

BlueBook Law Society

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O'Grady v. Brown Complete Article



***Making the Case for a Viable Fetus in a Missouri Wrongful Death Claim
The Case that Changed the Law in Missouri—in 1983***

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A Landmark Case:

On August 15, 1983, the New York Times ran the following headline, “Missouri Court Rules That a Fetus **Is** a Person.” The beginning of the article read:

A living fetus is legally a person under the state’s wrongful death law, the Missouri Supreme Court said recently, ruling that a Kansas couple had the right to sue for damages to their unborn child. The ruling reverses a previous interpretation of Missouri’s wrongful death statute that a fetus was not a person deserving of the protection of the 14th Amendment of the United States Constitution.

When Terri O’Grady checked herself into St. Joseph’s Hospital—across the state line from where she lived in Kansas, her life was irrevocably altered. Not only was she to receive negligent medical care that would result in the stillborn birth of her baby, but Missouri had a Wrongful Death Act that was fundamentally different from that of Kansas, and it would not allow her to pursue a claim against the medical professionals responsible for its wrongful and tragic death. The reason being, a viable fetus which was injured and died before birth was not recognized as a “person” within the Missouri’s Wrongful Death Statute, and therefore, there was no “cause of action”—meaning, no legal ability to pursue a wrongful death claim. Wrongful Death Statutes are created by state legislatures and specify the following: who can bring a lawsuit or “claim” against another for the wrongful death of a family member; under what circumstances they can bring this claim; and what they can recover in the form of “damages” or financial compensation.

Legal precedents for failure to recognize a fetus as a person were two landmark cases: *Roe v. Wade* in 1973, which was a United States Supreme Court decision, and *Hardin v. Sanders*—a case that had made its way to the Missouri Supreme Court in 1976. Among other things, *Roe v. Wade* specifically stated that a viable fetus was not a “person,” and therefore, not deserving of the protection of the 14th amendment. [No state shall deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction, the equal protection of the law.] *Hardin V. Sanders* found no “legislative intent” within the Missouri Wrongful Death Statute, to allow recovery for the death of an unborn fetus. However, if a viable fetus was injured before birth, born alive and then died—that was different—for in order to recover for the wrongful death of a stillborn baby, there had to have been a “breath of life.” Without that, viable or not, a fetus was not considered to be a person. Criminal acts against a fetus had a legal remedy, as did matters concerning property and inheritance, but actual negligent acts against a fetus resulting in its stillborn death—well, that was entirely another matter. Or so it was in late 1979 Missouri, when Terri O’Grady and her husband, Kevin, walked through the doors of Jim Bartimus’s office. They had lost their unborn baby due to medical negligence, they were distraught with grief and inconsolable—and yet they had absolutely no legal recourse. They had been told by other lawyers, “The law does not allow you to do that.” Jim recalls, “I remember hearing the story and it just didn’t sound right—it sounded like the law was misplaced.”

Rules of Law: Case Law/Common Law & Statutes

When laws are made, it is by two primary methods: by legislative statute, but also by case law—or what is referred to as common law. Statutes are those laws passed by state legislatures and by Congress, and are the primary sources of law. Case law is the rule of law made by the courts when they are deciding upon the outcome of a particular case. This involves interpreting existing statutes and previous court decisions and determining how or if they apply to the matter before them. Statutes strive to provide guidance, rules, and overall direction, but it is quite impossible for a statute to encompass all situations, legal issues, and curious inconsistencies that will inevitably arise. Therefore, courts are given the task of interpreting law; and by this process, they establish legal precedents and authority where statutory law

happens to be unclear, ambiguous, or silent. These resulting decisions create “legal” precedents that guide other judges in deciding similar future cases—the cumulative effect of which is considered to be “common law” or law that is established by cases. The value of a common law system is that the law can be adapted to situations that were not contemplated by the legislature. It is important to understand that the decisions of the highest court in a jurisdiction create mandatory “Binding” precedent that must be followed by lower courts within that jurisdiction. This is called the Doctrine of Stare Decisis which states, “To stand by decisions and not disturb settled matters.” A “Case of First Impression” refers to those cases in which a question regarding the interpretation of law is presented which has never been addressed by that court, or within that court's jurisdiction, thus, there is no binding authority on that matter. *Hardin v. Sanders* was a case of first impression that was decided by the Missouri Supreme Court—the “highest” court in Missouri. Therefore, it established binding legal precedent that had to be followed.

Making the Case for a Cause of Action

At the time Jim took on the O’Grady’s case, he was a young lawyer—only out of law school for five years—but he also had the added benefit and insight of having attended medical school for three years.

Therefore, he more fully grasped the weighty implications of the merging medical and legal complexities of this case better than most. He understood that the questions, *and the answers*, at the heart of it would shape the law for generations to come. Questions such as: “When does life begin?” “What is the definition of a person in the eyes of the law?” “What the true purpose and intent of a Wrongful Death Statute?” and “How is it possible—or is it—to determine the “present worth of life” of a fetus or an unborn child?”

Jim took this case intending to change the law in Missouri. In order to do so, he must of necessity confront and overcome almost insurmountable obstacles and convince the Missouri Supreme Court to reverse their own recent landmark ruling, thereby creating a new cause of action the wrongful death of an unborn child. Additionally, Jim was going to have to get to the heart of the legislative intent behind the creation of the Missouri Wrongful Death Statute and show that the current rule of law and its strict interpretation produced absurd, illogical and inconsistent results, and was antagonistic to the very purpose for which the statute had been passed. Furthermore, in order to prevail, Jim was going to have to challenge the binding precedent established by *Hardin v. Sanders* and show that the *Hardin* Court—had gotten it wrong. With all the highly significant questions that needed to be asked with regard to this case, perhaps the one remaining, albeit most critical, would be: “Would the Missouri Supreme Court be willing to reverse its own ruling in *Hardin v. Sanders* and create a cause of action for the negligent death of an unborn fetus—with *O’Grady v. Brown*?”

History of Wrongful Death Statutes:

Early American courts did not recognize wrongful death claims. Instead, they followed a rule that said when [tort] victims died, the right to bring a case died with them. What this amounted to subsequently—as a deceased person obviously was unable to bring such a claim against another—was that an untenable and ridiculous loophole was created which allowed liability to be attributed to someone who had caused another’s injury, but not their death; the absurd result being—the ability to escape liability simply because the injury was severe enough to kill the victim. Therefore, in the last century, lawmakers and state legislatures—realizing how unjust this was—began enacting their own individual statutes to create a right for such a recovery; the purpose being to compensate close family members for the death of a loved one—due to the wrongful or negligent act of a defendant.

The Evolution of Prenatal Claims:

Cause of Action for an Unborn Child & Present Worth of Life

From 1884 until 1946, the law did not allow any recovery whatsoever by or for the unborn child. Courts usually offered a number of reasons for this denial: First, the defendant could owe no duty of conduct to a person who was not in existence at the time of the action; second, a fetus was not considered to be a

person in the eyes of the law; third, the difficulty of proving any causal connection between negligence and damage was almost insurmountable, and therefore, there was too much danger of fictitious claims; and fourth, how was it even possible to assess damages—with regard to a wrongful death claim—for the loss of a fetus or unborn child? Determining or “proving” financial losses or even loss of comfort, companionship, etc., would require speculative, expert testimony. In wrongful death claims, damages are based on a myriad of factors including loss of present and future earnings. It would not be possible for the courts, medical science, or even “experts” to be able to determine a “present worth of life” with regard to the estate of a child that had not been born.

The Right of Recovery:

A parent’s ability to recover for the wrongful death of a fetus in any given state, depends upon how the courts in that state interpret their own wrongful death statute—and whether a fetus is considered to be a person within it. Furthermore, there has been an evolution of theories—the adherence to which—has set forth the ability to recover damages for an unborn/stillborn child. In 1979, Missouri, and most states, did not have wrongful death statutes that allowed for the death of a stillborn fetus. The interpretation of the Missouri Wrongful Death Statute necessitated that a child/fetus be born alive—taking a “breath of life” before passing—before there could be a cause of action for wrongful death. This was referred to as the “Live Birth Doctrine.” However, there was a dominant theory which preceded this doctrine, referred to as the “Unity Rule.” This rule maintained that an unborn child was not separate from its mother until it was born so therefore, there could be no recovery available to a fetus who sustained an injury prior to birth. Advances in medicine and science rendered this “rule” or “theory” obsolete, ultimately giving way to the Live Birth Doctrine. By this time unfortunately however, considerable legal precedent had already begun to accumulate, and it all rested precariously upon the shaky foundation of denying recovery to a stillborn baby—that had been illogically established by the flawed science of the Unity Rule.

The Viability Rule:

In 1983, when the O’Grady’s case finally made it’s way to the Missouri Supreme Court, a new rule or doctrine was already emerging which had begun to replace the Live Birth Doctrine. It was known as the “Viability Rule.” This new rule permitted recovery for an injured viable fetus that was stillborn due to the belief that viability was the time at which a child was capable of being delivered and remaining alive separate from the mother—and should therefore at that point be considered an independent legal entity. It was this very theory that Jim would incorporate into the framework of the case he would be making before the Missouri Supreme Court. He would also address the nature of the true legislative intent behind the Missouri Wrongful Death Statute, as well as the danger of adhering to outdated or faulty logic—specifically making reference to the “Unity Rule,”—which had in effect, bound the Courts to the flawed legal precedent it had spawned. Jim addressed this issue in his statement to the Missouri Supreme Court by saying, “The significance of the demise of the Unity Theory is that as the theory began its process of extinction, the cases born under it became mutants, of sorts.....”

The Path to the Missouri Supreme Court— The Obstacles: Hardin, the Missouri Statute & Stare Decisis

Hardin v. Sanders: A Case of First Impression

In 1976 the Hardin Court stated the following:

“The question for decision in this case is whether there can be a recovery under the Missouri Wrongful Death Act, for the wrongful death of a viable child or fetus born dead as a result of injuries negligently inflicted en ventre sa mere. This is a question of first impression in Missouri.”

Their Findings:

1. A fetus was not a person within the wrongful death statute until there was a live birth; there was no cause of action within the statute to pursue a cause of action for the wrongful death of a fetus; if the legislature had intended to create such a cause of action, it would have done so.

The Hardin Court & the Viability Theory

The Court also cited the following while rejecting the Viability Theory: “The time at which a pre-viable fetus becomes viable is indefinite and therefore, incapable of precise determination. 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.” [Wenger, 69 Dickinson L. Rev. 258, 268.]

The Question of Legislative Intent & the Missouri Wrongful Death Statute

Things can get a bit murky when courts try to determine the “legislative intent” behind a statute and there are two conflicting schools of thought regarding statutory interpretation. The first approach mandates that the statute must be “strictly construed,” adhering to the philosophy that the plain language of the statute is not open to discussion—so to speak; the statute means exactly what it says and what it does not say it does not intend to say. The second approach evaluates the “spirit” or “purpose” of the statute and interprets it in such a way so as to avoid an illogical or an absurd result. Regarding the legislative intent behind the Missouri Wrongful Death Statute, the Hardin Court stated that if the legislature had intended to create a cause of action for an unborn fetus, it would have been specifically stated—or plainly apparent—in the statute.

The Impact of Stare Decisis:

While judges and courts are generally willing to take upon themselves the development of common law or case law, they are quite averse to taking upon themselves the reinterpretation of statutes. They believe when the Legislature has enacted a statute, the doctrine of “Stare Decisis” is in full force—meaning, a line in the sand has been drawn, and just as equally by what has been said in the statute as by what has not been said. This is perhaps most true when it involves a case of first impression—where they are particularly loathe to even attempt to “contract” or “expand” what has been specifically stated. By doing so, they would in effect, be actually amending the statute itself and they consider it to be beyond their scope of authority to do so. However, when a Court is confronted with the undeniable harsh reality of absurd results, which have been the unexpected outcome of adhering to the strict interpretation of a statute, they have no choice but to [eventually] re-evaluate, reassess, and reapply a broader understanding to that which had once been “strictly construed.” Such was the case with *O’Grady v. Brown*.

O’Grady v. Brown versus Hardin v. Sanders:

Two Cases—One Question—Different Outcomes

In 1983, the *O’Grady* court posed the same question that the *Hardin* Court had posed in 1976: “Whether or not a claim for the wrongful death of a viable fetus, caused by the negligence of the medical health care providers, can be brought pursuant to the Missouri Wrongful Death Statute.”

Much had transpired between the *Hardin* Court ruling and *O’Grady v. Brown*—medical advancements and evolving opinions as to when life begins, the growing acceptance of the “Viability Theory,” the trend in an increasing number of other states allowing for a cause of action for the unborn fetus, even amendments to the Missouri Wrongful Death Statute itself, permitting recovery of compensatory damages. However, *Hardin v. Sanders* still stood firmly as an obstacle in the path of the *O’Grady*s with regard to *even being able to pursue a claim* against those who had so negligently brought about the death of their baby—all they wanted was their day in court and the “Law” would not even allow them that

opportunity. Why? Because not so very long ago, Hardin had *already* answered the question as to whether there was a cause of action for a wrongful death of a viable fetus, and their definitive answer had been, “No!” If Jim was to achieve justice for his clients, and change the law for all those who would one day encounter the same tragic situation, he was going to have to make a case that was powerful and potent enough to overturn *Hardin v. Sanders* and that is exactly what he did.

Jim’s Primary Arguments before the Missouri Supreme Court: Absurd Results, Viability & Statutory Paradox

Jim’s case before the Missouri Supreme Court centered upon this primary assertion, “The court erred in dismissing count III of the plaintiff’s petition because under the Missouri Wrongful Death Statute, a person should be construed as including a viable fetus.”

The Missouri Wrongful Death Statute: Intended Results v. Absurd Results

When a legislature creates a statute, it is done so with the intention to accomplish a particular purpose. The “Plain Language Rule” infers or dictates that statutes are to be interpreted according to their plain or obvious meaning unless by doing so, the results are ridiculous, cruel or absurd. Jim’s asserted that adhering to the plain or “strict” language of the Missouri Wrongful Death Statute would produce illogical, absurd and inconsistent results and therefore, would be contrary to the true legislative intent of the statute.

“To deny recovery where injury is so severe as to cause the death of a fetus subsequently stillborn and to allow recovery where injury occurs during pregnancy and death results therefrom after a live birth, would only serve the tortfeasor by rewarding for his severity for inflicting the injury. It would be bizarre, indeed, to hold the greater the harm inflicted, the better opportunity for exoneration of the defendant. Logic, fairness and justice compel our recognition of an action, as here, for prenatal injuries causing death before a live birth. The punitive purposes of the Wrongful Death Act [therefore] also require that a claim be allowed for the stillborn death of a viable fetus.”

The Live Birth Doctrine & the Continuation of Injustice:

Before wrongful death statutes were created, the right and the ability to bring a case against a defendant [tortfeasor] *died with the victim*, thus creating the loophole—and absurd reality—that allowed the defendant to escape punishment for the wrongful death of another; the tragic irony therefore being—a serious injury resulting in death of a victim, would garner **less** liability or “financial punishment,” than for those situations where the negligent injury did not actually cause death. Similarly, under the Live Birth Doctrine—with regard to a stillborn fetus—the right to pursue a claim, *died with the fetus*, thereby producing the exact same absurd result, or rather, no liability whatsoever. In Jim’s words:

“The ridiculous reality and inconsistent results are that if injury is done to a fetus, the tortfeasor would be smart to make sure that the injury is sufficiently severe to result in death. To imply that this was intended by the legislature or to rationalize that some injustice will always be done when “line drawing” occurs, [referring to the line drawn at live birth, in which a fetus *becomes* a “person.”] is totally inconsistent with the nature of justice. The unborn viable fetus who dies at the hands of a tortfeasor, is the victim of a capricious border dispute.”

The Dilemma of Twins:

Jim cited *Stidam v. Ashmore*, to further illustrate the additional absurdities inherent in failing to allow a claim for the stillborn death of a viable fetus:

“Suppose that viable fetal twins are simultaneously injured in utero. Suppose further that the injury induces labor and the twins are prematurely delivered. One twin dies five minutes before delivery, the other, five minutes after. Shall a cause of action for the death of one exists, but not for the other? Surely logic requires recognition of causes of action for the deaths of both or neither. All

courts hold that a death action lies for the live born twin, and thus such an action should also lie for the stillborn twin.”

The Missouri Wrongful Death Statutory Paradox:

The reasoning and legislative intent that first recognized and created the Missouri Wrongful Death statute as a remedy/deterrent for wrongful death and as a protection for life, paradoxically drew the line at protecting the “life” of an unborn fetus. The reason being, a fetus was not mentioned specifically within the statute. So therefore, the protection afforded a deceased victim was not extended to a fetus—inexplicably negating the fundamental purpose for which that statute had been created—the protection of life and deterrent against negligent action.

In his closing arguments, Jim made the following statement:

The most demanding and compelling argument to make in this case is the reality, that a human being—a child—was killed by the alleged negligence of the defendants. By rule of law, as has existed heretofore, the existence of a living child in the mother’s womb, is ignored and denied. Terri O’Grady’s fetus was viable. By attaining viability, this “fetus” becomes a “legal person” with the rights under contemporary law to have a sound healthy life. This child would therefore have had a remedy against those who would have impaired that right even if the injury occurred while he was still in utero and had survived.

Overturing Hardin v. Sanders: The Ruling & the Remedy

The Missouri Supreme Court determined that the relevant inquiry before the Court was whether the death of a human fetus was the type of loss for which the legislature intended to establish a remedy.

They concluded that the manifest purpose of the Missouri Wrongful Death Statute was clearly to provide the following:

1. Compensation to bereaved plaintiffs for their loss due to the wrongdoing/negligence of the defendant;
2. To ensure that the tortfeasors/defendants pay for the consequence of their actions;
3. Deterrence to harmful conduct which might lead to death.

Furthermore, they found these objectives, “applied with equal force whether the deceased was born or unborn and that permitting a cause of action for the wrongful death action for the death of a viable fetus, was consistent with the broad purpose for which the Missouri Wrongful Death Statute was passed, and that nothing in the language of the statute prevented this conclusion.”

The Reversal of Hardin v. Sanders—an “En Banc” Decision:

An en banc decision is one in which the matter before the court is of such critical importance and significance, that the full number of judges of that court—seven—are all present or in attendance. In a remarkable reversal, the Missouri Supreme Court unanimously found that there did exist a cause of action to pursue a wrongful death claim of a viable fetus. In overturning binding legal precedent, the O’Grady Court reversed a fairly long line of Missouri case decisions, each of which had further served to establish that the Wrongful Death Statute should be strictly construed—meaning there must be adherence to the plain language of the statute. Therefore, **after** O’Grady, the wrongful death statute **was not** to be “strictly construed,” but rather, interpreted in such a way as to be consistent with its original intent—as a deterrent for the negligent disregard for life, as well as a safeguard for its protection.

In Summation:

In Jim’s words:

“I took the case knowing that the law was what it was, setting out deliberately to change the law. I filed the lawsuit on behalf of Terri and Kevin, for the wrongful death of their baby—that was a

certainly a viable fetus. I was dismissed by the trial court but in a strong opinion by the trial judge suggesting the law should be re-examined. The Court of Appeals immediately upheld the dismissal, but similarly, with an opinion that this should be revisited. Greatly encouraged by these 2 opinions, I then took the case to the Missouri Supreme Court. The two lawyers on the other side were “The” two premier defense lawyers in the city—recognized as stalwarts in the legal community. After my arguments, one of these defense lawyers came up to me, told me that I had done a nice job, and said because of that, I might be “lucky” to get one judge to agree with me. However, when the decision was handed down in August of ’83, it was 7 to nothing. The Court claimed that it was reversing itself unanimously in finding that in this instance, a viable fetus did have rights under the constitution—the Missouri constitution—and was considered to be a person for the purposes of wrongful death; the O’Grady’s did in fact have an actionable claim. I was elated! The case therefore was remanded back to the trial court for a new trial. Once that happened however, the defendants approached us with regard to settling the case. We agreed and we were able to arrive at a successful resolution.”

The Lasting Significance of O’Grady v. Brown:

After the ruling, Special Judge James A. Pudlowski stated the following, “Parents clearly have an interest in being protected against or compensated for the loss of the child they wish to have. The fetus itself has an interest in being protected from injury before birth.”

Indisputable as that statement seems today in 2016, in 1983, only 28 states had legally recognized a “cause of action” for the stillborn birth of a fetus. Today, 41 states plus the District of Columbia recognize that same cause of action; and of those, 14 states recognize a cause of action for a non-viable fetus. However, in 1983 the case that definitively decided that issue in Missouri, was O’Grady v. Brown. This case significantly contributed to moving forward the rights of the unborn child in the United States, and it helped to solidify the very foundation upon which our legal system has been established. It created a new law and binding precedent in Missouri, and it impacted and influenced the formation of new laws in other states. O’Grady has, and always will have, a place in history that will remain unchanged. The reason parents today have the right and ability to pursue a wrongful death claim for prenatal injuries and stillborn births arising from negligence, is because of this case, and cases just like this across the country—that were instrumental in changing the law for everyone else, and still continue to do so.

“The Potentiality of Continued Life:”

One of the most curious statements made by the Hardin court in rejection of recovery and cause of action for an unborn fetus was: “.....The fetus, at most, represents only the potentiality of life.” Before the Missouri Supreme Court, Jim—in direct confrontation of that exact statement—asserted the following, “To say that the unborn, viable fetus represents only the potential for life is a misnomer because actually it is the potential for continued life.”

For Jim, this case was not solely a matter of creating a new cause of action for the wrongful death of a viable fetus, or, [re]defining a “person” in the eyes of the law, or solely about pursuing justice for the O’Grady’s. It was not even just about doing the best possible job he could do for them as their lawyer. It cut directly to the heart of the matter as to why he became a lawyer and it was perhaps something those years at Medical school had more fully impressed upon him—a deeper comprehension and respect for what life is, when it truly begins—and how greatly it needs to be protected. And, most critically, the very sacred responsibility of seeking justice **for** it, when it has not.....