 178 (Okla. 1953).
20. 204 Tenn. 235, 319 S.W.2d 221 (1958).
21. Shousha v. Matthews Drivurself Serv. Inc., 210 Tenn. 384, 358 S.W.2d 471 (1962).
22. Durrett v. Owens, 212 Tenn. 614, 371 S.W.2d 433 (1963).
23. Scott v. McPheeters, 33 Cal. App.2d 629, 92 P.2d 678, *rehearing denied*, 93 P.2d 562 (1939). Recovery was based on a statute recognizing the foetus as a person on the condition it is later born alive.
24. See Norman v. Murphy, 124 Cal. App. 2d 95, 268 P.2d 178 (1954).
25. 340 Mass. 633, 165 N.E.2d 912 (1960).
26. Woods v. Lancet, 303 N.Y. 349, 102 N.E.2d 691 (1951).
27. Kelly v. Gregory, 282 App. Div. 542, 125 N.Y.S.2d 696, *appeal granted*, 283 App. Div. 914, 129 N.Y.S.2d 914 (1954).
28. 208 Misc. 870, 144 N.Y.S.2d 235 (1955); *In re* Logan's Estate, 4 Misc.2d 283, 156 N.Y.S.2d 49 (1956), *aff'd*, 2 App. Div. 2d 842, 156 N.Y.S.2d 152 (1956), *aff'd*, 3 N.Y.2d 800, 166 N.Y.S.2d 3 (1957).
29. Smith v. Brennan, 31 N.J. 353, 157 A.2d 497 (1960).
30. Graf v. Taggert, 43 N.J. 303, 204 A.2d 140 (1964).
31. Notable exceptions to this criticism are the excellent decisions of the New Jersey Supreme Court in Smith v. Brennan, 31 N.J. 353, 157 A.2d 497 (1960), and Graf v. Taggert, *supra* note 30.

ANALYSIS OF THE PENNSYLVANIA VIEW

Carroll v. Skloff[32] is the most recent decision in Pennsylvania on the wrongful death issue. However, the contrary and virtually simultaneous case of *Gullborg v. Rizzo*,[33] gives rise to doubt as to the soundness and validity of the *Carroll* decision. Moreover, evaluation of both cases is made difficult by the brevity of the opinions.

Gullborg, the federal court case, is clear in its holding. Recovery may be had under survival and wrongful death statutes for the wrongfully caused stillbirth of a viable foetus. However, the reasoning by which the court reached this conclusion is not clear. The opinion adhered substantially to the pattern established in *Verkennes*, by dwelling heavily upon the topic of prenatal injury; apparently assuming that the instance of prenatal death has no legal significance distinguishable from the case where the injured foetus is born alive. In the same vein the court attacks the long discarded rule of *Dietrich v. Northampton*. Again failing to distinguish between prenatal injury and prenatal death, the court cites *Bonbrest v. Kotz*[34] in support of its decision, even though *Bonbrest* was specifically limited to infants born alive.[35]

The *Gullborg* opinion then cites the Pennsylvania case of *Sinkler v. Kneale*[36] as support for the wrongful death action. In *Sinkler* a woman one month pregnant was injured, causing the infant to be born mongoloid. The court held that the non-viability of the foetus at the time of the accident would not bar recovery for the prenatal injury.[37] The primary significance of the *Sinkler* decision is its recognition of the right to maintain an action for prenatal injury and its simultaneous repudiation of the viability test in such cases. *The case itself bears no relation to the issue of prenatal death.* Correctly observing that Pennsylvania has in *Sinkler v. Kneale* assumed a liberal position with regard to cases of prenatal injury, the *Gullborg* court transposes this liberality into the area of prenatal wrongful death.[38] This view completely disregards the common law origin of personal injury actions as opposed to the statutory nature of survival and wrongful death actions.[39]

Surprisingly, *Gullborg* gave only minor attention to cases in other jurisdictions which have decided the issue of prenatal wrongful death. The court

32. 415 Pa. 47, 202 A.2d 9 (1964).
33. 331 F.2d 557 (3d Cir. 1964).
34. 65 F. Supp. 138 (D.C. Cir. 1946). See also text accompanying notes 9 & 10 *supra*.
35. 65 F. Supp. at 142.
36. 401 Pa. 267, 164 A.2d 93 (1960).
37. *Id.* at 273, 164 A.2d at 96.
38. Gullborg v. Rizzo, 331 F.2d at 559.
39. Compare Bonbrest v. Kotz, 65 F. Supp. 142 (D.C. Cir. 1946) with Voelkel v. Bennett, 115 F.2d 102, *affirming*, 31 F. Supp. 506 (3d Cir. 1940).

merely noted that the majority view permits recovery for the wrongful death of a viable foetus.[40]

Also in *Gullborg*, minimal consideration was given to the Pennsylvania lower court decision of *Carroll v. Skloff*, for it was cited only in regard to that court's interpretation of the viability rule.[41] The fact that the Pennsylvania lower court decided *Carroll v. Skloff* solely on the basis of viability would no doubt lessen its impact upon *Gullborg*, since viability was not an issue in the latter case.[42] Nevertheless, *Carroll* was the Pennsylvania case most similar to *Gullborg* and, consequently, it deserved, but did not receive, extensive consideration by the *Gullborg* court.

In contrast to *Gullborg*, *Carroll v. Skloff* is complicated by the additional issue of viability.[43] The court's failure to separate the issues of viability and prenatal death, as well as the brevity of the opinion, have resulted in an ambiguous holding.

The common pleas court in *Carroll* held: first, that as a matter of law a foetus of ten weeks gestation was not viable; and second, that this lack of viability barred recovery under the wrongful death and survival statutes. Plaintiff appealed both these holdings. The Pennsylvania Supreme Court, while endorsing the lower court's opinion, avoided the question of viability and seemed to decide the case on other grounds.

Briefly, the arguments set forth by the supreme court are: (1) the policy considerations which support recovery for prenatal injury do not inhere in an action for prenatal wrongful death; (2) the real beneficiaries under the death action, the parents, may be adequately compensated under their own independent actions;[44] and (3) an infant has no estate capable of bringing an action until it is born alive.[45]

Since the opinion makes no reference to the viability issue, it would appear that *Carroll* denies actions for prenatal death, regardless of the viability or non-viability of the foetus. It is not certain, however, that this was the intention of the court. There are at least three indications that the *Carroll* rule was directed only to cases involving non-viable foetuses. One such indication is the supreme court's endorsement of the lower court's opinion. Secondly, the *Carroll* court made no effort to repudiate the *Gullborg* rule permitting

40. 331 F.2d at 560.

41. Brief for Appellant and Record, pp. 12A-14A, Carroll v. Skloff, 415 Pa. 47, 202 A.2d 9 (1964).

42. The *Gullborg* foetus was of seven months gestation, whereas the *Carroll* foetus was of less than three months gestation. Viability is not generally acquired before the sixth month of intrauterine life. 2 BOUVIER, LAW DICTIONARY 3399 (8th ed. 1914).

43. *Ibid.*

44. 415 Pa. at 49, 202 A.2d at 11.

45. *Ibid.*

recovery where the stillborn foetus was viable.[46] Finally, *Carroll* claims to be supported by the weight of authority.[47] It would seem that this statement is either erroneous or else denotes the significance of non-viability in the court's decision. If, as is apparently the case, the court accepted Carroll's allegation of viability, then the court's claim is erroneous, because the majority view is that recovery *should* be allowed for the death of a viable foetus.[48] Conversely, if the court tacitly held the *Carroll* foetus to be non-viable and denied recovery for that reason, then its claim as to the weight of authority is correct. The majority of jurisdictions clearly deny a cause of action where the stillborn foetus was non-viable.[49]

Thus, the law in Pennsylvania remains unsettled. *Carroll v. Skloff*, on its face, appears to deny any action for prenatal wrongful death, in which case *Gullborg* is effectively repudiated. If, however, the *Carroll* rule was meant to be applied only in cases of non-viability, then the doctrine of *Gullborg v. Rizzo*, allowing recovery for the stillbirth of a viable foetus, remains valid.[50]

A Critique of Prenatal Wrongful Death Recovery

It is submitted that the cases have incorrectly resolved the issue of prenatal wrongful death and therefore, a reappraisal of it is necessary. The first step in such an appraisal would seem to be a separation of the concepts of prenatal injury and prenatal wrongful death. Although the factual situations which give rise to the respective actions are often similar, it does not necessarily follow that they should be equated. There are at least three areas where prenatal death should be distinguished from prenatal injury.

First, it must be noted that cases of prenatal injury constitute a type of common law personal injury action, whereas survival and wrongful death actions are statutory creations. In determining liability in prenatal injury cases, the courts are not bound by the limited scope of a specific statute. Moreover, they are free to take advantage of the common-law fiction that a foetus may be regarded as a person whenever to do so will benefit the child later born.[51] Survival and wrongful death actions, being creatures of statute present

46. Plaintiff cited *Gullborg v. Rizzo* in the lower court, but the case was rejected as inapplicable because the *Gullborg* foetus was viable. See Brief for Appellant and Record, pp. 17A-18A, Carroll v. Skloff, 415 Pa. 47, 202 A.2d 9 (1964).

47. 415 Pa. at 50, 202 A.2d at 11.

48. See cases cited notes 11 & 15 *supra*.

49. Of the ten jurisdictions cited in note 11 *supra*, all except New Hampshire, *Bennett v. Hymers*, 101 N.H. 483, 147 A.2d 108 (1958), have either expressly or by dictum limited recovery to situations involving a viable foetus.

50. In this event, it would seem there is a cause of action in Pennsylvania for the stillbirth of a viable foetus, but not for the stillbirth of a non-viable foetus.

51. The law of property recognizes posthumous issue as persons capable of inheriting property. However, the inheritance is conditioned upon the subsequent live birth of

a different problem.[52] The question in the case of a stillborn foetus is whether the foetus is a "person" within the meaning of a wrongful death and survival statutes.[53] It is a virtual certainty that foetuses were not intended to be covered by the framers of the survival or wrongful death statutes, since at the time of their enactment foetuses were nowhere considered complete legal persons. The *Bonbrest* line of cases, cited by the proponents of the death action, are inapplicable to the issue of prenatal death, for they don't raise the status of a foetus to that of a legal person. Indeed, to do so would cause far flung repercussions in areas of law utterly remote to the subject of prenatal injury.[54] Rather, the *Bonbrest* line of cases is directed and limited to the issue of prenatal injury. It is not suggested that the wording of the death statutes presents an insurmountable barrier to recovery. However, the existence of the death statutes serves to indicate that a prenatal wrongful death action is not merely a manifestation of prenatal injury actions and requires consideration as an independent action apart from the law of prenatal injury.

A second area of substantial difference between prenatal injury and wrongful death actions is the beneficiary, or person to be compensated. In the case of prenatal injury the beneficiary is the injured infant. The sheer injustice perpetrated by not permitting recovery in such a case is the primary force in support of prenatal injury actions.[55] In cases of prenatal death, however, the parents rather than the foetus are the beneficiaries. Thus, the basic policy underlying recovery for prenatal injury is lacking in the case of prenatal death. The fact of prenatal death brings a different set of equities into play, and demands a basis for liability other than that which supports an action for prenatal injury.

Thirdly, prenatal injury and prenatal death are to be distinguished with regard to proof of causation. Although difficulty of proof should not bar litigation of an issue, it is well established that impossibility of proof is a bar to litigation. Obviously there exists a grey area between the latter and the former and difficulty or impossibility may beset both prenatal injury and prenatal death cases.[56] Nevertheless, in the case of prenatal injury, the existence of

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the foetus. If the foetus is never born alive, the property passes as if the foetus never existed.

Likewise, criminal law recognizes the unborn foetus as an existing person.

52. See Voelkel v. Bennett, 115 F.2d 102 (3d Cir. 1940).

53. See Carroll v. Skloff, 415 Pa. at 49, 202 A.2d at 11.

54. See Odham v. Sherman, 243 Md. 179, 198 A.2d 71 (1964), where the dissenting opinion expresses the fear that the unborn foetus may be used as a conduit of property to the parents.

A more absurd possibility is that a foetus, if recognized as a complete legal person, might be claimed as a dependent under the federal income tax.

55. See 2 HARPER AND JAMES, TORTS § 18.3 (1956).

56. PROSSER, TORTS § 56 at 355 (3d ed. 1964).

specific, observable damage to the infant often facilitates proof. In many cases, however, the exact cause of prenatal death remains subject to conjecture and is often impossible to determine, especially in cases where the stillbirth occurs early in pregnancy.[57] Ultimately, difficulty of proof should not bar the wrongful death action, but the greater evidentiary difficulties encountered in wrongful death weigh against the practice of analogizing prenatal death to prenatal injury.[58]

Appropriateness of Prenatal Death Actions

Once freed from the control of prenatal injury law, the question remains whether wrongful death and survival actions are appropriate to the instance of prenatal death.

The survival action is strictly derivative in nature. It is, in essence, the cause of action which the deceased might have brought if he had lived. This cause of action is preserved by statute and passed on to the estate of the deceased in the form of the survival action.[59] The measure of damages in Pennsylvania, as in most jurisdictions,[60] is the injury to the decedent, or his estate. This includes pain and suffering plus decedent's probable future earnings, less maintenance and expenses, all reduced to present value.[61] In the case of a minor, or foetus, the probable future earnings are measured from the age of twenty-one.[62]

Wrongful death, while technically an independent action, is also generally regarded as derivative.[63] It is an action brought by the family or dependents of the decedent to recover the pecuniary loss suffered by them because of the decedent's death. The measure of damages in the case of a minor or foetus is the probable future earnings of the child up to the age of twenty-one, reduced to its present value.

Neither of these actions was originally intended to cover cases of prenatal death, and it is submitted that they are a demonstrably inappropriate and ineffective means of dealing with such cases. The inapplicability of the survival and wrongful death actions is evident in the area of proof and measurement of damages. In any death action the matter of damages involves a certain amount of conjecture. The rule is that the jury may indulge in such speculation where it is necessary and where there are sufficient facts to support

57. See Note, 110 U. Pa. L. Rev. 554 (1962).
58. See Odham v. Sherman, 243 Md. 179, 181, 198 A.2d 71, 73 (1964); Stidam v. Ashmore, 109 Ohio App. 431, 432, 167 N.E.2d 106 (1959).
59. See Voelkel v. Bennett, 115 F.2d 102 (3d Cir. 1940).
60. See Prosser, Torts § 120, 121 (3d ed. 1964).
61. See Voelkel v. Bennett, 115 F.2d 102 (3d Cir. 1940).
62. *Ibid.*
63. See Carroll v. Skloff, 415 Pa. 47, 202 A.2d 9 (1964).

speculation.[64] Conversely, damages may not be assessed on the basis of sheer speculation, devoid of factual substantiation.[65] In the case of prenatal death there is virtually no competent means of measuring the probable future earnings of the foetus. None of the usual indicia such as mental and physical capabilities, personality traits, aptitudes and training of the wrongfully killed are present. While it is true that the social position of the parents may constitute a slight unit of measure, the probable future earnings of a stillborn foetus are patently a matter of sheer speculation.

An objection, in the same vein, specifically applicable to the wrongful death action is that it can hardly be seriously contended that the death of a foetus represents *any* real pecuniary loss to the parents. There may have been a time when the average child went to work as soon as he was able. That day has passed. Today, the rearing of a child typically constitutes a great pecuniary liability for the parents.

Some courts, realizing the inapplicability of the pecuniary loss concept to cases involving infants, have developed the "investment" theory which permits a parent to recover the amount of his investment in the child.[66] One wonders whether the "investment" rule would dictate that the parents of a ten-year-old should receive roughly twice the compensation given the parents of a five-year-old. In any event the "investment" rule is totally unsatisfactory in the case of prenatal death, since the investment made by the parents prior to birth is usually relatively small and bears no relation to the real injury involved.

Prenatal death actions may also provide an opportunity for a double recovery.[67] In a hypothetical situation where an expectant mother is injured and the accident also causes the stillbirth of the foetus, the mother will have her own cause of action. Theoretically, she is not to be compensated for the death of the foetus in this action. As a practical matter, however, it would seem virtually impossible to remove the fact of the foetus' death from the consideration of the jury.[68] Consequently, it seems probable that the mother's judgment will contain compensation for the stillbirth. If she is then allowed to bring a separate action for the wrongful death of the foetus, the result is a double recovery. Moreover, if the mother fails in her action, she may still bring the wrongful death action, forcing a readjudication of the same factual situation before a new jury, and, in effect, forcing the defendant to defend twice. One additional argument against actions for prenatal death is that,

64. See Krasowski v. White Star Lines, 307 Pa. 470, 162 A. 200 (1932).
65. Cromley v. Speich, 19 F. Supp. 857, *aff'd*, 94 F.2d 543 (D.C. 1942).
66. See 26-27 NACCA L. J. 206-210 (1960).
67. See PROSSER, TORTS § 56 (3d ed. 1964).
68. See 11 BELLI, TRIAL AND TORT TRENDS 574 (1961).

despite medical advances, proof of causation remains difficult in most cases and is often virtually impossible.[69]

In support of prenatal death actions it is claimed that, since the difference between a foetus and an infant may merely be a matter of hours, it is unjust to deny recovery for the death of the former, while permitting an action for the death of the latter.[70] In short, it is claimed that birth is an arbitrary and unreasonable limitation to liability. An illustrative case is *Gorke v. LeClerc*[71] where the court, using the above rationale, substituted viability for birth as a prerequisite for the death action. This argument has some merit, since the birth limitation is concededly arbitrary to an extent and, therefore, will occasionally result in injustice. However, merely removing the birth limitation does not solve the problem. Unless the courts are willing to extend recovery from the time of conception, there remains the matter of choosing a standard to replace birth. To date, it has not been seriously proposed that liability be imposed from the time of conception; in fact, no court has recognized the death action for a non-viable foetus.[72] It would appear, therefore, that viability is the most probable replacement for the birth limitation. Is this an improvement? It is submitted that the viability test is no less arbitrary than the birth standard. The sole difference between viability and non-viability is merely a matter of time. Consequently, the injustice will not be removed, merely relocated. Moreover, the viability test is uniformly criticized by writers as being unworkable,[73] for the time at which a pre-viable foetus becomes viable is indefinite and therefore, incapable of precise determination.[74] Thus, since any limitation will be arbitrary in nature, a tangible and concrete event would be the most acceptable and workable boundary. Birth, being a definite, observable and significant event, meets this requirement.[75]

69. See PROSSER, TORTS § 56, at 355 (3d ed. 1964); Note, 110 U. PA. L. REV. 554 (1962).

70. See Groke v. LeClerc, 23 Conn. Supp. 256, 181 A.2d 448 (1962).

71. *Ibid.*

72. *But see* Porter v. Lassiter, 91 Ga. App. 712, 87 S.E.2d 100 (1955). Recovery in this case was based upon a criminal statute. In Bennett v. Hymers, 101 N.H. 483, 147 A.2d 108 (1958), the court abrogated the viability test for prenatal injury cases and may have intended to include cases of prenatal death.

73. See PROSSER, TORTS § 56, at 356 (3d ed. 1964); Note, 110 U. PA. L. REV. 554 (1962).

74. See PROSSER, *op. cit. supra* note 73, at 356.

75. In the area of prenatal injury where many of the prenatal death issues are not present, six jurisdictions have eliminated the viability test. It is noteworthy that three of these six, Pennsylvania, New Jersey and New York, have nevertheless, denied any recovery for prenatal death. See Sana v. Brown, 35 Ill. App. 2d 425, 183 N.E.2d 187 (1962); Sinkler v. Kneale, 401 Pa. 267, 164 A.2d 93 (1960); Smith v. Brennan, 31 N.J. 353, 157 A.2d 497 (1960); Bennett v. Hymers, 101 N.H. 483, 147 A.2d 108 (1958); Hornbuckle v. Plantation Pipe Line Co., 212 Ga. 504, 93 S.E.2d 727 (1956); Kelly v. Gregory, 282 App. Div 542, 125 N.Y.S.2d 696 (1953), *appeal granted*, 283 App. Div. 914, 129 N.Y.S.2d 914 (1954).

The viability question may be of particular significance in Pennsylvania. In *Sinkler v. Kneale*,[76] Pennsylvania discarded the viability test in cases of prenatal injury. Therefore, if Pennsylvania allows the prenatal wrongful death action, it should logically permit recovery regardless of viability. To do so, however, would place Pennsylvania in a position other jurisdictions have carefully avoided.[77] All courts have either held or specifically stated in dicta that the death action was to be limited to cases involving viable foetuses.[78] On the other hand, if Pennsylvania follows the majority and accepts the prenatal wrongful death action along with the viability test, the result will either negate the progress made in *Sinkler v. Kneale*, or else establish an anomalous double standard. It is suggested that anticipation of this dilemma *may* have influenced the court to deny recovery in *Carroll v. Skloff*.

Recovery for Mental Distress

If death actions are, as suggested, inappropriate to the circumstance of prenatal death, the issue next raised is whether there is any compensable injury suffered in the wrongfully caused death of a foetus. As in the case of prenatal injury, common sense and natural justice here dictate an affirmative answer. The basic flaw in the death actions is that they simply do not touch the injury incurred. It is submitted that the injury which results from prenatal death is not pecuniary loss, but rather the fear, anxiety and sorrow suffered by the parents. The compensable injury is mental distress. At least one case, *Valence v. Louisiana Power & Light Co.*[79] has recognized this to be the primary injury and has permitted the mother to recover for the mental distress caused by the stillbirth of her foetus.

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76. 401 Pa. 267, 164 A.2d 93 (1960).

77. Courts have refused recovery for the wrongful death of pre-viable foetuses. See cases cited note 73 *supra*.

78. Of the ten jurisdictions allowing recovery for prenatal wrongful death, all have either expressly or impliedly limited recovery to cases involving viable foetuses. A possible exception is the New Hampshire case, *Bennett v. Hymers*, 101 N.H. 483, 147 A.2d 108 (1958), expanding the rule of *Poliquin v. MacDonald*, 101 N.H. 109, 135 A.2d 249 (1957); see also note 70 *supra* and cases cited note 11 *supra*.

79. 50 So. 2d 847 (La. 1951).