# Wrongful Death of the Fetus: Viability Is Not a Viable Distinction

## I. INTRODUCTION

The legal status of the unborn child and the rights of its parents are unsettled areas of tort law.[1] Historically, courts did not allow recovery when an unborn child was injured or killed.[2] Over the past century, courts and legislatures in the United States have expanded the scope of recovery for prenatal injury and death.[3] Today, most jurisdictions recognize causes of action for the injury of a fetus and for the wrongful death of a viable fetus.[4] However, most jurisdictions do not recognize a cause of action for the wrongful death of a nonviable fetus.[5] This Comment argues that viability is irrelevant in deciding whether to allow a cause of action to the parents of a fetus that has been wrongfully killed. Rather than barring all causes of action for the death of a nonviable fetus, courts should ignore the arbitrary line of viability and decide each case on its merits.

Viability is not an issue in actions for prenatal injury to children who are subsequently born alive,[6] and it is logically inconsistent that viability should be an issue when the prenatal injury results in the death of a fetus.[7] This is especially true in Washington, where the legislature has enacted a statute that allows recovery to parents for grief and mental suffering because of the injury or death of a minor child,[8] and where the state

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1. This issue as it arises in other areas of the law, such as criminal law and constitutional law (abortion), is beyond the scope of this Comment.

2. *See infra* text accompanying notes 20-23.

3. *See infra* text accompanying notes 24-45.

4. *See infra* text accompanying notes 29-36. A viable fetus is a fetus that is "sufficiently developed to live outside the uterus." STEDMAN'S MEDICAL DICTIONARY 1556 (5th Unabridged Lawyer's ed. 1982).

5. *See infra* text accompanying notes 78-99.

6. *See infra* text accompanying notes 30-32.

7. Most wrongful death statutes are based on the presumption that a cause of action exists in favor of the named beneficiaries if the decedent would have had a cause of action had he survived. *See, e.g.*, Moen v. Hanson, 85 Wash. 2d 597, 599, 537 P.2d 266, 267 (1975); Upchurch v. Hubbard, 29 Wash. 2d 559, 564, 188 P.2d 82, 85 (1947), *overruled on other grounds*, Sargent v. Selvar, 46 Wash. 2d 271, 280 P.2d 683 (1955).

8. The Washington Statute provides:

> The mother or father or both may maintain an action as plaintiff for the injury or death of a minor child, or a child on whom either, or both, are dependent

supreme court has held that a viable fetus falls within the terms of the statute.[9] The parents of a four-month-old fetus who is wrongfully killed may suffer as much as the parents of a six- or seven-month-old fetus.

This Comment reviews the history of tort law treatment of the fetus who is wrongfully injured or killed.[10] The Comment discusses case history and wrongful death statutes, with a focus on Washington law.[11] Finally, the Comment concludes that courts should ignore viability when deciding cases of fetal wrongful death.

## II. WRONGFUL DEATH

The right of recovery for the wrongful death of a person is a statutory right.[12] Consequently, recovery for the wrongful death of a fetus depends upon the state's wrongful death statute and the court's interpretation of that statute.[13]

Historically, if the defendant's tort resulted in the death of the victim, the tort was said to die with the victim.[14] The result of the rule was that in the most severe tort cases the defendant was absolved of liability.[15]

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In such an action, in addition to damages for medical, hospital, medication expenses, and loss of services and support, damages may be recovered for the loss of love and companionship of the child and for injury to or destruction of the parent-child relationship in such amount as, under all the circumstances of the case, may be just.

WASH. REV. CODE § 4.24.010 (1983).

9. Moen v. Hanson, 85 Wash. 2d 597, 599, 537 P.2d 266, 267 (1975). *See infra* notes 117-28 and accompanying text.

10. *See infra* text accompanying notes 20-77.

11. *See infra* text accompanying notes 100-37.

12. *E.g.*, Eich v. Town of Gulf Shores, 293 Ala. 95, 98-99, 300 So. 2d 354, 356-57 (1974); Britt v. Sears, 150 Ind. App. 487, 494, 277 N.E.2d 20, 24 (1971). *See generally* W. PROSSER, HANDBOOK OF THE LAW OF TORTS 902 (4th ed. 1971); Annot., 15 A.L.R.3d 992, 993 (1967).

13. A particular problem involved in these cases is the need to determine whether the fetus is a "person" within the meaning of the state's wrongful death statute. In some jurisdictions, the statute may only require a determination of whether the fetus is a "minor child" within the meaning of the wrongful death statute. *See, e.g.*, WASH. REV. CODE § 4.24.010 (1983).

14. W. PROSSER, *supra* note 12, at 901. In England in 1808, Lord Ellenborough held that "in a civil court the death of a human being could not be complained of as an injury." Baker v. Bolton, 170 Eng. Rep. 1033 (1808).

15. "[I]t was more profitable for the defendant to kill the plaintiff than to scratch him, and . . . the most grievous of all injuries left the bereaved family of the victim, who

In 1846 the English Parliament passed the first wrongful death statute, Lord Campbell's Act, to remedy this situation.[16] In the United States, state legislatures followed the British example, and today every state has some form of wrongful death statute.[17]

Most state wrongful death statutes are modeled after Lord Campbell's Act and create a new cause of action for the death of the victim.[18] The action can be brought by the victim's personal representative for the benefit of statutorily designated beneficiaries.[19]

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frequently were destitute, without a remedy." W. PROSSER, *supra* note 12, at 902.

16. W. PROSSER, *supra* note 12, at 902. Lord Campbell's Act was also known as the Fatal Accidents Act of 1846, 9 & 10 Vict., ch. 93 (1846).

17. Moragne v. States Marine Lines, Inc., 398 U.S. 375, 390 (1970) (court discussed the history of wrongful death actions in England and the United States and the broad acceptance of recovery for wrongful death, and allowed a cause of action for wrongful death in admiralty).

18. W. PROSSER, *supra* note 12, at 902. Washington State has this type of wrongful death statute. *See* WASH. REV. CODE §§ 4.20.010, .24.010 (1983). *See infra* note 120.

Some states have wrongful death statutes that are like survival statutes. The survival-type statutes preserve the decedent's own cause of action and enlarge the cause of action to include damages for the death of the decedent. W. PROSSER, *supra* note 12, at 902. Actions under the survival-type wrongful death statutes are brought by the executor of the decedent's estate, and recovery usually goes to the estate. *Id.* at 903-04.

Some states, including Washington, have both wrongful death statutes and survival acts. *See* WASH. REV. CODE § 4.20.046 (1983). When the two actions can be brought and maintained independently, there are sometimes problems of limiting damages so that the defendant is not held liable twice for the same act. *See, e.g.*, Criscuola v. Andrews, 82 Wash. 2d 68, 507 P.2d 149 (1973); Pezzulli v. D'Ambrosia, 344 Pa. 643, 26 A.2d 659 (1942), *overruled on other grounds*, Murray v. Philadelphia Transp. Co., 359 Pa. 69, 58 A.2d 323 (1948).

This Comment, when discussing wrongful death statutes, refers to statutes that are modeled after Lord Campbell's Act, rather than to survival acts. When discussing Washington statutes, the Comment refers to WASH. REV. CODE §§ 4.20.010 and 4.24.010, rather than to WASH. REV. CODE § 4.20.046.

19. The amount of damages recoverable under wrongful death statutes varies. Typically, in states where compensation is based upon loss to the beneficiaries, the plaintiffs must show some pecuniary loss. W. PROSSER, *supra* note 12, at 907. But many states have modified the rule limiting damages for wrongful death to pecuniary loss. The modification may be done judicially by extending the meaning of pecuniary loss beyond strict financial value. This involves speculation as to the decedent's life expectancy, character, habits, and health. *Id.* at 908. *See, e.g.*, Gaydas v. Domabyl, 301 Pa. 523, 536, 152 A. 549, 554 (1930) (court considered age, health, and life expectancy of deceased mother in wrongful death action by children). The pecuniary loss rule has also been modified by statutes, which either specify damages other than pecuniary damages, or permit juries to award damages as seem just. *See, e.g.*, WASH. REV. CODE § 4.24.010 (1983), *supra* note 8 (permitting recovery to parents for their grief and mental suffering "in such amount as, under all the circumstances of the case, may be just").

Damages in cases of wrongful death of minor children are particularly difficult to determine because of speculation as to the child's life expectancy, future earnings, and

## III. History of Tort Law and the Unborn Child

The common law did not allow broad tort recovery by or for the unborn child. Justice Holmes applied the common law rule in 1884 in *Dietrich v. Inhabitants of Northampton*,[20] when he stated that an unborn child is a part of its mother and that any injury to the child that was not too remote was recoverable by the mother on her own behalf.[21] Because an unborn child was not separate from its mother, the parents could not recover for prenatal injuries to, or death of, the fetus. United States courts followed the common law rule[22] until 1946.[23]

### *A. History of Recovery for Prenatal Injury*

In 1946 the Federal District Court for the District of Columbia deviated from the common law rule in *Bonbrest v. Kotz*.[24] In *Bonbrest*, an infant sued through its father for injuries sustained during delivery. The court denied the defendant's motion for summary judgment and distinguished the case from *Dietrich* on the ground that the infant in *Bonbrest* had survived to prove that it could live apart from its mother.[25] Since the case involved a viable fetus, and since the fetus had demonstrated its capacity to survive, the *Bonbrest* court reasoned that it could not deny the child standing in court.[26] The *Bonbrest* court rejected the common law rule, noting that the common law is an

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other factors relevant to determining pecuniary loss. W. Prosser, *supra* note 12, at 908-09. Regardless of this difficulty, courts have allowed recovery in many wrongful death cases involving minor children. *Id.* at 909. Washington allowed recovery for the wrongful death of a minor child prior to Wash. Rev. Code § 4.24.010. *See* Upchurch v. Hubbard, 29 Wash. 2d 559, 188 P.2d 82 (1947), *overruled on other grounds*, Sargent v. Selvar, 46 Wash. 2d 271, 280 P.2d 683 (1955). Washington now specifically allows recovery for the wrongful death of minor children under Wash. Rev. Code § 4.24.010. *See supra* note 8.

20. 138 Mass. 14 (1884), *overruled*, Torigian v. Watertown News Co., 352 Mass. 446, 225 N.E.2d 926 (1967).

21. *Id.* at 17.

22. According to the 1939 Restatement of Torts, "a person who negligently causes harm to an unborn child is not liable to such child for the harm." Restatement of Torts § 869 (1939).

23. Prior to 1946, one notable critic of the rule was Judge Boggs, who argued that a child should be considered a legal entity when it reaches viability. Allaire v. St. Luke's Hosp., 184 Ill. 359, 370-74, 56 N.E. 638, 641-42 (1900) (Boggs, J. dissenting), *overruled*, Amann v. Faidy, 415 Ill. 422, 114 N.E.2d 412 (1953).

24. 65 F. Supp. 138 (D.D.C. 1946).

25. *Id.* at 140.

26. "Here, however, we have a viable child—one capable of living outside the womb—and which has demonstrated its capacity to survive by *surviving*—are we to say *now* it has no locus standi in court or elsewhere?" *Id.* (emphasis in original).

ever-changing phenomenon.[27]

United States courts quickly incorporated the *Bonbrest* holding into the common law. According to Dean Prosser, *Bonbrest* and the cases that followed it "brought about what was up till that time the most spectacular abrupt reversal of a well settled rule in the whole history of the law of torts."[28] All states now allow recovery for prenatal injuries if the child is subsequently born alive.[29]

When an injured fetus is subsequently born alive, viability at the time of injury is not a determinative factor.[30] Courts have either ignored the viability question when the injured fetus was subsequently born alive[31] or have expressly stated that the issue is irrelevant.[32]

### *B. History of Recovery for Wrongful Death*

After permitting recovery for an injured fetus that is subsequently born alive, courts began to recognize a cause of action for the wrongful death of a child who died because of prenatal injuries. Courts first recognized a cause of action when the child was born alive and then died.[33]

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27. "The common law is not an arid and sterile thing, and it is anything but static and inert." *Id.* at 142.

28. W. PROSSER, *supra* note 12, at 336. *See* Williams v. Marion Rapid Transit, Inc., 152 Ohio St. 114, 128-29, 87 N.E.2d 334, 340 (1949) (in which the Supreme Court of Ohio was the first state court of final jurisdiction to hold that a viable fetus was a person and could maintain an action after birth for prenatal injuries).

29. Kader, *The Law of Tortious Prenatal Death Since* Roe v. Wade, 45 Mo. L. REV. 639, 642 (1980).

30. W. PROSSER, *supra* note 12, at 337. *See, e.g.*, Womack v. Buchhorn, 384 Mich. 718, 187 N.W.2d 218 (1971) (allowing recovery to child for injuries sustained by it as a nonviable fetus); Kelly v. Gregory, 282 A.D. 542, 125 N.Y.S.2d 696 (1953) (allowing recovery for injury to a three-month-old fetus). Note, however, that most cases arise out of injuries to a viable fetus.

31. *E.g.*, Seattle First Nat'l Bank v. Rankin, 59 Wash. 2d 288, 367 P.2d 835 (1962). *See infra* text accompanying notes 113-16.

32. *E.g.*, Smith v. Brennan, 31 N.J. 353, 157 A.2d 497 (1960):

> [T]he viability distinction has no relevance to the injustice of denying recovery for harm which can be proved to have resulted from the wrongful act of another. Whether viable or not at the time of injury, the child sustains the same harm after birth, and therefore should be given the same opportunity for redress.

*Id.* at 367, 157 A.2d at 504.

33. *See, e.g.*, Simon v. Mullin, 34 Conn. Supp. 139, 380 A.2d 1353 (Super. Ct. 1977) (court allowed a wrongful death action when a fetus was injured during the fourth month of pregnancy, was born prematurely two months later, and died the day after birth); Torigian v. Watertown News Co., 352 Mass. 446, 225 N.E.2d 926 (1967) (court allowed

Courts justified the action on two bases. First, most wrongful death statutes provide a right of action for the death of a person.[34] The child who is born alive has always been considered a "person."[35] Second, most wrongful death statutes limit the action to cases in which the decedent might have recovered damages from the tortfeasor if death had not occurred.[36] Because the child who lives can recover for prenatal injuries, it follows that the child's statutory representative can recover for wrongful death.

When a fetus sustains injuries and is stillborn, courts are divided as to whether to allow a wrongful death action.[37] Although some states do not allow the fetal wrongful death action,[38] the majority of states allow wrongful death actions for the death of a viable fetus.[39]

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wrongful death action when child died two-and-one-half hours after birth). *See* Note, *The Law and the Unborn Child: The Legal and Logical Inconsistencies*, 46 NOTRE DAME LAW. 349, 358 (1971). Viability is not an issue when the injured fetus is born alive and then dies. *See, e.g.*, Group Health Ass'n v. Blumenthal, 295 Md. 104, 116, 453 A.2d 1198, 1206 (1983) (when a fourteen-week-old fetus was injured and died less than three hours after birth, court held that the concept of viability had no role in the case).

34. For example, see Washington's wrongful death statute:

> When the death of a person is caused by the wrongful act, neglect or default of another his personal representative may maintain an action for damages against the person causing the death; and although the death shall have been caused under such circumstances as amount, in law, to a felony.

WASH. REV. CODE § 4.20.010 (1983).

35. Note, *supra* note 33, at 358.

36. This is true whether the statute is modeled after Lord Campbell's Act or after a survival act. W. PROSSER, *supra* note 12, at 910. *See supra* note 18.

37. Note, *Wrongful Death and the Stillborn Fetus: A Common Law Solution to a Statutory Dilemma*, 43 U. PITT. L. REV. 819, 821 (1982). The first court to allow recovery for the wrongful death of a stillborn viable fetus was the Supreme Court of Minnesota. Verkennes v. Corniea, 229 Minn. 365, 38 N.W.2d 838 (1949).

38. 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); Hernandez v. Garwood, 390 So. 2d 357 (Fla. 1980); Dunn v. Rose Way, Inc., 333 N.W.2d 830 (Iowa 1983); 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, 494 Pa. 487, 431 A.2d 959 (1981); Hamby v. McDaniel, 559 S.W.2d 774 (Tenn. 1977); Lawrence v. Craven Tire Co., 210 Va. 138, 169 S.E.2d 440 (1969).

39. Simmons v. Howard Univ., 323 F. Supp. 529 (D.D.C. 1971); Eich v. Town of Gulf Shores, 293 Ala. 95, 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 Del. 258, 128 A.2d 557 (Super. Ct. 1956); Porter v. Lassiter, 91 Ga. App. 712, 87 S.E.2d 100 (1955); Volk v. Baldazo, 103 Idaho 570, 651 P.2d 11 (1982); 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, 637 (La. 1981) (rehearing opinion); Odham v.

An overwhelming number of courts do not recognize a right of action for the wrongful death of a nonviable fetus.[40] Only Georgia and Rhode Island have deviated from the general rule and have allowed recovery for the wrongful death of a nonviable fetus.[41]

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Sherman, 234 Md. 179, 198 A.2d 71 (1964); Mone v. Greyhound Lines, Inc., 368 Mass. 354, 331 N.E.2d 916 (1975); O'Neill v. Morse, 385 Mich. 130, 188 N.W.2d 785 (1971); Verkennes v. Corniea, 229 Minn. 365, 38 N.W.2d 838 (1949); Rainey v. Horn, 221 Miss. 269, 72 So. 2d 434 (1954); O'Grady v. Brown, 654 S.W.2d 904 (Mo. 1983); White v. Yup, 85 Nev. 527, 458 P.2d 617 (1969); Poliquin v. MacDonald, 101 N.H. 104, 135 A.2d 249 (1957); Salazar v. St. Vincent Hosp., 95 N.M. 150, 619 P.2d 826 (N.M. Ct. App. 1980); Werling v. Sandy, No. 1-83-4, slip op. (Ohio 3d App. D. Apr. 30, 1984); Evans v. Olson, 550 P.2d 924 (Okl. 1976); Libbee v. Permanente Clinic, 268 Or. 258, 518 P.2d 636 (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 42 (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).

40. *See, e.g.*, Wallace v. Wallace, 120 N.H. 675, 421 A.2d 134 (1980):

> To deny a nonviable fetus a cause of action . . . is simply a policy determination that the law will not extend civil liability by giving a nonviable fetus a cause of action for negligence before it becomes a person, in the real and usual sense of the word, by being born alive. In other words, life may begin at conception but causes of action do not.

*Id.* at 679, 421 A.2d at 136-37.

Note, however, that the concept of allowing recovery to the child for its injuries is not necessarily the same as allowing the parents to recover for the death of a fetus. The former does not seem justifiable to courts that concur with the *Wallace* court because these courts do not want to allow recovery to someone who is not a person. In the latter case, recovery is to the parents, not to the child. Arguably, the parents suffer equally when a fetus has been killed, whether or not the fetus was viable.

Most courts that have allowed recovery for the death of a viable fetus have expressly stated that the fetus was viable at the time of injury. *See, e.g.*, Verkennes v. Corniea, 229 Minn. at 371, 38 N.W.2d at 841.

41. The Court of Appeals of Georgia allowed recovery for the death of a six-week-old fetus. Porter v. Lassiter, 91 Ga. App. 712, 87 S.E.2d 100 (1955). In *Porter*, the court found that the fetus had been able to move at six weeks. The court held that for the purposes of Georgia's wrongful death statute, a fetus is a child when the fetus is "quick," or perceived to move in the mother's womb. *Id.* at 716, 87 S.E.2d at 103. *Cf.* Shirley v. Bacon, 154 Ga. App. 203, 267 S.E.2d 809 (1980) (wrongful death action not allowed for the death of a fetus that was two months old at the time of injury, because that fetus was not "quick").

The Supreme Court of Rhode Island held that a fetus is a person for the purposes of the Rhode Island Wrongful Death Act whether the fetus is viable or nonviable. Presley v. Newport Hospital, 117 R.I. 177, 365 A.2d 748 (1976). In *Presley*, the court discussed the issue of viability despite the fact that the fetus was viable at the time of injury. "[A]s our holding in this case indicates, the decedent, whether viable or nonviable, was a 'person' within the meaning of the Wrongful Death Act. . . . It would be palpably illogical to discredit viability in one context [prenatal injury] only to rehabilitate it . . . in another, integrally related context [wrongful death]." *Id.* at 188, 365 A.2d at 754. *But see* State v. Amaro, ___ R.I. ___, 448 A.2d 1257 (1982) (fetus held not a person under the vehicular

### *C. Wrongful Birth and Wrongful Life*

The relatively new torts of "wrongful birth"[42] and "wrongful life"[43] are the most recent extensions of tort law as it applies to the unborn child. Under a wrongful birth action, the parent sues for the birth of a child who would not have been born but for the negligence of a third person.[44] Wrongful life is an analogous tort action by the child, who claims that he or she would not have been born, and presumably would not have had to suffer, but for the negligence of a third person.[45] In discussing viability, this Comment will draw analogies between these torts and wrongful death actions for unborn children, but a thorough analysis of wrongful birth and wrongful life actions is beyond the scope of this Comment.

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homicide statute, so the cause of action was dismissed when a nine-month-old fetus was killed in a collision).

Other jurisdictions have not followed the decisions of the Georgia and Rhode Island courts. *See supra* note 40.

42. *See generally* Phillips v. United States, 508 F. Supp. 544 (D.S.C. 1981) (wrongful birth claim by parents of a child born with Down's Syndrome stated a legally cognizable cause of action); Rogers, *Wrongful Life and Wrongful Birth: Medical Malpractice in Genetic Counseling and Prenatal Testing*, 33 S.C.L. REV. 713 (1982); Comment, *Berman v. Allan*, 8 HOFSTRA L. REV. 257 (1979); Annot., 83 A.L.R.3d 15 (1978).

The Washington Supreme Court has defined a wrongful birth action as "an action based on an alleged breach of duty of a health care provider to impart information or perform medical procedures with due care, when the breach is a proximate cause of the birth of a *defective* child." Harbeson v. Parke-Davis, Inc., 98 Wash. 2d 460, 467, 656 P.2d 483, 488 (1983) (emphasis added).

43. *See generally* Phillips v. United States, 508 F. Supp. 537 (D.S.C. 1980) (the court reviewed the status of the wrongful life cause of action in the United States); Rogers, *supra* note 42; Comment, *"Wrongful Life": The Right Not to Be Born*, 54 TUL. L. REV. 480 (1980). In a wrongful life action:

> The child does not allege that the physician's negligence caused the child's deformity. Rather, the claim is that the physician's negligence—his failure to adequately inform the parents of the risk—has caused the *birth* of the deformed child. The child argues that *but for* the inadequate advice, it would not have been born to experience the pain and suffering attributable to the deformity.

*Id.* at 485 (emphasis in original).

The Washington Supreme Court expanded the above definition by permitting actions for "negligent performance of a procedure intended to prevent the birth of a defective child: sterilization and abortion." Harbeson v. Parke-Davis, Inc., 98 Wash. 2d 460, 478, 656 P.2d 483, 494 (1983).

44. The parents claim either that they would not have allowed the pregnancy to last its full term if they had known that the child would be defective, or that the physician negligently failed to prevent the pregnancy. *See, e.g., Harbeson*, 98 Wash. 2d at 465-66, 656 P.2d at 488.

45. *Id.* at 478, 656 P.2d at 494.

## IV. Recovery for Prenatal Injury and Fetal Wrongful Death

Arguments for and against allowing a cause of action for prenatal injuries or death of the unborn child were asserted in the earliest cases on the subject.[46] Modern courts and scholars advance essentially the same arguments.[47]

The major arguments against recovery for prenatal injuries include: (1) lack of precedent;[48] (2) inseparability of the fetus from the mother;[49] (3) difficulty of proof of causation;[50] (4) danger of double recovery by the mother;[51] (5) potential of fraudulent claims;[52] and (6) legislative prerogative.[53]

Courts have refuted each of the above arguments in arriving at the now unanimously accepted rule that an action exists for prenatal injuries to a child who is born alive.[54] The argument of lack of precedent has not been valid since 1946, when *Bonbrest* was decided. Lack of precedent was not a strong argument even then, for as the *Bonbrest* court stated, "[t]he absence of precedent should afford no refuge to those who by their wrongful act, if such be proved, have invaded the right of an individual."[55] Courts used similar reasoning to refute the arguments that causation would be too difficult to prove, and that fraudulent claims might arise.[56] Problems of proof and possibilities of fraud exist in many areas of law, but should not preclude action by an injured plaintiff. Furthermore, courts have long recognized the ability of the judiciary to make law.[57]

As early as *Bonbrest*, courts refuted the contention that a

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46. *See, e.g.*, Dietrich v. Inhabitants of Northampton, 138 Mass. 14 (1884), *overruled*, Torigian v. Watertown News Co., 352 Mass. 446, 225 N.E.2d 926 (1967).

47. *See, e.g.*, Justus v. Atchison, 19 Cal. 3d 564, 565 P.2d 122, 139 Cal. Rptr. 97 (1977); Gordon, *The Unborn Plaintiff*, 63 Mich. L. Rev. 579, 588-97 (1965).

48. Dietrich v. Inhabitants of Northampton, 138 Mass. 14, 15 (1884), *overruled*, Torigian v. Watertown News Co., 352 Mass. 446, 225 N.E.2d 926 (1967).

49. *Id.* at 17.

50. *See, e.g.*, Graf v. Taggert, 43 N.J. 303, 310-11, 204 A.2d 140, 145 (1964).

51. W. Prosser, *supra* note 12, at 338.

52. Magnolia Coca Cola Bottling Co. v. Jordan, 124 Tex. 347, 360, 78 S.W.2d 944, 949-50 (1935), *overruled*, Leal v. C. C. Pitts Sand and Gravel, Inc., 419 S.W.2d 820 (Tex. 1967).

53. *See, e.g.*, Justus v. Atchison, 19 Cal.3d 564, 581, 565 P.2d 122, 133, 139 Cal. Rptr. 97, 108 (1977).

54. Kader, *supra* note 29, at 642.

55. Bonbrest v. Kotz, 65 F. Supp. 138, 142 (D.D.C. 1946).

56. *Id.* at 142-43.

57. *Id.* at 142.

fetus is merely part of its mother.[58] These courts pointed out that the unborn child is recognized as a separate entity in medicine[59] and in other areas of law.[60] Furthermore, under the view that the fetus is a separate entity, double recovery does not occur. The mother recovers for her own personal injuries, and the child, or its parent on its behalf, recovers for injuries that the child incurred as a separate being.

Each jurisdiction addressed and refuted the major arguments against recovery before holding that the child born alive has an action for prenatal injuries.[61] Courts address the same arguments when deciding whether to allow recovery for the wrongful death of a fetus.[62] Courts are beginning to realize that the arguments that were invalid as to prenatal injuries are just as invalid as to prenatal death.[63]

Opponents of the fetal wrongful death action add the argument that wrongful death statutes allow recovery only for the death of a "person," and that a fetus is not a person.[64] Opponents also argue that damages are too difficult to prove.[65] Despite these arguments, most jurisdictions now recognize a cause of action for the wrongful death of a viable fetus.[66]

Proponents of the fetal wrongful death action point out that it is unjust to allow recovery for injuries that do not result in death, but to bar recovery for those injuries that are severe

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58. *Id.*

59. As to a viable child being "part" of its mother—this argument seems to me to be a contradiction in terms. True, it is in the womb, but it is capable now of extra-uterine life—and . . . it is not a "part" of the mother in the sense of a constituent element. . . . Modern medicine is replete with cases of living children being taken from dead mothers. Indeed, apart from viability, a non-viable foetus is not a part of its mother.

*Id.*

60. *See generally* Note, *supra* note 33 (discussing the law of property, the law of equity, criminal law, and abortion law, with respect to the unborn child).

61. *See* Note, *Prenatal Injury*, 38 WASH. L. REV. 390, 392-95 (1963).

62. *See, e.g.*, Moen v. Hanson, 85 Wash. 2d 597, 600, 537 P.2d 266, 267-68 (1975).

63. *See supra* text accompanying notes 54-60. *See* Annot., 84 A.L.R.3d 411, 417 (1978). *But see* Justus v. Atchison, 19 Cal. 3d 564, 581, 565 P.2d 122, 133, 139 Cal. Rptr. 97, 108 (1977) (stating that: (1) a fetus has no dependents, and no heirs other than the parents; (2) the death of a fetus causes no economic loss, since it is not a wage earner; and (3) the parents of a stillborn fetus have never touched, seen, or heard the child, but have felt only random movements).

64. *See, e.g.*, Justus v. Atchison, 19 Cal. 3d 564, 579, 565 P.2d 122, 132, 139 Cal. Rptr. 97, 107 (1977).

65. Justus v. Atchison, 53 Cal. App. 3d 556, 565, 126 Cal. Rptr. 150, 158 (1975), *aff'd*, 19 Cal. 3d 564, 565 P.2d 122, 139 Cal. Rptr. 97 (1977).

66. *See supra* notes 37-39 and accompanying text.

enough to kill.[67] To overcome this inconsistency and to ensure that justice does not favor the tortfeasor over the innocent fetus, many courts have held that a viable fetus is a "person" under the meaning of their particular wrongful death statute.[68]

One of the major arguments against allowing wrongful death actions for the death of the unborn child is that damages are too speculative.[69] Opponents of the fetal wrongful death action contend that plaintiffs cannot prove loss of support and services from a child who was never born.[70] However, courts can infer

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67. *See, e.g.*, Volk v. Baldazo, 103 Idaho 570, 651 P.2d 11 (1982). In *Volk*, the Supreme Court of Idaho reversed the trial court holding that a wrongful death action could not be allowed for the death of a viable fetus. The court stated that "[a] holding here affirming the trial court would . . . in effect reinstate the harsh rule of the common law that a tortfeasor could be held liable for injury to a fetus, but be granted immunity for the killing of the fetus." *Id.* at 574, 651 P.2d at 15. *See also* Eich v. Town of Gulf Shores, 293 Ala. 95, 300 So. 2d 354 (1974).

A common illustration of this injustice is the "twin dilemma." Kader, *supra* note 29, at 646. Suppose that viable twin fetuses are injured. One twin survives the injury to be born alive. The other twin is more severely injured, and is stillborn. In a jurisdiction that allows recovery for prenatal injuries, but does not allow a cause of action for the wrongful death of the fetus, recovery would be allowed only for the injury to the twin that, by chance, was least severely injured. This result is anomalous. Even more anomalous is the situation in which the twin who was born alive dies soon after birth. In that case, the wrongful death action would be allowed for the twin who was born alive, but not for the twin who died before birth.

While the twin dilemma is purely hypothetical, it is physically possible, and demonstrates the logical inconsistency of allowing recovery for prenatal injuries but not for wrongful death of the fetus.

68. Note, *supra* note 33, at 359. *See, e.g.*, O'Neill v. Morse, 385 Mich. 130, 188 N.W.2d 785 (1971).

The United States Supreme Court held in *Roe v. Wade* that the word "person" as used in the fourteenth amendment does not include the unborn. Roe v. Wade, 410 U.S. 113, 158 (1973). If read very broadly, this Supreme Court finding can be taken to negate any argument that courts should allow wrongful death actions on behalf of the unborn child, whether viable or nonviable at the time of injury. However, the Supreme Court limited its statement that an unborn child is not a person to the specific terms of the fourteenth amendment. *Id.*

Conversely, opponents of abortion have argued that allowing recovery for the wrongful death of a fetus requires a finding that a fetus is a person, and that the abortion decisions are therefore wrong. *See, e.g.*, Note, *supra* note 33. However, the decision to allow abortion does not depend on the same policies and justifications as does the decision to allow a cause of action for the wrongful death of a fetus. While the fetus may not be a "person" for the purposes of the fourteenth amendment, it may be a "person" for the purposes of a state's wrongful death statute. Furthermore, while a woman's right to privacy is the policy involved in the abortion decision, the policy that a tortfeasor should not escape liability is involved in the wrongful death decision. One decision does not solve the controversy of the other.

69. W. PROSSER, *supra* note 12, at 908. *See supra* notes 18-19.

70. *See, e.g.*, Justus v. Atchison, 53 Cal. App. 3d 556, 565, 126 Cal. Rptr. 150, 158 (1975), *aff'd*, 19 Cal. 3d 564, 565 P.2d 122, 139 Cal. Rptr. 97 (1977).

that the unborn child would have had some earning power, just as courts have inferred earning power in cases involving a child who has died before reaching the age of majority.[71] Where the wrongful death statute does not limit recovery to pecuniary damages, courts have held that parents may recover for the mental suffering caused by the loss of a fetus.[72] Most courts are reluctant to preclude plaintiffs from bringing an action for the death of a fetus merely because of the difficulties of proof involved.[73]

Courts have accepted in large part the arguments in favor of recovery for injury to the unborn child. All jurisdictions allow recovery when the injured fetus is born alive.[74] Many jurisdictions allow recovery when a viable fetus is wrongfully killed.[75] The arguments that courts use to deny actions for the wrongful death of a nonviable fetus are the same as those that were used to deny recovery for prenatal injuries,[76] and to deny recovery for the wrongful death of a viable fetus.[77] If those arguments are invalid as to the viable fetus, they are also invalid as to the nonviable fetus, unless there are valid differences between viability and nonviability that ought to affect recovery.

## V. Viability: An Arbitrary Cut-off

The history of recovery for injury or death of the unborn child has involved arbitrary line-drawing by courts. Courts first drew the line at birth. No recovery was possible if the child was injured or killed before birth.[78] The *Bonbrest* court stretched the line by allowing recovery for prenatal injury of a viable fetus who was born alive.[79] The Supreme Court of Minnesota stretched the line further when it allowed recovery for the wrongful

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71. *See, e.g.*, Hinzman v. Palmanteer, 81 Wash. 2d 327, 332-35, 501 P.2d 1228, 1232-33 (1972) (discussing the methods used to impute future income of a seven-year-old child).

72. *See, e.g.*, Moen v. Hanson, 85 Wash. 2d 597, 598-99, 537 P.2d 266, 266-67 (1975).

73. *See, e.g.*, Jones v. Karraker, 98 Ill. 2d 487, 490, 457 N.E.2d 23, 25 (1983) (court held that proof of actual loss of pecuniary services was unnecessary when jury awarded verdict for wrongful death of viable fetus); Presley v. Newport Hospital, 117 R.I. 177, 189, 365 A.2d 748, 754 (1976).

74. *See supra* notes 29-32 and accompanying text.

75. *See supra* notes 33-36 and accompanying text.

76. *See supra* notes 48-53 and accompanying text.

77. *See supra* notes 48-53, 61-65 and accompanying text.

78. *See, e.g.*, Dietrich v. Inhabitants of Northampton, 138 Mass. 14 (1884), *overruled*, Torigian v. Watertown News Co., 352 Mass. 446, 225 N.E.2d 926 (1967).

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

death of a stillborn viable fetus in *Verkennes v. Corniea*.[80] Fetal wrongful death cases after *Bonbrest* and *Verkennes* demonstrated that a new line had been drawn at viability, rather than at birth.[81] Modern courts, with two exceptions, draw the line for allowing a cause of action for the wrongful death of a fetus at viability.[82]

Birth and viability are equally arbitrary lines for courts to use in deciding whether to allow recovery for the wrongful death of a fetus. Birth and viability are not the only possible lines, and they are not necessarily the most logical lines. At least one state has drawn the line at quickness.[83] The line could just as easily be set at conception.[84] As courts have crossed each line, they have asserted that the standard being rejected is arbitrary, and that recovery is the most just result under the circumstances before them.[85] Currently, conception is the most generally accepted line drawn for recovery for children who are injured prenatally, but born alive.[86] For stillborn children, however, the line is viability.[87]

Viability is as arbitrary a standard in wrongful death cases as was birth.[88] Viability depends upon many factors and varies from case to case.[89] Viability has no medical reality because of

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80. 229 Minn. 365, 38 N.W.2d 838 (1949).

81. *See supra* notes 33-40 and accompanying text.

82. The exceptions are Rhode Island and Georgia. *See supra* note 41.

83. Porter v. Lassiter, 91 Ga. App. 712, 87 S.E.2d 100 (1955).

84. *See, e.g.*, Presley v. Newport Hospital, 117 R.I. 177, 365 A.2d 748 (1976).

85. *See* Seattle-First Nat'l Bank v. Rankin, 59 Wash. 2d 288, 291, 367 P.2d 835, 838 (1962).

86. Kader, *supra* note 29, at 642. When the child is born alive, the point at which it was injured is usually considered irrelevant, and courts rarely consider whether any line is drawn. *See* Simon v. Mullin, 34 Conn. Supp. 139, 380 A.2d 1353 (Super. Ct. 1977). "The development of the principle of law that now permits recovery by or on behalf of a child born alive for prenatal injuries suffered at any time after conception, without regard to the viability of the fetus, is a notable illustration of the viability of our common law." *Id.* at 147, 380 A.2d at 1357.

87. Note, *supra* note 39, at 821. This is the majority view. A minority of jurisdictions does not allow recovery for the wrongful death of the stillborn viable fetus. *See supra* notes 37-39 and accompanying text.

This inconsistency raises a new "twin dilemma." Suppose that twin fetuses are injured before viability. One twin is more severely injured, and is stillborn. The other twin is born alive. In most jurisdictions today, the result would be recovery on behalf of the twin who was born alive, regardless of how long it lived after birth. The parents would not recover for the wrongful death of the stillborn fetus.

88. Gordon, *supra* note 47, at 589.

89. W. PROSSER, *supra* note 12, at 337. Viability is defined as: "Capability of living; the state of being viable; *usually* connotes a fetus that has reached 500 g in weight and 20 gestational weeks." STEDMAN'S MEDICAL DICTIONARY 1556 (5th Unabridged Lawyer's

these factors. The legal reality of viability developed out of the historical need to explain that a fetus exists as a being separate from its mother.[90] In fact, modern medicine has shown that biological separability can occur long before viability.[91]

Legislatures enacted wrongful death statutes to prevent injustices and to solve the problem that the tortfeasor was in a better position when killing a plaintiff than when injuring the plaintiff.[92] Thus, most statutes limit wrongful death actions to cases where the decedent might have recovered damages if death had not occurred.[93] In the case of the unborn child, the law still leaves the tortfeasor in a better position when killing the nonviable fetus than when injuring the fetus. Although the nonviable fetus would have a cause of action for prenatal injuries if it survived, most courts allow the cause of action to die with the fetus.[94]

One explanation of the current inconsistency is that courts are able to see the injustice of denying recovery when they can also see the injured or defective child.[95] But this explanation relates to the issue of damages, rather than to the issue of whether a cause of action should exist. Damages are easier to prove for injury to a child who must bear the costs of the injury

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ed. 1982) (emphasis added). Whether a fetus is capable of living will depend upon any number of factors, including the health of its mother and the general state of medical science. *See, e.g.*, Green v. Smith, 71 Ill. 2d 501, 377 N.E.2d 37 (1978) (court was unable to hold as a matter of law that a fourteen-week-old fetus that weighed less than 120 grams was nonviable); Renslow v. Mennonite Hosp., 67 Ill. 2d 348, 352, 367 N.E.2d 1250, 1252 (1977) (court pointed out that "[i]n addition to the length of the pregnancy, viability depends on other facts which include the weight . . . of the child and the available life-sustaining techniques.").

90. *See, e.g.*, Smith v. Brennan, 31 N.J. 353, 363-65, 157 A.2d 497, 502-03 (1960).

91. *See* Kelly v. Gregory, 282 A.D. 542, 125 N.Y.S.2d 696 (1953):

> We ought to be safe in this respect in saying that legal separability should begin where there is biological separability. We know something more of the actual process of conception and foetal development now than when some of the common law cases were decided; and what we know makes it possible to demonstrate clearly that separability begins at conception.

*Id.* at 543-44, 125 N.Y.S.2d at 697.

92. W. PROSSER, *supra* note 12, at 902. *See supra* notes 14-17 and accompanying text.

93. W. PROSSER, *supra* note 12, at 910.

94. *See supra* text accompanying notes 37-40.

95. *See, e.g.*, Scott v. Kopp, 494 Pa. 487, 491, 431 A.2d 959, 961 (1981) (the court in denying a wrongful death action for the death of a stillborn child argued that the stillborn child does not have to live with "the seal of the defendant's negligence"). This argument is irrelevant when the wrongful death action is intended to compensate the parents for their suffering and loss of their child, rather than to compensate the child.

by living with it. However, just as difficulty of proof does not justify denial of a cause of action for the wrongful death of a viable fetus,[96] it should not justify denial of the same cause of action for the death of a nonviable fetus.[97] Regardless of the difficulty of proving damages, "[t]he loss incurred by the mother of a three-month-old fetus should be not less compensable than that of the mother of a seven-month-old fetus."[98]

Viability, like birth, is an arbitrary line. Courts have rejected the viability criterion when the child is born alive.[99] They should also reject the viability criterion when the child is stillborn. The real difficulties in allowing recovery for the wrongful death of a fetus are in proof of causation and damages. Where causation and damage exist, viability should not be used as a demarcation point.

## VI. Washington Law

The Washington Supreme Court has addressed the issues involved in recovery for injury or death of a fetus on three occasions.[100] In addressing these issues, the Washington court has refuted the basic arguments that have been used by other courts to deny recovery for prenatal injuries to children who are born alive and to deny recovery for the wrongful death of a viable fetus.[101]

The Washington Supreme Court has not yet faced the issue of the wrongful death of a nonviable fetus. When it does, the court should not draw the line of possible recovery at viability. Instead, the court should examine the merits of the case in light of the compensatory purpose of section 4.24.010 of the Revised Code of Washington, the minor child wrongful death statute.[102]

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96. *See supra* text accompanying notes 56-57.

97. Presley v. Newport Hospital, 117 R.I. 177, 189, 365 A.2d 748, 754 (1976).

98. Kader, *supra* note 29, at 660.

99. *See supra* notes 33-35 and accompanying text.

100. In 1962 the court allowed a cause of action for prenatal injury to a viable fetus who was born alive. Seattle-First Nat'l Bank v. Rankin, 59 Wash. 2d 288, 367 P.2d 835 (1962). In 1975 the court held that parents had a cause of action for the wrongful death of a viable fetus. Moen v. Hanson, 85 Wash. 2d 597, 537 P.2d 266 (1975). In 1983 the court recognized the torts of wrongful birth and wrongful life. Harbeson v. Parke-Davis, Inc., 98 Wash. 2d 460, 656 P.2d 483 (1983). *See infra* text accompanying notes 113-37.

101. *See supra* notes 48-53 and accompanying text.

102. *See infra* notes 108-12 and accompanying text.

### *A. Washington Statutory Law*

The recovery accorded the parents of a fetus who is injured or killed depends in large part on the interpretation of the term "minor child" in section 4.24.010 of the Revised Code of Washington.[103] The statute allows recovery by the parents of a minor child who is injured or killed.[104] If a fetus falls within the definition of a minor child, the statute allows recovery to the parents of a fetus who is wrongfully injured or killed. However, Washington courts have not yet defined the limits of the term "minor child."

The Supreme Court of Washington held in *Moen v. Hanson*[105] that a *viable* fetus was within the intended statutory definition of the term "minor child" in section 4.24.010 of the Revised Code of Washington.[106] Although the court found that no lower age limit was implied by the term, it specifically declined to rule on whether a nonviable fetus was also within the meaning of the term "minor child."[107]

The minor child wrongful death statute and subsequent judicial interpretation demonstrate the intent to compensate parents for their own personal loss.[108] Recovery under the statute is not limited to pecuniary damages.[109] Instead, the statute enumerates the damages that parents may recover for the death or injury of a minor child.[110] In *Wilson v. Lund*,[111] the Washington court held that the legislature intended the statute to cover "parental grief, mental anguish and suffering."[112]

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103. *See supra* note 8.

104. Although WASH. REV. CODE § 4.24.010 is not exclusively a wrongful death statute because it deals also with actions for injury to a minor child, the courts refer to WASH. REV. CODE § 4.24.010 as the "wrongful death statute" when a case involves the death of a minor child. *See, e.g.*, Balmer v. Dilley, 81 Wash. 2d 367, 368, 502 P.2d 456, 457 (1972). *See supra* note 8.

105. 85 Wash. 2d 597, 537 P.2d 266 (1975).

106. *Id.* at 599, 537 P.2d at 267.

107. *Id.* at 599-601, 537 P.2d at 267-68.

108. *Id.* at 598-99, 537 P.2d at 266-67.

109. *See supra* note 8.

110. Allowable damages include expenses that are actually incurred, loss of services and support, damages for loss of love and companionship, and damages for harm to the parent-child relationship. WASH. REV. CODE § 4.24.010, *supra* note 8.

111. 80 Wash. 2d 91, 491 P.2d 1287 (1971).

112. *Id.* at 97, 491 P.2d at 1291.

### *B. Washington Case Law*

In 1962 the court faced the issue of recovery for prenatal injury for the first time in *Seattle-First National Bank v. Rankin.*[113] Recognizing the "clear trend"[114] of judicial decisions, the court allowed recovery to a child for prenatal injuries. The court stated that to permit recovery was "the more just rule."[115] The *Rankin* court recognized that to allow recovery could lead to difficult problems in proving causation, but stated that "[d]ifficulty of proof does not prevent the assertion of a legal right."[116]

In 1975 in *Moen v. Hanson,*[117] the Washington Supreme Court allowed a wrongful death action by the father of a viable fetus. The court held that a viable fetus was a "minor child" within the meaning of section 4.24.010 of the Revised Code of Washington.[118] Although the court did not consider whether a nonviable fetus was also a "minor child,"[119] the court stated that "no lower age limitation is implied by the term."[120] The court discounted the defendant's claim that the action should not be allowed because of the difficulties of proof and the possibilities of fraudulent claims.[121]

The *Moen* court rejected birth as the line to be used in

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113. 59 Wash. 2d 288, 367 P.2d 835 (1962).

114. *Id.* at 291, 367 P.2d at 838.

115. *Id.*

116. *Id.*

117. 85 Wash. 2d 597, 537 P.2d 266 (1975) (action by a father for the wrongful death of an eight-month-old fetus after both mother and fetus died as a result of injuries sustained in an automobile accident).

118. *Id.* at 599-600, 537 P.2d at 267.

119. *Id.* at 601, 537 P.2d at 268.

120. The court stated that the term "minor child" marks the age of *majority* as the point beyond which wrongful death actions must be brought under WASH. REV. CODE § 4.20.010, the state's primary wrongful death statute, rather than under WASH. REV. CODE § 4.24.010, the minor child statute. *Id.* at 599, 537 P.2d at 267. Washington's primary wrongful death statute, WASH. REV. CODE § 4.20.010, authorizes a right of action by the personal representative of a "person" who is wrongfully killed. The statute is typical of the wrongful death statutes of many states because it allows recovery for pecuniary damages when the decedent would have been entitled to recover damages if death had not occurred.

> When the death of a person is caused by the wrongful act, neglect or default of another his personal representative may maintain an action for damages against the person causing the death; and although the death shall have been caused under such circumstances as amount, in law, to a felony.

WASH. REV. CODE § 4.20.010 (1983).

121. *Moen,* 85 Wash. 2d at 601, 537 P.2d at 268.

allowing a wrongful death action.[122] The court cited the logical inconsistency of the twin dilemma, in which one twin is born alive and the second twin is stillborn.[123] The court noted that "[d]enial of recovery to an unborn child tortiously killed, on the *arbitrary* grounds that the child did not survive the tort long enough to be born alive, is eminently illogical."[124]

*Moen* involved the death of a viable fetus, and the *Moen* court specifically avoided deciding "whether recovery can be had for injury to a nonviable fetus."[125] However, the court observed that "a parent's bereavement does not depend on whether or not the child survives to full term."[126] Similarly, a parent's bereavement will not depend on whether the child was viable or nonviable at the time of injury or death.[127] The Washington Supreme Court has not had to address a case of prenatal injury or death of a nonviable fetus.[128] However, the court refuted, in *Rankin* and *Moen*, the arguments against such recovery.

In 1983 the Washington Supreme Court recognized two new causes of action, "wrongful birth" and "wrongful life," in *Harbeson v. Parke-Davis, Inc.*[129] The *Harbeson* court may have answered indirectly the question that was left open in *Moen*.[130] Although the *Harbeson* court fashioned two new causes of action, the court, by allowing recovery for the birth of a defective child, effectively allowed recovery for an injury sustained before viability.[131] The *Harbeson* court defined the wrongful birth and wrongful life actions narrowly, excluding cases of wrongful conception and excluding cases in which a healthy child is born.[132]

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122. *Id.*

123. *Id.* *See supra* notes 67 and 87 for discussion of the twin dilemmas.

124. *Moen*, 85 Wash. 2d at 601, 537 P.2d at 268 (emphasis added).

125. *Id.*

126. *Id.* at 599, 537 P.2d at 267.

127. One can argue that the parents' attachment grows as the term of pregnancy progresses. However, even if true, this argument relates to the issue of damages, rather than to the existence or nonexistence of a cause of action.

128. WASH. REV. CODE § 4.24.010 covers both injury and death of the minor child. *Moen* dealt specifically with the issue of wrongful death, but interestingly, the court chose to use the word "injury" in the statement quoted in the text. It is unclear whether the court meant to say "injury," or "death," or whether the court meant both.

129. 98 Wash. 2d 460, 462, 656 P.2d 483, 486 (1983).

130. "[W]hether recovery can be had for injury to a nonviable fetus." *Moen*, 85 Wash. 2d at 601, 537 P.2d at 268.

131. But viability was not considered sufficiently relevant to warrant discussion.

132. *Harbeson*, 98 Wash. 2d at 467, 478-80, 656 P.2d at 488, 494. *See also supra* notes 42-43.

If birth of a defective child, caused by the negligence of a third person, is the issue, then these actions are not substantially different from actions for recovery for prenatal injuries, as covered by section 4.24.010 of the Revised Code of Washington. The *Harbeson* court based recovery in both the wrongful birth and the wrongful life actions on the defect and the costs attributable to the defect.[133] Furthermore, the court cited the minor child wrongful death statute to show the legislative policy of compensating parents for emotional injury.[134] The emotional injury experienced by the parents in *Harbeson* was not merely for the birth of a child. The injury compensated was the birth of a defective child.[135]

Whether the actions in *Harbeson* had been called wrongful birth and wrongful life, or recovery by the parents and the children for prenatal injuries, the defects were at issue. Without defects, the court would not have allowed the actions. The defects in *Harbeson* were caused before viability.[136] Thus, the *Harbeson* court, without relying directly on the minor child wrongful death statute, appears to have answered the question left open by the *Moen* court.[137] The *Harbeson* court permitted recovery in Washington for injury to a nonviable fetus. The next logical step would be to allow recovery for the wrongful death of a nonviable fetus.

## VII. Conclusion

Viability is not a valuable criterion for deciding whether to allow parents to recover for the wrongful death of a fetus. Viability is a legal fiction that creates logically inconsistent rules.

Washington courts have taken the steps that lead logically to permitting parents to recover for the death of a nonviable fetus. Section 4.24.010 of the Revised Code of Washington demonstrates legislative intent to compensate parents for their own personal losses as a result of the injury or death of a minor child. The extent of the loss must be decided by looking at the merits

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133. *Harbeson*, 98 Wash. 2d at 477, 483, 656 P.2d at 494, 497.

134. *Id.* at 474-75, 656 P.2d at 492-93.

135. *Id.* at 476, 656 P.2d at 493.

136. The defects were caused by Mrs. Harbeson's use of the drug Dilantin. Because Mrs. Harbeson took the drug during pregnancy, the children suffered from "mild to moderate growth deficiencies, mild to moderate developmental retardation, . . . and other physical and developmental defects." *Id.* at 463, 656 P.2d at 486.

137. *See supra* note 130.

of each case. In order to do this, Washington courts must ignore the arbitrary line of viability that other courts have drawn and include the nonviable fetus in the definition of a "minor child."

Washington courts will be able to look at each case individually if they do not distinguish between the viable and the nonviable fetus when interpreting section 4.24.010 of the Revised Code of Washington. Causation and damages will be difficult to prove. These are problems that should be addressed in each case, however. Difficulties of proof should not serve as absolute bars to recovery. Burden of proof requirements are more relevant, and less arbitrary, in cases of prenatal wrongful death than is the requirement of viability.

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