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**Torts - Wrongful Death - A Viable Fetus Is a Person under New Mexico Wrongful Death Statute: Salazar v. St. Vincent Hospital**

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# TORTS—WRONGFUL DEATH—A Viable Fetus Is a “Person” under the New Mexico Wrongful Death Statute: *Salazar v. St. Vincent Hospital*

## I. INTRODUCTION

In *Salazar v. St. Vincent Hospital*,<sup>1</sup> the court addressed the issue of whether there was a right of recovery, under the New Mexico wrongful death statute,<sup>2</sup> for the wrongful death of a viable fetus. The New Mexico Court of Appeals upheld the plaintiff's wrongful death claims,<sup>3</sup> finding that the legislature which enacted the New Mexico wrongful death statute in 1882 intended to include a viable fetus within the meaning of the word “person” as it was used in that statute.

This Note will discuss the *Salazar* decision in light of the history of claims for the wrongful death of an unborn child and will examine conflicting decisions reached by other state courts which have addressed the issue of whether there is a right of recovery for such claims. The Note will also consider the *Salazar* holding in light of the United States Supreme Court's definition of the word “person” in *Roe v. Wade*.<sup>4</sup> In *Roe*, the Court upheld a woman's right to have an abortion during the first trimester of pregnancy, on the ground that she had a right to privacy under the fourteenth amendment.

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1. 95 N.M. 150, 619 P.2d 826 (Ct. App. 1980), *cert. quashed*, Sept. 30, 1980.

2. N.M. Stat. Ann. § 41-2-1 (1978):

Whenever the death of a person shall be caused by the wrongful act, neglect or default of another, although such death shall have been caused under such circumstances as amount in law to a felony, and the act, or 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.

N.M. Stat. Ann. § 41-2-3 (1978) provides in part:

Every such action as mentioned in Section 42-2-1 NMSA 1978 shall be brought by and in the name . . . of the personal representative . . . of such deceased person, and the jury in every action may give such damages, compensatory and exemplary, as they shall deem fair and just, taking into consideration the pecuniary injury . . . resulting from such death to the surviving party . . . entitled to the judgment . . . and also having regard to the mitigating or aggravating circumstances attending such wrongful act, neglect, or default.

These statutes were enacted in 1882.

3. 95 N.M. at 154, 619 P.2d at 830.

4. 410 U.S. 113 (1973).

## II. STATEMENT OF THE CASE

In *Salazar*, the plaintiff individually sought damages for the alleged negligence and malpractice of the defendant hospital and doctors in treating her vaginal bleeding.<sup>5</sup> Those claims were not dealt with on appeal. The plaintiff, as personal representative of the estate of her fetus, also sought damages for the wrongful death of the fetus.<sup>6</sup> The plaintiff was seven and one-half months pregnant at the time of the treatment by defendants which allegedly caused the death of the fetus.<sup>7</sup> The trial court dismissed the plaintiff's wrongful death claims on the ground that they failed to state a claim upon which relief could be granted.<sup>8</sup> After determining that a viable fetus is a "person" as that word is used in the New Mexico wrongful death statute,<sup>9</sup> the court of appeals reversed the trial court, holding that there is a right of recovery for the wrongful death of a viable fetus in New Mexico.

## III. ANALYSIS AND DISCUSSION

### A. *The Salazar Decision*

#### 1. *The majority opinion*

The *Salazar* court first framed the issue as "whether damages may be recovered, in New Mexico, for the wrongful death of a viable fetus."<sup>10</sup> The court of appeals accepted the plaintiff's allegations of viability as being true for the purpose of considering the wrongful death claims.<sup>11</sup> The court first looked to the common law for guidance and found that there was no right of recovery for wrongful death of anyone under the common law as it existed in New Mexico in 1882.<sup>12</sup>

Finding no help in the common law, the court then turned to the New Mexico wrongful death statute. The court noted that the statute applies

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5. 95 N.M. at 150, 619 P.2d at 826.

6. *Id.*

7. *Id.* at 151, 619 P.2d at 827. The fetus was alive at the time of the alleged negligence and malpractice but was stillborn. *Id.*

8. *Id.* at 150-51, 619 P.2d at 826-27.

9. *Id.* at 154, 619 P.2d at 830. See N.M. Stat. Ann. § 41-2-1 (1978), *supra* note 2: "Whenever the death of a *person* shall be caused . . ." (emphasis added).

10. 95 N.M. at 151, 619 P.2d at 827.

11. "Viability" is generally regarded as being the point at which a fetus is capable of remaining alive, although outside the mother's womb. *Roe v. Wade*, 410 U.S. at 160. In *Roe*, the Court stated that "viability is usually placed at about seven months (28 weeks) but may occur earlier, even at 24 weeks." *Id.*

12. 95 N.M. at 151, 619 P.2d at 827. The court noted that the common law rule was an ancient one and that in *Ickes v. Brimhall*, 42 N.M. 412, 79 P.2d 942 (1938), the New Mexico Supreme Court "affirmed the existence of the common-law rule in New Mexico." 95 N.M. at 151, 619 P.2d at 827.

to the death of a "person" and phrased the issue as whether the word "person," as used in the statute, "included a viable fetus."<sup>13</sup> The court again considered the common law to decide whether a viable fetus is a "person" under the statute. The court found that under tort law there was no recovery for the wrongful death of a fetus.<sup>14</sup> In addition, the court found that the property rights of a fetus depended on its being born.<sup>15</sup> The court then turned to the criminal law, but found that commentators disagreed on whether the killing of a fetus at common law was a felony, a crime short of a felony, or not a crime of any kind.<sup>16</sup>

Because the common law provided no guidance, the court then considered whether the plaintiff's claim that the status of a viable fetus as a "person" had been established by contemporary common law.<sup>17</sup> Although noting that courts in other states had used contemporary common law as a basis for their decision, the *Salazar* court declined to do so, stating that it would "make a mockery of legislative intent."<sup>18</sup> Instead, the court said that it must determine the enacting legislature's intent in 1882 when that legislature used the word "person."<sup>19</sup>

In determining the enacting legislature's intent, the court first assumed that the legislature knew that the common law offered no protection to a fetus.<sup>20</sup> Because the court must "presume that the legislature was informed as to existing law, not only statutory law, but common law,"<sup>21</sup> the *Salazar* court then concluded that the legislature knew of criminal statutes in effect in 1882.<sup>22</sup> Although the court never said it was construing an ambiguous statute, it looked at two criminal statutes which dealt with the

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13. *Id.* at 152, 619 P.2d at 828.

14. *Id.*

15. *Id.* Cf. note 80, *infra*, where a court compared the property interests of the unborn to the right to life.

16. 95 N.M. at 152, 619 P.2d at 828.

17. *Id.* If a court relies on contemporary common law, it construes legislation on the basis of the contemporary meaning of words used by the enacting legislature instead of on the actual intent of the enacting legislature as it existed then. *Id.* at 152-53, 619 P.2d at 829.

18. *Id.* at 153, 619 P.2d at 829.

19. *Id.*

20. *Id.*

21. *Id.* See also *Bettini v. City of Las Cruces*, 82 N.M. 633, 635, 485 P.2d 967, 969 (1971).

22. 95 N.M. at 153, 619 P.2d at 829. The pertinent criminal statutes then in effect were 1853-54 N.M. Laws, act 28, ch. 3, §§ 10 and 11:

Sec. 10. The willful killing of an unborn infant child, by any injury to the mother of such child, which would be murder if it resulted in the death of such mother, shall be deemed murder in the third degree.

Sec. 11. Every person who shall administer to any woman pregnant with a quick child, any medicine, drug, or substance whatever, or shall use or employ any instrument or other means, with intent thereby to destroy such child, unless the same shall have been necessary to preserve the life of such mother, and shall have been advised by a physician to be necessary for such purpose, shall, in case the death of such child or such mother be thereby produced, be deemed guilty of murder in the third degree.

willful killing of an unborn child. The sections were entitled, "Of Offences Against Lives and Persons" and stated that the act of killing an "unborn infant child" or a "quick child" was murder in the third degree.<sup>23</sup> Due to the existence of these criminal statutes, the *Salazar* court concluded that the 1882 legislature knew that a fetus was protected by the legislation dealing with lives and persons.<sup>24</sup>

After determining the legislature's knowledge, the court found that actions for civil liability for willful criminal conduct were recognized in 1882.<sup>25</sup> Once the court established that it was a criminal offense to kill a viable fetus in 1882, and that there was civil liability for such an offense, it concluded that the 1882 legislature intended to provide a remedy for the death of a fetus in the wrongful death statute.<sup>26</sup> The court relied on *Moragne v. States Marine Lines, Inc.*<sup>27</sup> in reasoning that when there is recovery for violations causing injury, it is a remedial matter to allow recovery for violations causing death.

The *Salazar* court next reasoned that the 1882 legislature applied the same meaning to "infant child" and "quick child"—that of "person," because the criminal statutes were entitled "Lives and Persons." Although the criminal statutes use the terms "unborn infant child" and "quick child," it is not clear they mean the same as a viable fetus. More likely "quick child" refers to an earlier stage than viability,<sup>28</sup> while the exact meaning of "unborn infant child" is ambiguous.<sup>29</sup> The court went on to equate viable fetus with "person" because the criminal statutes were entitled "lives and persons."<sup>30</sup> This argument is weak in light of the finding in *Albuquerque v. Campbell*,<sup>31</sup> that headings to statutes are "merely descriptive and intended as aids in the use of the statutes."<sup>32</sup> Finally, the

23. *Id.* The offense was upgraded to second degree murder in 1907. N.M. Laws, ch. 36, §§ 5 and 6 (1907). *Id.*

24. 95 N.M. at 153-54, 619 P.2d at 829-30.

25. *Id.* at 154, 619 P.2d at 830. The court noted that civil liability was based on criminal conduct, "[A] wrongful act punishable as an offense, does not preclude exemplary damages therefor in a civil act sounding in tort." *Id.* (citing *Colbert v. Journal Publishing Co.*, 19 N.M. 156, 168, 142 P.146, 150 (1914)).

26. 95 N.M. at 154, 619 P.2d at 830.

27. 398 U.S. 375 (1970). In *Moragne*, the Court recognized a cause of action for wrongful death under general maritime law. *Id.* at 401. The court reasoned that "nothing in ordinary notions of justice suggests that a violation should be nonactionable simply because it was serious enough to cause death." *Id.* at 381.

28. "Quick" child: "one that has developed so that it moves within the mother's womb;" Black's Law Dictionary 122 (5th ed. 1979). Quickening: "The first motion of the fetus in the womb felt by the mother, occurring usually about the middle of the term of pregnancy." *Id.*

29. In addition, the criminal statutes deal with the "willful" killing of an unborn child, whereas civil liability for a killing under the wrongful death statute deals with negligence.

30. 95 N.M. at 153-54, 619 P.2d at 829-30.

31. 68 N.M. 75, 358 P.2d 698 (1961).

32. *Id.* at 78, 358 P.2d at 700. In *Campbell*, the court was considering a statute which provided for liability insurance on all vehicles owned by the state.

*Salazar* court should have looked at the entire criminal statute to see how the term "person" was used.<sup>33</sup> The court would have found that "person" and "human being" were used in the criminal statute to describe those who were already born; the more specific terms of "unborn infant child" and "quick child" were used to describe the unborn.<sup>34</sup>

## 2. *The dissent*

The dissent in *Salazar* did not directly attack the weakness in the majority's analysis of the criminal and the wrongful death statutes.<sup>35</sup> Instead it developed a four-pronged argument containing some of the traditional reasons for denying recovery in similar claims. The dissent argued that 1) legislative enactments amending the wrongful death statutes are preferable to judicial legislation;<sup>36</sup> 2) the New Mexico courts have generally followed the views of the Missouri Supreme Court and that court denied recovery in *State ex rel. Hardin v. Sanders*,<sup>37</sup> 3) there is no room for construction "[w]here the terms of a statute are plain and unambiguous,"<sup>38</sup> and 4) there are serious problems as to proof of damages.<sup>39</sup>

The dissent's first argument is weak. The court was not necessarily legislating, but was interpreting ambiguous or unclear terms in the wrongful death statute. The court in *Salazar* did not necessarily create a new cause of action for recovery of damages for the wrongful death of a viable fetus. It merely interpreted an ambiguous old statute to include such recovery.<sup>40</sup> Second, the dissent's reliance on *Sanders* is questionable because the *Sanders* court reached its decision by distinguishing an earlier case where the Missouri Supreme Court had suggested that a viable fetus is a "person."<sup>41</sup> The *Sanders* court found that any such statement "was

33. In *State ex rel. Newsome v. Alarid*, 90 N.M. 790, 794, 568 P.2d 1236, 1240 (1977), the court said, "[t]he entire statute is to be read as a whole so that each provision may be considered in its relation to every other part."

34. See note 22 *supra*, 1853-54 N.M. Laws, act 28, ch. 3, §§ 3, 8, 10, 11, 12, 15, 34.

35. Judge Sutin dissented. 95 N.M. at 155, 619 P.2d at 831.

36. 95 N.M. at 156, 619 P.2d at 832.

37. *Id.* at 157, 619 P.2d at 833. In *State ex rel. Hardin v. Sanders*, 538 S.W.2d 336 (Mo. 1976), the court held that an unborn child was not a "person" within the wrongful death statute until there had been a live birth. *Id.* at 338-39.

38. 95 N.M. at 158, 619 P.2d at 834 (citing *Hendricks v. Hendricks*, 55 N.M. 51, 226 P.2d 464 (1950)).

39. 95 N.M. at 159-60, 619 P.2d at 835-36.

40. See *M & M Rental Tools, Inc. v. Milchem, Inc.* 94 N.M. 449, 612 P.2d 241 (1980), where the court created a new cause of action in New Mexico for tortious interference with contractual relations. If judicial creation of an entirely new cause of action is not "legislating," then interpreting a statute should not be considered legislating.

41. 538 S.W.2d at 337. In the earlier case, *Steggall v. Morris*, 363 Mo. 1224, 258 S.W.2d 577 (1953), the court argued that because common law principles authorize courts to compel a tortfeasor to compensate a *person* who has been injured through the tortfeasor's negligence, it follows that an unborn viable child, injured through the tortfeasor's negligence, should be able to maintain an action in tort after birth. *Id.* at 579 (emphasis added). The *Steggall* court seemed to be equating the terms "person" and "unborn viable child."

dictum and not a part of the decision and hence need not be followed."<sup>42</sup> Third, as the *Salazar* dissent noted, "a majority of the appellate courts of the country"<sup>43</sup> have issued opinions regarding the right of action for the wrongful death of an unborn child.<sup>44</sup> Such a large number of controversies over the terms in the wrongful death statutes indicates that the language is neither plain nor unambiguous. Furthermore, one case suggested that one reason why the wrongful death statutes are ambiguous is because legislators enacting such statutes probably never thought about whether they were creating an action for the death of a fetus.<sup>45</sup> Fourth, as will be discussed, damages are provable. Although the majority reached the right decision, it did so by relying on a weak analysis of criminal statutes. The dissent's analysis is equally weak. A look at the history of the unborn and conflicting state court opinions shows that only the application of *Roe* will result in a sensible consensus.

### B. History of the Law of Wrongful Death of the Unborn

Most courts first consider the development of the cause of action for the wrongful death of the unborn before deciding whether there is a right of recovery.<sup>46</sup> As the majority in *Salazar* noted, wherever the common law existed, there was no right of recovery for wrongful death.<sup>47</sup> State legislatures enacted wrongful death statutes in response to the harsh common law rule. These statutes generally provide that a person who causes the wrongful death of another person shall be liable in an action for damages and that the representative of the deceased shall be awarded such damages.<sup>48</sup> The New Mexico wrongful death statute, enacted in 1882 and amended in 1891, contains such provisions.<sup>49</sup>

Four major cases established the history of the cause of action for

42. 538 S.W.2d at 339. The *Sanders* court conceded that there was some indication that the *Steggall* court believed a viable fetus was a person within the meaning of the wrongful death statute. The court did not explain why it found the *Steggall* language to be dictum.

43. 95 N.M. at 157, 619 P.2d at 833.

44. The courts are hopelessly split. See *Eich v. Town of Gulf Shores*, 293 Ala. 95, 300 So. 2d 354 (1974) and *Presley v. Newport Hosp.*, 117 R.I. 177, 365 A.2d 748 (1976) (action is maintainable); *Kilmer v. Hicks*, 22 Ariz. App. 552, 529 P.2d 706 (1974) and *Justus v. Atchison*, 19 Cal.3d 564, 139 Cal. Rptr. 97, 565 P.2d 122 (1977) (action is not maintainable).

45. See *Britt v. Sears*, 150 Ind. App. 487, \_\_\_\_\_, 227 N.E.2d 20, 24-25 (1971). In *Britt*, the court noted that the word "child" in the Indiana wrongful death statute could have the same meaning as "child" in the phrase "with child" and held that a full term fetus was a "child" within the meaning of the statute. *Id.* at \_\_\_\_\_, \_\_\_\_\_, 277 N.E.2d at 24-25, 27. The *Britt* court was examining a statute that was enacted in 1881. The New Mexico statute was enacted in 1882.

46. See *Presley v. Newport Hosp.*, 117 R.I. 177, 365 A.2d 748 (1976); *Britt v. Sears*, 150 Ind. App. 487, 277 N.E.2d 20 (1971); *Rainey v. Horn*, 221 Miss. 269, 72 So. 2d 434 (1954).

47. 95 N.M. at 151, 619 P.2d at 827.

48. Malone, *The Genesis of Wrongful Death*, 17 Stan. L. Rev. 1043, 1044 (1965).

49. 95 N.M. at 151, 619 P.2d at 827. The "1891 amendment carried forward the substance of . . . the 1882 Act." *Id.* See note 2, *supra*, for the text of the statute.

wrongful death of the unborn.<sup>50</sup> The first decision, *Dietrich v. Northampton*,<sup>51</sup> denied a right of recovery for a child who, due to an accident, only survived a short time after birth. The *Dietrich* court held that an infant who died before it was able to live separately from its mother was not a "person" and did not have standing in court.<sup>52</sup> In *Allaire v. St. Luke's Hospital*,<sup>53</sup> the majority followed *Dietrich* and denied recovery, but the dissenting judge argued that a fetus was a legal entity capable of sustaining an actionable injury.<sup>54</sup> The other two decisions marked the beginning of the trend toward recovery. In *Bonbrest v. Kotz*,<sup>55</sup> the court held that a child who was injured while being removed from its mother's womb and who had demonstrated its capability to survive by surviving for a short time, was a viable child and had standing to maintain an action for its injury. The court in *Verkennes v. Corniea*,<sup>56</sup> also held that there was a cause of action when a viable fetus is injured and stillborn. Since 1949, when *Verkennes* was decided, twenty-six states and the District of Columbia have decided to allow recovery. Eleven states deny recovery, and the remaining states have not dealt with the issue.<sup>57</sup>

### C. Contrasting Positions Taken by Other State Courts

The *Salazar* court's rationale is not supported by the rationales underlying the decisions reached by other state courts which have addressed the issue of whether wrongful death statutes support a right of recovery for the death of an unborn child. These decisions differ from *Salazar* and vary from each other on both sides of the issue.<sup>58</sup>

#### 1) Reasons for denial of recovery

In *State ex rel. Hardin v. Sanders*,<sup>59</sup> the court held that a fetus is not a "person" within the wrongful death statute until there is live birth. The court reasoned that if the legislature had intended to create such a cause

50. The *Salazar* dissent discussed two of the cases which favored its position, *Dietrich v. Northampton*, 138 Mass. 14, 52 Am. R. 242 (1884) and *Allaire v. St. Luke's Hospital*, 184 Ill. 359, 56 N.E. 638 (1900). See Reilly, *Torts—Wrongful Death—A Viable Fetus is a "Person" for Purposes of the Rhode Island Wrongful Death Act*, 46 U. Cin. L. Rev. 266, 267-69 (1977).

51. 138 Mass. 14, 52 Am. R. 242 (1884).

52. *Id.* at 17, 52 Am. R. at 245. Cf. *Bonbrest v. Kotz*, note 55 *infra*, in which the court permitted recovery because a child had survived a few minutes outside the womb.

53. 184 Ill. 359, 56 N.E. 638 (1900).

54. *Id.* at \_\_\_\_\_, 56 N.E. at 641-42.

55. 65 F. Supp. 138 (D.D.C. 1946).

56. 229 Minn. 365, 38 N.W.2d 838 (1949).

57. See Annot., 84 A.L.R.3d 411, 422 (1978 and Supp. 1981); Kader, *The Law of Tortious Prenatal Death Since Roe v. Wade*, 45 Mo. L. Rev. 639, 644-45 (1980) [hereinafter cited as Kader].

58. As will be discussed, an application of the Supreme Court's decision and analysis in *Roe v. Wade* could provide a single standard for granting recovery under wrongful death legislation, thereby diminishing the number of conflicting decisions. See text accompanying notes 98-129, *infra*.

59. 538 S.W.2d 336 (Mo. 1976).



of action, it would have specifically stated such an intention in the statute.<sup>60</sup> The *Salazar* court rejected this argument because the argument assumes that wrongful death statutes were not intended to have prospective application and that recovery would only be permitted for causes of action known to exist when the statute was enacted.<sup>61</sup> Courts denying a right of action also argue that because the common law denied recovery for any wrongful death, statutes should not be construed as effecting any change in the common law beyond that which is clearly indicated.<sup>62</sup> In contrast, the *Salazar* court found that because the common law denied recovery, it would turn to the wrongful death statute.<sup>63</sup>

Courts which deny recovery also contend that there is no possible evidence by which pecuniary loss can be proved when the deceased is a fetus.<sup>64</sup> The *Salazar* majority did not discuss the issue of damages. The dissent, however, argued that determining compensatory damages, including pecuniary losses resulting from the death of a fetus, would require speculative, expert testimony.<sup>65</sup> The dissent also argued that even if damages were based on the present worth of the life of the decedent, neither courts, experts, nor medical science could create a "present worth of life" to the estate of an unborn child.<sup>66</sup> Although some courts have found that such determinations might be arbitrary or even impossible,<sup>67</sup> one commentator argues that the amount of pecuniary loss in the case of a stillborn child can be determined on the basis of factors similar to those considered when an infant dies.<sup>68</sup>

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60. *Id.* at 338-39.

61. 95 N.M. at 152, 619 P.2d at 828. The court agreed with the plaintiff's argument that the statute was "general, prospective and remedial." *Id.*

62. See *Justus v. Atchison*, 19 Cal.3d 564, 139 Cal. Rptr. 97, 565 P.2d 122 (1977), in which the court found that when the legislature enacted the wrongful death statute, it intended to regulate the entire question of wrongful death, "thus cutting off all future judicial initiative." *Id.* at 574, 139 Cal. Rptr. at 103, 565 P.2d at 128.

63. 95 N.M. at 151, 619 P.2d at 827.

64. See, e.g., *Justus v. Atchison*, 19 Cal.3d 564, 139 Cal. Rptr. 97, 565 P.2d 122 (1977) and *Gay v. Thompson*, 266 N.C. 394, 146 S.E.2d 425 (1966).

65. 95 N.M. at 159, 619 P.2d at 835.

66. *Id.*

67. See *Fowler v. Woodward*, 244 S.C. 608, 138 S.E.2d 42 (1964). In *Fowler*, the court held that a viable child is a "person" before separation from the body of its mother, and that a cause of action for tortious injury to that child arises upon infliction of that injury. The court concluded, that "[i]t is beside the point that the extent of damages might be difficult, or even impossible, to establish prior to birth." *Id.* at \_\_\_\_\_, 138 S.E.2d at 44.

68. See *Kruger, Wrongful Death and the Unborn: An Examination of Recovery After Roe v. Wade*, 13 J. Fam. L. 99, 106-07 (1973-74). Such factors include the "child's age, sex, ambition, physical and mental characteristics, parents' social and economic status, and employment of other children in the family." *Id.* As *Kruger* notes, "[w]hile not all these factors are present in a stillborn child, it would appear that enough factors are present to enable a jury to calculate the pecuniary value of his life to his parents with little more speculation than is used in calculating the pecuniary loss of an infant child." *Id.*

## 2) Reasons for permitting recovery

Courts permitting recovery have generally found that a fetus is a "person" within the meaning of the statutory language.<sup>69</sup> Courts denying recovery argue that the legislature did not intend to include a fetus within the meaning of person.<sup>70</sup> In *Salazar* the court had to rely upon a criminal statute in its attempt to find the legislative intent behind the wrongful death statute.<sup>71</sup> The court drew a tenuous connection between that statute and the intent of the legislature when it enacted the wrongful death statute.<sup>72</sup> Some courts have stressed viability as a reason for finding the fetus to be a "person," because it is capable of staying alive outside the mother.<sup>73</sup> The dissent in *Salazar* contended that courts which equated viability to personhood "redefined the word 'person' as commonly understood in the 19th century"<sup>74</sup> and imputed a legal personality to an unborn child because birth is an artificial and unreasonable demarcation of a right of action.

Other courts have not found "personhood," but have relied on other reasons for permitting recovery. In *Chrisafogeorgis v. Brandenburg*,<sup>75</sup> the court had previously permitted a right of action for a child born alive. The *Chrisafogeorgis* court used that decision as a basis for permitting recovery for a stillborn child.<sup>76</sup> In *Green v. Smith*,<sup>77</sup> the court noted that the action on behalf of a child born alive is based on a common law action for damages. In contrast, the court in *Justus v. Atchison*<sup>78</sup> noted that a cause of action for wrongful death was a "pure creature of statute."<sup>79</sup> Other courts rely on statutes which protect property interests of the unborn by providing for the appointment of a guardian ad litem.<sup>80</sup> As the Court

69. See *Fowler v. Woodward*, note 67 *supra*. See also *Chrisafogeorgis v. Brandenburg*, 55 Ill. 2d 368, 304 N.E.2d 88 (1973), in which the court found that the critical stage of "person" is when a child is capable of remaining alive, although separate from its mother. *Id.* at \_\_\_\_\_, 304 N.E.2d at 92. The wrongful death statutes in both *Fowler* and *Chrisafogeorgis* are very similar to the New Mexico wrongful death statute.

70. See *Presley v. Newport Hosp.*, 117 R.I. 177, 365 A.2d 748 (1976) (dissenting opinion); *O'Neill v. Morse*, 385 Mich. 130, 188 N.W.2d 785 (1971) (dissenting opinion).

71. 95 N.M. at 152, 619 P.2d at 828.

72. See text accompanying notes 25-34 *supra*.

73. See note 67 *supra*.

74. 95 N.M. at 156, 619 P.2d at 832.

75. See *Chrisafogeorgis v. Brandenburg*, note 69, *supra*.

76. The *Chrisafogeorgis* court found that allowing a right of recovery for a fetus was a "reasonable and natural development of the holding" from its earlier decision, *Amann v. Faidy*, 415 Ill. 422, 114 N.E.2d 412 (1953), involving a child who survived.

77. 71 Ill.2d 501, \_\_\_\_\_, 377 N.E.2d 37, 38 (1978).

78. 19 Cal.3d 564, 565 P.2d 122 (1977), 139 Cal. Rptr. 97.

79. *Id.* at \_\_\_\_\_, 565 P.2d at 129, 139 Cal. Rptr. at 104.

80. *O'Neill v. Morse*, 385 Mich. 130, 188 N.W.2d 785 (1977). In *O'Neill*, the court argued that "[i]f 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?" *Id.* at \_\_\_\_\_, 188 N.W.2d at 788.

in *Roe* recognized, however, “[p]erfection of the interests involved . . . has generally been contingent upon live birth.”<sup>81</sup> Other courts have said that denial of recovery rewards the tortfeasor “for his severity in inflicting the injury.”<sup>82</sup> The *Salazar* dissent rejected public policy reasons that argued for a right of action because they “do not so far outweigh those which deny the right as to call for judicial legislation on the question.”<sup>83</sup>

#### *D. Salazar in Light of Roe v. Wade*

In *Roe v. Wade*, the Supreme Court addressed the question of whether a fetus was a “person” under the fourteenth amendment for abortion purposes.<sup>84</sup> The *Roe* Court arrived at a definition of “person” which is substantially different from that applied in *Salazar*.

In *Roe*, John and Mary Roe alleged that they were a childless couple and that Mrs. Roe’s doctor had advised against pregnancy due to Mrs. Roe’s medical disorder.<sup>85</sup> The Roes stated that upon medical advice, Mrs. Roe had discontinued birth control pills. They also decided that if she became pregnant, Mrs. Roe would terminate the pregnancy by an abortion.<sup>86</sup> Mrs. Roe became pregnant and the Texas criminal abortion laws prevented her from procuring an abortion.<sup>87</sup> The Roes attacked the Texas abortion statutes on the ground that they invaded a pregnant woman’s constitutional right to choose to terminate her pregnancy.<sup>88</sup> They further contended that the concept of personal liberty embodied in the fourteenth amendment’s due process clause is “protected by the Bill of Rights” or is a right “reserved to the people by the Ninth Amendment . . . .”<sup>89</sup> The Supreme Court found that the right to an abortion was within the penumbra of the right of privacy protected by the fourteenth amendment.<sup>90</sup> The Court went on to balance the state’s interest in protecting prenatal life against the mother’s right to privacy in deciding to terminate the pregnancy.<sup>91</sup> The Court found that it did not have to determine when life began; as long as there was the potential for life, the state had an interest beyond that of protecting the mother’s health.<sup>92</sup>

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81. 410 U.S. at 162.

82. *Eich v. Town of Gulf Shores*, 293 Ala. 95, \_\_\_\_\_, 300 So. 2d 354, 355 (1974). The *Eich* court thought that it “would be bizarre, indeed, to hold that the greater the harm inflicted the better the opportunity for exoneration of the defendant.” *Id.*

83. 95 N.M. at 156, 619 P.2d at 832.

84. 410 U.S. at 156-57.

85. *Id.* at 121.

86. *Id.*

87. *Id.* The statutes, Tex. Stat. Ann. §§ 1191-94, 1196 (1935), made it a crime to procure an abortion or attempt one unless to save the life of the mother.

88. 410 U.S. at 129.

89. *Id.*

90. *Id.* at 153.

91. *Id.* at 147-52.

92. *Id.* at 150.

The *Roe* Court considered the argument, presented by the state, that a fetus is a "person" within the language and meaning of the fourteenth amendment and therefore has due process rights.<sup>93</sup> In its attempt to define "person," the Supreme Court first looked to the language of the fourteenth amendment and then to other parts of the Constitution. It could not find a definition of the word "person," but did find that the use of "person" in various parts of the Constitution never indicated any prenatal application.<sup>94</sup>

The *Salazar* court also considered whether a fetus was a "person" within the language and meaning of its wrongful death statute for the purposes of claims arising under the Act.<sup>95</sup> The *Salazar* court first looked to the terms of the statute and rejected the plaintiff's contention that "person" included "fetus" as established by contemporary common law.<sup>96</sup> The court then looked at the relevant criminal statutes in its attempt to define the word "person." Unlike the Supreme Court, the *Salazar* court found an indication of intent to include a fetus within the meaning of the word "person" in the criminal statutes which were in effect on the date the wrongful death legislation was passed.<sup>97</sup> In light of the Supreme

93. *Id.* at 156-57.

94. *Id.* The Court stated:

The Constitution does not define "person" in so many words. Section 1 of the Fourteenth Amendment contains three references to "person." The first, in defining "citizens," speaks of "persons born or naturalized in the United States." The word also appears both in the Due Process Clause and in the Equal Protection Clause. "Person" is used in other places in the Constitution: in the listing of qualifications for Representatives and Senators . . . ; in the Apportionment Clause . . . ; in the Migration and Importation provision . . . ; in the Emolument Clause . . . ; in the Electors provisions and the superseded Fugitive Slave Clause 3; and in the Fifth, Twelfth and Twenty-second Amendments, as well as in §§ 2 and 3 of the Fourteenth Amendment. But in nearly all these instances, the use of the word is such that it has application only postnatally. None indicates, with any assurance, that it has any possible pre-natal application.

*Id.* at 157.

95. 95 N.M. at 152, 619 P.2d at 828. The court had to consider the definition of "person" because the "statute, by its language, applied to the death of a 'person.'" *Id.* Although the Supreme Court was considering the Constitution and the *Salazar* court was considering a statute, both courts were trying to define the term "person" by determining its use in other parts of the Constitution or statute.

96. *Id.*

97. *Id.* at 153-54, 619 P.2d at 829-30. In light of this finding, the *Salazar* court concluded that the 1882 legislature knew that a viable fetus was protected by legislation dealing with lives and persons. *Id.* If the court had looked at the whole criminal statute, it would have found, as the United States Supreme Court found, that "person" was used to describe those who were already born.

*Cf. Harman v. Daniels*, 525 F. Supp. 798 (W.D. Va. 1981), where a United States District Court held that a fetus is not a "person" or "citizen" who may, after birth, maintain an action under 42 U.S.C. § 1983 (1976). In *Harman* the fetus was allegedly injured by a police officer during the arrest of her pregnant mother. The district court acknowledged a recent Louisiana Supreme Court decision which allowed recovery for the wrongful death of a fetus and agreed with the plaintiff that even if a fetus is not constitutionally entitled as a "person" to claim certain rights, Congress can extend protection to unborn children by appropriate legislation. Nevertheless, the court found no such protection in the Civil Rights Act. *Id.* at 802.

Court's analysis of the fourteenth amendment to the United States Constitution and the application of that analysis in the *Roe* decision, it appears that the *Salazar* court applied faulty reasoning in finding that the legislative intent of the wrongful death statute was to include recovery for the death of an unborn child.

### *E. Correlation between Salazar and Roe*

Courts which have addressed the issue of recovery for the wrongful death of an unborn child have dealt with *Roe* in a number of ways. Courts which have denied recovery have emphasized the Supreme Court's finding that a fetus is not a "person."<sup>98</sup> Courts which have permitted recovery have stressed the importance of the finding that the state has a compelling interest in protecting fetal life.<sup>99</sup> Many other courts have not relied on *Roe* at all in reaching their decisions.<sup>100</sup> The *Salazar* court virtually ignored *Roe*, and cited to it only as an historical source with regard to the status of a fetus.<sup>101</sup>

The abortion decision and the wrongful death decisions need to be correlated because 1) there is such diverse treatment of *Roe* by courts deciding the wrongful death issue and 2) both the wrongful death and the abortion statutes deal with the status of the unborn child. Such a correlation would result in a cohesive theory regarding the rights of the unborn and would allow courts to permit recovery with substantial and persuasive authority. The analysis employed in *Salazar* demonstrates the need for the courts to formulate a consistent approach which may be applied in future cases which address similar issues.

Correlating the Supreme Court's holding on abortion with the wrongful

98. See *Justus v. Atchison*, 19 Cal.3d at \_\_\_\_\_, 565 P.2d at 130-31, 139 Cal. Rptr. at 105-06. In *Justus*, the court cited *Roe* as authority for its argument that the treatment of a fetus as equivalent to the born child is the exception rather than the rule. *Id.* See also *Kilmer v. Hicks*, 22 Ariz. App. 552, 529 P.2d 706 (1974), in which the court cited to the *Roe* finding that a fetus is not a "person" within the meaning of the fourteenth amendment and held that a fetus is not a "person" under the wrongful death statute. *Id.* at \_\_\_\_\_, 529 P.2d at 707-08.

99. See *Presley v. Newport Hosp.*, 117 R.I. 177, 365 A.2d 748 (1976), in which the court noted that "the Supreme Court's decision in *Roe* recognized that a state has such a compelling interest in the protection of a fetal life after viability that it may proscribe nontherapeutic abortions during that period." *Id.* at \_\_\_\_\_, 365 A.2d at 756. The *Presley* court held that the beneficiaries of the fetus were entitled to bring an action for the wrongful death of a viable fetus.

100. See *Stern v. Miller*, 348 So. 2d 303 (Fla. 1977) (denied recovery for seven-month fetus); *Evans v. Olson*, 550 P.2d 924 (Okla. 1976) (permitted recovery for viable fetus); *Moen v. Hanson*, 85 Wash. 2d 597, 537 P.2d 266 (1975) (permitted recovery for eight-month fetus); *Mone v. Greyhound Lines Inc.*, 368 Mass. 354, 331 N.E.2d 916 (1975) (permitted recovery for eight and one-half month fetus); *Pehrson v. Kistner*, 301 Minn. 299, 222 N.W.2d 334 (1974) (permitted recovery for viable fetus); *Chrisafogeorgis v. Brandenburg*, 55 Ill. 2d 368, 304 N.E.2d 88 (1973) (permitted recovery for nine-month fetus).

101. 95 N.M. at 152, 619 P.2d at 828. One commentator suggests that courts have reached decisions without relying on *Roe* because it "was not a wrongful death case" and because "it did not directly address the question of recovery for such." Kader, *supra* note 57, at 651.

death decisions initially involves resolving the apparently conflicting definitions of "person." A close look at the *Roe* decision shows that such a resolution is possible. The Supreme Court found that the word "person," as used in the fourteenth amendment, does not include the unborn.<sup>102</sup> The Court's reference to wrongful death recovery for the unborn and its statement that "the unborn have never been recognized in the law as persons in the whole sense"<sup>103</sup> are part of the Court's historical analysis, not its holding. The Court did not hold that states must deny recovery for the wrongful death of a fetus. The Court found that because a fetus represents the potentiality of life, the state can assert an interest, subject to the limitations imposed by the Court.

In addition, "person" can mean different things in different contexts. For example, Professor Kader argued that in both its fourteenth amendment context and its wrongful death context, the word "person" is an "attribution that bestows upon the annointed a legal personality entitled to certain rights or benefits."<sup>104</sup> Professor Kader also noted that a court may hold that a viable fetus is a "person" for purposes of the wrongful death statute but is not a "person" for purposes of the vehicular homicide statute.<sup>105</sup> These arguments suggest that although the Supreme Court's finding that a fetus is not a "person" appears to conflict with the holding in *Salazar* and with other decisions permitting wrongful death recovery, the finding of the Court in *Roe* "neither prohibits nor compels consistency of interpretation of the meaning of 'person' as between the fourteenth amendment and wrongful death statutes."<sup>106</sup>

If *Roe* does not preclude recovery for the wrongful death of a fetus despite the different definitions of the word "person," two questions remain. The first is whether *Roe* should ever be applied to the issue of recovery for wrongful death of a fetus. The second is if *Roe* is to be applied, whether it limits such recovery. Although in *Roe* the Supreme Court did not directly address the question of recovery for the unborn, it did consider the legal status of the unborn in relation to the abortion

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102. 410 U.S. at 157.

103. *Id.* at 162.

104. Kader, *supra* note 57, at 657.

105. Kader, *supra* note 57, at 656-57 n. 94 (citing Note, *Torts—Wrongful Death—A Viable Fetus is a "Person" for Purposes of the Rhode Island Wrongful Death Act*, 46 U. Cin. L. Rev. 266 (1977)). In *State v. Dickinson*, 23 Ohio App. 2d 259, 263 N.E.2d 253 (1970), the vehicular homicide case, the court based its holding on the history of common law: "It is well settled that at common law an unborn fetus, viable or otherwise, could not be the subject of homicide." *Id.* at \_\_\_\_\_, 263 N.E.2d at 255. In *Stidam v. Ashmore*, 109 Ohio App. 431, 167 N.E.2d 106 (1959), the court relied on an earlier Ohio Supreme Court decision, *Williams v. Marion Rapid Transit, Inc.*, 152 Ohio St. 114, 87 N.E.2d 334 (1949), in which the court held that a viable unborn child was a person. 109 Ohio App. at \_\_\_\_\_, 167 N.E.2d at 107.

106. Kader, *supra* note 57, at 657. The effect of such a conclusion is that courts no longer have to struggle to define "person." This conclusion also eliminates courts' denying wrongful death recovery based on the Supreme Court's definition of "person."

statutes and other areas of the law.<sup>107</sup> In light of its consideration of the legal status of the unborn, the *Roe* decision logically provides guidance in the wrongful death area.<sup>108</sup> Furthermore, reliance upon the analysis applied in *Roe* would enable state courts to formulate a coherent theory regarding the status of the unborn.

While it appears that *Roe* is applicable to wrongful death actions, the decision implicitly limits recovery to a fetus injured in the second and third trimesters of pregnancy by establishing guidelines which limit the state's interest in regulating abortions. The Court did not require the state to assert an interest in protecting the health of the mother and the potentiality of life; but if states wish to assert such an interest, they must follow the guidelines the Court proposed.<sup>109</sup> The Court stated that in the first trimester of pregnancy, there is no state interest which can override the woman's right to terminate her pregnancy.<sup>110</sup> The court found that in the second trimester the state interest was strong enough to regulate abortion precedures.<sup>111</sup> In the third trimester, the state interest is strong enough to regulate and proscribe abortions.<sup>112</sup> The degree of state interest in protecting the potentiality of life from wrongful acts can and should be correlated with the state's interest in regulating abortions.<sup>113</sup> That is, the state has an interest in protecting the fetus from injury and death during the second and third trimesters of pregnancy, but cannot successfully assert such an interest in the first trimester.

Application of the Court's reasoning in *Roe v. Wade* requires that both abortion and wrongful death statutes recognize the state's interest in protecting the potentiality of life in the third trimester. In *Roe*, the Court

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107. 410 U.S. at 161-63. The Court considered the legal status of the unborn in tort law and property law. *Id.*

108. As one commentator asserted, "the challenge to the [*Salazar* court] can only be appreciated in light of the reasoning . . . in *Roe v. Wade*." See Scales, *Torts*, 12 N.M. L. Rev. 481, 485 (1981). In *Salazar*, the court had to justify its finding that "person," as it was used in the wrongful death statute, included a fetus even though the statute was ambiguous. There was no support for that definition in case law, and the court refused to give the word a contemporary meaning. 95 N.M. at 152-53, 619 P.2d at 828-29. The *Roe* analysis eliminates the need for such justification by providing clear guidelines as to when a state can assert an interest under the wrongful death statute regardless of its definition of "person." See notes 106 *supra* and 110-13 *infra*, and accompanying text.

109. 410 U.S. at 164. The Supreme Court noted that states have enacted criminal abortion laws due to an interest in the areas of health and medical standards and in protecting prenatal life. *Id.* at 149-50.

110. *Id.* at 164.

111. *Id.*

112. *Id.* at 164-65.

113. In *Chrisafogeorgis v. Brandenburg*, *supra* note 75, the dissent advised that:

[w]ith the leeway conferred upon the States within which they may authorize or proscribe abortion by statute, it would appear that, to avoid apparent or actual inconsistencies in the law, any right of action created for the wrongful death of an unborn child should be correlated with the provisions of the statute pertaining to abortions.

*Id.* at \_\_\_\_\_, 304 N.E.2d at 95.

stated that "[w]ith respect to the state's important and legitimate interest in potential life, the 'compelling' point is at viability."<sup>114</sup>

Previous New Mexico courts have stated that the wrongful death statute considered by the *Salazar* court has several purposes, including promotion of "safety of life and limb by making negligence that causes death costly to the wrongdoer."<sup>115</sup> Courts in other states have found that "the paramount purpose of our wrongful death statutes . . . is the preservation of human life."<sup>116</sup> Wrongful death statutes thus have a general purpose of protecting life. The *Roe* Court also found that there is a state interest in protecting potential life. It is therefore a logical extension of *Roe* to find that wrongful death statutes also protect potential life.

The state interests in the second trimester of pregnancy are somewhat dissimilar<sup>117</sup> under the abortion and wrongful death statutes, but are not conflicting. *Roe* did not preclude, but only limited, the state's interest in the second trimester. It similarly did not preclude the state's interest in the case of the wrongful death of a fetus. In view of this fact, *Roe* did not preclude the state from protecting the unborn in the second trimester under the wrongful death statutes. The *Roe* Court found that "[w]ith respect to the State's important and legitimate interest in the health of the mother, the 'compelling' point . . . is at approximately the end of the first trimester."<sup>118</sup> The Court held that a state could at that time regulate abortion procedures in a manner related to the protection of maternal health.<sup>119</sup>

New Mexico courts have recognized that a major purpose underlying the adoption of wrongful death statutes involves promoting the "safety of life."<sup>120</sup> In addition, New Mexico courts have cited other purposes served by wrongful death statutes, such as compensation<sup>121</sup> and public punishment and deterrence.<sup>122</sup> The Court in *Roe*, in acknowledging the existence of an action for the wrongful death of a fetus, found it was "one to vindicate the parents' interest."<sup>123</sup> These findings emphasize the state's interest in protecting life by deterring the potential wrongdoer.

The state's interests in protecting potential life and in deterring a po-

114. 410 U.S. at 163. The Court found that viability began at the third trimester. *Id.*

115. *Stang v. Hertz Corp.*, 81 N.M. 348, 350-51, 467 P.2d 14, 16-17 (1970).

116. *Eich v. Town of Gulf Shores*, 293 Ala. at \_\_\_\_\_, 300 So. 2d at 356 (1974). The court permitted recovery for the wrongful death of a viable fetus because "[t]o deny recovery would sanction the tortfeasor's wrongful act and would clearly negate the primary objective of the statute."

117. Under the abortion statute the state interest is in protecting the health of the mother. Under the wrongful death statutes, the state has a more general interest in protecting all lives.

118. 410 U.S. at 163.

119. *Id.*

120. See notes 115-116 *supra* and accompanying text.

121. See *Stang v. Hertz Corp.*, 81 N.M. at 350-51, 467 P.2d at 16-17; N.M. Stat. Ann. § 41-2-3 (1978), see *supra* note 2 for the text of the statute.

122. See *Trujillo v. Prince*, 42 N.M. 337, 345, 78 P.2d 145, 150 (1938).

123. 410 U.S. at 162.



tential tortfeasor under the wrongful death statute are as "compelling" as are the state's interest in protecting potential life and in protecting the mother's health under the abortion statutes. An apparent conflict of state interests arises in the second trimester if a state attempts to protect potential life under the wrongful death statutes by threatening punishment, but cannot provide that same protection under the abortion statutes by preventing abortions. This conflict may be eliminated by the Supreme Court's finding that under the abortion statutes, a woman has a personal right of privacy which offsets the state's interest in protecting her health.<sup>124</sup> There is no such offsetting right in the wrongful death statutes, where a tortfeasor clearly does not have a right to be exonerated for his wrongful act.

Professor Kader stated that *Roe* can be used to expand recovery for the wrongful death of a fetus injured in the first trimester of pregnancy.<sup>125</sup> He bases this interpretation on the assumption that *Roe* implicitly recognizes the existence throughout pregnancy of a legitimate state interest in protecting "the potentiality of life," and that *Roe* only limits that interest in the context of protecting the woman's right to privacy or her health.<sup>126</sup> Therefore, the state can enforce tort liability for the death of a non-viable fetus in the first and second trimesters within those limitations.<sup>127</sup> While it is agreed that the state can assert an interest in the second trimester, the argument that such an interest can be asserted in the first trimester assumes too much from what the Supreme Court says about the status of the unborn. Although the Court "implicitly" recognized the existence of the potentiality of life throughout pregnancy, it clearly refused to protect that existence when it held that a woman and her doctor could terminate her pregnancy in the first trimester without any interference from the state.<sup>128</sup>

There would be an inherent conflict with the *Roe* decision if recovery for wrongful death of a fetus were permitted in the first trimester. The result would be that a tortfeasor would be liable for the death of a fetus injured in the first trimester, but a woman could abort her fetus during that time.<sup>129</sup> This conflict is absent in the second trimester because the Court did not preclude the existence of all the rights of the unborn as it did in the first trimester.

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124. *Id.* at 154.

125. Kader, *supra* note 57, at 663-64.

126. *Id.* at 664.

127. *Id.* at 665.

128. 410 U.S. at 164.

129. See *Toth v. Goree*, 65 Mich. App. 296, 304, 237 N.W.2d 297, 301 (1975), in which the court held that a three-month-old fetus was not a "person" within the wrongful death statute. *Id.* at \_\_\_\_\_, 237 N.W. 2d at 302.

## IV. CONCLUSION

*Salazar v. St. Vincent Hospital* was a case of first impression in New Mexico. The court allowed recovery in an action for the wrongful death of a viable fetus. The court's holding that a viable fetus is a "person" under the New Mexico wrongful death statute was based on a tenuous connection between that state statute and criminal statutes. Although such a holding seems to conflict with the United States Supreme Court's decision in *Roe v. Wade* that a fetus is not a "person" under the fourteenth amendment, the two findings are reconcilable. Furthermore, *Roe* provides guidance to states which must decide whether to allow recovery for the wrongful death of a fetus.

There should be no recovery in the first trimester because the Supreme Court did not protect the potential life of the fetus by precluding abortions in that period. Where the wrongful death of a viable fetus occurs during the third trimester of pregnancy, the *Salazar-Roe* decisions may be viewed as consistent in suggesting that recovery may be allowed. Recovery may also be allowed if the fetus is injured in the second trimester. During that period the Supreme Court does not deny the value of the fetus' life. There is a strong state interest in punishing and deterring a tortfeasor in order to protect potential life, as there is a strong state interest in regulating abortion during the second trimester.

An application of the *Roe* analysis to wrongful death claims will provide New Mexico courts with a more authoritative basis than that which was used in *Salazar* for permitting recovery. It will also permit courts to extend recovery into the second trimester. New Mexico courts and other state courts should consider *Roe* in their decisions. Courts should rely on *Roe* as authority, rather than on nebulous determinations of legislative intent of 100 years ago or on definitions of "personhood." Using *Roe* as precedent will establish one cohesive theory for permitting recovery for the wrongful death of a fetus injured in the second and third trimesters of pregnancy.

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