Court observed that the original wrongdoer was liable for the aggravation of the injury by a treating physician[29] and that there could be but one satisfaction for the injury received.[30] The court then held that the release "was clearly designed to release the original wrongdoers from all and every claim. . . . This necessarily included the aggravation . . ." of the injury by the defendant.[31] In a later case,[32] the court held that the act of the original wrongdoer was the proximate cause of the injury and that it "naturally followed, therefore, that, where the injured party proceeds against the wrongdoer by an action for damages, and thereby recovers his damages, he is deemed to have received full satisfaction for the injury suffered and for all of its aggravations, if any, by unskillfull treatment."[33] The court has also said that the reason for the holding in *Phillips v. Werndorff*[34] was that there "can be but one settlement for one tort or wrong, and that the case showed there was a release from all damages arising from or growing out of the accident. . . ."[35] In another decision, the court stated that "full compensation" did not mean complete or adequate compensation and that the "consideration so demanded and received [for the release] was, in a legal sense, full payment, and he [releasor] cannot recover another or further payment from any other person for the same wrong."[36] The court again held that there could be but one satisfaction for one claim.[37] The Iowa Supreme Court thus placed itself with the majority of jurisdictions by accepting the rationale that there is but one cause of action and that a release is to be considered as full satisfaction for the injury as aggravated.

In *Smith*,[38] the court overruled *Phillips v. Werndorff* insofar as it "implies a complete release to an original tort-feasor conclusively releases the treating physician from liability for subsequent negligence. . . ."[39] In so holding the court said that the general principle that there could be but one satisfaction for an injury received does not necessitate the broad majority rule.[40] The court then cited extensively from a New York case[41] for the proposition that the plaintiff has two causes of action, one against the original wrongdoer for his negligent acts and the other against the doctor for his alleged malpractice[42] and that the release of one is not full satisfaction unless it is full recovery and is so regarded.[43] The court, continuing to cite the New York case, said that

---

29 *Id.* at 522, 243 N.W. at 526.
30 *Id.* at 523, 243 N.W. at 526.
31 *Id.* at 524, 243 N.W. at 527.
32 Paine v. Wyatt, 217 Iowa 1147, 251 N.W. 78 (1934).
33 *Id.* at 1149, 251 N.W. at 79.
34 215 Iowa 521, 243 N.W. 525 (1932).
35 Johnson v. Selindh, 221 Iowa 378, 382, 265 N.W. 622, 624 (1936).
36 Dungy v. Benda, 251 Iowa 627, 635, 102 N.W.2d 170, 175 (1960).
37 *Id.* at 633, 102 N.W.2d at 174.
38 Smith v. Conn, 163 N.W.2d 407 (Iowa 1968).
39 *Id.* at 411.
40 *Id.* at 409.
41 Derby v. Prewitt, 236 N.Y.S.2d 953, 187 N.E.2d 556 (1962).
42 Smith v. Conn, 163 N.W.2d 407, 410 (Iowa 1968).
43 *Id.* at 411.

the plaintiff had the burden of proving that the release was not intended to be and was not in fact a full satisfaction of the aggravated injury.[44]

The *Smith* decision thus places Iowa with those jurisdictions holding that a release by an injured party of the one responsible for the original injury does not of itself preclude an action by the injured person against a physician for negligent treatment of the injury. This appears to be the more practical approach, as the consideration given in exchange for the release of the original tort-feasor often does not fully compensate the injured party.

SIDNEY E. DRAKE

Wrongful Death—A STILLBORN FETUS MAY NOT BE INCLUDED WITHIN THE MEANING OF A STATUTE PERMITTING RECOVERY FOR THE WRONGFUL DEATH OF A MINOR CHILD.—*Stokes v. Liberty Mutual Insurance Company* (Fla. 1968).

The parents of a stillborn fetus[1] claimed damages for its wrongful death pursuant to a clause in a policy issued by an insurer. The insurer brought an action to determine if a stillborn fetus, prenatally injured, is a minor child within the meaning of the statute for the wrongful death of a minor child. The parties stipulated that the viability[2] of the fetus was immaterial. The district court of appeal[3] affirmed the judgment for the insurer, and the Florida Supreme Court granted certiorari. *Held*, affirmed, one justice dissenting. A stillborn fetus is not within the meaning of a statute permitting recovery for the wrongful death of a minor child. *Stokes v. Liberty Mutual Insurance Company*, 213 So. 2d 695 (Fla. 1968).

Although there was virtually no right of recovery for wrongful death at common-law,[4] every state has now enacted some type of statute providing a cause of action where death results from a wrongful act.[5] Most of these statutes provide for a cause of action by the decedent's personal representative

---

44 *Id.*

1 A fetus is the "product of pregnancy (*i.e.*, the infant growing in the uterus) from the end of the second month to the time it is born." SCHMIDT'S ATTORNEYS' DICTIONARY OF MEDICINE 299 (1968).

2 Viability is the "ability to survive outside the uterus, depending on the state of development or age." *Id.* at 870.

3 Stokes v. Liberty Mut. Ins. Co., 202 So. 2d 794 (Fla. 1967).

4 Baker v. Bolton, 1 Camp. 493, 170 Eng. Rep. 1033 (1808).

5 W. PROSSER, TORTS 924 (3d ed. 1964).

for the benefit of certain named beneficiaries.[6] However, a minority of jurisdictions[7] have survival-type statutes which enlarge a cause of action formerly vested in the decedent to include damages for death.[8]

In addition to general survival and death acts, several states have provisions which allow a distinct cause of action for the wrongful death of a minor child.[9] In the instant case, the Florida Supreme Court denied recovery on the basis of the peculiar language of their statute allowing recovery for the wrongful death of a minor child.[10] Consequently, it appears that an action for the wrongful death of an unborn child, like other actions for wrongful death, must be based on the statutory provisions of the particular jurisdiction.[11]

The Massachusetts Supreme Court is generally recognized as having been the first appellate court to deal with the general question of recovery for prenatal injuries. As a result of a fall, a five-month pregnant woman gave birth to a child which lived for approximately fifteen minutes.[12] The woman sought recovery against the city, upon whose street she fell, for the wrongful death of her child. Noting a lack of precedent, the court in denying recovery stated: "[A]s the unborn child was a part of the mother at the time of the injury . . . , we think it clear that the statute sued upon does not embrace the plaintiff's intestate within its meaning. . . ."[13] This decision was cited by the Illinois Supreme Court when it denied a living child the right to recover for injuries suffered prenatally.[14] However, the dissent suggested that since an unborn child is capable of living separately from its mother once it reaches viability, if the injured child is subsequently born alive, it should have a cause of action.[15] Using this same reasoning, the district court for the District of Columbia became the first American court to allow a living child to recover for its prenatal injuries.[16] At present, an overwhelming majority of jurisdictions allow recovery for prenatal injuries when the injured child is born alive.[17]

The Minnesota Supreme Court was the first appellate court in the United States directly confronted with the question of whether recovery should be

---

6 Rose, *Foreign Enforcement of Actions for Wrongful Death*, 33 MICH. L. REV. 545 (1935).

7 *See, e.g.*, IOWA CODE § 611.20 (1966).

8 Rose, *Foreign Enforcement of Actions for Wrongful Death*, 33 MICH. L. REV. 545 (1935).

9 *See, e.g.*, FLA. STAT. § 768.03 (1965); GA. CODE ANN. § 105-1307 (1956); IOWA R. CIV. P. 8.

10 Stokes v. Liberty Mut. Ins. Co., 213 So. 2d 695 (Fla. 1968).

11 In those states that have both a general survival or death statute and a wrongful death of a minor child provision there appears to be a choice of actions. In Iowa, it appears possible that a cause of action could be brought under IOWA CODE § 611.20 (1966) (survival statute) or under IOWA R. CIV. P. 8 (injury or death of a minor child).

12 Dietrich v. Inhabitants of Northampton, 138 Mass. 14, 52 Am. Rep. 242 (1884).

13 *Id.* at 17, 52 Am. Rep. at 245.

14 Allaire v. St. Luke's Hosp., 184 Ill. 359, 56 N.E. 638 (1900).

15 *Id.* (dissenting opinion).

16 Bonbrest v. Kotz, 65 F. Supp. 138 (D.D.C. 1946).

17 *See, e.g.*, Sinkler v. Kneale, 401 Pa. 267, 164 A.2d 93 (1960), and cases cited therein.

allowed for the wrongful death of an unborn child. The court allowed recovery stating: "It seems too plain for argument that where independent existence is possible and life is destroyed through a wrongful act a cause of action arises under the statutes . . . ."[18] Previously, the Louisiana Court of Appeals, by way of dictum, had indicated that: "[I]f the child be killed . . . before its birth, we see no reason why its parents cannot maintain an action for the death of their child."[19]

In contrast to the Minnesota decision, several courts have denied recovery for the wrongful death of an unborn child on the theory that any right of recovery should be formulated by the state legislature and not by judicial legislation.[20] "Where a right of action is dependent upon the provisions of a statute, . . . we are not privileged to create such a right under the guise of a liberal interpretation of it. Judicial legislation has long been regarded . . . as unwise . . . ."[21] The Oklahoma Supreme Court, referring to an earlier decision in which recovery was denied,[22] stated: "[S]ince this Court construed our wrongful death statute in 1953, . . . the Legislature has not seen fit to amend such statute."[23] The court implied that if the legislature does not amend the state's wrongful death statute to include unborn children once a recovery has been denied, it is not the court's prerogative to incorporate them.

Other courts have denied recovery because death damages for an unborn child are too speculative.[24] After discussing the scant proof of pecuniary loss from the death of a young child, the New Jersey Supreme Court held that: "[N]ot even these scant proofs can be offered when the child is stillborn. It is virtually impossible to predict whether the unborn child, but for its death, would have been capable of giving pecuniary benefit to its survivors."[25] Similarly, the New York Supreme Court provided: "Unfortunate though it is, it is the law of the State of New York that there does not exist an action for wrongful death for fatal injury to a foetal child due to the remote and speculative character of the damages."[26] Since a mother can recover for injuries suffered from the loss of an unborn child, various courts seem to believe they will be permitting double damages if they allow recovery for the wrongful death of the unborn child.[27]

Although there is a substantial number of jurisdictions which deny recovery if the child is stillborn, the cases in which a cause of action has been

---

18 Verkennes v. Corniea, 229 Minn. 365, 370, 38 N.W.2d 838, 841 (1949).
19 Cooper v. Blanck, 39 So. 2d 352, 360 (La. App. 1923) (dictum).
20 *See, e.g.*, Norman v. Murphy, 124 Cal. App. 2d 95, 268 P.2d 178 (1954); Hogan v. McDaniel, 204 Tenn. 235, 319 S.W.2d 221 (1958).
21 Hogan v. McDaniel, 204 Tenn. 235, 239, 319 S.W.2d 221, 223 (1958).
22 Howell v. Rushing, 261 P.2d 217 (Okla. 1953).
23 Padillow v. Elrod, 424 P.2d 16, 18 (Okla. 1967).
24 *See, e.g.*, Graf v. Taggert, 43 N.J. 303, 204 A.2d 140 (1964); Endresz v. Friedburg, 52 Misc. 2d 693, 276 N.Y.S.2d 469 (1966); Gay v. Thompson, 266 N.C. 394, 146 S.E.2d 425 (1966).
25 Graf v. Taggert, 43 N.J. 303, 310, 204 A.2d 140, 144 (1964).
26 Endresz v. Friedburg, 52 Misc. 2d 693, 276 N.Y.S.2d 469, 470 (1966).
27 *See, e.g.*, Norman v. Murphy, 124 Cal. App. 2d 95, 268 P.2d 178 (1954); Carroll v. Skloff, 415 Pa. 47, 202 A.2d 9 (1964).

permitted, now in the majority,[28] have severely criticized the harsh results produced by a denial.[29] "The origin and development of the rule favoring a denial of recovery . . . appears to have been one of convenience, and has been the subject of strong criticism both in dissenting opinions and by various writers for many years. The harshness of the rule is at once apparent."[30] Other courts have contended that denial of recovery is against reason and logic[31] and is artificial and unjust.[32] "Suppose, for example, viable unborn twins suffered simultaneously the same prenatal injury of which one died before and the other after birth. Shall there be a cause of action for the death of the one and not for that of the other?"[33]

Although recovery has been granted because courts feel the rule denying recovery is harsh, illogical and unjust, the primary explanation given for allowing a cause of action centers around the belief that biologically a viable unborn child is an individual person. "The most cogent reason, we believe, for holding that a viable unborn child is an entity within the meaning of the general word 'person' is because, biologically speaking, such a child is, in fact, a presently existing person, a living human being."[34] The Mississippi Supreme Court, following this reasoning, held that after an unborn child reaches viability, it is capable of an independent existence from its mother, and if injured before birth because of another's negligent act, an action could be maintained in its behalf.[35] Although the majority of courts that have allowed recovery have limited it to situations involving viable unborn children, the Georgia Court of Appeals has gone one step further by allowing the parents to recover for the homicide of their unborn child quick[36] in the womb.[37]

In *Stokes*,[38] the question of the unborn child's viability was not an important factor in the court's decision. Noting that a large number of cases where recovery was allowed turned on the question of viability, the court stated: "This element has been eliminated as a determinant . . . by virtue of the stipulation."[39] However, it seems doubtful that viability, even if admitted as fact, would have changed the court's decision, for in referring to the peculiar language of the statute for wrongful death of a minor the court stated that: "[I]n our view of the Florida Statute, the prior existence of viability does not affect the legal status of the stillborn fetus."[40]

---

28 W. PROSSER, TORTS 357 (3d ed. 1964).
29 *See, e.g.*, Hatala v. Markiewicz, 26 Conn. Supp. 358, 224 A.2d 406 (1966).
30 Rainey v. Horn, 221 Miss. 269, 281, 72 So. 2d 434, 439 (1954).
31 Gorke v. Le Clerc, 23 Conn. Supp. 256, 181 A.2d 448 (1962).
32 Todd v. Sandidge Constr. Co., 341 F.2d 75 (4th Cir. 1964).
33 Stidam v. Ashmore, 109 Ohio App. 431, 434, 167 N.E.2d 106, 108 (1959).
34 Mitchell v. Couch, 285 S.W.2d 901, 905 (Ky. App. 1955).
35 Rainey v. Horn, 221 Miss. 269, 72 So. 2d 434 (1954).
36 A quick child is "[o]ne that has developed so that it moves within the mother's womb." BLACK'S LAW DICTIONARY 1415 (4th rev. ed. 1968).
37 Porter v. Lassiter, 91 Ga. App. 712, 87 S.E.2d 100 (1955).
38 Stokes v. Liberty Mut. Ins. Co., 213 So. 2d 695 (Fla. 1968).
39 *Id.* at 700.
40 *Id.*

The Iowa Supreme Court has not been directly confronted with the question of recovery for the wrongful death of an unborn child. However, the Federal District Court for the Northern District of Iowa, applying Iowa law in *Wendt v. Lillo*,[41] allowed the father, as administrator of the stillborn child's estate, to recover for the wrongful death of his viable unborn child. The plaintiff in *Wendt* brought the action under the Iowa survival statute which provides: "All causes of action shall survive and may be brought notwithstanding the death of the person entitled or liable to the same."[42] The court held that no new cause of action was created by wrongful death, rather the cause of action accruing to the decedent survives his death. "Thus, the statute only leads back to the question whether the viable infant had a cause of action."[43]

The defendant in *Wendt* contended that in Iowa the infant would not have a cause of action because it did not have an independent circulatory system.[44] Plaintiff contended that the independent circulatory rule relied upon by the defendant was merely dictum, that the case cited by the defendant for the independent circulatory rule was decided in 1935, when it was the universal rule that there could be no recovery for prenatal injuries and that a majority of courts currently allow recovery for the wrongful death of a viable unborn child. The federal court, noting that where the state law is in doubt a federal court is justified in assuming the state will follow the majority rule, determined:

> Seldom in the law has there been such an overwhelming trend in such a relatively short period of time as there has been in the trend toward allowing recovery for prenatal injuries to a viable infant.
>
> In view of that trend, it is the view and holding of the Court that if the question were presented to the Iowa Supreme Court it would hold that the plaintiffs could maintain the action here under consideration.[45]

It seems likely that the Iowa Supreme Court, when presented with the question of recovery for the wrongful death of an unborn child, will adopt the reasoning of *Wendt*. The trend in recent years has been in favor of allowing recovery for the wrongful death of viable unborn children. Because the parties stipulated that viability was immaterial, the *Stokes*[46] decision should have little effect on either the trend in other jurisdictions or the Iowa courts. It is an accepted medical belief that when a fetus reaches viability it

---

41 182 F. Supp. 56 (N.D. Iowa 1960).
42 Iowa Code § 611.20 (1966).
43 Wendt v. Lillo, 182 F. Supp. 56, 59 (N.D. Iowa 1960).
44 Defendant relied upon Wehrman v. Farmers & Merchants Sav. Bank, 221 Iowa 249, 259 N.W. 564 (1935), for the "independent circulatory rule." The rule, as noted by the court in the *Wehrman* case, was established in State v. Winthrop, 43 Iowa 519, 22 Am. Rep. 257 (1876).
45 Wendt v. Lillo, 182 F. Supp. 56, 62-63 (N.D. Iowa 1960).
46 Stokes v. Liberty Mut. Ins. Co., 213 So. 2d 695, 700 (Fla. 1968).

is capable of an independent existence from its mother. It would seem extremely illogical if the Iowa courts denied recovery for the wrongful death of a fetus capable of its own existence simply because the damages are too speculative or because the mother can recover for her injuries or because the legislature has not expressly included unborn children in the statute.

W. MICHAEL SHINKLE