Damages For the Wrongful Death of a Fetus - Proof of Fetal Viability

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There was no recovery for prenatal torts at the early common law. This was true not only for nonfatal injuries incurred while *en ventre sa mere*, but also under the more recent statutory action for wrongful death. Gradually during the twentieth century, actions for fetal torts were permitted, first for mere injuries sustained while *in utero*, and later for the wrongful death of a child born alive, but whose injuries sustained while *in utero* caused its death. But where a fetus had received fatal injury sufficient to effect a stillbirth, the courts have been more reluctant to allow an action by the survivors for wrongful death. However, the Supreme Court of Illinois, in *Chrisafogeorgis v. Brandenberg*, has recently permitted the survivors of a stillborn fetus to sue for its wrongful death where the injuries were sustained while the fetus was in a viable state.

In September of 1966, decedent’s mother, while in her 36th week of pregnancy, was struck by defendants’ automobile as she walked across a street on the Southwest Side of Chicago. Emergency surgery failed to save the child who, according to the complaint, had died as a result of the accident. The complaint was in two counts, one for the injuries to the mother and one for the wrongful death of the stillborn child. The action by the mother for her own injuries is not herein involved. Upon dismissal of the complaint, plaintiff appealed to the appellate court. That court affirmed the dismissal, relying on the premise that a fetus does not become a “person” as that term is ordinarily understood until the instant of birth. Plaintiff then perfected an appeal to the Illinois Supreme Court, which was faced with the construction of the word “person” in the Illinois Wrongful Death Act. The issue for determination was at what point in its development a

1. A more accurate statement, according to *Salmond, Torts* 346 (10th ed. Stallybrass 1945), would be that there was no English authority on either side of the question. Nevertheless, it is generally agreed that no action was permitted. The history of this action is well summarized in 5B L. Med. Cyc. §§ 37.29-32 (1972); *Prosser, Torts* § 55 (4th ed. 1971) (hereinafter cited as Prosser); Gordon, *The Unborn Plaintiff*, 63 Mich. L. Rev. 579 (1965) (hereinafter cited as Gordon).
2. “In its mother’s womb.”
3. The wrongful death acts originated with the enactment of the Fatal Accidents Act of 1846, 9 & 10 Vict., c. 93, commonly known as Lord Campbell’s Act.
4. “In the uterus,” used synonymously with *en ventre sa mere*.
8. *Ill. Rev. Stat. ch. 70, §§ 1, 2* (1973). In pertinent part:
fetus acquires legal personality for purposes of the action for wrongful
death. In this and other legal contexts, arguments have been propounded
that the legal line of life be drawn at the various stages of preconception, quickness, viability, or live birth. The court, relying on the earlier case of Amann v. Faidy, decided that viability, "the time at which a child is capable of being delivered and remaining alive separate from and independent of the mother," is realistically and reasonably the appropriate line of demarcation. Thus the court held that there could be a recovery under the Wrongful Death Act for the wrongful death of a viable child or fetus born dead as a result of injuries negligently inflicted while en ventre sa mere. In so doing, the court placed Illinois law in accord with the majority of American jurisdictions which have passed upon this point.

1. Whenever the death of a person 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 company or corporation which would have been liable if death had not ensued, shall be liable to an action for damages ....

9. The fetus is often a person under the common law of crimes and property. The civil law regards the fetus in utero as born whenever birth would be to its advantage. PROSSER § 55, at 336, n.17; Gordon, 590, n.71.


12. "Quickening" has been defined as the first recognizable movement of the fetus in utero, appearing usually from the 16th to the 18th week of pregnancy. Roe v. Wade, 410 U.S. at 132. See Porter v. Lassiter, 91 Ga. App. 712, 87 S.E.2d 100 (1955).

13. Verkennes v. Cornies, 229 Minn. 365, 38 N.W.2d 383, 10 A.L.R.2d 634 (1949), was the first American case which permitted recovery for the wrongful death of a viable fetus whose prenatal injury caused death before birth. See generally SPEISER, note 5 supra, § 4.32.


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This case will initially serve as a vehicle for reviewing the Illinois chapter in the history of prenatal tort actions. This will be followed by a synopsis of the case itself. Finally, two problems left open by this decision will be discussed. The first problem is the proper measure of damages for the wrongful death of a fetus, and the second is the proof of fetal viability.

THE CHRISAFOGEORGIS RATIONALE AS SEEN THROUGH ILLINOIS PRECEDENT

The prenatal injury controversy first began in Illinois in 1900 with Al-laire v. St. Luke's Hospital. In that case the mother had entered the hospital in preparation for delivery. An accident caused by the mechanical malfunction of an elevator resulted in a permanently crippled child. The child, although viable when the harm was inflicted, was denied recovery en ventre sa mere. But in terms of legal history what was more significant then the holding of this case was the dissenting opinion


In addition, three states have recently permitted a wrongful death action where there has been a live birth, but have expressly reserved decision on the stillbirth situation. Huskey v. Smith, 289 Ala. 52, 265 So. 2d 596 (1972); Sylvia v. Gobeille, — R.I. —, 220 A.2d 223 (1966) (rejecting viability standard); Leal v. C.C. Pitts Sand & Gravel, Inc., 419 S.W.2d 820 (Tex. 1967).


The RESTATEMENT (SECOND) OF TORTS § 869 (Tent. Draft No. 16, 1970) leaves the question open:

1. One who tortiously causes harm to an unborn child is subject to liability to the child for such harm if it is born alive.
2. If the child is not born alive, there is no liability unless the applicable wrongful death statute so provides.

Excellent analyses of the pertinent statutes are found in SPEISER, note 5 supra, at 773; 7 House L. REV. 449 (1970); 13 J. Fam. L. 99, 111 (1973).

18. 184 Ill. 359, 56 N.E. 638 (1900).
19. It appears from the case that the mother only recovered for her own injuries.
of Justice Boggs. His forceful and eloquent argument helped persuade later courts to change the common law rule prohibiting recovery by a viable fetus:

[The mother] may die . . . and the child remain alive, and capable of maintaining life, when separated from the dead body of the mother. If at that period a child so advanced is injured . . . is it not sacrificing truth to a mere theoretical abstraction to say the injury was not to the child, but wholly to the mother?20

This lone dissent was until 1933 the sole common law21 judicial challenge to Holmes' famous revitalization22 of the ancient rule23 that a fetus is not sui juris for purposes of tort law. Subsequently, American courts began permitting actions for fetal injuries and wrongful death.24

Illinois law was put in accord with that trend in 1953. In Amann v. Faidy,25 a case presenting the same essential facts as Chrisafogeorgis (save that the Amann court treated the child as being born alive),26 a unanimous court overruled Allaire and held:

[T]hat plaintiff, as administratrix of the estate of a viable child, who suffered prenatal injuries and was thereafter born alive, has a right of action [for wrongful death] against the defendant whose alleged negligence caused the injuries.27

The Amann court did not have great difficulty in permitting an action for damages in the case of a live birth.28 But the stillborn child presented a more troublesome case, one which until Chrisafogeorgis had not been decided by the Illinois Supreme Court.29 After discussing the arguments for

21. Cooper v. Blanck, 39 So. 2d 352 (La. App. 1949), was decided under the civil law in 1923. The Supreme Court of Canada, in Montreal Tramways v. LeVéille, 4 D.L.R. 337 (1933) was the first common law court (albeit a strong civil law tradition) to permit an action for prenatal injuries. There is now no authority left supporting the older rule. PROSSER § 55.
22. Dietrich v. Inhabitants of Northampton, 138 Mass. 14 (1884). In that case the fetus actually was born alive, but died ten or fifteen minutes later. See note 49 infra. But see Gordon, n.54.
23. The Earl of Bedford's Case, 7 Co. 7b, 8b: 77 Eng. Rep. 421, 424 (K.B. 1586), a property case, is an early recorded case setting down the dictum filius in utero matris est pars viscerum matris ("A son in the mother's womb is part of the mother's vitals." BLACK'S L. Dict. 756 (4th ed. 1951).
24. PROSSER, § 55.
26. As defendant failed to allege the specific defect complained of at trial, under what was then ILL. REV. STAT. ch. 110, § 169 (1951), now ILL. REV. STAT. ch. 110, § 45 (1973).
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and against permitting a wrongful death action by the survivors of a stillborn child, the Chrisafogeorgis court decided that allowing the action would not effect a wanton abandonment of traditional elements of plaintiff's case.

Specifically, the court found irrelevant two basic arguments for denial of the action. The first of these concerned the difficulty of proving the causal relation between prenatal injury and death. The second argument stressed the speculative measure of pecuniary loss to the survivors of a still-born child.

As to the first of these, the court simply adhered to the issue at bar, which was not one of fact, but of law. The peroration of a quotation from Amann stated the essence of this argument:

The right to bring an action is clearly distinguishable from the ability to prove the facts. The first cannot be denied because the second may not exist.80

Nevertheless, the court observed in passing that as the mother was in her 36th week81 of pregnancy, there was no doubt as to the viability of the fetus. It is thus inferred that proof of causation in fact (whether the injuries effected the death) would not be as difficult82 in the case of a viable fetus as in that of a previable fetus. Finally, the court noted that proof of proximate cause of death is no different in the case of stillbirth than in the case of live birth.83

The second argument against permitting the action, that of the proper measure of damages, presents special problems. These problems will be considered following a discussion of the position of the dissenting justices.

The three dissenters84 in Chrisafogeorgis maintained that the point of viability, as opposed to the time of birth, is uncertain, indefinite, and, according to a leading authority, "a most unsatisfactory criterion" of the existence of a legal human being for purposes of wrongful death.85 In con-

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held that there was no wrongful death action in the case of an injury to a 4½ month-old fetus who was later stillborn.


31. Viability usually begins around the 26th or 28th week. See text at note 98 infra.


34. Rvan, J., with Underwood, C.J., and Kluczynski, J., joining.

35. Prosser § 55, at 337. However, Prosser later states that "all logic is in favor of ignoring the stage at which (the injury) occurs." Id.
demning the majority for "just pure judicial legislation" by construing the word "person" in the Wrongful Death Act to include the viable fetus, the dissent first argued that the wrongful death action is in derogation of the common law and hence must be strictly construed. The statute was enacted in 1853 and by well-settled rules of statutory construction, the words must be taken in the sense in which they were understood at the time when the statute was enacted. The United States Supreme Court recently examined the sense in which the word "person" was first used in the fourteenth amendment (enacted just 15 years after the Wrongful Death Act became law in Illinois) and concluded that the word "person", as initially understood in the fourteenth amendment, did not include the unborn. Hence when the Illinois statute was enacted, the word "person" as originally used in that Act did not encompass the unborn either.

In addition, the Illinois General Assembly has amended the Wrongful Death Act twelve times since 1853. The dissent noted that:

In spite of the decisions of this court and other jurisdictions that denied recovery for prenatal injuries the legislature did not amend the Act to specifically create a cause of action for death of an unborn fetus.

38. Citing Wilson v. Tromly, 404 Ill. 307, 89 N.E.2d 22 (1949). But cf.: "Death statutes have their roots in dissatisfaction with the archaisms of the law . . . It would be a misfortune if a narrow or grudging process of construction were to exemplify and perpetuate the very evils to be remedied." Cardozo, J., in Van Beeck v. Sabine Towing Co., 300 U.S. 342, 350 (1936).
41. E.g., "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."
42. The dissent refrained from stating the Roe Court's dictum that this ruling was not inconsistent with the policy of some states to permit the parents of a stillborn child to maintain an action for wrongful death because of prenatal injuries. Mr. Justice Blackmun noted that what is really being vindicated in that case is the right of the unborn child's parents to recover for their loss. (emphasis added) 410 U.S. 113, 157, 162 (1973).
43. Id.
44. Primarily in the area of limitations on recovery.
45. 55 Ill. 2d 368, 379, 304 N.E.2d 88, 94 (1973). More accurately, the legislature neither restricted nor expanded the court's power to modify or extend its earlier decisions. In response to a similar argument, Mr. Justice Douglas cautioned: "It is
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Thus from legislative inaction the Chrisafogeorgis dissent inferred legislative intent not to extend the scope of the Act's coverage to include the unborn, and especially the stillborn.\(^{46}\)

Finally, the dissent used the New York Wrongful Death Act,\(^{47}\) with its subsequent interpretation, for additional support. While New York permits an Amann-type action to recover for injuries sustained in utero (which causes death after a live birth),\(^{48}\) New York does not permit an action for death of a stillborn fetus.\(^{49}\) Thus the New York construction would support the contention that there is no logical basis to expand Amann to stillborn fetuses. The dissent further stated:

The court in Endresz distinguished between the updating of a common law action by judicial decision which was the effect of the decision in Woods and the reinterpretation of a statutory cause of action which had been created by the legislature.\(^{50}\)

Hence the dissenters here were disinclined to engage in what was termed "just pure judicial legislation" by extending judicial interpretation to an action solely of legislative origin.

The Chrisafogeorgis court held that there may be liability for the wrongful death of a viable fetus born dead as a result of injuries negligently inflicted while in utero. In so doing, the court left open two important questions: the measure of damages for the wrongful death of a fetus, and proof of fetal viability. A discussion of the first of these follows.

EVALUATING A STILLBORN CHILD UNDER ILLINOIS LAW

In keeping to the narrow question of defendants' duty to plaintiff, Chrisafogeorgis necessarily skirted the collateral issue of damages. The court in dictum merely stated that, whether the child is born alive or still,


\(^{47}\) E.P.T.L. 5-4.1 (formerly Decedent Estate Law, N.Y. CONSOL. LAWS ch. 13 § 130).


\(^{50}\) Chrisafogeorgis v. Brandenberg, 55 Ill. 2d 368, 377, 304 N.E.2d 88, 93 (1973) (Ryan, J., dissenting).
the difficulties in determining damages to the parents are no different. However, the court did recognize that certain difficulties do exist. The function of this section is to review these difficulties and to suggest solutions.

An action under the Illinois Wrongful Death Act\textsuperscript{51} proceeds on the theory of compensating the next of kin for loss of the economic benefit which they might reasonably have expected to receive from the decedent. This economic benefit may take the form of support, services, or contributions during the remainder of the decedent's lifetime if he had not been killed.\textsuperscript{52} Until recently, solatium (damages for pain and suffering) was not permitted in wrongful death actions.

The law was changed in \textit{Murphy v. Martin Oil Co.}\textsuperscript{53} There, plaintiff's decedent was injured as a result of defendant's negligence, and died nine days later. In a wrongful death action, plaintiff also claimed damages for conscious pain and suffering of the decedent from the time of injury until the time of death. Plaintiff was confronted with a long-standing precedent\textsuperscript{54} that the wrongful death action was her exclusive remedy. Nevertheless, the Illinois court agreed with plaintiff, stating that the Wrongful Death Act and the Survival Act\textsuperscript{55} are to be read separately. That is, the action for injuries is not precluded by the action for wrongful death, but rather survives independently from it. While it is suggested that \textit{Murphy} and \textit{Chrisafogeorgis} are distinguishable (in that the latter death was instantaneous), the measure of damages for the wrongful death action was still the amount of pecuniary loss suffered by the next of kin.

Where the next of kin are lineal, there is a presumption of "some substantial pecuniary loss."\textsuperscript{56} This is true even when both the decedent and the lineal heirs are adults.\textsuperscript{57} The presumption is rebuttable; its effect is merely to establish a prima facie case absent evidence of loss. However, the burden is shifted to defendant to establish facts to the contrary.\textsuperscript{58}

\textsuperscript{51} ILL. REV. STAT. ch. 70, § 2 (1973). In pertinent part:
[The amount recovered in every such action shall be for the exclusive benefit of the widow and next of kin of such deceased person and in every such action the jury may give such damages as they shall deem a fair and just compensation with reference to the pecuniary injuries resulting from such death, to the wife and next of kin of such deceased person.]

\textsuperscript{52} PROSSER § 127, at 906.

\textsuperscript{53} 56 Ill. 2d 423, 308 N.E.2d 583 (1974).

\textsuperscript{54} Holton v. Daly, 106 Ill. 131 (1882).

\textsuperscript{55} ILL. REV. STAT., ch. 3, § 339 (1973). In pertinent part:
[In addition to the actions which survive by the common law, the following also survive: . . . actions to recover damages for an injury to the person (except slander and libel), . . .]

\textsuperscript{56} ILL. PATTERN JURY INSTRUCTIONS § 31.01.01 (1965) (hereinafter cited as I.P.I.), adopted as law, ILL. REV. STAT., ch. 110A, § 239(a) (1973). \textit{See} Hall v. Gil- lins, 13 Ill. 2d 26, 147 N.E.2d 352 (1958) and 16 I.L.P. Death § 45.

\textsuperscript{57} Naslund v. Watts, 80 Ill. App. 2d 464, 224 N.E.2d 474 (1967).

\textsuperscript{58} Flynn v. Vancil, 41 Ill. 2d 236, 242 N.E.2d 237 (1968), where the presumption was rebutted in an action for the wrongful death of a two-week-old infant afflicted with an independent and incurable congenital condition.
The pecuniary loss method has its origin in the basic principle that damages are only to be compensatory in nature. The Wrongful Death Act was designed to prevent the deceased’s dependents from becoming destitute as a result of the fault of a third person. Rather, the Act shifted the loss of the decedent’s prospective earnings from the dependents to that third person. Later in the nineteenth century, recovery was also allowed for the wrongful death of children, many of whom were fatally injured while working in order to help support the family. Since the action for the wrongful death of both the child and the adult are based upon the same statute, the pecuniary loss formula was extended to cover the child decedent as well. But since the child was also dependent on the parents for economic sustenance, in fairness to the defendant the court advised the jury to deduct the probable costs of rearing the child. This method of determining the expected earnings of the child during minority, less the cost of raising him, has been termed the “wage-profit” formula. This formula quickly gained disfavor as its fictional foundation became apparent. Since “damages honestly calculated on this basis could never be anything but a minus quantity,” other methods were suggested to cope with the problem of “evaluating” the loss of a minor child in those jurisdictions which employ the pecuniary loss method.

Some authorities have suggested that no recovery be permitted at all. On the other hand, others believe that, while the method of this legal fiction is improper, the end product is correct. For example, Dean Prosser stated:

60. Gordon 594.
61. PROSSER § 127 at 909.
62. Id. That is, the expected earnings must exceed the costs of raising the child. As for earnings, these would vary greatly from case to case. For example, in poorer families, the child may begin gainful employment at an earlier age in order to help support the family. On the other hand, the child of a wealthier family would perhaps be expected to earn a higher wage, although the wealthy child would remain in school longer.

An effort should be made to estimate the costs of raising a child. In DUBLIN & LOTKA, THE MONEY VALUE OF A MAN § 57 (rev. ed. 1946), the authors estimated the cost of raising a child to the age of eighteen (based on 1936 American society) to be $20,785 (interest included) for a family with an income of $5,000 to $10,000. On the basis of the change in price levels, as reflected in the STATISTICAL ABSTRACT OF THE UNITED STATES 346, Table 568 (94th ed. 1973), the 1972 equivalent of this is $62,770. But by another method (16 AM. JUR. PROOF OF FACTS Proof of Lost Earning Capacity and of Future Expenses 701 (1961)), which uses Department of Labor statistics extrapolated to age 18, the figure is $32,745, assuming a family of three, constant prices, a 1972 median income of $11,000 (which is the median in Illinois; STAT. ABST., supra, 332, Table 541), and is exclusive of interest. This method assumes the child each year consumes an additional 1% of family income after age 5; thus at age 18, the child consumes 24% of family income.

63. Some jurisdictions even extend recovery beyond the age of majority, the speculative nature of the damages notwithstanding. PROSSER § 127 at 909.
64. E.g., Graf v. Taggart, 43 N.J. 303, 204 A.2d 140 (1964); 2 HARPER & JAMES, TORTS § 18.3 (1956). But cf. SPEISER § 4.32.
Such decisions [permitting sentimental factors to be tacitly considered] do not appear very likely to command respect for the administration of justice; but it seems evident that it is the theory which is wrong, and not the result.65

Nevertheless, several alternative means of computing damages for the death of a child have been proposed.

In a leading case,66 the Michigan court devised what has been called the “lost investment” rule67 whereby the loss of the child-decedent’s consortium is compensable. That is, the

value was to be measured by the functioning value of the human being as a part of the family, taking into account, as in the case of a machine in a factory, the expenses heretofore incurred, and treating the child as a unit in place.68

These expenses are readily determinable. The parents are given what in effect is restitution for birth costs, financial contributions, food, clothing, and shelter. This is the parents’ lost investment, and, when combined with the value of the child’s society and companionship, determine the value of the child to that family. This method has gained some favor by the authorities.69

Illinois does not subscribe to either the “wage-profit” or “lost investment” approaches.70 The pattern jury instruction71 simply includes pecun-
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pecuniary benefits which the decedent might reasonably have contributed to his next of kin. Neither past expenditures made in anticipation of raising a child, nor the value of the child as a member of the family, are compensable. To be considered by the trier of fact in this determination are the decedent’s age, sex, and health. As conjectural as this may seem in the case of a young child, it is a fortiori conjectural when the plaintiff is unborn. It appears that only evidence of the decedent’s sex and prenatal health are relevant to these issues. Evidence of the degree of conjecture is shown by the wide disparity in the amount of jury verdicts.

Thus the determination of damages in the Chrisafogeorgis-type case where the fetus is fatally injured before birth presents greater difficulty. In those states which have permitted the action (save those following the Michigan rule), the traditional pecuniary loss formula is often used. Logically, those who criticize the pecuniary loss method in the wrongful death of a child also criticize that method when used to evaluate the wrongful death of a fetus. But again suggestions are offered.

One writer is incisive in his statement of the problem:

[The grant of compensation . . . to the parents of an infant [who has died] in utero is in reality pure speculation and duplicity . . . . It is not submitted that the tortious destroyer of a child in utero should be able to escape completely by killing instead of merely maiming. But it is submitted that to compensate the parents any further than they are entitled by well-settled principles of law and to give them a windfall through the estate of the fetus is blatant punishment. The actual-pecuniary-loss basis of compensation in wrongful death actions has, where the award will be based on speculation, given way in some states to a fixed sum of money . . . .

73. As culled from the Cook County Jury Verdict Reporter, the mean verdict in wrongful death actions for children under age 5 from 1969 through 1973 is $32,900. The average compromise offer is therein shown to be $13,000. The Urban Ring Reporter outside Cook County shows mean verdicts for the same type case to be under $8,000. The disparity in Cook County is shown by the extremes. Compare, e.g., $14,500 for a seven-year-old boy, with $162,000 ($115,000 actual damages, $45,000 punitive) for a five-year-old girl.
74. See note 69 supra. The statutes, which are somewhat less than uniform, are summarized in Comment, A Modern View of Wrongful Death Recoveries, 54 Nw. U. L. Rev. 254, 255 (1959).
This fixed-sum approach should be compared with one which is similar yet more flexible. This author suggests a fixed statutory minimum supplemented by the parents' actual lost investment in the child or fetus.

This restitutitional method is suggested to be the most rational and practical method of measuring damages in the tortious death of a young child. It would in theory have the additional effect of granting a lesser sum in the stillbirth situation, since fewer expenses are incurred when a fetus fails to survive birth. In the adult-decedent situation the pecuniary loss formula is well-suited to do its job: that of keeping the decedent's dependents safe and secure. But in the case of the child-decedent the function of recovery should be entirely different. First, the pecuniary loss rule was implemented when children worked for the family during their minority. That situation is now rare, if not a complete anachronism. Furthermore, while each human life is unique, pragmatically speaking, contemporary family-planning parents may simply be expected to have another child. If they cannot, then of course the parents have suffered redoubled injury, for which they ought justifiably recover. As a matter of basic public policy, a restitutional approach will better encourage the parents to forget their grievous loss, and start over again, rather than (as under the pecuniary loss method) encourage the parents to dwell upon what their child might have produced in the future. This result should be codified into the Illinois statutes.

The term "viability" has lately received some notoriety. It is central not only to the instant case, but has been given superadded importance in light of recent abortion decisions by the Supreme Court of the United States. The next section elaborates on medical opinion as to the meaning of this elusive term.

PROOF OF FETAL VIABILITY*

Due to recent advances in the science of medicine, the law has had much difficulty in the determination of when life begins and ends. While philosophy and theology have opinions on the matter, the law has tradi-

77. Comment, A Modern View of Wrongful Death Recoveries, 54 Nw. U.L. Rev. 254, 261 (1959). A variation on this theme has been propounded:

"An arbitrary but substantial measure of damages would perhaps be the best solution. Such an award might be a fixed amount or a scale within which the jury could fix damages. At the same time it would be wise to continue the recognition of actual economic harm. This could be done by a statutory provision requiring specific proof of economic loss."


* The author wishes to thank Dr. Rowine Hayes Brown, M.D., J.D., Medical Director, Cook County Hospital, and Dr. John J. Fennessey, M.D., Professor and Chairman of the Department of Radiology in the Pritzker School of Medicine of the University of Chicago, for their most helpful suggestions on this point.

tionally turned to medicine for guidance in answering these questions. While medicine has had some consensus as to the precise time of death, the same cannot be said in regard to the precise beginning of human life.

The existence of fetal viability is pertinent here because the survivors of a stillborn fetus, injured while in a previable state, have no action for wrongful death in Illinois. In the typical case of a possibly viable fetus, the physician who has rendered prenatal care will be called as an expert witness. He will be asked his opinion whether the fetus was or was not viable, both at the time of the last pretrauma examination and at the time of the injury. Counsel for plaintiff, in his cross-examination of defendant's experts, will attempt to establish the fact of viability by reference to the minimal standards of fetal viability discussed below. The defendant, in cross-examining plaintiff's experts, will try to show that the fetus was not viable at the time of the injury by reference to the most stringent standards of viability, and hence no action for wrongful death should lie. The post-trauma examining physician will also be called to give his opinion whether the fetus was viable at the time of the injury. Also, any pathologist who examined the fetus might also be called to ascertain whether the fetus was viable at the time of the injury.

In addition to proving viability, plaintiff must also show that the injury was a material or substantial factor in the death of the fetus. As the proximate cause issue is discussed elsewhere, this section will examine the factors which determine fetal viability, both in utero and postpartum.

Noteworthy here is the recent Supreme Court case of Roe v. Wade. In that decision viability also plays a supporting role. In partitioning the human gestation period into three stages, the Court stated that:

For the [third] stage subsequent to viability the State, in promoting its interest in the potentiality of human life, may, if it chooses, regulate, and even proscribe, abortion . . . .

Thus, a legislature must consider the concept of fetal viability in drafting an abortion statute. It is hoped that this discussion will better enable that body to define a viable fetus.

Abortion is the termination of a pregnancy at any time before the fe-

81. Where there is a continuing injury which occurs during both previability and viability (as by noxious medicine), it is suggested that a wrongful death action ought to lie if a material and substantial injury has been sustained during the stage of viability.
83. Note 33 supra.
84. 410 U.S. 113 (1973).
85. Id. at 164.
tus has attained a stage of viability. Viability is the time at which a child is capable of being delivered and remaining alive separate from and independent of the mother. This capability, in turn, is a direct function of lung and nervous system for purposes of respiration, and varies in each particular case. One expert states it:

A most significant milestone in lung development appears to occur at about 26-28 weeks when the fetus weighs about one kilogram. At this time the capillary network, which arose about the 20th week ... proliferates close to the developing airway. Extruterine existence is not possible until there is a sufficiently extensive surface area of the lung for gas exchange.

Another, while substantially agreeing, notes:

While the question of viability turns on the development of the fetal lung, a necessary concomitant is the maturity of the central nervous system. Specifically, impulses from the medulla and the thoracic spinal cord must be able to compel the lungs to breathe. Otherwise no respiration may occur.

There are numerous secondary factors in the determination of fetal viability. The two most important factors, birth weight and gestational age, are discussed in some detail. The others shall be treated seriatim.

Weight at birth is an easy and objective criterion of fetal viability. For this reason, birth weight is the sole determinant of viability under international agreement. Thus the World Health Organization has established that, for statistical purposes, fetuses below 500 g. (1.1 lbs.) at birth are not viable. However, this conclusion is not supported by the weight of medical authority; most choose 1000 g. (2.2 lbs.) as the standard. Neverthe-

86. HELLMAN & PRITCHARD, WILLIAMS OBSTETRICS 493 (14th ed. 1971) (hereinafter cited as WILLIAMS).
88. AVERY, THE LUNG AND ITS DISORDERS IN THE NEWBORN INFANT 5 (1964). The average human gestation period is 38 weeks, or 40 weeks from the onset of the last menses. 5B LAWYER'S MEDICAL CYCLOPEDIA OF PERSONAL INJURIES AND ALLIED SPECIALTIES § 37.2a (1972) (hereinafter cited as L.M.C.).
89. NELSON, TEXTBOOK OF PEDIATRICS 19 (8th ed. 1964) (hereinafter cited as NELSON). At about 21-24 weeks, the chemical surfactin appears in the fetal lung. This has the effect of lowering the surface tension in the lung, which in turn allows the lung to expand normally and support life. COTES, LUNG FUNCTION 345 (2d ed. 1968).
90. TUTTLE AND SCHOTTELIUS, TEXTBOOK OF PHYSIOLOGY 462 (14th ed. 1961). But see note 100 infra.
91. BREWS, MANUAL OF OBSTETRICS 702 (12th ed. 1963).
92. 5 GRAY, ATTORNEY'S TEXTBOOK OF MEDICINE § 307.11(2) (3d ed. 1973) (hereinafter cited as GRAY). For comparison, the average full term birth weight is 3350 g. for boys and 3050 g. for girls. L.M.C. § 37.2b.
93. Accord, AVERY, note 88 supra; BREWS, note 91 supra, at 62; POTTER &
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less, some set 400 g. (14 oz.) as the point at which viability begins,\(^*\) noting that the lightest babies on record to survive have weighed 396\(^*\) and 397 g.\(^*\)

The determination of precise gestational age is very difficult.\(^*\) However, most authorities believe that, in the normal pregnancy of 38-40 weeks since conception, viability is possible from 26-28 weeks onward.\(^*\) Some, however, state that viability is possible as early as the 20th week of gestation.\(^*\) The youngest recorded surviving infant was born in the 18th week of pregnancy.\(^*\)

A list of the factors used in the determination of the stage of pregnancy would be helpful to the attorney questioning a medical expert. While the fetus is in utero (and no twinning has occurred),\(^*\) the doctor may listen for the fetal heartbeat,\(^*\) palpate active movements,\(^*\) observe progressive increase in fetal size,\(^*\) utilize a fetal electrocardiograph or other monitor,\(^*\) employ ultrasonics,\(^*\) or x-ray the femur, tibia, humerus, skull, or pelvis.\(^*\)

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\(^*\) ADAIR, FETAL AND NEONATAL DEATH 82 (1949); REID, PRINCIPLES AND MANAGEMENT OF HUMAN REPRODUCTION 795 (1972); ULLERY & HOLLENBECK, TEXTBOOK OF OBSTETRICS 126 (1965); WILLIAMS, note 86 supra, at 493. With proper care, the newborn weighing less than 1000 g. has a 20% chance of survival. GREENHILL, OBSTETRICS, 834 (12th ed. 1960).

94. DANFORTH, OBSTETRICS AND GYNECOLOGY 310 (1966). Cf. REID, note 93 supra, at 254 (500 g.); STEDMAN'S MEDICAL DICTIONARY 1388 (22d ed. 1972) (500 g.). But cf. GRAY §§ 307.11(2), 307.32, 311.00 (1500 g.).


96. WILLIAMS, note 86 supra, at 493.

97. Interview with Dr. J. Laurance Hill, M.D., of the University of Chicago Hospitals, in Chicago, March 11, 1974.

98. Roe v. Wade, 410 U.S. 113, 160 (1973) (24-28 weeks); 9 AM. JUR. PROOF OF FACTS Prenatal Injuries 533-6 (1961) (25-28 weeks); AVERY, note 88 supra (26-28 weeks); NELSON, note 89 supra (28 weeks); POTTER, note 93 supra (26-28 weeks); REID, note 93 supra, at 795 (28 weeks).

99. STEDMAN, note 94 supra (20 weeks); REID, note 93 supra, at 254 (20 weeks); WILLSON, OBSTETRICS AND GYNECOLOGY 4 (4th ed. 1971) (20 weeks). The World Health Org. uses 20 weeks for statistical purposes. GRAY § 307.32.

100. NELSON, note 89 supra. While the infant may have been able to respire, this does not mean that he was able to digest and assimilate food. 9 AM. JUR. PROOF OF FACTS Prenatal Injuries 536 (1961). Thus while there has been a live birth, the child may have died of starvation within a few hours. 70 Mich. L. Rev. 729, 752-5 (1972).

101. In the case of a multiple birth, these factors are much less reliable. Interview with Dr. Rowine Hayes Brown, in Chicago, March 27, 1974.

102. L.M.C. § 37.2b. But the inability to detect the fetal heart (even as late as seven months) does not necessarily mean the fetus is dead. Id.

103. DANFORTH, note 94 supra, at 264.

104. Id.

105. Id.


107. Id.; L.M.C. § 37.2b; LUSTED & KEATS, ATLAS OF ROENTGENOGRAPHIC MEASUREMENT 166 (1959).
Other evidence of previous viability will appear after a stillbirth. That is, the eyelids have separated, testicles descended, nails reached the tips of the digits, and the downy coat of lanugo hair presented. An autopsy of the lungs and spine will then directly show whether the fetus would have been able to respire had he not been injured. However, it may take as long as one month before the dead fetus has been expelled by the mother. During this period, sufficient atrophy may have occurred to render the autopsy nugatory.

Fetal death may be diagnosed while in utero by the following: cessation of uterine growth, regression in uterine size, regression in size of maternal breasts, cessation of fetal movement, absence of fetal heartbeat, disappearance of a previously observed electrocardiogram, absence of uterine bruit, x-ray of skull and spine, maceration of the fetal skin, various biologic tests, and the mother's loss of weight.

Finally, there are more minor characteristics of fetal viability. These are the availability of expert neonatal care, height at birth, maternal health, maternal nutrition, the amount of certain hormones present in the uterus, and the mother's socioeconomic class. These factors correlate with, rather than cause fetal viability. For example, delivery in a fully-equipped hospital with well-trained personnel tends to increase the chances of survival.

It appears that the following diagnoses are essential to plaintiff's case. He must first establish that the fetus was viable at the time of the injury. This may be done by showing that the fetus was viable at the time of the last pretrauma examination. If not, then plaintiff must show that the fetus

108. GRADWOHL, note 33 supra, at 443.
109. L.M.C. § 37.2b, Table 1.
110. PATTEN, HUMAN EMBRYOLOGY 237 (1946).
111. Id. at 239.
112. Id.
113. Interview with Dr. Rowine Hayes Brown, in Chicago, March 27, 1974.
114. Id.
115. DANFORTH, note 94 supra, at 264.
116. WILLIAMS 493.
117. A fetus with a crown-to-heel height of 35 cm. (13 in.) is quite uniformly considered viable. See, e.g., L.M.C. § 37.2b.
118. Id. § 37.16.
119. Unlike mere diet deficiency, malnutrition in the pregnant woman leads to a high incidence of stillbirths and of premature births. NELSON 18. A premature infant is a viable fetus born before term. WILLIAMS 493. One writer estimates that 5-10% of U.S. births per year are premature. MONTAGU, PREGNATAL INFLUENCES 399 (1962). On the subject of statistics, another writer estimates the incidence of abortion (note 86 supra) to birth rate of theoretically viable infants is 20%. HOLLENBECK, note 93 supra, at 126. Also, prenatal injury accounts for 15.4% of total infant death. SHAPIO, INFANT, PERINATAL, MATERNAL, & CHILDHOOD MORTALITY 28 (1968).
120. FETAL EVALUATION DURING PREGNANCY AND LABOR (Milan Symposium) 37, 65 (1971).
121. BREVWS, note 91 supra, at 703.
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had at least attained viability at the time of the injury. This may be proved by testimony of the posttrauma examining physician or pathologist. Secondly, plaintiff must establish that the fetus was dead after the injury.

Defining fetal viability is fraught with problems of imprecision. Gestational age is imprecise since the experts differ by as much as eight weeks in this determination, and further that gestational age is so difficult to determine. The weight standard of 1000 grams is helpful as a generality, but need not be determinative of viability in the particular case. Also, in those states which have proscribed third trimester abortions, a doctor performing an abortion will not know until the abortus has been weighed (and thus after the abortion itself) whether he has committed a crime. Despite these difficulties, it is hoped that this discussion will provide some guidance to the trial lawyer in his effort to establish or refute the existence of a fetus who was viable when fatally injured.

SUMMARY

Most jurisdictions permit the survivors of a fatally injured viable fetus, born dead, to sue the tortfeasor in an action for wrongful death. Illinois is now a part of this majority. However, two problems left open by this result have been dealt with in greater detail.

First, the measure of damages for the wrongful death of a fetus is still the amount of pecuniary loss suffered by the next of kin. This formula, while proper in the case of an adult decedent, is suggested to be inappropriate where the decedent is a fetus or young child. The alternative herein recommended is a fixed statutory amount, supplemented by a reimbursement of any investment lost as a result of the death of the child.

The second problem concerned the characteristics inherent in a viable fetus. The major attribute of viability is the capacity of the lungs to respire. In addition, numerous correlative characteristics of viability were mentioned, primarily weight and gestational age at the time of injury. That is, a fatally injured fetus was probably viable when it weighed more than one kilogram and had a gestational age of more than 26 weeks. However, substantial deviation from these figures exists among medical authorities. This indicates a sufficient difference of expert opinion to enable counsel, in a close case, to prove or refute the existence of a viable fetus.

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