



Thresholds of Life

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“Thresholds of Life”

- Wrongful death
- Survival actions
- Loss of consortium
- Unborn plaintiffs
- Wrongful conception
- Wrongful birth
- Wrongful life

Wrongful death

- There is no tort cause of action for death in the common law.
- Wrongful death is a tort created by statute in all 49 common-law states.
- There must be an underlying tort theory which makes it “wrongful,” such as negligence, strict liability, or battery.

Wrongful death

- Plaintiff is a close relative of decedent, suing for the plaintiff’s loss.
 - In this sense, the law still doesn’t see the decedent as having suffered a loss.
- Typically allowed as plaintiffs:
 - Spouse
 - Children
 - Parents
- May or may not be allowed as plaintiffs:
 - Siblings

Wrongful death

- Damages
 - Traditionally limited to pecuniary losses suffered
 - Such as lost financial/economic support
 - Increasingly, jurisdictions allow recovery for consortium-type damages for lost love and affection.
- Remember: Wrongful death is a statutory cause of action, so it really all depends on what the statute itself provides for.

Survival actions

- Under the common law, a person's unfiled causes of action die with her or him.
- Statutes allow actions accrued by decedents by the time of their death to be filed by survivors.
- Note: The word "survival" refers to the claim, which lives on, not to a person.
- Gravamen of claim is decedent's experience prior to death, not the death itself.

Loss of consortium

- A loss of consortium claim is about lost love, affection, and/or companionship because of injury sustained to a third party.
- The plaintiff is not the injured person, but a loved one of the injured person.
- Generally thought of as a claim where the injured party is still living, but might be used post-mortem as well.

Loss of consortium

- Who can be a plaintiff?
 - Spouse
 - Very widely accepted
 - Child
 - Recognized in many jurisdictions at least where child is a minor.
 - More rare where child is an adult.
 - Parent
 - Also recognized in many jurisdictions at least where child is a minor.
 - Also more rare where child is an adult.

Benally v. Navajo Nation

- Consider the rationale of the wrongful-death cause of action.
- Have a contemporary way to re-imagine the project of tort law and the common law; get a from-the-outside view of the Anglo-American common-law.
- Consider from a fresh perspective the role of precedent and culture in a common-law legal system.
- Be introduced to tribal courts in the United States.

From the casebook ... p, 505-506

Problem: Death on Route 12

At 3 a.m. in a sparsely populated rural area, Melida was driving with her friends Felipe and Antone. Texting on a brightly lit cell phone, Melida's impaired night vision and distraction level caused her to cross the center line and hit an automobile driven by Ronni. Because of the remoteness of the location and its lack of cell coverage, no help arrived at the accident scene for five hours.

The evidence shows that Felipe stayed alive for two hours, immobilized in the twisted wreckage, experiencing intense pain, a fact memorialized in cell phone videos made by Antone. Felipe is survived by his husband and his one-year-old son.

Antone retained consciousness for four hours – as evidenced by his phone logs. He lost consciousness when a carotid embolism severely deprived a large part of his brain of oxygen. He nonetheless stayed alive. At the hospital, physicians determined that Antone was in a permanent vegetative state. Antone has a wife and an adult child.

Kyle was a hitchhiker riding as a passenger in Ronni's car. Because of the angle of the impact, Kyle received catastrophic head trauma that killed him instantly. Statements by Ronni established that Kyle was sleeping before the accident, and autopsy results showing high levels of opiate pain killers made it more likely than not that he died without any awareness of the accident. Kyle had no family or loved ones who survived him.

As for Ronni, unsent texts on her phone show she was alive for at least 20 minutes, during which she experienced a great deal of pain and fear.

Melida – the tortfeasor at the center of it all – survived long enough to be taken by ambulance to the hospital. She died there several hours later from her injuries. A software engineer with a valuable portfolio of vested stock options, Melida is survived by a husband and two minor children.

What liability will there be for wrongful death, survival actions, and/or loss of consortium?

Problem: Death on Route 12

Felipe

Antone

Kyle

Ronni

Melida

Unborn plaintiffs

- If plaintiff born alive, universally held that plaintiff can sue for negligence for injuries sustained in utero.
 - First recognized in *Bonbrest v. Kotz* (D.D.C. 1946).
 - *Montreal Tramways* (Can. Sup. Ct. 1933) was a forerunner with this holding.
- Where the negligence causes the death of the fetus, jurisdictions differ.
- Where the fetus is the plaintiff suing the mother for her negligence while pregnant, jurisdictions differ.
 - Example: *Dobson v. Dobson re Canada* (can't sue)
 - American cases described in *Dobson*: Illinois (can't sue), New Hampshire (can sue)

Wrongful conception, birth, and life

- **Wrongful conception**
 - brought by parents for failed contraception
- **Wrongful birth**
 - brought by parents for untermintated pregnancy
- **Wrongful life**
 - brought by child for untermintated pregnancy

Wrongful conception

- Brought by parents for failed contraception (e.g., tubal ligation, vasectomy).
- Virtually all courts allow these claims.
- Damages allowed for costs associated with pregnancy and birth, including medical care and mother's lost wages.
- Most courts do not allow damages for costs of raising child to adulthood.

Wrongful birth

- Brought by parents for negligent failure to diagnose fetal condition that will result in impairment (e.g., birth defect).
- To show actual causation, parents must prove pregnancy would have been terminated but for the failure to diagnose.
- While harsh sounding, in reality, these suits are generally about trying to fund the best care for the child.

Wrongful life

- Brought by the affected child for negligent failure to diagnose fetal condition that will result in impairment (e.g., birth defect).
- To show actual causation, child must prove pregnancy would have been terminated but for the failure to diagnose.
- Most courts have rejected this theory.
 - Perceive problems with claim of, in essence, "I'm damaged by being alive."
- A minority of courts allow a plaintiff to recover extraordinary costs associated with impairment.

Wrongful conception, birth, and life

- Some economic context:
 - Children are very expensive.
 - Additional costs for caring for an individual with a substantial disability can run to the millions of dollars over a lifetime.
 - Lawsuits for wrongful conception, birth, and life are habitually used as means of funding care.
 - Consider the real-world parental motivation of caring -- alongside the essence of the plaintiff's theory in these lawsuits, which characterizes the life of a child as an injury.
- All in all, this is fertile ground for controversy.

Dobson v. Dobson

Case

- Consider the policy debate in allowing causes of action brought by plaintiffs for injuries in utero.
- See the doctrinal variation in this issue.
- Have a contemporary way to re-imagine the project of tort law and the common law; get a from-the-outside view of the Anglo-American common-law.
- Consider from a fresh perspective the role of precedent and culture in a common-law legal system.
- Be introduced to Canadian courts.