

BlueBook Law Society

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O'Grady v. Brown

Condensed Article

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

Medical Negligence in Missouri & the Wrongful Death of a Stillborn Baby:

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 meaning of 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.

The Cause of Action for an Unborn Child:

A Parent’s ability to recover for the wrongful death of a fetus in any given state, depends upon how the courts in that particular state interpret their own wrongful death statute—and whether a fetus is considered to be a person within it. From 1884 until 1946, the law did not allow any recovery whatsoever for the death of an 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 even in existence at the time of the [negligent] 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 to an unborn baby was insurmountable, and, fourth, how would it even be possible to determine a “present worth of life” for a child that had not been born?

A Matter of Precedent:

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 a wrongful death, there had to be 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 another matter entirely. 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 doesn’t 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. 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?”

The Path to the Supreme Court of Missouri: The Obstacles

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 for 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*?”

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 case that was powerful and potent enough to overturn *Hardin v. Sanders* and that is exactly what he did.

Overturning 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. 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 Missouri Supreme Court Reversal—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 for the death 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 to be consistent with its original intent—as a deterrent for the negligent disregard for life, as well as a safeguard for its protection.

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 will always 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.

Jim says of this case:

“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 Terry and Kevin, for the wrongful death of their baby—there was absolutely no question that it was a viable fetus. I was dismissed by the trial court, but in a strong opinion by the trial judge—suggesting that the law should be re-examined. The Court of Appeals immediately upheld the dismissal, but similarly, with an opinion that this should be revisited. Therefore, I then took the case to the Missouri Supreme Court. Once the Court ruled that the O’Grady’s had an actionable claim, the case was remanded back to the trial court for a new trial. At that time however, the defendants approached us with regard to settling the case. We agreed and we were able to arrive at a successful resolution.”

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’Gradys. 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.....

Today, 33 years after O’Grady, Jim is a partner at the highly successful law firm of Bartimus Frickleton Robertson—located in Leawood, Kansas. He is considered to be one of the country’s foremost medical malpractice attorneys, focusing on complex negligence and pharmaceutical cases. He represents clients throughout the country. Regarding the practice of law, Jim says this: "Every day, people walk in who have suffered a catastrophe or a tragedy and my motivation is to try to help them."

Jim is a member of many of the country’s premier legal organizations such as, ABOTA-American Board of Trial Advocates, The International Academy of Trial Lawyers, American Society of Legal Medicine, American College of Legal Medicine and the International Society of Barristers, among others.