OPINION OF THE COURT

1. DEATH—WRONGFUL DEATH ACT—STATUTES.
The obvious purpose of the wrongful death statute is to provide an action for wrongful death whenever, if death had not ensued, there would have been an action for damages (MCLA § 600.2922).

2. DEATH—WRONGFUL DEATH—COMMON LAW—DAMAGES.
The statutory wrongful death action is coextensive with the common-law right of action for damages (MCLA § 600.2922).

3. DEATH—WRONGFUL DEATH ACTION—INFANT EN VENTRE SA MERE —STATUTES.
Plaintiff's decedent, an eight-month-old viable infant *en ventre sa mere* at the time of the injury which caused his death, was a person within the meaning of the wrongful death statute and the administrator of the infant's estate can maintain an action for damages under that statute (MCLA § 600.2922).

DISSENTING OPINION

BLACK and ADAMS, JJ.

4. STATUTES—CONSTRUCTION—LEGISLATIVE INTENT.
The primary rule of statutory construction is to ascertain and declare the intention of the legislature, and to carry such intention into effect to the fullest degree.

5. STATUTES — CONSTRUCTION — LEGISLATIVE INTENT — ORDINARY MEANING.
The first and basic rule of statutory construction is that all portions of statutory provisions brought under scrutiny should be read together and considered for accurate identification of the will of the legislature and the other rule is that words of a statute are to be taken in their ordinary meaning.

*6. S*TATUTES—CONSTRUCTION—WRONGFUL DEATH—FETUS.
An unborn or stillborn fetus simply could not and cannot succeed in leaving a "widow", a "wife", a "spouse", or "next of kin who suffered such pecuniary injury" nor could any legislator when statutes were enacted in 1848, 1939 and 1965 reasonably have conceived otherwise.

7. DEATH—WRONGFUL DEATH ACT—LEGISLATIVE INTENT—PERSON.
It was the wrongful taking of a breadwinning or otherwise pecuniarily supportive person which the legislature had in mind, all the way through, in the several wrongful death acts when it dealt successively with the wrongful death of a "person" and the wrongful death of "such deceased person" (MCLA § 600.2922).

8. STATUTES—CONSTRUCTION—CONSTITUTIONAL LAW—LEGISLATIVE INTENT—COURTS.
Neither the Fourteenth Amendment nor the Michigan Constitution may, without saying so, amend any Michigan statute; they may destroy such a statute, depending upon the Michigan Supreme Court's interpretation and application of it but it is for that Court to say what the legislature meant by employed language when conflicting constructions of such a statute are pressed upon that Court (US Const, Am 14).

9. ACTION ON THE CASE—REMEDIES.

Action on the case is an outgrowth of the principle that, whenever the law gives a right or prohibits an injury, it will also afford a remedy; hence, where there has been an injury for which none of the established forms of actions will lie, an action on the case may be maintained.

Appeal from Court of Appeals, Division 3, Fitzgerald, P. J., and R. B. Burns and Bronson, JJ., affirming Saginaw, Fred J. Borchard, J. Submitted January 8, 1971. (No. 16 January Term 1971, Docket No. 52,693.) Decided July 7, 1971.

20 Mich App 679 reversed.

Complaint by James E. O'Neill, administrator of the estate of Baby Boy Pinet, deceased, against Eldon Morse, Bernice Morse, and Gary R. Root, for damages under the wrongful death act. Summary judgment for defendants. Plaintiff appealed to the Court of Appeals. Affirmed. Plaintiff appeals. Reversed and remanded.

Cicinelli, Mossner, Majoros, Harrigan & Alexander, for plaintiff.

Smith & Brooker, P. C. (by *Webster Cook* and *Mona C. Doyle),* for defendant Gary R. Root.

Heilman, Purcell, Tunison & Cline, for defendants Eldon Morse and Bernice Morse.

T. E. BRENNAN, J. The case before us is indistinguishable upon its facts from the case of *Powers v. City of Troy* (1968), 380 Mich 160.

The complaint here alleges that plaintiff's decedent, Baby Boy Pinet, was an eight-month-old viable infant *en ventre sa mere* at the time of the injury which caused his death.

Action was brought under Michigan's wrongful death statute. MCLA § 600.2922 (Stat Ann 1971 Cum Supp § 27A.2922). By motion for summary judgment, defendants raised the issue of whether the plaintiff's decedent was a person within the meaning of that statute.

Plaintiff answered the motion, contending that his decedent was a person within the meaning of the wrongful death statute, and further arguing that his decedent was a person within the meaning of the Fourteenth Amendment to the United States Constitution; that his right of action may not be denied without depriving him of a vested property right without due process of law.

We lay the constitutional question aside.

Intervening since our decision in *Powers* is the case of *Womack v. Buchhorn* (1971), 384 Mich 718, decided at this term.

In *Womack,* we overruled *Newman v. Detroit* (1937), 281 Mich 60, and held that a common-law action does lie in this state for prenatal injuries.

Womack being the applicable rule of common-law tort liability, we have only to apply the wrongful death statute to the facts of this case.

The first section of that statute reads as follows:

"Sec. 2922.(1) Whenever the death of a person or injuries resulting in death shall be caused by wrongful act, neglect or default, 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, and although the death shall have been caused under such circumstances as amount in law to felony. All actions for such death, or injuries resulting in death, shall be brought only under this section." MCLA § 600.2922 (Stat Ann 1971 Cum Supp § 27A.2922).

The obvious purpose of the statute, originally enacted as PA 1848, No 38, is to provide an action for wrongful death whenever, *if death had not ensued,* there would have been an action for damages.

Womack settled the question of whether, if death had not ensued, Baby Boy Pinet would have had an action for damages.

The statutory wrongful death action is co-extensive with the common-law right of action for damages.

We have never supposed that the 1848 legislature intended only to provide an action for wrongful death under those circumstances in which there was precedent for recovery of damages in cases reported before 1848. It would be anomalous indeed if we were to have two co-existing bodies of common-law tort liability in Michigan—one static and frozen as of 1848 for wrongful death and one living and growing to apply in other cases.

Justices who felt no action should lie for the wrongful death of an unborn person subscribed to the following statements in *Powers v. City of Troy, supra:*

"Appellee, *per contra,* premises his argument on the traditional view that to hold a fetal child under our death act to be a 'person' we, in legal effect, judicially amend a statute which has been construed since its enactment over a hundred years ago to exclude the cause of action contended for by appellant. * * *

"Rather we rest our decision squarely upon the fact that at the time our wrongful death act was passed the legislature used the term `person' in its ordinary, generally accepted meaning at that time. * * *

"We are not convinced that `person' in its ordinary signification in 1848 when our death act was passed included the concept of a fetal child. It should be noted and emphasized that we deal here, not with a cause of action which existed at common law. We do not face here the question of broadening the base of recovery in an action already recognized at common law. We deal with a statute in derogation of the common law.

* * *

"Considering the plain import of the word 'person' at the time of enactment of our statute and its uniform interpretation through the years, we feel obligated to accord to the term its `ordinary signification' when legislatively employed."

No citation of authority was provided in *Powers* to establish the historical accuracy of those conclusions. It is not accurate to assume that our recent explosion of medical knowledge on the subject of prenatal life constituted a complete reversal of previous thinking on the subject.

The instructive dissent of *Mr. Justice Boggs,* in *Allaire v. St. Lukes Hospital,* 184 Ill 359 (56 NE 638), at 368, was written in 1900. His view has been largely adopted in this country.

The majority in that case held:

"That a child before birth is, in fact, a part of the mother and is only severed from her at birth, cannot, we think, be successfully disputed."

Justice Boggs wrote:

"Medical science and skill and experience have demonstrated that at a period of gestation in advance of the period of parturition the foetus is capable of independent and separate life, and that though within the body of the mother it is not merely a part of her body, for her body may die in all of its parts and the child remain alive and capable of maintaining life when separated from the dead body of the mother."

If the mother can die and the fetus live, or the fetus die and the mother live, how can it be said that there is only one life?

If tortious conduct can injure one and not the other, how can it be said that there is not a duty owing to each?

The phenomenon of birth is not the beginning of life; it is merely a change in the form of life. The principal feature of that change is the fact of respiration. But the law does not regard the incidence of respiration as the sole determinative of life. Respiration can be artificially induced or mechanically supplied. Life remains.

That the fetus cannot be seen is hardly the measure of life. That it cannot cry or see or remember—can these things control its right to live?

What of the capacity for "independent" life?

A baby fully born and conceded by all to be "alive" is no more able to survive unaided than the infant *en ventre sa mere.* In fact, the babe in arms is less self-sufficient—more dependent—than his unborn counterpart.

Does he want to eat? He cannot take himself to his mother's breast, or even discover the use of it without her help. He cannot keep himself warm or dry or ward off danger. He lives by the sufferance of others, demanding the means of sustaining his life by the noisy, endearing, obvious fact of his presence.

The demands of the unborn child are no less total, but they are enforced by physical rather than emotional attachments. Ensconced and protected, he takes what he needs without asking. Only the conscious or negligent acts of others can deprive him of sustenance.

The phenomenon of birth is an arbitrary point from which to measure life. True, we reckon age by counting birthdays. The Chinese count from New Years. The choice is arbitrary.

Birth may be natural, where the fetus has commenced the process by chemical changes within himself, and the mother has cooperated; it may be intentional, as in the case of Cesarean section or induced labor; or it may be accidental, as where the child is separated from the mother by trauma.[1]

One need not be alive in order to be born; as the delivery of stillborn babies demonstrates. Neither is it possible for one to be born alive unless he be living prior to the birth.

A fetus having died within its mother's womb is dead; it will not come alive when separated from her. A fetus living within the mother's womb is a living creature; it will not die when separated from her unless the manner, the time or the circumstances of separation constitute a fatal trauma.

The fact of life is not denied.

Neither is the wisdom of the public policy which regards unborn persons as being entitled to the protection of the law.

PA 1968, No 292, constitutes a legislative recognition of the *personhood* of the unborn:

"600.2045 Guardian ad litem for *unborn persons.* [M.S.A. 27A.2045].

"Sec. 2045. (1) If in an action or proceeding, other than in probate court, it appears that a person not in being may become entitled to a property interest, real or personal, legal or equitable, involved in or affected by the action or proceeding, and the interest of the unborn person is not or cannot otherwise properly be represented and protected, the court, upon its own motion, or upon the motion of any party, may appoint a suitable person to appear and act as guardian ad litem of the unborn person. The guardian ad litem is authorized to engage counsel and do whatever is necessary to defend and protect the interest of the unborn person. A judgment or order made after the appointment shall be conclusive upon the unborn person for whom a guardian was appointed.

"(2) The guardian ad litem may be removed by the court which appointed him, without notice, when it appears to the court to be for the best interests of the ward. The guardian ad litem may be allowed reasonable compensation by the court appointing him, to be paid and taxed as a cost of the proceedings as directed by the court." MCLA § 600.2045 (Stat Ann 1971 Cum Supp § 27A.2045). (Emphasis added.)

If property interests of unborn persons are protected by the law, how much more solicitous should the law be of the first unalienable right of man—the right to life itself?

There remains the question of whether the statutory action for wrongful death contemplates an action for the wrongful death of an unborn child, in the light of the unitary and interdependent provisions of PA 1939, No 297, and sections 114 and 115 of the probate code of the same year, 1939.

These statutes were interpreted in *Breckon v. Franklin Fuel Company* (1970), 383 Mich 251.

We there held that damages recoverable in wrongful death actions were limited to pecuniary injury, reasonable medical, hospital, funeral and burial expenses, and conscious pain and suffering, and that the concept of "pecuniary injury" was further delineated by the probate code provision requiring distribution of such pecuniary loss among "dependents of the decedent."

We have never held, however, that "dependents of the decedent" were limited to those persons who received actual support and maintenance from the decedent during his lifetime.

In *In re Olney's Estate* (1944), 309 Mich 65, we held that a husband was entitled to the value of his wife's services, less the reasonable cost of her maintenance, and that such loss of services constituted a "pecuniary loss" recoverable by him as administrator of her estate, and distributable to him as a "dependent".

So, too, in the case of minor children, parents are entitled to the net value of their children's services; these are pecuniary injuries with respect to which the parents stand in the capacity of dependents for the purpose of distribution under the probate code.

Admittedly in the case of very young or stillborn children, the value of prospective filial service is not easy to prove.

But pecuniary injuries are alleged in this cause, and no issue has been made of it in this appeal based upon the motion for summary judgment.

Reversed and remanded. Costs to plaintiff.

T. M. KAVANAGH, C. J., and T. G. KAVANAGH, SWAINSON and WILLIAMS, JJ., concurred with T. E. BRENNAN, J.

ADAMS, J., concurred in the result

REFERENCES FOR POINTS IN HEADNOTES

[1] 22 Am Jur 2d, Death § § 2-11.
[2] 22 Am Jur 2d, Death §§ 2, 115, 126, 140.
[3] 22 Am Jur 2d, Death §§ 142-144, 147-149.
Action for death of unborn child. 15 ALR3d 992.
[4, 5, 7, 8] 50 Am Jur, Statutes § 223.
[6, 7] 22 Am Jur 2d, Death § 6.
Action for death of unborn child. 15 ALR3d 992.
[9] 1 Am Jur 2d, Actions §§ 22-27.

ENDNOTES

[1] Widely reported was the March 20, 1971, birth of one Kimberly Sue Bange, found alive and in good condition some distance from the body of her mother, killed in a fatal auto accident. Termed "a Cesarean section by violence," the event, whether true or not, establishes a useful hypothetical case; suppose Kimberly Sue had also been found dead. How many "persons" would have died in the crash? How many wrongful deaths?