



# BlueBook Law Society

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## O'Grady v. Brown

Significant Summary

*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** **A Wrong without a Remedy:**

**W**hen 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 than 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. A wrongful death claim is a claim made against a negligent party who is responsible and liable for another's death. 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. A parent’s ability to recover for the wrongful death of their unborn baby—or 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. In 1979, the Missouri Wrongful Death Statute did not allow a recovery for the death of an unborn fetus. However, if a viable fetus was injured before birth, born alive and then died—that was an entirely different matter—for in order to recover for a wrongful death, there had to have been a “breath of life” taken. Without that, viable or not, a fetus was not considered to be a person. Legal precedents for this 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 14<sup>th</sup> 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 include recovery for the death of an unborn fetus.

### **Making the Case for a Cause of Action for an Unborn Child:**

When Terri O’Grady and her husband, Kevin, walked through the doors of Jim Bartimus’s office in Leawood, Kansas—they were inconsolable with grief. They had lost their unborn baby due to medical negligence 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 somehow misplaced.” 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 in *Hardin v. Sanders*—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 which were antagonistic to the very purpose for which the statute had been passed. Furthermore, in order to prevail, Jim needed to challenge the binding precedent established by *Hardin v. Sanders* and show that the *Hardin* Court—had gotten it wrong. 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 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 residing within this case, better than most—understanding that both the questions, *and the answers*, 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 is 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?” However, of all the highly significant questions to be asked, 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*?”

### **Overtaking *Hardin v. Sanders*: The Ruling & the Remedy**

In 1976, when the Missouri Supreme Court was asked whether there could be recovery under the Missouri Wrongful Death Act for the wrongful death of a viable fetus, the answer had been a definitive “NO!” However in 1983, when asked the very same question, the answer was a resounding “YES!” 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 as to be consistent with its original intent—that being—as a deterrent for the negligent disregard for life, as well as a safeguard for its protection. The case was then “remanded” or sent back to the trial court for a new trial at which time, the defense approached Jim with regard to a settlement. Jim agreed and the case was resolved to the satisfaction of the O’Gradys.

### **The Lasting Significance of O’Grady v. Brown:**

In 1983, only 28 states had legally recognized a “cause of action” for the wrongful death of a stillborn baby. 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. O’Grady v. Brown 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. 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** continues to do so.