gested that this is an unfortunate step backward in view of the modern trend towards greater discovery, and the fact that one of the purposes underlying this trend has been to equalize the opportunities of large corporate defendants and less pecunious plaintiffs to obtain the facts needed to present their respective cases.[15]

TORTS—WRONGFUL DEATH ACTIONS—PRENATAL INJURIES
Steggall v. Morris, 258 S.W.2d 577 (Mo. 1953)

A car negligently operated by the defendant collided with the car of a pregnant woman. The child was born alive but subsequently died as a result of injuries allegedly sustained in the accident. Suit was brought against the defendant under the Missouri "wrongful death" statute.[1] The trial court dismissed the case for failure to state a cause of action. The Supreme Court of Missouri reversed and held that since a child may maintain a suit for negligently caused injuries received while viable and *en ventre sa mere*, under the statute the representatives of the child may recover where the injury results in death.[2]

Most courts do not allow recovery for the negligent injury of an unborn child.[3] In the leading case of *Dietrich v. Inhabitants of Northampton*,[4] Mr. Justice Holmes, denying recovery for prenatal injuries, reasoned that the unborn child is part of the mother, that the mother can recover for injuries not too remote, and that therefore the child need not recover. Other reasons which have been advanced for the denial of recovery are: that there is no person in existence to whom a duty could be owed at the time of the accident;[5] that to allow recovery would increase the probability of false claims;[6] that there was no common law right of action, and the right, if created, should arise

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15. Martin v. Lingle Refrigeration Co., 260 S.W.2d 562 (Mo. 1953). This recent case apparently cited the principal case as holding that the photographs were exempt as a privileged communication.

1. MO. REV. STAT. § 537.080 (1949):
Whenever the death of a person shall be caused by a wrongful act, neglect or default of another, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, *and in every such case*, the person who or the corporation which would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured. [Italics added.]

2. Steggall v. Morris, 258 S.W.2d 577 (Mo. 1953).

3. RESTATEMENT, TORTS § 869 (1939): "A person who negligently causes harm to an unborn child is not liable to such child for the harm." See 12 MD. L. REV. 223, 224 (1951), for an enumeration of the few jurisdictions which allow recovery.

4. 138 Mass. 14 (1884).

5. PROSSER, TORTS 188-190 (1941).

6. Bliss v. Passanesi, 95 N.E.2d 206 (Mass. 1950).

from "legislative action;"[7] and that proof of causal connection is impossible.[8]

A minority of courts allow recovery for prenatal injuries.[9] These courts hold that because a viable[10] unborn child is capable of living outside the uterus it is a person in esse.[11] Recent cases have rejected the argument that "legislative action" is necessary for recovery and have allowed recovery without express statutory authorization.[12] These courts also necessarily hold that proof of the causal connection of the defendant's negligence to the injury is possible.[13]

There is disagreement among the courts allowing recovery as to when a child is actually viable. The child has been considered as a person by some courts only when it could be severed from the mother and continue life absolutely separated from her.[14] Other courts have indulged in a legal fiction by which they have extended viability so that a child is considered a person from the time of its conception.[15]

Where recovery is disallowed under the wrongful death statutes the same reasons are given by the majority courts that they give in denying recovery to the prenatally injured person. This holding is logical, because the statute gives a cause of action only where the deceased could have recovered if he had lived. Those courts which allow recovery by the injured child, by calling the viable child a per-

7. Newman v. City of Detroit, 281 Mich. 60, 274 N.W. 710 (1937); Buel v. United Rys. Co. of St. Louis, 248 Mo. 126, 154 S.W. 71 (1913); Stemmer v. Kline, 128 N.J.L. 455, 26 A.2d 489 (Ct. Err. & App. 1942); Ryan v. Public Service Coordinated Transport, 18 N.J. Misc. 429, 14 A.2d 52 (Sup. Ct. 1940).

8. Superior Transfer Co. v. Halstead, 189 Md. 536, 56 A.2d 706 (1948). For a discussion of medical testimony see: Note, 1951 WASH. U.L.Q. 408; Meyer and Cummins, *Severe Maternal Trauma In Early Pregnancy; Congenital Amputations in the Infant at Term*, 42 AM. JOUR. OBSTETRICS AND GYNECOLOGY 150, 153 (1941).

9. Bonbrest v. Kotz, 65 F. Supp. 138 (D.D.C. 1946); Scott v. McPheeters, 33 Cal. App. 2d 629, 92 P.2d 678 (1939); Tucker v. Howard Carmichael and Sons, Inc., 208 Ga. 201, 65 S.E.2d 909 (1951); Cooper v. Blanck, 39 So.2d 352 (La. App. 1923) (opinion published in 1949); Damasiewicz v. Gorsuch, 79 A.2d 550 (Md. 1951); Verkennes v. Corniea, 229 Minn. 365, 38 N.W.2d 838 (1949); Woods v. Lancet, 303 N.Y. 349, 102 N.E.2d 691 (1951); Jasinsky v. Potts, 153 Ohio St. 529, 92 N.E.2d 809 (1950).

10. Dorland, THE AMERICAN ILLUSTRATED MEDICAL DICTIONARY, 1616 (21st ed. 1948), defines viable as follows: "Viable. Capable of living; especially capable of living outside the uterus: said of a fetus that has reached such a stage of development that it can live outside the uterus."

11. Scott v. McPheeters, 33 Cal. App. 2d 629, 630, 92 P.2d 678, 679 (1939); Cooper v. Blanck, 39 So.2d 352, 355 (La. App. 1923) (opinion published in 1949). One court has said that a duty of due care is owed to the unborn child. Verkennes v. Corniea, 229 Minn. 365, 38 N.W.2d 838 (1949).

12. Tucker v. Howard Carmichael and Sons, Inc., 208 Ga. 201, 65 S.E.2d 909 (1951); Woods v. Lancet, 303 N.Y. 349, 102 N.E.2d 691 (1951).

13. Woods v. Lancet, 303 N.Y. 349, 102 N.E.2d 691 (1951). It has been observed that the difficulty in cases involving prenatal injuries is no greater than in many other matters of medical proof. PROSSER, TORTS 188-190 (1941).

14. See, *e.g.*, Williams v. Marion Rapid Transit, Inc., 152 Ohio St. 114, 87 N.E. 2d 334 (1949).

15. Bonbrest v. Kotz, 65 F. Supp. 138 (D.D.C. 1946); PROSSER, TORTS 188-190 (1941).

son, also allow recovery by the representatives under a wrongful death statute.[16]

Only one case, *Buel v. United Rys. Co. of St. Louis*,[17] had been decided on prenatal injuries in Missouri prior to the principal case. In that case suit was brought under the wrongful death statute,[18] and recovery was denied to the representative of a child whose death was caused by injuries inflicted while in the mother's womb. The court held that since an infant could not recover for prenatal injuries if he himself were alive, the presence of the statute was no reason to grant relief to the survivors. By expressly overruling the *Buel* case, the court in the principal case joined the progressive minority of courts. The court would allow recovery to a person prenatally injured and therefore did allow recovery to the representatives of the child where the injuries were fatal, under the "plain terms" of the wrongful death statute.[19]

The trend of the recent cases is definitely toward allowing recovery to persons injured before birth, and allowing recovery by the representatives of such persons where the injury is fatal. Commendable though the trend may be, until there is a definite determination of when a child is viable, and more adequate proof as to the causal connection, extreme caution should be exercised before allowing recovery.

WORKMEN'S COMPENSATION—COMMON LAW ACTION AGAINST EMPLOYER FOR INJURY NOT COMPENSABLE UNDER THE ACT

McDaniel v. Kerr, 258 S.W.2d 629 (Mo. 1953)

Plaintiff developed an abscessed lung from exposure to plaster dust in the course of employment. He brought an action against his employer to recover damages for injuries resulting from defendant's alleged breach of his common law duty to provide a safe place in which to work and adequate protective devices. Both plaintiff and defendant had accepted coverage of the Missouri Workmen's Compensation Act relating to injury by accident,[1] but not to occupational diseases.[2] The trial court entered judgment for defendant notwithstanding the verdict for plaintiff on the ground that the evidence showed as a matter of law that plaintiff's injury was an accident within the meaning of

16. Verkennes v. Corniea, 229 Minn. 365, 38 N.W.2d 838 (1949); Jasinsky v. Potts, 153 Ohio St. 529, 92 N.E.2d 809 (1950); Williams v. Marion Rapid Transit, Inc., 152 Ohio St. 114, 87 N.E.2d 334 (1949).

17. 248 Mo. 126, 154 S.W. 71 (1913).

18. See note 1 *supra*.

19. Steggall v. Morris, 258 S.W.2d 577, 581 (Mo. 1953).

1. MO. REV. STAT. § 287.010 *et seq.* (1949).

2. MO. REV. STAT. § 287.020 (4) (1949). The court did not decide whether plaintiff's injury was or was not an occupational disease, because the parties had not accepted the occupational disease provision.