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Recovery for Tortious Death of the Unborn

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RECOVERY FOR TORTIOUS DEATH OF THE UNBORN

On July 1, 1981, in *Danos v. St. Pierre*,[1] the Supreme Court of Louisiana affirmed an award under Louisiana's wrongful death statute for an *in utero*[2] death that resulted from tortious injury during the sixth month of pregnancy. The court concluded that the unborn[3] is a child from the moment of conception.[4] Six days later in *Scott v. Kopp*,[5] the Supreme Court of Pennsylvania denied recovery under Pennsylvania's wrongful death statute for the death of a fetus from an injury *en ventre sa mere*[6] during the eighth month of pregnancy. These decisions exemplify the great disparity in judicial treatment of death actions[7] arising from tortious injury to an unborn.[8]

Because an action for wrongful death was not recognized at common law,[9] such an action must be based upon the appropri-

1. 402 So. 2d 633 (La. 1981).

2. The term "*in utero*," used widely in the literature on prenatal injury, signifies that the child is still in his mother's womb.

3. Throughout this article the term "unborn" is utilized rather than such terms as "embryo" or "fetus," which refer only to specific stages of gestation. *See* Note, *The Law and the Unborn Child: The Legal and Logical Inconsistencies*, 46 NOTRE DAME LAW. 349, 350-51 (1971).

4. 402 So. 2d at 639.

5. __ Pa. __, 431 A.2d 959 (1981).

6. This term appears commonly in prenatal injury literature and refers to an unborn. BLACK'S LAW DICTIONARY 479 (5th ed. 1979). See note 3 *supra*.

7. "Death action," as used in this Note, refers to a claim under a wrongful death statute or a survival statute. *See* S. SPEISER, RECOVERY FOR WRONGFUL DEATH app. A (2d ed. 1975) [hereinafter cited as S. SPEISER]; Note, *Tort Recovery For the Unborn Child*, 15 J. FAM. L. 276, 283-94 (1976). The wrongful death statute provides a relatively new action intended to compensate those deprived of a relationship with the deceased. Though these statutes vary among jurisdictions, the beneficiary may normally recover for the loss of the decedent's future earnings, services, and comfort. Survival statutes continue an action that the deceased initiated or would have initiated if alive and permit recovery for injury and pain and suffering of the decedent between the time of the tortious act and death. Many jurisdictions have formed a hybrid statute by combining the elements of recovery. *See* Davis, *Wrongful Death*, 1973 WASH. U.L.Q. 327, 331-36; Note, *Tort Recovery*, *supra*, at 283-94.

8. *See generally* S. SPEISER, *supra* note 7, §§ 4:21-:38.

9. The ill-considered conclusion that English common law did not recognize an action for wrongful death first appeared in dicta in Baker v. Bolton, 1 Campbell 493, 173 Eng. Rep. 1035 (K.B. 1808). The decision offered no rationale for this result, but two

ate jurisdiction's death statute.[10] The provisions of these statutes vary widely among jurisdictions, and differences in construction and interpretation of the statutes are even greater.[11] This Note identifies issues that courts must confront when determining whether to award damages for death resulting from tortious prenatal injury and suggests the manner in which these issues might be resolved.

I. Essential Elements of a Death Claim Resulting from Tortious Prenatal Injury

A. *The Unborn as a "Person"*

A death claim is not a claim by the estate of the deceased.[12]

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common-law doctrines suggest a possible basis. First, under the felony-merger doctrine, torts were deemed subsequent to an offense against the Crown. Punishment by death following a felony conviction resulted in forfeiture of the felon's property to the state, and nothing was left from which a civil judgment could be paid. *See* Moragne v. States Marine Lines, 398 U.S. 375, 382 (1970); S. SPEISER, *supra* note 7, § 1.1. Because felony punishment in America does not include forfeiture of property to the state, the felony-merger doctrine does not explain the absence of a common-law wrongful death action in the United States. *See* 398 U.S. at 384; Hyatt v. Adams, 16 Mich. 180, 185-88 (1867); W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 127 (4th ed. 1971) [hereinafter cited as W. PROSSER]. Second, under the death-survival doctrine, a cause of action in tort died with the injured party. *E.g.*, Huggins v. Butcher, 1 Brown & Golds 205, 123 Eng. Rep. 756 (1607). See W. PROSSER, *supra*, § 127; Holdsworth, *The Origin of the Rule in* Baker v. Bolton, 32 L.Q. REV. 431 (1916). All American jurisdictions except Hawaii have adopted the rule of Baker v. Bolton. *Compare* Carey v. Berkshire R.R., 55 Mass. (1 Cush.) 475 (1848) *with* Kate v. Houton, 2 Hawaii 209 (1860). The rule has been strongly criticized, however, on both sides of the Atlantic. *E.g.*, Moragne v. States Marine Lines, 398 U.S. 375 (1970) (the Court concluded that there was a cause of action for wrongful death under the common law); Rose v. Ford, A.C. 826; Panama R. Co. v. Rock, 266 U.S. 209, 216 (1924) (Holmes, J., dissenting); Osborn v. Gillett, L.R. 8 Ex. 88, 94 (1873) (Lord Bramwell, dissenting). *See generally* W. HOLDSWORTH, HISTORY OF ENGLISH LAW § 3, at 676-77 (3d ed. 1927); S. SPEISER, *supra* note 7, § 1.6.

10. The hardship of this anomaly in the common law was remedied in England with the enactment of Lord Campbell's Act. Fatal Accidents Act, 9 & 10 Vict. C. 93 (1846).

> Whensoever the death of a person shall be caused by [a] wrongful act . . . [which] is such as would [had death not occurred] have entitled the party injured to maintain an action and recover damages in respect thereof, then . . . the person who would have been liable if death had not ensued shall be liable to an action for damages.

Id. Legislation of this type has been adopted throughout the United States. *See* S. SPEISER, *supra* note 7, app. A. *Cf.* Gaudette v. Webb, 362 Mass. 60, 71, 284 N.E.2d 222, 229 (1972) (state law on wrongful death "has . . . evolved to the point where it may now be held that the right to recovery for wrongful death is of common law origin").

11. *See generally* S. SPEISER, *supra* note 7, chs. 3, 10.

12. *See id.* § 1:9, app. A. The Internal Revenue Service includes neither wrongful

Rather it is a cause of action of purely statutory creation that allows the enumerated beneficiaries to recover for the tortious death of the deceased. Statutes generally condition these claims on the deceased having been a "person."[13]

In determining whether an unborn is a "person" for purposes of a death statute, courts ordinarily focus on the intent or purpose of the legislature in enacting the statute,[14] the legal status unborns have traditionally enjoyed in the jurisdiction,[15] and community knowledge and attitudes about the unborn.[16]

Many courts have found legislative intent underlying a particular statute to be determinative of the question of whether an unborn is a "person" within the scope of the statute.[17] Because it is unlikely that nineteenth century legislatures gave any thought to the unborn at the time death statutes were enacted,[18]

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death nor survival act recoveries for decedent's death in the estate of the decedent. Rev. Rul. 75-127, 1975-1 C.B. 297.

13. "Person" has embraced entities both inside and outside the human gene pool for statutory and constitutional purposes. *See, e.g.*, Monell v. New York City Dep't of Soc. Servs., 436 U.S. 658 (1978) (municipality is "person" for purposes of 42 U.S.C. § 1983); Gulf, C. & S.F. Ry. v. Ellis, 165 U.S. 150, 154 (1887) (corporation is "person" for purposes of fourteenth amendment).

"Person" can have different meanings depending on the context in which it is used. In Ohio, for example, a viable unborn is a "person" for purposes of the wrongful death statute, Stedam v. Ashmore, 109 Ohio App. 421, 107 N.E.2d 106 (1959), but is not a "person" for purposes of the vehicular homicide statute. State v. Dickinson, 23 Ohio App. 2d 259, 263 N.E.2d 253 (1970), *aff'd*, 28 Ohio St. 2d 65, 275 N.E.2d 599 (1971). *But see* Chrisafogeorgis v. Brandenberg, 511 Ill. 2d 368, 378, 304 N.E.2d 88, 94 (1973) (Ryan, J., dissenting) ("person" has same meaning in both constitutional and statutory contexts).

14. *See, e.g.*, Egbert v. Wenzl, 199 Neb. 573, 576, 260 N.W.2d 480, 482 (1977) ("We express no opinion with respect to the existence of the fetus as a person in either the philosophical or scientific sense. We hold only that the legislature did not exhibit the intention to include a viable fetus within the scope of a wrongful death statute"); Kwaterski v. State Farm Mut. Auto Ins. Co., 34 Wis. 2d 14, 22, 148 N.W.2d 107, 111 (1967) (if death statute has been enacted in an era of limited knowledge of prenatal life, exclusion of unborn from statutory coverage cannot be assumed to be consequence of legislative intent).

15. *See generally* Kader, *The Law of Tortious Prenatal Death Since* Roe v. Wade, 45 Mo. L. Rev. 639, 653-56 (1980); Note, *The Law and the Unborn Child, supra* note 2, at 349.

16. *See generally* Kader, *supra* note 15, at 653-56; Note, *The Impact of Medical Knowledge on the Law Relating to Prenatal Injuries*, 110 U. Pa. L. Rev. 554 (1962).

17. *Compare* Cardwell v. Welsh, 25 N.C. App. 390, 392, 213 S.E.2d 382, 383 (1975) *with* Kwaterski v. State Farm Mut. Auto Ins. Co., 34 Wis. 2d 14, 22, 148 N.W.2d 107, 111 (1967).

18. Kwaterski v. State Farm Mut. Auto Ins. Co., 34 Wis. 2d 14, 22, 148 N.W.2d 107, 111 (1967). *See* Note, *The Impact of Medical Knowledge, supra* note 16, at 563.

focus on legislative intent affords limited guidance. Some courts call attention to statutory derogation of the common law and require strict construction of the statutory language, a focus that leads to the conclusion that an unborn is not a person.[19]

Other courts note the remedial nature of the statute and require broad interpretation to effect this purpose.[20] Additionally, courts allowing recovery may explain that legislatures need not provide for all possible contingencies on the face of every statute[21] and that courts must effectuate the spirit as well as the letter of the law.[22] The supporting analyses in these decisions do not explore the biological, philosophical, or theological dimensions of "personhood."[23] Absent explicit statutory language indicating legislative intent,[24] this level of analysis offers little help in deciding whether an unborn should be recognized as a person for purposes of a death statute.

The legal status of the unborn in other areas of law is the next level of authority available to courts deciding whether the unborn is a person for purposes of a death statute. The unborn has been accorded legal status in equity,[25] criminal law,[26] prop-

19. *See, e.g.*, Kilmer v. Hicks, 22 Ariz. App. 552, 553, 529 P.2d 706, 707 (1974); Egbert v. Wenzl, 199 Neb. 573, 576, 260 N.W.2d 480, 482 (1977).

20. *E.g.*, Eich v. Town of Gulf Shores, 293 Ala. 95, 99, 300 So. 2d 354, 356 (1974). *See* Del Tufo, *Recovery for Prenatal Torts: Actions for Wrongful Death*, 15 RUTGERS L. REV. 61, 76-77 (1960).

21. Del Tufo, *supra* note 20, at 76-77. "The legislature must speak in general terms. It is for the judiciary to supply content to enactments and, with respect to wrongful death statutes, to determine as a matter of common law who is a person within the legislature's intendment." *Id. But see* Justus v. Atchison, 19 Cal. 3d 564, 565 P.2d 122, 139 Cal. Rptr. 97 (1977), in which the court reasoned that when the legislature enacts a statute, it indicates an intention either to allow courts broad discretion in interpretation and application or to "occupy the field" and restrict judicial initiative. *Id.* at 575, 565 P.2d at 129, 139 Cal. Rptr. at 104.

22. *E.g.*, Eich v. Town of Gulf Shores, 293 Ala. 95, 99, 300 So. 2d 354, 356 (1974).

23. *E.g.*, Verkennes v. Cornica, 229 Minn. 365, 38 N.W.2d 838 (1949) (accepting the unborn as a person for purposes of the death statute without any logical argument); Egbert v. Wenzl, 199 Neb. 573, 576, 260 N.W.2d 480, 482 (1977).

24. *E.g.*, TENN. CODE ANN. § 20-5-106 (1980) (expressly recognizing a viable fetus as a person for purposes of wrongful death statute). *See* Note, *California's Response for Wrongful Death of a Stillborn Fetus*: Justus v. Atchison, 5 PEPPERDINE L. REV. 589, 602-08 (1978) (advocating revision of California's wrongful death statute to include fetuses); Recent Developments, 45 TENN. L. REV. 545 (1978); Legislation, 18 VAND. L. REV. 847 (1965) (advocating recovery in Tennessee for wrongful death in case of stillbirth, regardless of viability).

25. *E.g.*, Jefferson v. Griffin Spalding County Hosp. Auth., 247 Ga. 86, 274 S.E.2d 457 (1981) (requiring mother to have caesarean section despite contrary religious beliefs

erty law,[27] and tort law.[28] In each of these areas, however, the legal status of an unborn is often contingent on quickening,[29] viability,[30] or eventual birth.[31] Abortion law and *Roe v. Wade*[32] provide additional legal authority from which inferences can be drawn about the unborn's status as a person. Under *Roe*, "per-

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because fetus, viable at thirty-nine weeks, was endangered); Raleigh Fitkin-Paul Morgan Memorial Hosp. v. Anderson, 42 N.J. 421, 201 A.2d 537 (1964), *cert. denied*, 377 U.S. 985 (1964) (ordering blood transfusion for mother to save unborn despite mother's contrary religious beliefs); Note, *The Law and the Unborn Child, supra* note 2, at 360-62; Note, *The Unborn Child and the Constitutional Conception of Life*, 56 IOWA L. REV. 994, 1000-01 (1971).

26. *E.g.*, CAL. PENAL CODE § 187 (West Supp. 1977) ("Murder is the unlawful killing of a human being, or a fetus, with malice aforethought"). *See* Note, *The Law and the Unborn Child, supra* note 2, at 362-69; Note, *The Constitutional Conception of Life, supra* note 25, at 1001-03.

27. *E.g.*, Thellusson v. Woodford, 31 Eng. Rep. 117 (Ch. 1798). Responding to the contention that an unborn is a nonentity, the court observed:

> Let us see, what this non-entity can do. He may be vouched in a recovery though it is for the purpose of making him answer over in value. He may be an executor. He may take under the Statute of Distributors. . . . He may take by devise. He may be entitled under a charge for raising portions. He may have an injunction; and he may have a guardian.

Id. at 163. *See* Note, *The Law and the Unborn Child, supra* note 2, at 351-54; Note, *The Constitutional Conception of Life, supra* note 25, at 999-1000.

28. *E.g.*, Renslow v. Mennonite Hosp., 40 Ill. App. 234, 351 N.E.2d 870 (1976), *aff'd*, 67 Ill. 2d 348, 367 N.E.2d 1250 (1977) (allowing recovery by a child for prenatal harm caused by negligent preconception blood transfusion received by mother); Kelly v. Gregory, 282 A.D. 542, 125 N.Y.S.2d 696 (1953) (allowing recovery for all postconception prenatal injuries to a liveborn child). *See* Note, *The Law and the Unborn Child, supra* note 2, at 354-60; Note, *The Constitutional Conception of Life, supra* note 25, at 996-99.

29. Although the approach is now in disfavor, some cases require that the unborn be quick at the time of the injury to maintain a tort action for prenatal harm. *E.g.*, Damasiewicz v. Gorsuch, 197 Md. 417, 438, 79 A.2d 550, 559 (1951) (similar requirement of quickness made under criminal law); Drobner v. Peters, 232 N.Y. 220, 222-23, 133 N.E. 567, 567 (1921) ("By the criminal law, . . . it is a great crime to kill the child after it is able to stir in the mother's womb").

30. This distinction is disappearing. *See, e.g.*, Renslow v. Mennonite Hosp., 40 Ill. App. 3d 234, 351 N.E.2d 870 (1976), *aff'd*, 67 Ill.2d 348, 367 N.E.2d 1250 (1977) (allowing recovery for injuries resulting from tort committed before conception); Kelly v. Gregory, 282 A.D. 542, 125 N.Y.S.2d 696 (1953) (extending liability to all tortious injuries occurring after conception).

31. Property law generally recognizes the unborn as an heir even if birth occurs after the decedent's death. An unborn's right to participate in an estate is usually contingent on live birth. Hall v. Hancock, 32 Mass. (15 Pick.) 255 (1834); CAL. PROB. CODE § 123 (West 1956). *See* Note, *The Law and The Unborn Child, supra* note 2, at 351-54; Note, *The Constitutional Conception of Life, supra* note 25, at 999-1000.

32. 410 U.S. 113 (1973). One commentator has asserted that *Roe* is not a constitutional law decision. Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920 (1973).

son" as used in the fourteenth amendment[33] does not include the unborn.[34] Although *Roe* may be cited for the proposition that states may deny recovery for death of a nonviable fetus,[35] *Roe* is a federal constitutional decision rather than a tort or death statute decision and does not compel its interpretation of "person" in decisions of the latter types.[36] Furthermore, the use of *Roe* in death statute cases may be attacked as circular.[37] *Roe* relied in part on prenatal death authority inaccurately represented by Dean Prosser[38] for the conclusion that the unborn was not considered or intended to be a person under the law. In turn, some modern prenatal death decisions cite *Roe*'s conclusion for the same proposition.[39]

The final area by which courts may be guided when deciding whether the unborn is a person is the knowledge and attitudes of the community. As Justice Holmes observed: "[t]he life of the law has not been *logic*: it has been experience."[40] The experience to which Justice Holmes referred is the accumulation of knowledge in all areas of a society and the attitudes such knowledge generates. Modern medicine now regards the unborn as a separate though dependent entity from the moment of conception.[41] With the help of currently available life support technol-

33. U.S. CONST. amend. XIV.

34. *Roe*, 410 U.S. at 158. *See* Kader, *supra* note 15, at 656.

35. Kader, *supra* note 15, at 659.

36. Toth v. Goree, 65 Mich. App. 296, 312, 237 N.W.2d 297, 305 (1975) (Maher, J., dissenting) ("The narrow question this case presents is how broad is the word 'person' in our state's wrongful death act. The constitutional question decided in *Roe v. Wade* . . . is unconnected to the statutory question at hand").

37. Kader, *supra* note 15, at 658.

38. *Id.* at 653-56. The cited authority accompanying Dean Prosser's discussion of prenatal injuries is incomplete and inaccurate. Prosser cites five cases on each side of the issue of recovery for prenatal death but fails to indicate that a majority of jurisdictions favored recovery. *Id.* at 654. Also,

> [i]n footnote 36, . . . Prosser cites seven law review articles, implying that they likewise oppose recovery. The Supreme Court apparently accepted that implication, concluding that a majority of the commentators opposed recovery. While three of the articles do in fact approve of decisions denying recovery, one other article is not relevant to the question, and three argue for recovery for wrongful death of a stillborn fetus.

Id.

39. Toth v. Goree, 65 Mich. App. 296, 237 N.W.2d 297 (1975); Hamby v. McDaniel, 559 S.W.2d 774 (Tenn. 1977).

40. O. HOLMES, THE COMMON LAW 1 (1881).

41. W. PROSSER, *supra* note 9, § 55, at 336 n.16.

ogy, an unborn may be able to survive outside the mother's womb after as few as twenty-five weeks of gestation and at a weight of less than 400 grams or fourteen ounces.[42] In addition, the medical community now has the ability safely to monitor and test the unborn from the earliest stages of pregnancy.[43] In response, parents typically show concern for the unborn and develop emotional ties from the moment they are aware of its existence.[44] Parental concern with the unborn has increased with advances in medical science, and this reality supports inclusion of the unborn within the meaning of death statutes.

Courts faced with deciding whether an unborn is a person under a death statute have found strong arguments for recognition of the unborn as a person.[45] Other courts, in jurisdictions that have interpreted their death statutes as inapplicable to unborns must determine the proper response when confronted with the opportunity to reinterpret a death statute. The alternatives are reinterpreting "person" to include the unborn[46] or deferring to the legislature for any change.[47]

Courts in a majority of the states have reinterpreted death statutes to include the unborn but have limited the application of the statutes to viable unborns.[48] While this approach recog-

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42. Ismach, *The Smallest Patients,* MED. WORLD NEWS, Sept. 14, 1981, at 28, 29.

43. *See* notes 90-93 and accompanying text *infra.*

44. An interesting example of this phenomenon occurs in the case of "test tube" babies whose parents have sought the extreme remedy of artificial fertilization and implantation of the ovum in order to have children.

45. See note 48 *infra.*

46. *E.g.*, Justus v. Atchison, 19 Cal. 3d 564, 586, 565 P.2d 122, 136, 139 Cal. Rptr. 97, 111 (1977) (Tobriner, J., concurring); O'Neill v. Mouse, 385 Mich. 130, 134, 188 N.W.2d 785, 786 (1971); Smith v. Brennan, 31 N.J. 353, 157 A.2d 497 (1960).

> If judges of later years who examine the problem [of liability for prenatal injury] anew with the aid of recent judicial opinions, advanced medical knowledge, and the views of many eminent legal scholars "reach a contrary conclusion they must be ready to discharge their own judicial responsibilities in conformance with modern concepts and needs."

Id. at 362, 157 A.2d at 501. *See also* Moragne v. States Marine Lines, 398 U.S. 375, 389-92 (1970); B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 98 (1921).

47. *E.g.*, Kilmer v. Hicks, 22 Ariz. App. 552, 554, 529 P.2d 706, 708 (1974); Justus v. Atchison, 19 Cal. 3d 564, 579, 565 P.2d 122, 132, 139 Cal. Rptr. 97, 107 (1977); State *ex rel.* Hardin v. Sanders, 538 S.W.2d 336, 340 (Mo. 1976) (en banc); Egbert v. Wenzl, 199 Neb. 573, 576, 260 N.W.2d 480, 482 (1977); Cardwell v. Welch, 25 N.C. App. 390, 393, 213 S.E.2d 382, 384 (1975).

48. Twenty-seven jurisdictions allow recovery for stillbirth of a viable child. *See* Eich v. Town of Gulf Shores, 293 Ala. 94, 300 So. 2d 354 (1974); Hatala v. Markiewicz, 26 Conn. Supp. 358, 224 A.2d 406 (Super. Ct. 1966); Worgan v. Greggo & Ferrara, Inc., 50

nizes the courts' responsibility for interpreting statutory language in a manner that is consistent with modern understanding,[49] it may nevertheless be argued that legislative inaction implies satisfaction with prior decisions denying recovery.[50] Moreover, permitting the legislature to act allows democratic input into a decision that reorders societal relationships. This approach affords notice of any change and allows potential tortfeasors and insurance companies to adjust their insurance coverage with a minimum of economic dislocation. These advantages may, however, be offset by delay and additional harm to beneficiaries. Finally, as a practical matter, enactment of appropriate legislation may be difficult in the face of anticipated insurance company lobbying and in light of the related contro-

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Del. 258, 128 A.2d 557 (1956); Porter v. Lassiter, 91 Ga. App. 712, 87 S.E.2d 100 (1955); Chrisafogeorgis v. Brandenberg, 55 Ill. 2d 368, 304 N.E.2d 88 (1973); Britt v. Sears, 150 Ind. App. 487, 277 N.E.2d 20 (1971); Hale v. Manion, 189 Kan. 143, 368 P.2d 1 (1962); Mitchell v. Couch, 285 S.W.2d 901 (Ky. 1955); Danos v. St. Pierre, 402 So. 2d 633 (La. 1981); State *ex rel.* Odham v. Sherman, 234 Md. 179, 198 A.2d 71 (1964); Mone v. Greyhound Lines, Inc., 368 Mass. 354, 331 N.E.2d 916 (1975); Verkennes v. Cornica, 229 Minn. 365, 38 N.W.2d 838 (1949); Rainey v. Horn, 221 Miss. 269, 72 So. 2d 434 (1954); White v. Yup, 85 Nev. 527, 458 P.2d 617 (1969); Polinquin v. MacDonald, 101 N.H. 104, 135 A.2d 249 (1957); Salazar v. St. Vincent Hosp., 95 N.M. 147, 619 P.2d 823 (1980); Stidam v. Ashmore, 109 Ohio App. 431, 167 N.E.2d 106 (1959); Evans v. Olson, 550 P.2d 924 (Okla. 1976); Libbee v. Permanente Clinic, 268 Or. 258, 518 P.2d 635 (1974); Presley v. Newport Hosp., 117 R.I. 177, 365 A.2d 748 (1976); Fowler v. Woodward, 244 S.C. 608, 138 S.E.2d 432 (1964); Vaillancourt v. Medical Center Hosp., Inc., 139 Vt. 138, 425 A.2d 92 (1980); Moen v. Hanson, 85 Wash. 2d 597, 537 P.2d 266 (1975); Baldwin v. Butcher, 155 W. Va. 431, 184 S.E.2d 428 (1971); Kwaterski v. State Farm Mut. Auto Ins. Co., 34 Wis. 2d 14, 148 N.W.2d 107 (1967); TENN. CODE ANN. § 20-5-106 (1980).

Twelve jurisdictions expressly disallow recovery for stillbirth of a viable child. Kilmer v. Hicks, 22 Ariz. App. 552, 529 P.2d 706 (1974); Justus v. Atchison, 19 Cal. 3d 564, 565 P.2d 122, 139 Cal. Rptr. 97 (1977); Stern v. Miller, 348 So. 2d 303 (Fla. 1977); McKillip v. Zimmerman, 191 N.W.2d 706 (Iowa 1971); Toth v. Goree, 65 Minn. App. 296, 237 N.W.2d 297 (1975); State *ex rel.* Hardin v. Sanders, 538 S.W.2d 336 (Mo. 1976); Egbert v. Wenzl, 199 Neb. 573, 260 N.W.2d 480 (1977); Graf v. Taggert, 43 N.J. 303, 204 A.2d 140 (1964); Endresz v. Friedberg, 24 N.Y.2d 478, 248 N.E.2d 901, 301 N.Y.S.2d 65 (1969); Gay v. Thompson, 266 N.C. 394, 146 S.E.2d 425 (1966); Scott v. Kopp, ___ Pa. ___, 431 A.2d 959 (1981); Lawrence v. Craven Tire Co., 210 Va. 138, 169 S.E.2d 440 (1969).

Twelve jurisdictions have not considered the question: Alaska, Arkansas, Colorado, Hawaii, Idaho, Maine, Montana, North Dakota, South Dakota, Texas, Utah and Wyoming. *But see* Mace v. Jung, 210 F. Supp. 706 (D. Alaska 1962) (denying recovery for death of nonviable fetus).

49. *See* Bonbrest v. Kotz, 65 F. Supp. 138, 142 (D.D.C. 1946).

50. Egbert v. Wenzl, 199 Neb. 573, 576, 260 N.W.2d 480, 482 (1977); Hamby v. McDaniel, 559 S.W.2d 774, 776-77 (Tenn. 1977). *But see* Recent Developments, 45 TENN. L. REV. 545 (1978).

versy associated with abortion.[51]

Inclusion of the unborn within death statutes and expansion of their application beyond viable unborns should not be viewed by the courts as radical steps. The basic tort law concept of causation remains available to stem the flood of litigation and to ensure just adjudication of claims.[52]

B. *Viability*

The viability of the unborn at the time of injury has been a significant issue in nearly all the decisions in which beneficiaries have sought recovery for the tortious death of an unborn.[53] The concept of viability was first advanced in 1900 in *Allaire v. St. Luke's Hospital*[54] and had its initial effect on death actions in 1949 in *Verkennes v. Cornica.*[55] The viability distinction has a strong intuitive basis; it seems unfair to deny recovery when the stillborn child was capable of independent existence at the time of the fatal injury.[56] Furthermore, if some limitation on liability is necessary,[57] viability avoids the constitutional uncertainty of an arbitrary determination that personhood begins at birth.[58]

The New Jersey Supreme Court in *Smith v. Brennan*[59] offered a critical view of the rationale underlying the adoption of the viability requirement:

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51. See notes 143-149 and accompanying text *infra.*

52. W. PROSSER, *supra* note 9, ch. 7. See notes 78-95 and accompanying text *infra.*

53. See note 48 *supra. But see* Porter v. Lassiter, 91 Ga. App. 712, 87 S.E.2d 100 (1955) (court recognized cause of action for tortious injury resulting in death after quickening).

54. 184 Ill. 359, 368, 56 N.E. 638, 640 (1900) (Boggs, J., dissenting).

55. 229 Minn. 365, 38 N.W.2d 838 (1949).

56. Smith v. Brennan, 31 N.J. 353, 366, 157 A.2d 497, 504 (1960).

57. *E.g.*, Scott v. Kopp, ___ Pa. ___, ___, 431 A.2d 959, 961 (1981). *See* V. HARPER & F. JAMES, TORTS § 18.3 (1956). *But see* S. SPEISER, *supra* note 7, § 4:37 (criticizing the Harper & James approach).

58. The command of constitutional equal protection is that the law treat alike those who are similarly situated. . . . Classification for benefit is constitutionally permissible only if the classification bears some rational relationship to a legitimate state purpose. . . . The California wrongful death statute . . . [was intended] to compensate survivors of the victim and to deter conduct in this state which wrongfully takes life. . . . The requirement of live birth of the individual killed has no rational relationship to the most grevious tort of all—that which inflicts death upon its victim.

Justus v. Atchison, 126 Cal. Rptr. 150, 161 (1975) (Cobey, J., dissenting). *See* Del Tufo, *supra* note 20, at 71.

59. 31 N.J. 353, 157 A.2d 497 (1960).

> Although the viability distinction has no real justification, it is explainable historically. . . . The first dissent from this proposition, by Justice Boggs in the *Allaire* case, pointed out that an unborn who could sustain life apart from its mother could not be considered part of her. The logical appeal of Justice Boggs' approach, coupled with the understandable conservatism of the earlier courts who broke with the *Dietrich* theory, resulted in a rule of recovery limited by the viability distinction.[60]

A disadvantage of the viability requirement lies in the inconsistency among determinations of the point of viability. Viability is contingent upon a number of elements, including the characteristics of the unborn such as its period of gestation, weight, health, and hereditary makeup;[61] characteristics of the mother such as her age, weight, and health;[62] and the quality of available postnatal care, that is, the sophistication of local medical treatment and the competence of the attending physician.[63] As a result, a nearly full-term unborn with certain health complications whose mother lives in a medically impoverished area may not be viable, but an unborn for whom sophisticated medical treatment is available may be viable before the completion of the fifth month of pregnancy.[64] Substitution of the *Roe v. Wade*[65] rationale on viability would do little to resolve present inconsistencies because the Supreme Court has since rejected[66] the three tests for viability identified in *Roe*.[67] Although difficulties with the viability requirement might be glossed over with the assertion that the issue of viability is a question of fact to be

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60. *Id.* at 368, 157 A.2d at 504. *See, e.g.*, V. HARPER & F. JAMES, *supra* note 51, § 18.3; W. PROSSER, *supra* note 9, § 55; Del Tufo, *supra* note 20, at 78-79; Note, *The Impact of Medical Knowledge*, *supra* note 16, at 562-64.

61. *See generally* Ismach, *supra* note 42, at 28; Note, *The Impact of Medical Knowledge*, *supra* note 16, at 554.

62. *See* note 56 *supra*.

63. *See* Kader, *supra* note 15, at 658 n.102.

64. *Id.* at 658 n.102.

65. 410 U.S. 113 (1973).

66. *See* Colantti v. Franklin, 439 U.S. 379 (1979) (striking down a state's attempt to incorporate the twenty-fourth to twenty-eighth week of gestation test into its abortion statute).

67. *Roe* recognized that viability is reached six to twelve weeks after quickening, when the unborn has the capacity for meaningful life outside the womb, or between the twenty-fourth and twenty-eighth week of gestation. 410 U.S. at 160.

resolved by a preponderance of the evidence,[68] this argument ignores the nature of the death action—a means by which to compensate beneficiaries or parents for their loss—and raises serious constitutional equal protection issues.[69]

With the development of refined techniques[70] and sophisticated prenatal testing,[71] death claims are now, even more than previously, subject to a concern that originally led to the adoption of the viability requirement: the potential for speculative or ill-founded recoveries in prenatal actions.[72] The viability requirement purports to separate inherently speculative claims based on injuries occurring before viability[73] from inherently meritorious claims based on postviability injuries.[74] Advances in medicine have added greater certainty to the proof of causation and other tort elements while at the same time rendering the determination of viability less certain.

If a standard limiting liability is necessary or desirable, what are the alternatives to viability? Perhaps a return to traditional tort analysis—tortious conduct linked to the injury by factual and legal causation,[75] which is the touchstone in most other areas of personal injury, would supply an adequate standard. The concept of viability has fallen from use in the analysis of other prenatal injuries and, absent contrary legislative provision,[76] should also be eliminated in the area of the death statute claim.[77]

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68. The Illinois Supreme Court has gone so far as to hold that viability of a fourteen-week-old unborn is a question for the jury as trier of fact. Green v. Smith, 71 Ill. 2d 501, 505-06, 377 N.E.2d 37, 39 (1978).

69. See note 58 *supra*. In a given jurisdiction, parents of a fourteen-week-old unborn may be allowed to recover, while parents of a nine-month-old unborn might be denied recovery based on separate jury determinations of viability. Such disparate treatment of equally situated parties would appear to raise a serious equal protection issue.

70. *See* W. PROSSER, *supra* note 9, ch. 7.

71. *See generally* S. ROBBINS & M. ANGELL, BASIC PATHOLOGY (2d ed. 1976); notes 90-93 and accompanying text *infra*.

72. *See* notes 90-93 and accompanying text *infra*.

73. *See* note 61 and accompanying text *supra*.

74. *See* Allaire v. St. Luke's Hosp., 184 Ill. 359, 368, 56 N.E. 638, 640 (1900) (Boggs, J., dissenting); Verkennes v. Cornica, 229 Minn. 365, 38 N.W.2d 838 (1949).

75. *See* Allaire v. St. Luke's Hosp., 184 Ill. 359, 368, 56 N.E. 638, 640 (1900) (Boggs, J., dissenting); Verkennes v. Cornica, 229 Minn. 365, 38 N.W.2d 838 (1949).

76. See note 23 and accompanying text *supra*.

77. The justification for eliminating the viability requirement from actions for prenatal injuries that do not result in an unborn's death was the inherent unfairness of disallowing recovery when an individual faced lifelong physical impairment as a result of

C. Causation

The first comment on the difficulties of proving causation appeared in 1891:

> [T]here are instances in the law where rules of right are founded upon the inherent and inevitable difficulty or impossibility of proof. And it is easy to see on what a boundless sea of speculation in evidence this new idea would launch us. What a field would be open to extravagance of testimony, already great enough—if Science could carry her lamp, not over certain in its light where people have their eyes, into the unseen laboratory of nature—could profess to reveal the causes and things that are hidden there. . . . But it is also a landmark that forbids advance on defined rights and engagements; and if these rights are to be altered, if new rights and engagements are to be created, that is the province of legislation and not of decision.[78]

The difficulties of proving legal and factual causation[79] have played a large role in death actions for prenatal injuries,[80] yet the law of directly related evidentiary problems has not been adequately explored.[81] One commentator has noted that "[i]n part this may be explained by the fact that many of the reported cases were settled without trial after an appellate court decided

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tortiously inflicted injuries. The viability requirement in death actions by beneficiaries of the unborn permits infliction of loss or harm without any compensation to the injured party. *See* Bonbrest v. Kotz, 65 F. Supp. 138 (D.D.C. 1946).

78. Walker v. Great N. Ry., 28 L.R. Ir. 69, 81-82 (Q.B. 1891) (O'Brian, J., concurring). Early courts that adopted the "province of legislation" argument to deny prenatal injury remedies were in fact acting legislatively. If the courts limited themselves to the case or controversy before them, they may not have been confronted with a speculative or fictitious claim. *See generally* U.S. CONST. art. III, § 2. Early decisions approximated advisory opinions because they addressed not the particular facts or issues raised by an individual case but the larger issue of speculative or fictitious claims, which was not squarely before the court. *See* Flast v. Cohen, 392 U.S. 83, 94-97 (1968).

79. Legal causation is the reasonable foreseeability requirement of all negligence tort actions. Its purpose is to limit an actor's liability to injuries or harms that are foreseeable at the time he acts. W. PROSSER, *supra* note 9, § 42. Factual causation is generally a "but for" test, tracing the actor's conduct to the eventual harm or injury. *Id.* § 40.

80. *See* Magnolia Coca-Cola Bottling Co. v. Jordan, 124 Tex. 347, 78 S.W.2d 944 (1935), *overruled by*, Leal v. C.C. Pitts Sand & Gravel, Inc., 419 S.W.2d 820 (Tex. 1967); Walker v. Great N. Ry., 28 L.R. Ir. 69 (Q.B. 1891). One court has observed that the only reason for the old rule on recovery for prenatal injury was the difficulty of proof. Stemmer v. Kline, 19 N.J. Misc. 15, 17 A.2d 58 (Cir. Ct. 1940), *rev'd*, 128 N.J.L. 455, 26 A.2d 489 (1942). *See* Note, *The Impact of Medical Knowledge, supra* note 16, at 560.

81. Note, *The Impact of Medical Knowledge, supra* note 16, at 594.

that a cause of action existed."[82]

Many courts have abandoned the speculation argument and have allowed recovery for prenatal injuries by relying on medical knowledge to fill previous gaps in proof.[83] This shift has been accomplished with a variety of justifications: (1) difficulty in proof should not affect substantive rights;[84] (2) the rules of evidence are adequate to prevent fictitious claims;[85] (3) proof is no more difficult in a prenatal injury case than in other personal injury cases;[86] and (4) advances in medicine now justify recovery.[87]

Expert testimony is ordinarily required to establish causation[88] unless the cause and effect relationship is unmistakable.[89] Previously, external manifestation of injury to an unborn could not be discerned until after delivery, but ultrasound,[90] amniocentesis,[91] x-ray,[92] and other available techniques[93] may now es-

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82. *Id.*

83. *Id.* at 560.

84. *See, e.g.*, Woods v. Lancet, 303 N.Y. 349, 356, 102 N.E.2d 691, 695 (1951). In a pre-*Bonbrest* case, Scott v. McPheeters, 33 Cal. App. 2d 629, 637, 92 P.2d 678, 682 (1939), a California Court of Appeals suggested that if proof is more difficult in prenatal injury cases, courts should make it easier to sustain a claim.

85. *See, e.g.*, Damasiewicz v. Gorsuch, 197 Md. 417, 437, 79 A.2d 550, 559 (1951); Montreal Tramways Co. v. Leveille, [1933] 4 D.L.R. 337, 346 (Can.).

86. *See, e.g.*, Smith v. Brennan, 31 N.J. 353, 365, 157 A.2d 497, 503 (1960); Cooper v. Blanck, 39 So. 2d 352 (La. Ct. App. 1923) (furnished for publication 1949). *See* W. PROSSER, *supra* note 9, at 336; Note, *The Impact of Medical Knowledge, supra* note 16, at 577.

> The problem of proof, therefore, is basically no different in these cases than it was when only the mother had a cause of action. The causal relationship between the accident and the miscarriage must be shown, to establish a chain of causation from the negligent conduct to the damage suffered by the fetus.

Id. at 577.

87. *See, e.g.*, Bonbrest v. Kotz, 65 F. Supp. 138, 143 (D.D.C. 1946); Scott v. McPheeters, 33 Cal. App. 2d 629, 637, 92 P.2d 678, 683 (1939); Williams v. Marion Rapid Transit, Inc., 152 Ohio St. 114, 125-26, 97 N.E.2d 334, 339 (1949). *See* Note, *The Impact of Medical Knowledge, supra* note 16, at 562.

88. *See, e.g.*, Superior Transfer Co. v. Halstead, 189 Md. 536, 539-40, 56 A.2d 706, 706 (1948); Note, *The Impact of Medical Knowledge, supra* note 16, at 588.

89. Note, *The Impact of Medical Knowledge, supra* note 16, at 577. *See generally* C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 13 (2d ed. 1972). A judge and jury may rely on common knowledge and experience and may ignore relevant expert testimony on causation. Miami Coal Co. v. Luce, 76 Ind. App. 245, 249, 131 N.E. 824, 826 (1921).

90. Hirshhorn, *Prenatal Diagnosis of Genetic Disease*, in DEVELOPMENT GENETICS 87, 93 (C. Fenoglio, R. Goodman & D. King eds. 1976).

91. *See* Berman v. Allan, 80 N.J. 421, 424, 404 A.2d 8, 10 (1979); Friedman, *Legal*

tablish the trauma or injury immediately after an accident. Similar advances in pathology might create still more objective data for evaluating causation of an unborn's death.[94] These advances in medical knowledge and diagnostic techniques are not only effective in establishing liability but are useful in exculpating defendants.[95]

D. Damages

Evaluation of damages has been particularly difficult in death actions resulting from prenatal injuries. Issues essential to the determination of damages include an appreciation that the death action is a vindication of the parents' rights or a remedy for their loss,[96] a solution to the mother's double recovery problem,[97] and quantification of pecuniary loss.[98]

The death action is intended to benefit the survivor of the decedent.[99] Because its purpose is to compensate for the survivor's loss, the concepts of viability and live birth are of limited

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Implications of Amniocentesis, 123 U. PA. L. REV. 92 (1974).

92. *E.g.*, Sox v. United States, 187 F. Supp. 465, 467 (E.D.S.C. 1960) (fetal head shown to have been locus of maternal injury).

93. *See* Goodner, *Prenatal Genetic Diagnosis: Present and Future*, 19 CLIN. OBST. & GYN. 965, 965-76 (1976). *See generally Diagnostic Imaging*, MEDICAL WORLD NEWS Mar. 2, 1981, at 67.

94. *See generally* S. ROBBINS & M. ANGELL, *supra* note 71.

95. *E.g.*, Puhl v. Milwaukee Auto Ins. Co., 8 Wis. 2d 343, 99 N.W.2d 163 (1959) (expert testimony on the cause of Mongolism sufficient to eliminate possibility that accident caused condition). *Cf.* Montreal Tramways Co. v. Leveille, [1933] 4 D.L.R. 337 (Can.) (cause of action allowed for club foot allegedly caused by accident during eighth month of pregnancy would today be recognized as a congenital deformity).

96. *See generally Roe*, 410 U.S. at 162; Del Tufo, *supra* note 20, at 78; Recent Developments, 70 MICH. L. REV. 729, 742 (1972).

97. *See* Mone v. Greyhound Lines, Inc., 368 Mass. 354, 359, 331 N.E.2d 916, 919 (1975); Endresz v. Friedberg, 24 N.Y.2d 478, 484, 248 N.E.2d 901, 904, 301 N.Y.S.2d 65, 69 (1969); Recent Developments, 21 VILL. L. REV. 994, 999 (1976).

98. *But see* Wycko v. Gnodtke, 361 Mich. 331, 105 N.W.2d 118 (1960); S. SPEISER, *supra* note 7, §§ 4:22, 4:32, 4:33. Recovery under the death statute is generally limited to pecuniary losses, which may be loosely characterized as economic losses. Note, *Blind Limitation of the Past: An Analysis of Pecuniary Damages in Wrongful Death Actions*, 49 DEN. L.J. 99 (1972).

99. The types and combinations of these statutes vary widely among jurisdictions. *See generally* S. SPEISER, *supra* note 7, app. A; Finkelstein, Pickrel & Glasser, *The Death of Children: A Nonparametric Statistical Analysis of Compensation for Anguish*, 74 COLUM. L. REV. 884, 885-86 (1974); Note, *Tort Recovery for the Unborn Child*, 15 J. FAM. L. 276, 283-94 (1976-77).

importance.[100] As Justice Blackmun noted in *Roe v. Wade*, "an [unborn death] action . . . would appear to be one to vindicate the parent's interest. . . . The fetus . . . represents only the potentiality of life."[101] Although, the parents' interest in an unborn's potential life is unaffected by the state of the unborn's development, development might affect the magnitude of loss.[102]

The issue of double recovery arises when a mother seeks a recovery for her own personal injuries[103] and receives an award that includes compensation for the loss of her unborn.[104] A separate death action might arguably result in an "unjustified windfall or *bounty*"[105] or a punitive recovery[106] contrary to the intent of the statute. Nevertheless, the interests involved—recovery for the mother's bodily injury and immediate mental distress and recovery for pecuniary or personal loss inflicted by the death of the unborn child—are separate.[107] Moreover, the personal injury action has its source in common law while the death action is statutory and is therefore not limited by common-law doctrines.[108] Some legislatures have allowed attorney's fees,[109] puni-

100. *See, e.g.*, Chrisafogeorgis v. Brandenberg, 55 Ill. 2d 368, 373, 304 N.E.2d 88, 91 (1973); Mone v. Greyhound Lines, Inc., 368 Mass. 354, 360, 331 N.E.2d 916, 920 (1975); Del Tufo, *supra* note 20, at 78; Recent Developments, *supra* note 97, at 997-98.

101. 410 U.S. 113, 162 (1973). *See* Bayer v. Suttle, 23 Cal. App. 3d 361, 365, 100 Cal. Rptr. 212, 215 (1972) (Brown, J., dissenting). "The mother's claim for general damages for her injury does not embrace the real loss—the deprivation of parenthood." *Id.* at 367-68, 100 Cal. Rptr. at 217.

102. *See* Danos v. St. Pierre, 383 So. 2d 1019, 1024 (La. App. 1980) (Lottinger, J., concurring). "[V]iability is one of the factors to which courts should look in determining the nature and extent of damages in each particular case." *Id.* at 1029. *See* Recent Developments, *supra* note 97, at 1002-03. *See also* Note, *The Impact of Medical Knowledge*, *supra* note 16, at 562 n.57.

103. Pregnant women have traditionally been allowed to recover for tortious injuries resulting in miscarriage. *See, e.g.*, Thomas v. Gates, 126 Cal. 1, 58 P. 315 (1899); Finer v. Nichols, 158 Mo. App. 539, 138 S.W. 889 (1911).

104. *See* W. PROSSER, *supra* note 9, § 55; Recent Developments, 70 MICH. L. REV. 729, 748 (1972); Recent Developments, *supra* note 97, at 999.

105. Endresz v. Friedberg, 24 N.Y.2d 478, 484, 248 N.E.2d 901, 904, 301 N.Y.S.2d 65, 69 (1969). *See* Gordon, *The Unborn Plaintiff*, 63 MICH. L. REV. 579, 594-95 (1965) (any award to parents of an unborn in a death action constitutes "duplicity").

106. *See, e.g.*, Graf v. Taggert, 43 N.J. 303, 204 A.2d 140 (1964); Endresz v. Friedberg, 24 N.Y.2d 478, 248 N.E.2d 901, 301 N.Y.S.2d 65 (1969); Carrol v. Skloff, 415 Pa. 47, 202 A.2d 9 (1964).

107. *See* Mone v. Greyhound Lines, Inc., 368 Mass. 354, 359, 331 N.E.2d 916, 919 (1975).

108. See notes 26-33 and accompanying text *supra*.

109. See notes 26-33 and accompanying text *supra*. *See, e.g.*, S.C. CODE ANN. § 58-27-910 (1976) (allowing attorney's fees in suits to recover excess utility payments).

tive damages,[110] or other damages awards that go beyond exact compensation. Any further difficulty in reconciling the double recovery problem might be resolved by requiring that the actions be consolidated[111] or that defendants bear the responsibility of moving for consolidation if separate actions are pending.[112]

Damages under death statutes are ordinarily limited to pecuniary loss.[113] When the decedent is an unborn, pecuniary loss, which is normally associated with economic loss, is difficult to quantify.[114] Disallowing recovery for pecuniary loss associated with a child's death may result from a belief that no amount could adequately compensate parents for loss of companionship[115] and from fear of excessive awards and increased insurance premiums.[116] These concerns have been responsible for inconsistency in awards at both the trial and appellate levels. The dramatic variation in awards by trial courts within the same jurisdiction seems to suggest a selective judicial repeal of the strict pecuniary loss doctrine.[117] One commentator has challenged the validity of the pecuniary loss rule on due process and equal protection grounds.[118] Appellate courts have responded to the pecu-

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110. *See, e.g.*, S.C. CODE ANN. § 15-51-40 (1976) (allowing punitive damages in an action for wrongful death). When legislatures originally created death actions, they were probably not aware of potential double recovery issues that now arise when such a statute is applied to unborn death actions. Thus, application of death statutes is not completely analogous to application of other statutory remedial damages provisions. *See* note 109 *supra*. Nevertheless, the distinction points out the lack of care with which jurists use the double recovery argument.

111. *See* S. SPEISER, *supra* note 7, app. A; Note, *Tort Recovery for the Unborn Child*, 15 J. FAM. L. 276, 283-94 (1976).

112. *See* FED. R. CIV. P. 18.

113. Note, *Pecuniary Damages in Wrongful Death Actions*, *supra* note 98, at 99. Economic loss resulting from the death of an unborn is difficult to value and has been condemned as barbaric, requiring computation of "child-labor." *See, e.g.*, Wycko v. Gnodtke, 361 Mich. 331, 337, 105 N.W.2d 118, 121 (1960); Gary v. Schwartz, 72 Misc. 2d 332, 343, 339 N.Y.S.2d 39, 50 (1972); W. PROSSER, *supra* note 9, § 127.

114. *See* Comment, *Damages for Wrongful Death of Children*, 22 U. CHI. L. REV. 549, 549-50 (1955); Finkelstein, Pickrel, & Glasser, *supra* note 99, at 885.

115. *See* Comment, *supra* note 114, at 549-50.

116. W. PROSSER, *supra* note 9, § 127, at 907-08.

117. *See, e.g.*, Schreck v. State, 35 Misc. 2d 929, 231 N.Y.S.2d 563 (1962) (three awards of $0, one of $3,250, and one of $10,975, all also including funeral expenses, for death of five boys in state epileptic institution). *See generally* Finkelstein, Pickrel, & Glasser, *supra* note 99, at 884.

118. Finkelstein, Pickrel, & Glasser, *supra* note 99, at 893. *See generally* Gunther, *In Search of an Evolving Doctrine in a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972). Exclusion of punitive damages from death action

niary limitation by expanding its scope to include loss of society or companionship.[119] This judicial expansion suggests the existence of a broader societal belief that parents suffer a compensable loss when an unborn is tortiously killed, even if economic loss cannot be established.[120] Legislative action is needed to incorporate this social value into death statutes in order to avoid the intermittent and uncertain justice caused by the disparity among conclusions reached by particular judges or jurisdictions.

When addressing the issue of actual loss or injury, courts should focus primarily on identifying the elements that are relevant to determining the amount of loss[121] rather than on the scarcity of elements from which damages may be computed.[122] Elements that merit consideration include the mother's history of spontaneous abortion,[123] the stage of pregnancy at which the fatal prenatal injury occurs,[124] the number of children the parents presently have,[125] the probability of the pregnancy reaching full term,[126] the mother's ability to conceive following the injury,[127] the prenatal care that was administered,[128] the use of ar-

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recoveries has spawned numerous constitutional challenges to the pecuniary damages limitation of the statutes. *E.g.*, Johnson v. International Harvester Co., 487 F. Supp. 1176 (D.N.D. 1980) (North Dakota death statute does not violate equal protection clauses of United States or North Dakota Constitutions by excluding punitive damages); *In re* Paris Aircraft, 427 F. Supp. 701 (C.D. Cal. 1977), *rev'd*, 622 F.2d 1315 (9th Cir. 1980) (wrongful death statute violated equal protection clauses by excluding punitive damages).

119. *See, e.g.*, Sea-Land Services, Inc. v. Gaudet, 414 U.S. 573 (1974); Wycko v. Gnodtke, 361 Mich. 331, 105 N.W.2d 118 (1960); Green v. Bittner, 85 N.J. 1, 424 A.2d 210 (1980); S. SPEISER, *supra* note 6, § 4:32; Note, *Wrongful Death Damages: Recovery of Investment in and Society and Companionship of a Child*, 27 OHIO ST. L.J. 355 (1966).

120. Parilis v. Feinstein, 49 N.Y.2d 984, 406 N.E.2d 1059, 429 N.Y.S.2d 165 (1980) ($50,000 recovery awarded for minor's death without direct evidence of loss).

121. At present not all courts use these tools. *E.g.*, McFarland v. Illinois Cent. R.R., 241 La. 15, 26, 127 So. 2d 183, 187 (1961) (court forbade use of factors in evaluating pecuniary loss on ground that loss cannot be scientifically measured).

122. *See* Recent Developments, 70 MICH. L. REV. 729, 744-45 (1972).

123. Danos v. St. Pierre, 383 So. 2d 1019, 1024, 1030-31 n.15 (La. Ct. App. 1980) (Lottinger, J., concurring). *See* Note, *The Impact of Medical Knowledge*, *supra* note 16, at 578.

124. *Danos*, 383 So. 2d at 1030 n.15.

125. *Id.* at 1030 n.15.

126. *Id.* at 1030 n.15.

127. This information is relevant in determining the emotional impact or loss that the parents have suffered.

128. *Danos*, 383 So. 2d at 1030 n.15.

tificial means to induce pregnancy,[129] and parental preparation for the expected child.[130] These criteria can reduce the speculative nature of recoveries and enhance the certainty of the amount of recovery. As a result, settlement of unborn death action cases might be encouraged and litigation reduced.[131]

II. CONSTITUTIONAL ISSUES IN UNBORN DEATH ACTIONS

A. *Roe v. Wade*

The irrelevance of *Roe v. Wade*[132] to unborn death actions may be inferred from the numerous post-*Roe* decisions that do not rely on it.[133] The development of a coherent theory of the legal status of the unborn, however, requires a thorough analysis of *Roe*'s limitations.[134] The conflict between a mother's right intentionally to terminate her pregnancy before the unborn's viability and a parent's right to recover against a tortfeasor for fatal injury to an unborn before viability seems irreconcilable.[135] Yet, one commentator has noted that

> [a] close examination of the interests at stake in each context reveals that not only is a system of tort liability for harm to the unborn readily accommodated within the constitutional framework established in *Roe*, indeed, such a system, if properly tailored, can actually enhance the state's ability to protect those interests recognized by the Court as legitimate and compelling in certain situations.[136]

A mother's right to an abortion before the unborn's viability

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129. *Id.* at 1030 n.15.

130. *Id.* at 1030-31 n.15 ("i.e., house additions, baby crib and any other indicia of the degree of expectation exuded by the parents"). Many of the traditional elements for evaluating pecuniary loss such as sex, life expectancy, parental economic status, and present earning capacity have been omitted from this analysis because of their irrelevance to the determination of actual loss from the tortious death of an unborn.

131. As a practical matter, a jury might be encouraged to work through the proper analysis, and emotional aberrations in verdicts might be controlled, if proper interrogatories or special verdicts were required in this area. *See* FED. R. CIV. P. 49.

132. 410 U.S. 113 (1973).

133. *E.g.*, Danos v. St. Pierre, 402 So. 2d 633 (La. 1981). *See* Kader, *supra* note 15, at 650-62. *But see* Toth v. Goree, 65 Mich. App. 296, 237 N.W.2d 297 (1975).

134. *See* Kader, *supra* note 15, at 658.

135. *See* Toth v. Goree, 65 Mich. App. 296, 303-04, 237 N.W.2d 297, 301 (1976).

136. Kader, *supra* note 15, at 666.

is based on her privacy interest in controlling her pregnancy.[137] The right to maintain a pregnancy for its full term without interference is arguably a correlative interest.[138] Excusing a mother from liability in a death action for a legal abortion preserves her privacy interest, but no similar interest protects the tortfeasor,[139] whose acts result in prenatal death. Similarly, under the doctrine of *Roe*, a father's consent to a legal abortion before viability may be inferred.[140] After viability, it is likely that a father's consent would not be implied and that a death claim by him against the mother and her physician would be recognized[141] unless the abortion had been performed to preserve the mother's health or life.[142]

Consequently, it appears that *Roe v. Wade* is not inconsistent with death actions against third-party tortfeasors for prenatal injuries inflicted at any time during the pregnancy. *Roe* also allows tort actions against a mother by the father or other statutory beneficiary when an unborn has been illegally aborted.

B. The Proposed Right to Life Statute and Amendment

Passage of the proposed federal "right to life" statute[143] or

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137. *Roe*, 410 U.S. at 154-55. *See* Kader, *supra* note 15, at 664.

138. Kader, *supra* note 15, at 665. This assertion involves the presumption of an absence of a compelling state interest, such as one in the mother's health or life. *See* Galebach, *A Human Life Statute*, 7 HUMAN LIFE REV. 3, 14 (1981).

139. Toth v. Goree, 65 Mich. App. 296, 312, 237 N.W. 2d 297, 305 (1975) (Maher, J., dissenting); Kader, *supra* note 15, at 657; Recent Cases, 46 U. CIN. L. REV. 266, 273 (1977).

140. *See* Planned Parenthood v. Danforth, 428 U.S. 52 (1976) (a state cannot require a father's consent to an abortion); Herko v. Uviller, 203 Misc. 108, 114 N.Y.S.2d 618 (Sup. Ct. Spec. Term 1952) (father's consent to an abortion can be implied). The consent problem is discussed in Comment, *The New York Abortion Reform Law: Considerations Application and Legal Consequences—More Than We Bargained For?*, 35 ALB. L. REV. 644, 661-62 (1971).

141. Kader, *supra* note 15, at 665. "[T]he state would presumably be free to protect the viable fetus' potentiality of life by recognizing a wrongful death action for its abortion so long as the abortion were not performed to preserve the health or life of the woman." *Id. See also* Grodin v. Grodin, 102 Mich. App. 396, 301 N.W.2d 869 (1981) (father sued the mother on behalf of son for damage to son's teeth by the mother's negligent use of drug during pregnancy).

142. Kader, *supra* note 15, at 665.

143. *E.g.*, S. 158, 97th Cong., 1st Sess. §§ 1-3 (1981) ("[H]uman life shall be deemed to exist from conception"). *Compare* Galebach, *supra* note 130, *and* Senator East, Questions and Answers on S. 158, the Human Life Bill (embargoed until Apr. 23, 1981) (on file with University of South Carolina Law Review) *with* Cox, *Don't Overrule the Court*,

amendment[144] would require courts to ensure that state death statutes conform. Two right to life standards have been suggested. The proposed law would prohibit all abortions by recognizing an unborn's standing as an individual with constitutional rights from the moment of conception.[145] This proposal would preclude all abortions and would permit a father to bring a death action against the mother and her physician if an abortion were performed. The proposed amendment would permit the states to enact legislation controlling abortion and related problems;[146] it would be permissive rather than affirmative in nature. Under this proposal, the present status of unborn death actions would be unaltered absent affirmative state legislation.[147] If a state legislature could prohibit abortions altogether, a woman who obtained an abortion and her physician might be liable to the father for the unborn's death.[148] Similarly, both the mother and the physician might be liable to the child, in the event of its survivial, for any injury resulting from an attempted abortion.[149]

NEWSWEEK, Sept. 28, 1981, at 18. *See* Cohen, *Congressional Power to Interpret Due Process and Equal Protection*, 27 STAN. L. REV. 603 (1975); Monaghan, *The Supreme Court 1974 Term, Forward: Constitutional Common Law*, 89 HARV. L. REV. 1 (1975).

144. *E.g., Proposed Amendments to the U.S. Constitution to Protect Unborn Children: Hearings on S. J. Res. 119 & S. J. Res. 130 Before the Subcomm. on Constitutional Amendments of the Senate Judiciary Comm.*, 93d Cong., 2d Sess. (1974).

145. A constitutional amendment of this type, if ratified, would be beyond judicial review, but a similar federal statute might not withstand judicial scrutiny. *See* Katzenbach v. Morgan, 384 U.S. 641 (1966) ("[U.S. CONST. amend XIV,] § 5 does not grant Congress power to exercise discretion in the other directon and to enact 'statutes so as in effect to dilute equal protection and due process decisions of this Court' "). *Id.* at 651 n.10.

146. *E.g.*, S. 158, 97th Cong., 1st Sess. §§ 1-3 (1981).

147. [T]he choice should turn on whether the life of the unborn is more important than the right of the mother to decide whether or not to terminate her pregnancy. The proposed statute leaves this choice to the states, informed by Congress's judgment that unborn children are human life and human persons.

Galebach, *supra* note 138, at 24.

148. A woman who obtains a legal abortion is presumably immune from an unborn death action. "Medical advances may increase the number of affirmative acts which the physician will be required to take for the welfare of the fetus [unborn]." Note, *The Impact of Medical Knowledge, supra* note 16, at 583. "[T]he mother might bear . . . responsibility . . . [for] careless exposure to infectious diseases, maintaining an inadequate diet, obesity, using narcotics, excessive smoking, or any other practice leading to a material imbalance . . . affect[ing] the fetus adversely." *Id. See* Grodin v. Grodin, 102 Mich. App. 378, 301 N.W.2d 869 (1981).

149. *See* Allaire v. St. Luke's Hosp., 184 Ill. 359, 368, 56 N.E. 638, 640 (1900) ("If the action can be maintained, it necessarily follows that an infant may maintain an ac-

III. CONCLUSION

Recovery for prenatal death has been and will remain controversial. Nevertheless, this type of recovery deserves a place within tort law as a means of relieving the injury to parents caused by the loss of an unborn. Restrictive interpretations of the meaning of "person" in a death statute and reliance on the antiquated concept of viability add nothing to a sound resolution of the controversy. Instead with proper regard for constitutional limitations, courts must focus on the issues of causation and damages to resolve the conflicting interests and the philosophical dilemma presented by tortious prenatal death.

Tyler J. Scofield

tion against its own mother for injuries occasioned by the negligence of the mother while pregnant with it").