Lingering Questions about the

Prenatal Torts in

In 1998, Michigan's legislature enacted a statute that seems to add *something* new to our law of prenatal torts. Currently codified as MCLA 600.2922a, the statute states, in part: "A person who commits a wrongful or negligent act against a pregnant individual is liable for damages if the act results in a miscarriage or stillbirth by that individual, or physical injury to or the death of the embryo or fetus." We believe that this statute does indeed add something new to Michigan's prenatal tort law—specifically, a claim for the wrongful death of an embryo or previable fetus.

This view, to be sure, rests on an uncertain inference. As will be explained, Michigan's pre-1998 case law had already recognized a comprehensive range of prenatal tort claims—for a pregnant woman who suffers the tortious loss of the pregnancy, for a child born alive but in an injured condition due to a prenatal tort, and for the prospective family of a fetus wrongfully killed *after viability*. Lest the 1998 statute be a nullity, its imposition of liability for a "wrongful or negligent act . . . [that] results in . . . the death of the embryo or fetus," we believe, must have added a claim for the wrongful death of an embryo or *previable* fetus. This inference is bolstered by the statute's plain reference to an "embryo" and its amendatory codification to Michigan's wrongful death act, which is numbered MCLA 600.2922. The timing of the 1998 amendatory statute is also telling; indeed, 1997 saw the Michigan Supreme Court, under the unamended wrongful death act, refusing to join a small trend of jurisdictions recognizing a claim for the wrongful death of a previable fetus. According to House and Senate bill analyses, the 1998 amendatory statute was intended to reverse this feature of 1997 law. However, some other legislative history challenges this inference. A precursor bill to the one that became MCLA 600.2922a would have expressly codified the new claim, but that bill was rejected amidst apparent concerns about treating a previable fetus as an "individual" under the wrongful death act. Also troubling is the absence of any post-1998 authority interpreting the amendatory statute as we do. We address these difficulties below, after a more detailed look at the pre-1998 prenatal-tort landscape and the 1998 amendatory act.

Michigan's Pre-1998 Law of Prenatal Torts

Michigan's law of prenatal torts, as it existed by 1998, emerged from a series of key appellate decisions. The earliest was *Tunnicliffe v Bay Cities Consol Ry Co*,[1] which was decided by the Michigan Supreme Court in 1894. The case arose out of a rail car accident that caused the plaintiff's miscarriage. Although the court refused to allow recovery for the plaintiff's "sorrow and grieving" over the loss of her prospective child, the court did state that the plaintiff's own pain and mental suffering was compensable and, notably, that the jury's assessment of damages "involves to some extent a consideration of the nature of the injury, and cannot exclude . . . the fact that the physical and mental suffering of the mother by reason of such an injury would be more intense than in the case of the ordinary fracture of a limb . . . ."[2] Thus, more than 100 years ago, a woman's claim for tortious termination of her pregnancy seemed a straightforward matter.

Also seemingly straightforward was the June 1971 decision of the Michigan Supreme Court in *Womack v Buchhorn*.[3] With this case, Michigan joined a growing majority of states to recognize the claim of a child born alive but in an injured condition due to harm suffered in utero as a result of the defendant's tortious conduct. Holding that "an action does lie at common law for negligently inflicted prenatal injury,"[4] the court reasoned that, "a child has a legal right to begin life with a sound mind and body."[5] The same principle was applied later by the Michigan Court of Appeals in *Monusko*

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v Postle,[6] which held that the child's claim is valid even if the tortious conduct occurred before the child was conceived. According to the *Monusko* court, "there is a right to be born free from prenatal injuries foreseeably caused by a breach of duty to the child's mother."[7] So the child's claim for prenatal—indeed, even preconception—injury would seem a settled matter long before 1998.

The unfolding story, however, became more complicated in July 1971, when the Michigan Supreme Court, in *O'Neill v Morse*,[8] reconsidered an older case that had rejected a claim of wrongful death for the tortious killing of a six-month-gestational-age fetus. In the older case, the court had held that the fetus was not a "person" within the meaning of Michigan's wrongful death act.[9] Overturning this interpretation, the *O'Neill* court allowed a claim of wrongful death for the tortious killing of an eight-month-gestational-age fetus. This turnabout, in the court's view, followed logically from its decision, one month earlier, in *Womack*. Because the court in *Womack* had recognized a common law claim of a child born alive with prenatal injuries, and because the wrongful death act creates a claim whenever the decedent would have had a claim if he or she had survived the tort, it necessarily followed that the act allowed a claim for the wrongful death of the eight-month fetus—after all, if the fetus had survived the tort and had been born with injuries, *Womack* would have allowed recovery.[10]

The *O'Neill* court's reasoning—which, again, allows a wrongful death claim whenever the decedent would have had a claim if he or she had lived—logically should extend not only to viable fetuses, but also to previable ones. Indeed, the plaintiff in *Womack* itself had suffered prenatal injury before viability, at four months gestation;[11] therefore, as a matter of pure logic, the defendant in the case should have been subject to a wrongful death claim if death instead of injury had ensued. But logic is not always the path of the law,[12] as would be illustrated in *Toth v Goree*,[13] a 1975 Michigan Court of Appeals decision that limited the ruling in *O'Neill* to the death of a *viable* fetus and thus denied a claim for the wrongful death of a three-month-gestational-age fetus. The *Toth* court, citing *Roe v Wade*, reasoned, "If the mother can intentionally terminate the pregnancy at three months, without regard to the rights of the fetus, it becomes increasingly difficult to justify holding a third person liable to the fetus for unknowingly and unintentionally, but negligently, causing the pregnancy to end at that same stage."[14] The *Toth* court also noted that no other jurisdiction had allowed a wrongful death claim on behalf of a previable fetus.[15]

Over the next 22 years, the latter rationale eroded somewhat, as a handful of jurisdictions did indeed extend wrongful death recoveries to cases of previable decedents.[16] Nevertheless, the Michigan Supreme Court, in 1989 and again in 1997, endorsed the *Toth* court's limitation of the claim to cases of viable fetuses. In *Fryover v Forbes*[17] and *McDowell v Stubbs*,[18] respectively, the court summarily rejected any claim for the wrongful death of a previable fetus. Summary rejection in the 1997 case, *McDowell*, provoked a strong dissent from Justice Cavanagh given that the case involved twin fetuses delivered at about 20 weeks gestation—both with temporary heart rates, one with spontaneous movement, and both with hospital records indicating "liveborn" twins.[19] Apparently, as of 1998, viability was an absolute prerequisite to being a "person" under Michigan's wrongful death act.

The 1998 Amendment to Michigan's Wrongful Death Act

While *McDowell* was working through the courts, an effort apparently was underway to overrule *Toth* legislatively. On March 19, 1997, House Bill No. 4524 was introduced. The bill proposed an

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Pre-1998 case law had recognized a comprehensive range of prenatal tort claims.

amendment to Michigan's wrongful death act. The amendment would have provided a remedy for the wrongful death of "an individual" and would have defined "individual" to include "the live unborn offspring of a human being at any time or stage of development from conception to birth."[20] According to subsequent bill analyses, the characterization of the unborn as individuals with "new rights . . . comparable to those of legal persons" upset some "prochoice advocates" who saw potential constitutional conflict with reproductive rights explicated in cases like *Roe v Wade* and *Planned Parenthood v Casey*.[21] The bill analyses further explained that a substituted version of HB 5424—the one ultimately enacted into law—represented a compromise by "prolife advocates" who had previously offered bills with "highly emotionally charged language."[22] As currently codified at MCLA 600.2922a, the prochoice-prolife compromise resulted in a statute that states, in part: "A person who commits a wrongful or negligent act against a pregnant individual is liable for damages if the act results in a miscarriage or stillbirth by that individual, or physical injury to or the death of the embryo or fetus."

Bill analyses of the substituted bill that was passed into law suggests that the compromise was cosmetic, not substantive, in that the new law would still have the effect of extending wrongful death claims to cases involving the tortious killing of previable fetuses. According to a Senate Fiscal Agency Bill Analysis, for example, the new law should "avoid the difficult and confusing determination of whether a fetus was viable" and should make it "no longer . . . necessary to determine whether a fetus . . . could have survived outside the womb—a determination that has become increasingly difficult in view of modern medical technology."[23] Similarly, a House Legislative Analysis suggests that the new law fills a "gap in state law" that previously allowed "wrongful death actions only for persons and viable fetuses that are not born alive."[24]

Remarkably, however, no authorities have picked up on this apparent change in the law since its January 1, 1999, effective date. West Publishing has classified MCLA 600.2922a under the topic of "Assault and Battery."[25] In Michigan Civil Jurisprudence, the act is classified under "Damages to Pregnant Women."[26] And in Michigan's Non-Standard Jury Instructions, Civil, the act is in the "Stalking" chapter and is classified as a wrongful act against a pregnant individual.[27] These interpretations, to be sure, treat the statute (not to mention its explicit legislative history) like a nullity, for we already have laws to deal with these topics. Legislative acts are not supposed to be construed as enacting nothing new into law.[28] Yet this is precisely the direction of these authorities. It may also be the direction of the courts, if *McClain v University of Michigan Bd of Regents*[29] is any indication. In this 2003 opinion, the Michigan Court of Appeals stated that "under Michigan law, an action for wrongful death . . . cannot be brought on behalf of a nonviable fetus, because a nonviable fetus is not a 'person' within the meaning of the wrongful-death act."[30] The opinion entirely omits any reference to the amendatory statute—yet the case arose out of alleged medical malpractice that caused a miscarriage of an 18-week-gestational-age fetus.

A Closing Argument

As of 1998, there seemed to be just one noticeable gap in Michigan's prenatal tort law. Already addressed, more than 100 years earlier, was the claim of the pregnant woman who suffers the tortious loss of the pregnancy. She already had a remedy for "physical and mental suffering . . . more intense than in the case of the ordinary fracture of a limb . . . ." Already addressed, about 17 years earlier, was the claim of the child born alive but in an injured condition due to a prenatal tort. He or she already had a "legal right to begin life with a sound mind and body." And already addressed, also about 17 years earlier, was the claim of the family of the wrongfully killed *viable* fetus. The prospective family of the viable fetus already had a right to recover for the loss of a "person" to their household. The only significant gap in this tapestry seems to have been the subject of the 1998 amendatory act's imposition of liability for a "wrongful or negligent act . . . [that] results in . . . the death of the embryo or fetus."

If bill analyses is any indication, this statutory language added to the pre-1998 landscape a claim for the wrongful death of a *previable* fetus. The statute's plain reference to an "embryo"—which, of course, is a previable stage of development—supports this interpretation. So too does the act's amendatory codification to Michigan's wrongful death act, which plainly suggests a change of some sort to that act. The timing of the 1998 amendatory statute is also telling—the process beginning, as it did, in 1997, and thus coinciding with the controversial *McDowell* case's journey to a supreme court that held the line at viability.

To be sure, there is some legislative history that calls this interpretation of the statute into question. There was indeed a precursor bill to the one that became MCLA 600.2922a that would have more obviously treated a previable fetus as an "individual" under the wrongful death act. And rejection of that bill does raise the question of whether the view of some purportedly "prochoice advocates" prevailed to hold the line at viability. To this we offer two responses. First, and foremost, a wrongful death claim focuses not, as the *Toth* court once suggested, on the "rights of the fetus." Death claims focus on the rights of the living—the loss of society and companionship incurred by surviving family members. Compensating them for their loss does not necessitate equating an unborn fetus with a "person," and thus does not implicate anyone's constitutionally

protected reproductive rights. Indeed, recognition of their wrongful death claim makes especially clear whose choice it is to continue with or terminate the pregnancy. Our second response is really a question. If MCLA 600.2922a does not create a claim for the wrongful death of a previable fetus, then what does it do (that hasn't already been done)? ✦

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Footnotes

1. 102 Mich 624; 61 NW 11 (1894).
2. Id. at 630; 61 NW at 12.
3. 384 Mich 718; 187 NW2d 218 (1971).
4. Id. at 725; 187 NW2d at 222.
5. Id. (citation omitted).
6. 175 Mich App 269; 437 NW2d 367 (1989).
7. Id. at 274; 437 NW2d at 369 (citation omitted).
8. 385 Mich 130; 188 NW2d 785 (1971).
9. See *Powers v City of Troy*, 380 Mich 160, 170; 156 NW2d 530, 532 (1968).
10. See *O'Neill*, 385 Mich at 133; 188 NW2d at 786.
11. See *Womack*, 384 Mich at 719; 187 NW2d at 219.
12. See Oliver Wendell Holmes, Jr., *The Common Law* 1 (1881).
13. 65 Mich App 296; 237 NW2d 297 (1975).
14. Id. at 303–304; 237 NW2d at 301.
15. Id. at 298–299; 237 NW2d at 299. However, the court did note that Georgia permitted recovery if the fetus was "quick." Id.
16. Dena M. Marks, *Person v Potential: Judicial Struggles to Decide Claims Arising From the Death of an Embryo or Fetus and Michigan's Struggle to Settle the Question*, 73 Akron L Rev 41, 71–74 (2004).
17. 433 Mich 878; 446 NW2d 292 (1989).
18. 455 Mich 853; 564 NW2d 463 (1997).
19. See *Thomas v Stubbs*, 218 Mich App 46, 47–48; 553 NW2d 634, 635–636 (1996).
20. HB 4524, 1997 Leg, Reg Sess (Mich 1997).
21. See House Leg Analysis, HB 4524, May 11, 1998. See also Senate Fiscal Agency, Bill Analysis, HB 4524, August 4, 1998.
22. House Leg Analysis, supra note 21.
23. Senate Fiscal Agency, supra note 21.
24. House Leg Analysis, supra note 21.
25. MCLA 600.2922a (West Supp 2003).
26. 7 Mich Civ Jur Damages § 38.
27. Mich Non-Standard Jury Instr Civil § 23:05 (Cum Supp 2003).
28. See *Recorder's Court v Detroit*, 134 Mich App 239, 243; 351 NW2d 289, 291 (1984).
29. 256 Mich App 492; 665 NW2d 484 (2003).
30. Id. at 495; 665 NW2d at 486.