# TOWARD RATIONAL BOUNDARIES OF TORT LIABILITY FOR INJURY TO THE UNBORN: PRENATAL INJURIES, PRECONCEPTION INJURIES AND WRONGFUL LIFE

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Two recent cases, one from New York and one from Illinois, have again focused attention on injuries to the unborn. In the first of these, *Renslow v. Mennonite Hospital*,[1] the Illinois Supreme Court held that a child who suffered permanent disability to various organs, her brain and her nervous system as the result of the negligent transfusing of her Rh-negative mother with Rh-positive blood some nine years prior to the child's conception had a cause of action for negligence. In *Becker v. Schwartz*,[2] the New York Court of Appeals reversed the Appellate Division's decision in *Park v. Chessin*[3] which had recognized for the first time in American jurisprudence a "wrongful life" cause of action on behalf of a child born with a disabling kidney disease from which she died two and one-half years later. The so-called "wrongful life" count was based on the alleged malpractice of the defendant physicians in misadvising the child's prospective parents, whose previous child had died a few hours after birth from the same disease, that a second child would not suffer from the disease, thus allowing the parents to make a

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1. 67 Ill. 2d 348, 367 N.E.2d 1250 (1977).

2. 46 N.Y.2d 401 (1978).

3. 60 App. Div. 2d 80, 400 N.Y.S.2d 110 (1977). In Becker v. Schwartz, 60 App. Div. 2d 587, 400 N.Y.S.2d 119 (1977), decided the day following *Park*, the Appellate Division relied on *Park* in holding that a wrongful life cause of action on behalf of an infant born with Downs syndrome (mongolism) was stated by a complaint alleging that the defendant-physicians did not advise the infant's parents of the increased risk of Downs Syndrome in children born to women over 35 nor of the availability of an amniocentesis test to determine whether the fetus would be born with the condition.

The New York Court of Appeals decision on appeal of both *Park* and *Becker* is styled Becker v. Schwartz, 46 N.Y.2d 401 (1978).

conscious choice to seek conception of the second child. These two cases represent the most significant recent decisions in a field of tort liability that has been developing rapidly since a right of recovery for prenatal injuries was first recognized in 1946.[4]

In 1972, the Alabama Supreme Court made American jurisdictions unanimous in recognizing that one who intentionally or negligently injures an unborn fetus may be liable in damages.[5] The uniform recognition of this right of recovery represented a complete reversal of American jurisprudence in this area of the law in slightly less than thirty years.[6] The shift started with the landmark case of *Bonbrest v. Kotz*,[7] in which the District Court for the District of Columbia allowed recovery against an attending physician for injuries inflicted on an infant *en ventre sa mère* who was born alive. This case represented the first significant challenge to *Dietrich v. Northampton*,[8] the uniformly followed decision of the Massachusetts Supreme Court in which Justice Holmes denied a cause of action for injuries to the unborn. *Bonbrest*, however, expressed an idea whose time had come, and, within a few years, nearly all jurisdictions that faced the issue granted relief in some form.

Despite the general and almost immediate recognition (post-*Bonbrest*) that a cause of action exists, the courts are continuing to sort out the intricacies of the cause of action and to work out the extent of and limitations upon liability. Courts were—and to some extent still are— divided on such issues as whether the fetus must be "viable"[9] at the time of injury; whether the child must be born alive; whether an unborn infant has a cause of action for wrongful death; and, most re-

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

5. Huskey v. Smith, 289 Ala. 52, 265 So.2d 596 (1972).

6. In all jurisdictions except California, Scott v. McPheeters, 33 Cal. App. 2d 629, 92 P.2d 678 (1939) (cause of action allowed because of the particular wording of the California statute) and Louisiana, Cooper v. Blanck, 39 So. 2d 352 (La. App. 1923) (Civil Code of Louisiana held to support a cause of action), the reversal occurred through the common law process of court decision.

7. 65 F. Supp. 138 (D.D.C. 1946).

8. 138 Mass. 14 (1884).

9. As commonly used both by courts and by medical practitioners, "viability" describes the point in the life of the fetus at which it could maintain life if removed from its mother's womb. The term first arose in a legal context in Justice Boggs' dissent in Allaire v. St. Luke's Hosp., 184 Ill. 359, 56 N.E. 638 (1900), *overruled*, Amann v. Faidy, 415 Ill. 422, 117 N.E.2d 412 (1953). Biologically, the point of viability is reached somewhere between the twentieth and twenty-eighth week of pregnancy when the fetus weighs between 400 and 1000 grams. Survival of small immature fetuses is to a large extent a function of the availability of expert neonatal care. L. HELLMAN & J. PRITCHARD, WILLIAMS OBSTETRICS 493 (14th ed. 1971); STEDMAN'S MEDICAL DICTIONARY (23d ed. 1976). Courts have acknowledged that "legal" viability should begin when there is biological viability or separability. Kelly v. Gregory, 282 App. Div. 542, 125 N.Y.S.2d 696 (1953); *see* Gordon, *The Unborn Plaintiff*, 63 MICH. L. REV. 579, 589 (1965).

cently, whether a cause of action exists for "wrongful life."[10] Courts have also labored over the proper conceptual basis for allowing or denying a cause of action. For example, in the early cases, the reasons for denying recovery included the lack of a duty to an unborn fetus,[11] the difficulty of showing causation,[12] the danger of encouraging spurious or doubtful claims[13] and the lack of standing of an unborn child as a person.[14] When courts began to grant the right of recovery, the reasons given for such changes of position included the advances in medical knowledge recognizing the separate existence of the fetus from the mother,[15] the injustice of nonrecognition of a cause of action,[16] the recognition of the "personhood" of the fetus[17] and analogy to other

10. The term "wrongful life" apparently was coined by the Illinois Court of Appeals in its opinion in Zepeda v. Zepeda, 41 Ill. App. 2d 240, 190 N.E.2d 849 (1963), *cert. denied*, 379 U.S. 945 (1964), to describe a "new tort," the essence of which is the coincidence of the wrongful act with the moment of conception. In *Zepeda* the alleged wrongful act was the father's fraudulent inducement of the plaintiff's mother to perform sexual intercourse, which resulted in the subsequent illegitimate birth of the plaintiff. The term, or its twin, "wrongful birth," has also been used to describe the wrong for which compensation was sought in such cases as Williams v. State, 18 N.Y.2d 481, 223 N.E.2d 343, 276 N.Y.S.2d 885 (1966) (action against state for negligent supervision of plaintiff's mother, a patient in a New York institution, as a result of which plaintiff was born illegitimately to a mentally defective mother); Pinkney v. Pinkney, 198 So.2d 52 (Fla. Dist. Ct. App. 1967) (action against father for plaintiff's illegitimate birth); and Slawek v. Stroh, 62 Wis. 2d 295, 215 N.W.2d 9 (1974) (also an action against father for plaintiff's illegitimacy). During the last decade the term has been expanded to include any birth which allegedly should have been prevented by sterilization, contraception or abortion. In Rivera v. State, 94 Misc. 2d 157, 404 N.Y.S.2d 950 (1978), the New York Court of Claims called the term "wrongful life" an "unfortunate" one, primarily because it is inaccurate as a description either of the wrong that has been committed or of the injury suffered. *Id.* at 161, 404 N.Y.S.2d at 953. The term, nevertheless, seems to have found a place in American jurisprudence.

11. *E.g.*, Gorman v. Budlong, 23 R.I. 169, 49 A. 704 (1901), *overruled*, Sylvia v. Gobeille, 101 R.I. 76, 220 A.2d 222 (1966); Magnolia Coca Cola Bottling Co. v. Jordan, 124 Tex. 347, 78 S.W.2d 944 (1935), *overruled*, Leal v. C.C. Pitts Sand & Gravel, Inc., 419 S.W.2d 820 (1967).

12. *E.g.*, Stanford v. St. Louis-San Francisco Ry., 214 Ala. 611, 108 So. 566 (1926), *overruled*, Huskey v. Smith, 289 Ala. 52, 265 So.2d 596 (1972); Magnolia Coca Cola Bottling Co. v. Jordan, 124 Tex. 347, 78 S.W.2d 944 (1935), *overruled*, Leal v. C.C. Pitts Sand & Gravel, Inc., 419 S.W.2d 820 (1967).

13. *E.g.*, Stanford v. St. Louis-San Francisco Ry., 214 Ala. 611, 108 So. 566 (1926), *overruled*, Huskey v. Smith, 289 Ala. 52, 265 So.2d 596 (1972); Magnolia Coca Cola Bottling Co. v. Jordan, 124 Tex. 347, 78 S.W.2d 944 (1935), *overruled*, Leal v. C.C. Pitts Sand & Gravel, Inc., 419 S.W.2d 820 (1967).

14. *E.g.*, Allaire v. St. Luke's Hosp., 184 Ill. 359, 56 N.E. 638 (1900), *overruled*, Amann v Faidy, 415 Ill. 422, 117 N.E.2d 412 (1953); Dietrich v. Northampton, 138 Mass. 14 (1884).

15. *E.g.*, Bonbrest v. Kotz, 65 F. Supp. 138 (D.D.C. 1946); Huskey v. Smith, 289 Ala. 52, 265 So.2d 596 (1972); Damasiewicz v. Gorsuch, 197 Md. 417, 79 A.2d 550 (1951); Kelly v. Gregory, 282 App. Div. 542, 125 N.Y.S.2d 696 (1953).

16. *E.g.*, Chrisafogeorgis v. Brandenberg, 55 Ill.2d 368, 304 N.E.2d 88 (1973); White v. Yup, 85 Nev. 527, 458 P.2d 617 (1969).

17. *E.g.*, White v. Yup, 85 Nev. 527, 458 P.2d 617 (1969); Williams v. Marion Rapid Transit, 152 Ohio St. 114, 87 N.E.2d 334 (1949).

branches of the law.[18] Some courts made a distinction between cases in which a child received permanent injuries not causing death and wrongful death actions,[19] while others failed to recognize the conceptual and practical differences involved in the adjudication of these cases.[20] Determining the proper foundation of the duty of care toward the unborn has proven particularly difficult because some of the developments in tort law cannot be squared with compelling analogies to other branches of the law.[21]

The recent decisions in Illinois and New York provide an appropriate occasion for an examination of the current state of the law of injuries to the unborn and for an analysis of the underlying legal policies. First, this Article will trace the development of tort causes of action for prenatal injuries from the denial of such actions in early cases to the their acceptance in current law. The Article then will discuss several suggested theoretical bases for the cause of action for prenatal injuries and will resolve that the proper conceptualization is of a duty contingent upon live birth—thus rejecting the requirement of viability. Finally, the Article will turn to a discussion of the "New Jurisprudence," defending the *Renslow* decision and the ultimate disposition of the *Park* case by the New York Court of Appeals in *Becker*.

## I. HISTORICAL DEVELOPMENT

### A. *The Era of Nonliability.*

Although the history of the development of the concept that one may be liable for injury to the unborn is an often-told tale,[22] it forms such an integral part of the analysis that it is necessarily a part of any

18. *E.g.*, Tucker v. Howard L. Carmichael & Sons, 208 Ga. 201, 65 S.E.2d 909 (1951); Fowler v. Woodward, 244 S.C. 608, 138 S.E.2d 42 (1964).

19. *E.g.*, Endresz v. Friedberg, 24 N.Y.2d 478, 248 N.E.2d 901 (1969); Carroll v. Skloff, 415 Pa. 47, 202 A.2d 9 (1964).

20. *E.g.*, Verkennes v. Corniea, 229 Minn. 365, 38 N.W.2d 838 (1949); Poliquin v. MacDonald, 101 N.H. 104, 135 A.2d 249 (1957).

21. As will be discussed below, see text accompanying notes 25-28 *infra*, the criminal law and the laws pertaining to descent and distribution of property have acknowledged the separate existence of the unborn child from the moment of conception and the corresponding duty owed either to the state (criminal law) or to the child (property) for its protection from an early age. Many recent cases have predicated the existence of a cause of action in tort on the existence of life prior to birth and the corresponding duty. *See, e.g.*, *Renslow*, 67 Ill.2d at 355, 367 N.E.2d at 1254. *But see id.* at 374, 367 N.E.2d at 1263 (Ryan, J., dissenting) (majority's conception of duty in that case is "a tacit acceptance of causation as the sole determinant of liability").

22. *See, e.g.*, Gordon, *supra* note 9; Louisell, *Abortion, The Practice of Medicine, and the Due Process of Law*, 16 U.C.L.A. L. REV. 233, 241-43 (1969); Note, *The Law and the Unborn Child: The Legal and Logical Inconsistencies*, 46 NOTRE DAME LAW. 349, 354-60 (1971); Note, *Recovery for Prenatal Injuries: The Right of a Child Against Its Mother*, 10 SUFFOLK L. REV. 582, 583-90 (1976).

discussion of the concept. If, in the process of retelling, any new insights are developed, so much the better.

Any discussion of the history and background of the law of liability in tort for injury to the unborn usually begins with the case of *Dietrich v. Northampton*,[23] which appears to be the first reported case on this subject in a common law jurisdiction. As background for that case, however, one should be aware of the common law in two other fields—the criminal law and the law of property. Since most of the early American cases referred to Coke and Blackstone as their authorities on this subject,[24] this brief excursion into the pre-*Dietrich* common law may rest with some security on quotations from these early authorities.

The early common law recognized that the life of an unborn child was entitled to the legal protection of the criminal law from the time it stirred in its mother's womb. As stated by Coke in his *Third Institute*:

> If a woman be quick with child and by a potion or other wise killeth it in her womb, or if a man beat her, whereby the child dieth in her body and she is delivered of a dead child, this is a great misprision, and no murder, but if the child be born alive and dieth of the potion, battery, or other cause, this is murder; for in law it is accounted a reasonable creature, in *rerum natura* when it is born alive.[25]

Blackstone, in his *Commentaries*, stated essentially the same concept:

> Life is the immediate gift of God, a right inherent by nature in every individual; and it begins in contemplation of law as soon as an infant is able to stir in the mother's womb. For if a woman is quick with child, and by a potion, or otherwise, killeth it in her womb; or if any one beat her, whereby the child dieth in her body, and she is delivered of a dead child; this, though not murder, was by the ancient law homicide or manslaughter. But the modern law doth not look upon this offence in quite so atrocious a light, but merely as a very heinous misdemeanor.[26]

As to the law of property he added:

> An infant *in ventre sa mere*, or in the mother's womb, is supposed in law to be born for many purposes. It is capable of having a legacy, or a surrender of a copyhold estate made to it. It may have a guardian assigned to it; and it is enabled to have an estate limited to it's [*sic*] use, and to take afterwards by such limitation, as if it were

23. 138 Mass. 14 (1884).

24. *See, e.g.*, Allaire v. St. Luke's Hosp., 184 Ill. 359, 56 N.E. 638 (1900), *overruled*, Amann v. Faidy, 415 Ill. 422, 117 N.E.2d 412 (1953); Dietrich v. Northampton, 138 Mass. 14 (1884).

25. E. COKE, THIRD INSTITUTE 50 (1792).

26. 1 W. BLACKSTONE, COMMENTARIES *129-30.

then actually born. And in this point the civil law agrees with ours.[27]

Although not stated by Blackstone, a further requirement in the law of property was that the child be born alive.[28]

With that legal background, the Massachusetts Supreme Court in *Dietrich* refused to extend the criminal- and property-law precedents to include a cause of action in tort. Apart from the lack of precedent, which in his view was a substantial reason for denying a cause of action, Justice Holmes had difficulty with the proposition that an infant dying before it was able to live separate from its mother "could be said to have become a person recognized by the law as capable of having a *locus standi* in court, or being represented there by an administrator."[29] The factor which seemed finally persuasive to Holmes, however, was that the unborn child "was a part of the mother at the time of the injury, [and] any damage to it which was not too remote to be recovered for at all was recoverable by her . . . ."[30]

Another influential early case was the Irish decision of *Walker v. Great Northern Railway of Ireland*.[31] In sustaining a demurrer to a claim against a common carrier for injury to a child *en ventre sa mère*, Chief Justice O'Brien reasoned that any duty to the child must flow from the contract of carriage, and, since the existence of the child was not known to the carrier, no duty could exist.[32] Associate Justice O'Brien agreed that the contract of carriage was for only one person, but he also felt that there were additional reasons for denying recovery, the principal one being the danger of indefinite and unknown expansion of actions. His colorful and much-quoted language bears repeating:

> What a field would be opened to extravagance of testimony, already great enough—if Science could carry her lamp, not over certain in its light where people have their eyes into the unseen laboratory of nature—could profess to reveal the causes and things that are hidden there—could trace a hare-lip to nervous shock, or a bunch of grapes on the face to fright—could, in fact, make *lusus naturae* the same thing as *lusus scientiae* . . . . The law is in some respects a stream

27. *Id.* 130.

28. Knotts v. Stearns, 91 U.S. 638 (1875); Detrick v. Migatt, 19 Ill. 146 (1857); The Earl of Bedford's Case, 77 Eng. Rep. 421 (1586); 3 WASHBURN ON REAL PROPERTY 16 (5th ed. 1887).

29. 138 Mass. at 16.

30. *Id.* at 17.

31. 28 L.R. Ir. 69 (Q.B. 1890).

32. *Id.* at 79. Although the Irish court did not cite Winterbottom v. Wright, 10 M. & W. 109, 152 Eng. Rep. 402 (1842), it is interesting to speculate whether the court may have been influenced by that case. The reader will recall that *Winterbottom* predicated liability in what would now be called a "products liability" case on "privity." This "detour" from the mainstream of the development of the law of negligence lasted in American jurisprudence until McPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916).

> that gathers accretions with time from new relations and conditions. But it is also a landmark that forbids advance on defined rights and engagements; and if these are to be altered, if new rights and engagements are to be created, that is the province of legislation and not of decision.[33]

The next case to arise was *Allaire v. St. Luke's Hospital*,[34] which was decided by the Illinois Supreme Court in 1900. In that case, the plaintiff's mother, her pregnancy having gone its full term, had entered the defendant hospital for the purpose of delivering the plaintiff. According to the complaint, the unborn child was seriously and permanently disabled by a malfunctioning elevator in the hospital. In a *per curiam* opinion that merely concurred in the views of the appellate court which in turn had relied solely on *Dietrich* and *Walker*, the Illinois Supreme Court denied that a cause of action existed. *Allaire*, although one of the trilogy of prenatal injury cases upon which principal reliance was placed for the next forty-six years, is also of major significance because of the strong and well-reasoned dissent of Justice Boggs.[35]

After first providing a succinct essay on the nature and quality of the common law and its unique ability to apply existing principles to novel fact situations,[36] Boggs found that the "governing principle" was "that the common law, by way of damages, gave redress for personal injuries inflicted by the wrong or neglect of another."[37] He then concluded that the case was "embraced within the limits of the principle" and "could have been maintained at common law unless the fact [that] the plaintiff was unborn when the alleged injuries were inflicted would have operated to deny a right of action."[38]

Boggs then argued that the fact that the injuries were inflicted prior to birth should not operate to deny a right of action. He asserted that while a fetus might be regarded as part of its mother during the early period of its gestation, once it became viable "it is but to deny a palpable fact to argue there is but one life, and that the life of the

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33. 28 L.R. Ir. at 81-82.

34. 184 Ill. 359, 56 N.E. 638 (1900), *overruled*, Amann v. Faidy, 415 Ill. 422, 117 N.E.2d 412 (1953).

35. 184 Ill. at 368, 56 N.E. at 640. Justice Boggs' stance was subsequently adopted when *Allaire* was overruled in 1953. Amann v. Faidy, 415 Ill. 422, 117 N.E.2d 412 (1953).

36. The common law "would be an absurd science were it founded on precedents only." 184 Ill. at 368, 56 N.E. at 640, (quoting 1 KENT COMMENTARIES 477 (13th ed. 1884)). "New and peculiar cases must arise . . . for which the court must find the governing principle." 184 Ill. at 369, 56 N.E. at 641 (quoting T. COOLEY, LAW OF TORTS 13 (1878)).

37. 184 Ill. at 369-70, 56 N.E. at 641.

38. *Id.* at 370, 56 N.E. at 641.

mother."[39] After recognizing the common law rules applicable to the unborn in criminal and property cases and the anomaly of denying similar treatment in tort, Boggs added:

> In the case at bar the infant, when the injury was inflicted, had, as the declaration alleged, reached that advanced stage of foetal life which would have, according to the medical learning of the age, endowed it with such vitality and vigor, and with members and faculties so far complete and mature, that it could have maintained independent life, and the death of the mother would not have deprived it of life. It is but natural justice that such an infant, if born alive, should be allowed to maintain an action in the courts for injuries so wrongly committed upon its person while so in the womb of the mother.[40]

Boggs distinguished *Dietrich* on the ground that the fetus in that case had not reached the stage of viability. Likewise, *Walker* was not pertinent because in that case the court could find no duty to a plaintiff whose existence was unknown to the defendant common carrier. In the present case, however, "the appellee hospital knew of the condition of the mother, and of the existence of the plaintiff in her womb, contracted with direct reference to the safety and care of both mother and child, and received compensation for the performance of a duty to both."[41]

Boggs' persuasive plea was of little effect, however, and for the next forty-six years the almost uninterrupted course of the law was to deny a cause of action for prenatal injuries.[42] Rhode Island joined the parade in 1901,[43] Missouri in 1913[44] and Wisconsin in 1916.[45] When the New York Court of Appeals weighed in on the same side in *Drobner v. Peters*,[46] the fate of the injured unborn seemed to be sealed. With hardly a dissenting voice,[47] the courts of other jurisdictions, faced

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39. *Id.*

40. *Id.* at 372, 56 N.E. at 641-42.

41. *Id.* at 373, 56 N.E. at 642.

42. The rule in *Dietrich* was also followed in other common law jurisdictions outside of the United States. *See, e.g.*, Manns v. Carlon, [1940] Vict. L.R. 280 (Australia); Smith v. Fox, [1923] 3 D.L.R. 785 (Ont. Sup. Ct. 1922) (Canada); Walker v. Great N. Ry. of Ire., 28 L.R. Ir. 69 (Q.B. 1890) (Ireland).

43. Gorman v. Budlong, 23 R.I. 169, 49 A. 704 (1901), *overruled*, Sylvia v. Gobeille, 101 R.I. 76, 220 A.2d 222 (1966).

44. Buel v. United Rys., 248 Mo. 126, 154 S.W. 71 (1913), *overruled*, Stegall v. Morris, 363 Mo. 1224, 258 S.W.2d 577 (1953).

45. Lipps v. Milwaukee Elec. Ry. & Light Co., 164 Wis. 272, 159 N.W. 916 (1916).

46. 232 N.Y. 220, 133 N.E. 567 (1921), *overruled*, Woods v. Lancet, 303 N.Y. 349, 102 N.E.2d 691 (1951). Cardozo dissented but did not write an opinion.

47. In addition to Justice Boggs' dissent in *Allaire*, there were a few other dissenting voices. In 1924, a trial court in Pennsylvania overruled a demurrer to a complaint alleging prenatal injuries resulting in a child's birth 11 days later with a physical deformity. Kine v. Zuckerman, 4 Pa. D. & C. 227 (1924). The court in *Kine* recognized that it was acting without precedent in Pennsylvania and against the weight of authority in other jurisdictions but nevertheless upheld a cause

with a claim for damages by a living infant for prenatal injuries or for wrongful death of an infant from prenatal injuries, followed suit.[48] The American Law Institute adopted the view of this overwhelming majority and provided in the Restatement of Torts that "[a] person who negligently causes harm to an unborn child is not liable to such child for the harm."[49]

The tenacity of the courts in clinging to precedents denying causes of action for injuries to the unborn until the middle of the twentieth century is surprising in light of the advances in medical knowledge that were occurring during this period.[50] Although the denial of a right of recovery for prenatal injuries on the theory that "the unborn child was a part of the mother"[51] may have been in accord with the state of medical knowledge in 1884,[52] by the late 1920s, or certainly in the 1930s and early 1940s, when the courts of Alabama,[53] Texas,[54] Michigan,[55] New

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of action on several grounds: the analogy to the criminal and property law; the modern scientific fact that a fetus has a separate existence from the mother (an independent circulatory system); and the invalidity and want of persuasiveness of the reasons against recovery cited by the New York Court of Appeals in *Drobner*. In Korman v. Hagen, 165 Minn. 320, 206 N.W. 650 (1925), without any discussion of whether the injuries occurred prior to the plaintiff's birth, the court affirmed a jury damage award to an infant injured by the attending physician's negligence during delivery. *See* Stemmer v. Kline, 128 N.J.L. 455, 459, 26 A.2d 489, 684 (1942) (Brogan, C.J., dissenting), *overruled*, Smith v. Brennan, 31 N.J. 353, 157 A.2d 497 (1960). See authorities cited at note 6 *supra*.

The most eloquent appeal for a more humane and rational approach to the issue of liability for prenatal injuries was sounded by the Supreme Court of Canada in Montreal Tramways v. Leveille, [1933] 4 D.L.R. 337. See text accompanying notes 61-62 *infra*.

48. A summary of the status of the law in American jurisdictions on these two issues shortly after the *Bonbrest* decision is contained in 10 A.L.R.2d 639 (1950) and 10 A.L.R.2d 1059 (1950).

49. RESTATEMENT OF TORTS § 869 (1939). The comment emphasized that the section was applicable only to unintentional harms, and an explanatory note stated that the Institute took no position upon the question of liability for intentional or reckless injuries to mother or child.

50. Of course, legal science cannot be a slave to medical science any more than it can be to philosophy, logic or theology. Thus, separate *legal* existence need not correspond to separate *biological* existence. Factors such as causation, lack of precedent, difficulties of proof and the danger of spurious and conjectural claims, all of which were assigned at one time or another as reasons for denial of a cause of action for prenatal injuries, see text accompanying notes 11-14 *supra*, are appropriate for consideration in determining whether a living thing should be considered as separate for the purpose of creating a duty in others to protect it from wrongful injury. On the other hand, courts cannot remain oblivious to advances in medical knowledge—as the tort decisions following *Dietrich* seem to have done.

51. Dietrich v. Northampton, 138 Mass. 14, 17 (1884).

52. *But see* the abortion resolution passed by the American Medical Association in 1859 as quoted in Roe v. Wade, 410 U.S. 113, 141-42 (1973).

53. Stanford v. St. Louis-San Francisco Ry., 214 Ala. 611, 108 So. 566 (1926), *overuled*, Huskey v. Smith, 289 Ala. 52, 265 So.2d 596 (1972).

54. Magnolia Coca Cola Bottling Co. v. Jordan, 124 Tex. 347, 78 S.W.2d 944 (1935), *overruled*, Leal v. C.C. Pitts Sand & Gravel Co., 419 S.W.2d 820 (1967).

55. Newman v. Detroit, 281 Mich. 60, 274 N.W. 710 (1937), *overruled*, Womack v. Buchhorn, 384 Mich. 718, 187 N.W.2d 218 (1971).

Jersey,[56] Pennsylvania[57] and Ohio[58] faced the issue as one of first impression, this could no longer be said to be true. Standard medical works of the period recognized the separate biological existence of the fetus,[59] and an impressive body of medical knowledge concerning the effect of the prenatal environment on the unborn human fetus was accumulating.[60] This growth of medical knowledge should have exploded not only the no-separate-existence belief but also should have quieted the fears of those jurists who were wary of the possibility of speculative and conjectural claims and of the difficulties of proving causation. In fact, the state of medical knowledge at that time was such that the term "fiction" could more aptly have been applied to the various courts' continued denial of separate existence of the fetus than to what Holmes in *Dietrich* said was the "fiction" of separate existence indulged in by the common law concerning criminal responsibility and property rights.

The legal—as opposed to the medical—infirmity of the Holmes position was pointed out dramatically in *Montreal Tramways v.*

56. Stemmer v. Kline, 128 N.J.L. 455, 26 A.2d 489 (1942), *overruled*, Smith v. Brennan, 31 N.J. 353, 157 A.2d 497 (1960); Ryan v. Public Serv. Coordinated Transp., 18 N.J. Misc. 429, 14 A.2d 52 (Sup. Ct. 1940). Chief Justice Brogan in dissent sharply criticized the *Dietrich* case and the majority's reliance on *Dietrich* on the ground that it was decided on a wrong factual basis—that is, that the fetus is a part of the mother. 128 N.J.L. at 465-66, 26 A.2d at 686-87.

57. Berlin v. J.C. Penney Co., 339 Pa. 547, 16 A.2d 28 (1940), which apparently overruled, *sub silentio*, Kine v. Zuckerman, 4 Pa. D. & C. 227 (1924). See note 47 *supra*.

58. Mays v. Weingarten, 82 N.E.2d 421 (Ohio App. 1943).

59. Although the term "separate biological existence" was not used in the medical literature of the time, standard medical texts on obstetrics, gynecology, embryology and morphology were in agreement on the basic biological facts of the early development of the human embryo and fetus. According to that literature, the fertilized ovum lives off its surroundings for the first few days after conception. At about the fifth or sixth day it is implanted in the uterus. The embryo remains nonvascular through the third week, but in the fourth week its heart begins to beat, suggesting the beginning of blood circulation. At this point, although the fetus remains dependent on the mother for nourishment until its birth, its bodily functions may be said to be independent of those of the mother, giving the fetus a separate biological existence. *See, e.g.*, J. DeLEE & J. GREENHILL, PRINCIPLES AND PRACTICE OF OBSTETRICS 40-41 (8th ed. 1943); M. GILBERT, BIOGRAPHY OF THE UNBORN 12, 24, 25-26 (1938); W. HAMILTON, J. BOYD & H. MOSSMAN, HUMAN EMBRYOLOGY 87 (1947); O. HERTWIG, TEXTBOOK OF THE EMBRYOLOGY OF MAN AND MAMMALS 260 (5th ed. 1912); MORRIS' HUMAN ANATOMY 33-36, 47 (C. Jackson ed. 1925); Patten & Hartman, *The Early Development of the Embryo*, in 1 OBSTETRICS AND GYNECOLOGY 401 (A. Curtis ed. 1933).

The unborn infant goes through several developmental stages before reaching the stage technically denominated a "fetus" (*e.g.*, zygote, morula, embryo). For simplicity, however, the term "fetus" is used in this Article to refer to the unborn infant at all stages of development.

60. This new medical knowledge included discoveries of the correlation between birth defects and the incidence of rubella, the Rh-factor, radiation, vitamin deficiencies, thyroid and iodine deficiencies, oxygen deficiency, mechanical impact and the toxoplasm organism. *See* L. AREY, DEVELOPMENTAL ANATOMY 12-14, 155-56, 166, 172-74 (5th ed. 1947); D. MURPHY, CONGENITAL MALFORMATIONS 66-83 (1940).

*Leveille*,[61] in which the Canadian Supreme Court, though deciding the case principally on the basis of the civil law of Quebec, carefully considered the common law precedents. It stated:

> If a child after birth has no right of action for pre-natal injuries, we have a wrong inflicted for which there is no remedy, for, although the father may be entitled to compensation for the loss he has incurred and the mother for what she has suffered, yet there is a residuum of injury for which compensation cannot be had save at the suit of the child. If a right of action be denied to the child it will be compelled, without any fault on its part, to go through life carrying the seal of another's fault and bearing a very heavy burden of infirmity and inconvenience without any compensation therefor. To my mind it is but natural justice that a child, if born alive and viable, should be allowed to maintain an action in the Courts for injuries wrongfully committed upon its person while in the womb of its mother.[62]

B. *The Recognition of Liability.*

Despite the force and logic of the Canadian Court's opinion in *Montreal Tramways* in 1933, it fell to the United States District Court for the District of Columbia more than a decade later to rescue this area of compensation law from the strictures that had bound it since *Dietrich*. The case was *Bonbrest v. Kotz*,[63] in which a living infant asserted a "right of action springing from the alleged fact it was taken from its mother's womb through professional malpractice, with resultant consequences of a detrimental character."[64] The question was a novel one in the District of Columbia, and Judge McGuire therefore was not bound by the overwhelming weight of authority in other jurisdictions. While acknowledging Holmes' famous dictum that "[t]he life of the law has been *not* [*sic*] *logic*; it has been *experience*,"[65] Judge McGuire was persuaded that blind adherence to authority could not prevail against the medical knowledge of the time and that the unassailable logic of *Montreal Tramways* dictated the extension of the legal principle to parallel the progress made in science and medicine since 1884. As a result, he found that the duty of the physicians—"employed as the defendants were in this case to attend, in their professional capacities, both the mother and child"[66]— extended to the afterborn child

61. [1933] 4 D.L.R. 337 (Can. Sup. Ct.).

62. *Id.* at 345.

63. 65 F. Supp. 138 (D.D.C. 1946).

64. *Id.* at 139.

65. *Id.* at 142 (emphasis added by court) (quoting O. HOLMES, THE COMMON LAW Lecture 1, (1881)).

66. 65 F. Supp. at 142.

for injuries inflicted upon it before its birth but while it was viable.

Just as the *Dietrich* rule had been followed almost without dissent in the ensuing years, *Bonbrest* received almost immediate and uniform acceptance by the courts of other jurisdictions. Within three years, the Ohio Supreme Court upheld a cause of action on behalf of an infant born with permanent disabilities allegedly resulting from injuries received while a viable fetus.[67] In the same year, the Minnesota Supreme Court recognized a cause of action for the wrongful death of an *unborn* viable fetus.[68] Two years later the New York Court of Appeals overruled *Drobner v. Peters*[69] in a decision upholding a cause of action for negligent injuries sustained by an infant in its mother's womb in the ninth month of pregnancy.[70] With one of the principal citadels of the no-cause-of-action principle breached, the decisions of other jurisdictions followed in an almost unbroken chain.[71]

The road to recovery for unborn plaintiffs was not an easy one. Nor was it without sharp turns and twists as the courts worked out a conceptual framework to support recovery after more than half a century of blind adherence to the precepts of *Dietrich*. When denial of a cause of action was automatic for any prenatal injuries, courts did not have to face the more subtle issues posed as recovery was allowed. The early post-*Bonbrest* cases involved *viable* fetuses; in cases of both wrongful death and of injuries resulting in post-birth disabilities these early decisions—either expressly or by implication—limited their holdings to injuries to a viable fetus.[72] Within a few years, however, the illogic,[73] lack of factual medical support[74] and injustice[75] of this restriction became apparent, and most courts eliminated the requirement of viability in injury cases, requiring only that a causal connection between injury and damage be shown.[76] Further, when denial of a

67. Williams v. Marion Rapid Transit, Inc., 152 Ohio St. 114, 87 N.E.2d 334 (1949).

68. Verkennes v. Corniea, 229 Minn. 365, 38 N.W.2d 838 (1949).

69. 232 N.Y. 220, 133 N.E. 567 (1921).

70. Woods v. Lancet, 303 N.Y. 349, 102 N.E.2d 691 (1951). The infant was permanently disabled.

71. See text accompanying note 5 *supra*. Subsequent to *Bonbrest*, the courts of at least two jurisdictions handed down decisions clinging to earlier denial-of-recovery precedents. Bliss v. Passanesi, 326 Mass. 461, 95 N.E.2d 206 (1950); Estate of Powers v. Troy, 380 Mich. 160, 156 N.W.2d 530 (1968). These have subsequently been overruled. Keyes v. Construction Serv., Inc., 340 Mass. 633, 165 N.E.2d 912 (1960); O'Neill v. Morse, 385 Mich. 130, 188 N.W.2d 785 (1971).

72. *See, e.g.*, Damasiewicz v. Gorsuch, 197 Md. 417, 79 A.2d 550 (1951); Verkennes v. Corniea, 229 Minn. 365, 38 N.W.2d 838 (1949); Woods v. Lancet, 303 N.Y. 349, 102 N.E.2d 691 (1951); Williams v. Marion Rapid Transit, Inc., 152 Ohio St. 114, 87 N.E.2d 334 (1949).

73. *See* Bennett v. Hymers, 101 N.H. 483, 147 A.2d 108 (1958).

74. *See Id.*; Smith v. Brennan, 31 N.J. 353, 157 A.2d 497 (1960).

75. *See* Smith v. Brennan, 31 N.J. 353, 157 A.2d 497 (1960).

76. *E.g.*, Hornbuckle v. Plantation Pipe Line Co., 212 Ga. 504, 93 S.E.2d 727 (1956); Daley v.

right of recovery was automatic, the courts did not have to distinguish in logic or in law between the wrongful death cause of action and the disability-producing injury case. Once liability was recognized, however, the issue of live birth became one of preeminent importance in wrongful death actions, and it continues to be a source of disparate treatment in different jurisdictions. The so-called "wrongful life" causes of action have recently been sources of litigation and promise to increase in frequency.

Courts have yet to grapple with a number of issues that are certain to be raised in the near future. These may include the right of action of the unborn against its mother for failure to provide a healthful prenatal environment, when, for example, the mother is a drug addict, an alcoholic or an habitual and heavy smoker;[77] the right of action against the mother for a botched self-abortion attempt resulting in temporary or permanent disability of the child;[78] or the right of action against a parent with a known genetic defect for causing the birth of a child with the same genetic defect.[79] Further, some courts have had difficulty in harmonizing the developing law of tort—in which the separate existence and personality of the fetus for the purpose of maintaining a tort cause of action has been increasingly recognized—with the current law of abortion in which the life of the fetus (at least until viability) is subordinated to the mother's right of privacy.[80] These divergent trends may lead to anomalies such as existed pre-*Bonbrest* between criminal and property cases and tort cases. Although no attempt will be made to provide answers to all of these undecided questions, this Article will analyze the existing cases in such a way that the framework that emerges may provide some coherent basis for approaching new issues as they appear.

## II. TOWARD A COHERENT THEORY OF LIABILITY

The device of the common law for placing a limitation on tort liability, particularly liability for negligence, is the concept of duty.

Meier, 33 Ill. App. 2d 218, 178 N.E.2d 691 (1961); Smith v. Brennan, 31 N.J. 353, 157 A.2d 497 (1960).

77. The possibility of a cause of action in such cases was examined in Note, SUFFOLK L. REV., *supra* note 22.

78. Readers will recall the highly publicized case of Marla Pritchard, who was tried and acquitted in Kentucky for the gruesome death of her unborn child as a result of her inept attempt at self-abortion. Chicago Tribune, Aug. 31, 1978, at 1, col. 2. Had the outcome been a living but deformed child, would the child have had a cause of action against its mother?

79. To date, actions for such recovery have been against physicians who have allegedly negligently failed to prevent birth (by sterilization, contraception or abortion) where a genetic defect was probable. See text accompanying notes 244-88 *infra*.

80. *See* Roe v. Wade, 410 U.S. 113 (1973).

Whether expressed in the *Palsgraf* foreseeable-plaintiff formula,[81] the much-criticized *Polemis* formula of direct consequences to the injured person,[82] the *Wagon Mound II* foreseeability-of-the-risk test[83] or the manifold, all-purpose formulations proposed by other courts and scholars of the common-law system,[84] the concept of "duty" is the way the common law makes the policy determination of how far liability shall extend. Since this *is* a policy delimitation, it is always a question for the judge; when he determines that there is no "duty" he is, in the words of Holmes, saying that "the law does not spread its protection so far."[85]

In the pre-*Bonbrest* cases, then, the courts were saying, for reasons sufficient under the prevailing state of medical knowledge, social and economic mores, and shared notions of what was right and just, that the protection of the law should not spread so far as to protect against injuries to the unborn. The line of duty so drawn was clear, simple and thus easy to apply. Yet when the courts became ready to acknowledge that this duty boundary had been drawn too narrowly—that it was inconsistent with current medical knowledge and changing societal views of justice—a new outer boundary had to be found, one that not only would accommodate these changes, but also would fit within one of the traditional legal formulas. Under these circumstances, courts naturally proceeded cautiously so that in the process of extending the boundaries of duty they would avoid the creation of unlimited liability. Initially, courts drew the line at the concept of viability.[86]

### A. *The Requirement of Viability.*

Since the pre-*Bonbrest* cases rested on the theory that a fetus has no existence separate from its mother and thus no duty toward such a "nonexistent" being could arise, it was to be expected that the early post-*Bonbrest* decisions should find a duty most clearly in those cases in which the fetus was viable—that is, where it had reached the stage of development where life could be maintained outside the mother's womb.[87] In these cases, the "personhood" and separate existence of the

81. Palsgraf v. Long Island R.R., 248 N.Y. 339, 162 N.E. 99 (1928).

82. *In re* Polemis, [1921] 3 K.B. 560 (C.A.).

83. Overseas Tankship (U.K.), Ltd. v. Miller Steamship Co. [1966] 2 All E.R. 709 (P.C.).

84. *See, e.g.*, Heaven v. Pender, 11 Q.B.D. 503 (C.A. 1883) (foreseeability of harm to plaintiff); Donoghue v. Stevenson [1932] A.C. 562 (Scot.) (closely and directly affected plaintiff). *See generally* Prosser, *Palsgraf Revisited*, 52 MICH. L. REV. 1 (1953).

85. This insight is from the splendid article of Professor Leon Green, *Foreseeability in Negligence Law*, 61 COLUM. L. REV. 1401, 1407 (1961).

86. See text accompanying note 72 *supra*.

87. See note 9 *supra*.

child were most clearly apparent, and courts could most readily find a duty of care. Such a duty was found by courts deciding both the claims of surviving infants seeking damages for disabilities resulting from prenatal injuries[88] ("injury" cases) and the wrongful death actions of survivors of infants born alive but subsequently dying as a result of prenatal injuries.[89]

Since most early cases allowing recovery involved a viable fetus, it is difficult to conclude whether the courts were stating a rule that limited recovery only to cases in which the fetus was viable at the time of the injury or whether they were merely limiting their holdings to the facts before them.[90] As new and increasingly diverse fact situations were litigated, however, it became apparent that the viability-at-time-of-injury criterion made little practical, legal or medical sense in injury cases. The rubella cases suggest the illogic of such a rule.

Rubella— or German measles—is a relatively mild contagious disease, which, when contracted by either children or adults, produces only minor unpleasantness during its acute stage and normally no permanent harm whatever. Some cases are of such low order that the adult contracting the disease does not display any clinical symptoms.[91] When contracted by a mother in the early months of pregnancy, however, the effects on the fetus can be devastating. These effects are probably the best-documented example of postnatal disability resulting from prenatal harm.[92] The more commonly caused disabilities include eye defects, hearing losses and heart defects.[93] Correlation between rubella in the first trimester of pregnancy and postnatal disabilities is

88. *See, e.g.*, Tucker v. Howard L. Carmichael & Sons, 208 Ga. 201, 65 S.E.2d 909 (1951); Damasiewicz v. Gorsuch, 197 Md. 417, 79 A.2d 550 (1951); Woods v. Lancet, 303 N.Y. 349, 102 N.E.2d 691 (1951); Kelly v. Gregory, 282 App. Div. 542, 125 N.Y.S.2d 696 (1953); Williams v. Marion Rapid Transit, Inc., 152 Ohio St. 114, 87 N.E.2d 334 (1949).

89. *See, e.g.*, Steggall v. Morris, 363 Mo. 1224, 258 S.W.2d 577 (1953); Jasinsky v. Potts, 153 Ohio St. 529, 92 N.E.2d 809 (1950).

90. In Tucker v. Howard L. Carmichael & Sons, 208 Ga. 201, 65 S.E.2d 909 (1951), the court placed emphasis on the fact that the child was "fully developed," but as clarified in Hornbuckle v. Plantation Pipe Line Co., 212 Ga. 504, 93 S.E.2d 727 (1956), the holding was not limited to cases in which injuries occurred after the unborn infant had reached that stage of development. Similarly, in Poliquin v. MacDonald, 101 N.H. 104, 135 A.2d 249 (1957), the New Hampshire Supreme Court apparently established viability at the time of injury as a criterion, but only a year later in Bennett v. Hymers, 101 N.H. 483, 147 A.2d 108 (1958), dropped viability at the time of injury as a prerequisite, at least for a child born alive and suffering permanent damage from the prenatal injury.

91. Avery, Monif, Sever & Leikin, *Rubella Syndrome After Inapparent Maternal Illness*, 110 AM. J. OF DISEASES OF CHILDREN 444 (1965).

92. *See, e.g.*, Heggie, *Rubella: Current Concepts in Epidemiology and Teratology*, 13 PED. CLINIC OF N. AMERICA 251 (1966); Kalodner, *Obstetric Problems Associated with Rubella*, in RUBELLA 123 (H. Friedman & J. Prier eds. 1973).

93. Heggie, *supra* note 92, at 251.

high,[94] and, subject to such considerations as the parents' religious, moral, social or philosophic beliefs, therapeutic abortion is often recommended when contraction of rubella by the mother during this critical period is medically confirmed.[95] The apparent cause of the damage to the fetus is the attack upon the cell-growth process by the virus, which is transmitted through the bloodstream to the placenta and thence to the fetus. The greatest effect is on the three- to eight-week old fetus, since this is the critical period of organ development.[96]

Similar effects on the early-stage fetus can be caused by a number of phenomena, including trauma, other diseases, drugs and perhaps even emotional distress.[97] Since essentially all of the vital organs take form at a very early stage of fetal life, the most serious postnatal disabilities result from injuries occurring in the first trimester of pregnancy—long before viability.[98] From a medical point of view, therefore, it makes little sense to condition recovery on the viability of the fetus at the time of injury. The question courts have had to resolve is whether the results of this increased medical knowledge can be translated into a suitable formulation of duty upon which tort liability can be predicated.

The pre-*Bonbrest* cases, in essence, amounted to statements that one did not owe a duty of care to someone who would not come into full existence until sometime in the future—someone who, at the time of the infliction of the injury, was not an independent "person."[99] In the early post-*Bonbrest* cases, the requirement of viability permitted the retention of personhood as the predicate of an existence of duty, since a

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94. L. HELLMAN & J. PRITCHARD, *supra* note 9, at 810.

95. Doctors as well as parents have been troubled by the question of which cases are "appropriate" for abortion. If the incidence of postnatal deformity or disability is 20%, then abortion will result in killing four healthy fetuses for every defective one. As stated by one eminent obstetrician:

> For the woman who contracts rubella in the first trimester of pregnancy, the risk of bearing a child with serious congenital defects is increased by a factor of five. To many physicians and patients this risk has been unacceptable, and pregnancies have been terminated by medical intervention. To others the risk has seemed insufficient to justify such an approach. Social, psychologic, and religious considerations are involved. . . .
>
> Prerequisite to consideration of therapeutic abortion should be the certainty that (1) the patient had rubella, and (2) that it occurred during the first trimester.

Heggie, *supra* note 92, at 261.

96. Marshall, *The Clinical Impact of Intrauterine Rubella*, in INTRAUTERINE INFECTIONS 3, 4 (1973).

97. The correlation between emotional distress in the first trimester and birth defects has been suggested by several studies. *See, e.g.*, Drillien & Wilkinson, *Emotional Stress and Mongoloid Births*, 6 DEVELOPMENTAL MED. & CHILD NEUROLOGY 140 (1964).

98. Heggie, *supra* note 92, at 255; Marshall, *supra* note 96, at 4.

99. *E.g.*, Magnolia Coca Cola Bottling Co. v. Jordan, 124 Tex. 347, 78 S.W.2d 944 (1935), *overruled*, Leal v. C.C. Pitts Sand & Gravel, Inc., 419 S.W.2d 820 (1967).

viable fetus has the capacity to live outside the womb.[100] When asked to extend the duty to injuries occurring prior to viability, however, the courts had to find some basis other than personhood to support a duty. Clearly, medical knowledge had by this time convinced jurists that a fetus, from shortly after conception, is a separate biological organism.[101] Further, as we have seen, medical knowledge also suggested that events in the first trimester were more damaging to fetuses than those occurring at a later time. But whether liability was based on an independent duty to this "separate organism"[102] or on a contingent duty that matured when the infant was born alive[103] has never been made clear in many jurisdictions. Without detailed discussion of the scope of duty owed the unborn, the courts justified recovery on various other grounds.[104]

Notwithstanding the variety of rationales, no court which originally granted a living child a cause of action for prenatal injuries while the child was viable has subsequently denied such a cause of action for injuries occurring prior to viability.[105] Although the decisional law in a few jurisdictions suggests that viability at the time of injury remains a requirement for recovery,[106] it is probable that these cases have lost their vitality, remaining as apparent authority only because no case

100. *See, e.g.*, Amann v. Faidy, 415 Ill. 422, 114 N.E.2d 412 (1953).

101. *See* Bennett v. Hymers, 101 N.H. 483, 147 A.2d 108 (1958).

102. *Id.* at 485, 147 A.2d at 110; Kelly v. Gregory, 282 App. Div. 542, 544, 125 N.Y.S.2d 696, 697 (1953). *See also* Smith v. Brennan, 31 N.J. 353, 364, 157 A.2d 497, 502 (1960) ("distinct entity"); Sinkler v. Kneale, 401 Pa. 267, 273, 164 A.2d 93, 96 (1960) ("separate creature").

103. The case which most clearly predicates liability on a contingent duty is an Australian case, Watt v. Rama, [1972] Vict. 353 (Sup. Ct. Vict. Austl. 1971). *See also* Endresz v. Friedberg, 24 N.Y.2d 478, 248 N.E.2d 901, 301 N.Y.S.2d 65 (1969). See text accompanying notes 176-85 *infra*.

104. *See, e.g.*, Keyes v. Construction Serv., Inc., 340 Mass. 633, 165 N.E.2d 912 (1960) (the injustice of not permitting recovery; a manifest wrong should not go without redress); Womack v. Buchhorn, 384 Mich. 718, 725, 187 N.W.2d 218, 222 (1971) (following the "overwhelming weight of judicial authority"); Bennett v. Hymers, 101 N.H. 483, 147 A.2d 108 (1958) (the desirability of bringing the law of torts into symmetry with property and criminal law); Smith v. Brennan, 31 N.J. 353, 157 A.2d 497 (1960) (the rejection of the spurious-claim rationale of denying recovery); Sylvia v. Gobeille, 101 R.I. 76, 220 A.2d 222 (1966) (the right of a child to begin life without physical or mental disabilities resulting from the wrongful acts of another prior to birth); Seattle-First Nat'l Bank v. Rankin, 59 Wash. 2d 288, 367 P.2d 835 (1962) (the rejection of the rationale of denying recovery due to the difficulties of proof of causation).

105. Todd v. Sandidge Constr. Co., 341 F.2d 75, 79 (4th Cir. 1964) (Haynsworth, J., dissenting).

106. *See, e.g.*, Damasiewicz v. Gorsuch, 197 Md. 417, 442, 79 A.2d 550, 562 (1951) (Henderson, J., concurring); Steggall v. Morris, 363 Mo. 1224, 1233, 258 S.W.2d 577, 581 (1953). In Tursi v. New England Windsor Co., 19 Conn. Supp. 242, 111 A.2d 14 (Super. Ct. 1955), the court held that viability was a requirement for recovery for prenatal injury. The same court recently rejected that rule. Simon v. Mullin, 34 Conn. Supp. 139, 380 A.2d 1353 (Super. Ct. 1977). The Connecticut Supreme Court apparently has not spoken on the issue.

posing the issue of liability for previability injuries has yet reached the appellate courts of those jurisdictions. It appears that the viability rule is dead in causes of action for prenatal injuries brought by living infants.

The same cannot be said for wrongful death actions. In these cases the requirement of viability appears to have survived. This can be explained principally by the fact that wrongful death actions are creatures of statute[107] and courts have been restricted by the language of the wrongful death statute of the particular jurisdiction. Most wrongful death statutes create a cause of action for the death of a "person"[108] and usually require that the defendant would have been liable if the death of the person had not ensued.[109] The nearness of the injury to a viable fetus to the time of normal birth and the fetus' ability to survive outside its mother's womb have thus been persuasive factors for courts in considering whether a fetus which dies before birth is a "person" whose death may be compensated under the wrongful death statute.[110]

If one accepts the proposition that a wrongful death action should be allowed for the death of an unborn fetus,[111] then the logic of requiring viability at the time of death is apparent. Viability is what makes the fetus a "person" within most courts' construction of the wrongful death statutes. But does it follow that the injury causing the death must also have occurred when the fetus is viable? As we have seen, the most

107. Although it is recognized that Moragne v. States Marine Lines, Inc., 398 U.S. 375 (1970), has cast doubt on the historical accuracy of this statement, it is nevertheless accepted for the purpose of this analysis, since, except in Massachusetts, Gaudette v. Webb, 362 Mass. 60, 284 N.E.2d 222 (1972), the belief that a common law action for wrongful death would not lie was so widely held that it may be presumed that both courts and legislators have acted on this basis. *See* Justus v. Atchison, 19 Cal. 3d 564, 574, 565 P.2d 122, 128, 139 Cal. Rptr. 97, 103 (1977).

108. *See, e.g.*, ILL. REV. STAT. ch. 70, § 1 (1973 & Supp. 1974); MASS. ANN. LAWS ch. 229, § 2 (Michie/Law. Co-op 1974); MICH. COMP. LAWS ANN. § 600.2922 (West 1968); R.I. GEN. LAWS § 10-7-1 (1970). The statutes of a few states use other terms. *E.g.*, ALA. CODE tit. 6, ch. 5, § 391 ("minor child"); N.Y. EST., POWERS & TRUSTS LAW § 5-4.1 (McKinney 1967) ("decedent"). Whatever the term used, however, the meaning conveyed is "legal person." Therefore, when the term "person" is used hereafter in this connection, it should be construed to mean the statutory term used in the statute of the particular jurisdiction involved.

109. *See, e.g.*, ILL. REV. STAT. ch. 70, § 1 (1973 & Supp. 1974); MICH. COMP. LAWS ANN. § 600.2922 (West 1968); N.Y. EST., POWERS & TRUSTS LAW § 5-4.1 (McKinney 1967); R.I. GEN. LAWS § 10-7-1 (1970).

110. *See, e.g.*, Chrisafogeorgis v. Brandenberg, 55 Ill. 2d 368, 304 N.E.2d 88 (1973); Hale v. Manion, 189 Kan. 143, 368 P.2d 1 (1962); Mitchell v. Couch, 285 S.W.2d 901 (Ky. 1955); 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); Poliquin v. MacDonald, 101 N.H. 104, 135 A.2d 249 (1957); Fowler v. Woodward, 244 S.C. 608, 138 S.E.2d 42 (1964); Moen v. Hanson, 85 Wash. 2d 597, 537 P.2d 266 (1975).

111. See text accompanying notes 117-85 *infra* for an argument against acceptance of this proposition.

serious injuries to a fetus are likely to occur during the very early stages of its existence. If instead of causing either a spontaneous abortion, for which there would be no right of recovery for wrongful death because of the nonviability of the fetus at time of death, or a postnatal deformity or disability, for which recovery would be allowed, the previability injury causes stillbirth *after* the fetus becomes viable, should not a right of action for wrongful death exist? Unfortunately, the decided cases give us no answer. Most reported cases have involved fetuses which were viable *both* at the time of the injury and at the time of death.[112] The few courts that have allowed recovery for death following previability injury have based the decision either on a complete abandonment of the viability criterion for wrongful death actions[113] or on the acceptance of an allegation of viability even when the facts appeared to be otherwise.[114]

In principle, however, there is as much reason to allow a cause of action in cases involving previability injury and postviability death as there is in those involving postviability injury and postviability death. The traditional objections asserted to bar recovery—the speculative nature of the injury, the possibility of spurious claims, the difficulty of proof and the tenuousness of the causal chain—should be no more difficult to overcome in a wrongful death action than in an injury action. While viability at the time of death might be a requirement of statutory "personhood," no such statutory requirement exists as to personhood at the time of the injury.

One of the more thoughtful analyses of the irrelevance of viability at the time of injury is contained in the dissenting opinion of Judge Haynsworth in *Todd v. Sandidge Construction Co.*[115] After disposing of the various arguments advanced in favor of maintaining the viability criterion, he concluded:

> Treatment of viability at the time of injury as significant is a relic of a relatively modern misunderstanding. When Mr. Justice Holmes wrote for the Supreme Judicial Court of Massachusetts in 1884 he advanced as one reason for not allowing recovery for prenatal inju-

112. See authorities cited at note 110 *supra*.

113. Porter v. Lassiter, 91 Ga. App. 712, 87 S.E.2d 100 (1955) (recovery for death of fetus which was "quick"); Presley v. Newport Hosp., 117 R.I. 177, 365 A.2d 748 (1976) (distinction between viable and nonviable fetuses abandoned).

114. Valence v. Louisiana Power & Light Co., 50 So.2d 847 (La. App. 1951) ("viable" fetus of two to four months).

115. 341 F.2d 75 (4th Cir. 1964). Judge Haynsworth later withdrew his notation of dissent in the case when, in a subsequent opinion, Fowler v. Woodward, 244 S.C. 608, 138 S.E.2d 42 (1964). The Supreme Court of South Carolina held that the live birth of a viable fetus—the point on which Judge Haynsworth had dissented—was not a criterion for maintenance of a wrongful death action. 341 F.2d at 83.

> ries the notion that, until birth, the child was a part of its mother. That notion was inconsistent with what common law precedents there were and with medical facts as they are known today. Its expression, however, led those taking the first hesitant steps away from Dietrich to say with understandable restraint that a viable child, at least, was not a part of its mother. Since we now know that a child is no more a part of its mother before viability than after, this relic of an invalid notion does not deserve preservation. Our steps away from Dietrich need no longer be hesitant.[116]

If these arguments are accepted, the concept of viability does not provide meaningful assistance in determining the limits of duty with respect to prenatal injuries.

B. *The Requirement of Live Birth.*

In the two areas of the early common law in which the separate existence of an unborn child was recognized—property and criminal law—the rights of the unborn child to the protection of the law matured only upon live birth.[117] In tort cases in which the live infant is suing for postnatal harm resulting from prenatal injuries, live birth is obviously not an issue, since the living child himself is the person on whose behalf the action is brought.

Live birth *is* an issue in the wrongful death case. Before addressing that category of cases, however, it may be worthwhile to consider briefly a problem which no adjudicated cases have addressed. If an unborn infant, injured in its mother's womb, is later miscarried or stillborn from a totally unrelated cause, should there be recovery on behalf of the child for its injuries? The problem of dealing with such a case conceptually may illuminate some of the difficulties posed by allowing a cause of action in wrongful death actions for fetuses not born alive.

The principal difficulty in analyzing a possible cause of action by a dead fetus for injuries which were not the cause of death is the problem of establishing one element of negligence—harm or detriment—which is compensable in damages.[118] If a fetus has never lived outside its mother's womb, is it possible to assess the harm it has suffered? In the absence of pecuniary loss, the two principal elements for which monetary damages are awarded to living infants for prenatal harm are disability or deformity and pain and suffering. If the fetus dies before birth, it has not had to live with its handicap. Compensation for this

116. *Id.* at 79 (footnotes omitted). Although at this point Judge Haynsworth was speaking of an action for injury resulting in postnatal harm rather than death of the fetus, it is clear from his opinion that he would have applied the same logic to a wrongful death action.

117. See text accompanying notes 25-28 *supra.*

118. *See* W. PROSSER, LAW OF TORTS 143 (4th ed. 1971).

element, therefore, seems entirely inappropriate.

The second possible element of damages is somewhat more difficult to analyze. Although medical authorities tell us that unborn infants experience "fetal distress,"[119] is this the equivalent of "pain and suffering"? One difficulty we face in answering this question is the inability of medical authorities to define pain.[120] In spite of the lack of agreement on a precise definition, the authorities seem to agree that it has two components: the original sensation and the reaction to it.[121] Medical science also tells us that as early as ten weeks of gestation the nervous system of an unborn infant is sufficiently developed to allow it to respond to local stimuli.[122] By the end of the third month, stroking the lips causes the fetus to respond by sucking and stroking the eyelids provokes a reflex response.[123] Even at this early stage the fetus appears to have the capacity to fulfill both components of the definition of pain—to note the sensation and to react to it. But a mere motor reaction to stimuli seems an insufficient basis for the award of legal damages. Until more is known concerning fetal sensations, any award of damages based on pain and suffering would be based on mere conjecture and speculation.[124]

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119. "Fetal distress" is defined as "a threatening or adverse condition of the fetus, caused by stress; some of the criteria for recognition of fetal distress are cardiac arrhythmia, bradycardia, tachycardia, passage of meconium." STEDMAN'S MEDICAL DICTIONARY 416 (23d ed. 1976).

120. "[A]lthough the meaning of the word is understood, at least in a general sense, it defies exact definition. Working definitions have been proposed, but they invariably rely, at least in part, on illustration or example rather than objective description." M. SWERDLOW, RELIEF OF INTRACTABLE PAIN 10 (1974) *See* Endel, *"Psychogenic" Pain and the Pain-Prone Patient*, 26 AM. J. OF MED. 899 (1959).

121. Endel, *supra* note 120, at 899.

122. Such responses may include squinting, opening the mouth, incomplete finger closure and planter flexion of the toes. L. HELLMAN & J. PRITCHARD, *supra* note 9, at 223.

123. K. MOORE, THE DEVELOPING HUMAN 83 (1977).

124. Only two judicial opinions have been discovered which address this question even obliquely. The first is that of Judge Haynsworth, who, in his dissenting opinion in *Todd*, stated:

> Little can be said in favor of allowance of a cause of action for personal injury to a child *en ventre sa mère*, which thereafter is stillborn for some other unrelated reason. When the stillbirth is unrelated to the prenatal injury, the child suffers no economic loss, and it is, at least, highly dubious that it will have endured conscious pain and suffering.

341 F.2d at 80 (footnote omitted). The second is Fowler v. Woodward, 244 S.C. 608, 138 S.E.2d 42 (1964), in which the Supreme Court of South Carolina used language which suggests that recovery might be allowed:

> Once the concept of the unborn, viable child is accepted, we have no difficulty in holding that a cause of action for tortious injury to such a child arises immediately upon the infliction of the injury. It is beside the point that the extent of damages might be difficult, or even impossible to establish prior to birth. Indeed, the injurious consequences of a prenatal injury might not become manifest until long after birth, but *this would not affect the existence of the cause of action from the time of the wrong*, nor the character of the wrongful act as one entitling the child to recover damages therefor.

*Id.* at 613, 138 S.E.2d at 44 (emphasis added). If the South Carolina court is saying that an imperfect or incomplete cause of action arises when the injury occurs, to be made complete when

The cases in which the issue of live birth has actually arisen, however, have been wrongful death actions.[125] Under the statutes of most jurisdictions such actions, though dependent on the decedent's right to sue if he had survived, are for the purpose of compensating the survivors for the loss they have suffered because of the death.

Several different factual situations may be visualized in which the death of an infant may be made the subject of a wrongful death action. The unborn infant may receive an injury while in its mother's womb from which it dies instantaneously or within a very short time. Or the fetus may receive an injury which is not immediately fatal but which causes its death prior to normal birth. Or it may receive an injury prior to birth which proves fatal after some period of postnatal life.[126] Courts in the United States have faced all of those situations and have not always resolved them in a way that is completely satisfying from the point of view of symmetry and logic.

The first reported post-*Bonbrest* case involving the death of an unborn child appears to be *Verkennes v. Corniea*,[127] in which the court

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the child is born alive and the extent of its defect or disability can be measured in the usual terms of economic loss and pain and suffering, then the statement cannot be faulted. On the other hand, if the statement is meant to be taken literally—that it is "beside the point" that it is "impossible" to establish damages—then the court is suggesting that the lack of a basic element does not affect the existence of a cause of action in the tort of negligence. Such a suggestion is unacceptable. In negligence actions, at least, injury must produce harm which is compensable in damages to create liability. If the element of harm cannot be proven, then the cause of action fails.

Although a number of other courts have used language broad enough to embrace the cause of action visualized, it is clear that they were limiting the context of their words to the issue before them. *See, e.g.*, Damasiewicz v. Gorsuch, 197 Md. 417, 441, 79 A.2d 550, 561 (1950); Presley v. Newport Hosp., 117 R.I. 177, 188-89, 365 A.2d 748, 754 (1976).

125. Except for a wrongful death action, only one other situation can be visualized in which prenatal injuries to an infant not born alive might be a basis for a cause of action. Where an insurance policy covers the risk of injury or death of the "person" injured or killed, a contractual claim might be upheld. This issue has been addressed in at least two reported cases. In the first of these, Peterson v. Nationwide Mutual Ins. Co., 175 Ohio St. 551, 197 N.E.2d 194, *cert. denied*, 379 U.S. 853 (1964), the Ohio Supreme Court held that a five-and-one-half month old fetus, whose mother miscarried as a result of an automobile accident and which lived for 21 hours after birth, was a "person" within the meaning of the term "any person who suffers bodily injury . . . or death" within the family-compensation clause of the automobile insurance policy issued to the infant's father by the defendant. The court's opinion suggests that the live birth of the infant was a prerequisite for the cause of action, but Ohio's position among those jurisdictions not requiring live birth in wrongful death actions, see note 130 *infra*, indicates that the result might have been the same if the baby had been stillborn. In the second case, Orange v. State Farm Mutual Auto. Ins. Co., 443 S.W.2d 650 (Ky. 1969), the Kentucky Court of Appeals held that a viable unborn child, which was stillborn as a result of injuries it received in an auto accident involving its pregnant mother, was not only a "person" but also was a member of the "family" or "household" of the expectant father, thus subject to the exclusionary clause of the family auto insurance policy.

126. Although injuries inflicted during the process of delivery could be considered separately, they appear to be legally indistinguishable from other prenatal injuries and are so treated here.

127. 229 Minn. 365, 38 N.W.2d 838 (1949).

held that a claim alleging that the death of an unborn child during delivery was caused by the negligence of the defendants stated a cause of action under the Minnesota wrongful death statute. Relying principally on *Montreal Tramways, Bonbrest* and Justice Boggs' dissent in *Allaire*, and without making any attempt to distinguish a wrongful death case from one in which a living infant was suing for postnatal effects of prenatal injuries, the court concluded:

> We hold that under the wrongful-death statute the action here will lie. Its language is clear. Thereunder, a cause of action arises when death is caused by the wrongful act or omission of another, and the personal representative of the decedent may maintain such action on behalf of the next of kin of decedent. It seems too plain for argument that where independent existence is possible and life is destroyed through a wrongful act a cause of action arises under the statutes cited.[128]

Despite the hope expressed by one commentator that *Verkennes* would be ignored by future courts,[129] the rule enunciated in that case, requiring no live birth, rapidly took hold and today represents the majority rule.[130]

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128. *Id.* at 370-71, 38 N.W.2d at 841.

129. Gordon, *supra* note 9, at 595.

130. The author's research suggests that as many as 25 jurisdictions have no requirement of live birth while 12 now require live birth as a prerequisite in wrongful death actions. Although some of the decisions are not fully definitive— either because the point was not directly at issue or because the court of last resort has not yet spoken—a tabulation of the decisions on which these comparisons are based is included for the convenience of the reader:

a. Jurisdictions having no live-birth requirement in wrongful death actions:
   1. Alabama: Eich v. Town of Gulf Shores, 293 Ala. 95, 300 So.2d 354 (1974).
   2. Connecticut: Hatala v. Markiewicz, 26 Conn. Supp. 358, 224 A.2d 406 (Super. Ct. 1966); Gorke v. Le Clerc, 23 Conn. Supp. 256, 181 A.2d 448 (Super. Ct. 1962).
   3. Delaware: Worgan v. Greggo & Ferrara, Inc., 50 Del. 258, 128 A.2d 557 (Super. Ct. 1956).
   4. District of Columbia: Simmons v. Howard Univ., 323 F. Supp. 529 (D.D.C. 1971).
   5. Georgia: Porter v. Lassiter, 91 Ga. App. 712, 87 S.E.2d 100 (1955).
   6. Illinois: Chrisafogeorgis v. Brandenberg, 55 Ill. 2d 368, 304 N.E.2d 88 (1973).
   7. Indiana: Britt v. Sears, 150 Ind. App. 487, 277 N.E.2d 20 (1971).
   8. Kansas: Hale v. Manion, 189 Kan. 143, 368 P.2d 1 (1962).
   9. Kentucky: Mitchell v. Couch, 285 S.W.2d 901 (Ky. 1955).
   10. Louisiana: Valence v. Louisiana Power & Light Co., 50 So.2d 847 (La. App. 1951); Cooper v. Blanck, 39 So.2d 352 (La. App. 1923).
   11. Maryland: State *ex rel.* Odham v. Sherman, 234 Md. 179, 198 A.2d 71 (1964).
   12. Massachusetts: Mone v. Greyhound Lines, Inc., 331 N.E.2d 916 (Mass. 1975).
   13. Michigan: O'Neill v. Morse, 385 Mich. 130, 188 N.W.2d 785 (1971).
   14. Minnesota: Pehrson v. Kistner, 301 Minn. 299, 222 N.W.2d 334 (1974); Verkennes v. Corniea, 229 Minn. 365, 38 N.W.2d 838 (1949).
   15. Mississippi: Rainey v. Horn, 221 Miss. 269, 72 So.2d 434 (1954).
   16. Nevada: White v. Yup, 85 Nev. 527, 458 P.2d 617 (1969).
   17. New Hampshire: Poliquin v. MacDonald, 101 N.H. 104, 135 A.2d 249 (1957).
   18. Ohio: Stidam v. Ashmore, 109 Ohio App. 431, 167 N.E.2d 106 (1959).
   19. Oklahoma: Evans v. Olson, 550 P.2d 924 (Okla. 1976).
   20. Oregon: Libbee v. Permanente Clinic, 268 Or. 258, 518 P.2d 636 (1974).

In reaching their decisions, courts rejecting the live-birth rule have relied on a variety of grounds. The essential one, since wrongful death actions are almost uniformly considered to be statutory in origin,[131] is that a viable, unborn child is a "person" within the meaning of the state's wrongful death statute. In reasoning that an unborn fetus is a "person," the courts have used the following arguments:

(1) It is incongruous to allow a cause of action to a live infant injured prior to birth but to deny it to one whose injury was so severe that it died from it. The effect of the live-birth requirement is to permit the tortfeasor inflicting the greatest injury to avoid liability.[132]

(2) Allowing an action is in accord with the weight of current authority.[133]

(3) The difficulty of proof of causation of death-producing injury is no greater than the difficulty of proof in cases involving disability-producing injury to infants who survive.[134]

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21. Rhode Island: Presley v. Newport Hosp., 117 R.I. 177, 365 A.2d 748 (1976).
22. South Carolina: Fowler v. Woodward, 244 S.C. 608, 138 S.E.2d 42 (1964).
23. Washington: Moen v. Hanson, 85 Wash. 2d 597, 537 P.2d 266 (1975).
24. West Virginia: Baldwin v. Butcher, 155 W. Va. 431, 184 S.E.2d 428 (1971).
25. Wisconsin: Kwaterski v. State Farm Mut. Auto. Ins. Co., 34 Wis. 2d 14, 148 N.W.2d 107 (1967).

b. Jurisdictions having a live-birth requirement in wrongful death actions:
1. Arizona: Kilmer v. Hicks, 22 Ariz. App. 552, 529 P.2d 706 (1975).
2. California: Justus v. Atchison, 19 Cal. 3d 564, 565 P.2d 122, 139 Cal. Rptr. 97 (1977).
3. Florida: Stokes v. Liberty Mut. Ins. Co., 213 So.2d 695 (Fla. 1968).
4. Iowa: McKillip v. Zimmerman, 191 N.W.2d 706 (Iowa 1971).
5. Missouri: State *ex rel.* Hardin v. Sanders, 538 S.W.2d 336 (Mo. 1976).
6. Nebraska: Drabbels v. Skelly Oil Co., 155 Neb. 17, 50 N.W.2d 229 (1951).
7. New Jersey: Graf v. Taggert, 43 N.J. 303, 204 A.2d 140 (1964).
8. New York: Endresz v. Friedberg, 24 N.Y.2d 478, 248 N.E.2d 901, 301 N.Y.S.2d 65 (1969).
9. North Carolina: Gay v. Thompson, 266 N.C. 394, 146 S.E.2d 425 (1966); Cardwell v. Welch, 25 N.C. App. 390, 213 S.E.2d 382, *cert. denied*, 287 N.C. 464, 215 S.E.2d 623 (1975).
10. Pennsylvania: Carroll v. Skloff, 415 Pa. 47, 202 A.2d 9 (1964); Marko v. Philadelphia Transp. Co., 420 Pa. 124, 216 A.2d 502 (1966).
11. Tennessee: Durrett v. Owens, 212 Tenn. 614, 371 S.W.2d 433 (1963); Hogan v. McDaniel, 204 Tenn. 235, 319 S.W.2d 221 (1958).
12. Virginia: Lawrence v. Craven Tire Co., 210 Va. 138, 169 S.E.2d 440 (1969).

131. *But see* Gaudette v. Webb, 362 Mass. 60, 284 N.E.2d 222 (1972), in which the Massachusetts Supreme Court held that wrongful death had a common law origin and thus the court was not constricted by the ordinary rules of construction in applying a legislatively granted right. This case was one of the principal foundations for the Massachusetts court's decision in Mone v. Greyhound Lines, Inc., 368 Mass. 354, 331 N.E.2d 916 (1975), which overruled Leccese v. McDonough, 361 Mass. 64, 279 N.E.2d 339 (1972) (requiring live birth), shortly after it was handed down.

132. *See, e.g.*, Todd v. Sandidge Constr. Co., 341 F.2d 75 (4th Cir. 1964); Stidham v. Ashmore, 109 Ohio App. 431, 434, 167 N.E.2d 106, 108 (1959). See note 124 *infra* and accompanying text.

133. *See, e.g.*, Odham v. Sherman, 234 Md. 179, 198 A.2d 71 (1964); Mone v. Greyhound Lines, Inc., 368 Mass. 354, 331 N.E.2d 916 (1975).

134. *See, e.g.*, Mitchell v. Couch, 285 S.W.2d 901 (Ky. 1955); Evans v. Olson, 550 P.2d 924 (Okla. 1976).

(4) Live birth is an arbitrary point from which to measure life or personhood.[135]

(5) The wrongful death statute is punitive in nature, and there is just as much reason to punish a wrongdoer where the unborn infant dies before birth as where it survives to live birth.[136]

(6) Not to allow recovery would be to permit a wrong without a remedy. If the fetus is recognized as a life separate from its mother, certain elements of damage can only be compensated in an action by the unborn child.[137]

(7) Allowing a wrongful death action is a "reasonable and natural development" of the rule allowing recovery by infants born alive.[138]

Despite the fact that the current weight of authority is with those courts which do not require live birth as a condition for maintaining a wrongful death action—and the balance has recently shifted further in that direction with the Massachusetts and Oklahoma Supreme Courts' overruling of prior decisions requiring live birth[139]—the courts of a substantial number of jurisdictions continue to require live birth.[140] These jurisdictions include such important and populous states as California, Florida, New Jersey, New York, Pennsylvania and Texas.[141] The reasons advanced by the courts in these states are generally the obverse of those of the states having no such requirement. The essential determination is that the state's wrongful death statute does not include unborn fetuses within the statutory definition of persons. While most of these courts acknowledge the separate existence of the fetus,[142] they nevertheless find that the legislature did not intend to include the fetus as a person for whose death an action may be maintained. Drawing on the analogy to property and criminal law, they point out that the rights of the unborn, which have traditionally been protected, mature only upon live birth and that those rights are for the sole benefit of the infant and not for the benefit of those who might

135. *See, e.g.*, O'Neill v. Morse, 385 Mich. 130, 188 N.W.2d 785 (1971); Poliquin v. MacDonald, 101 N.H. 104, 135 A.2d 249 (1957).

136. *See, e.g.*, Eich v. Town of Gulf Shores, 293 Ala. 95, 300 So.2d 354 (1974). This rationale is applicable only in a few jurisdictions.

137. *See, e.g.*, Chrisafogeorgis v. Brandenberg, 55 Ill. 2d 368, 304 N.E.2d 88 (1973); White v. Yup, 85 Nev. 527, 458 P.2d 617 (1969).

138. *See, e.g.*, Chrisafogeorgis v. Brandenberg, 55 Ill. 2d 368, 304 N.E.2d 88 (1973).

139. Mone v. Greyhound Lines, Inc., 368 Mass. 354, 331 N.E.2d 916 (1975); Evans v. Olson, 550 P.2d 924 (Okla. 1976).

140. See note 130 *supra*.

141. *Id.*

142. As late as 1958, the Tennessee Supreme Court still spoke of the fetus as "a part of its own mother's physical body." Hogan v. McDaniel, 204 Tenn. 235, 243, 319 S.W.2d 221, 224 (1958). *see* Drabbels v. Skelly Oil Co., 155 Neb. 17, 22, 50 N.W.2d 229, 232 (1951).

take through the child.[143] In support of the logic, justice and consistency of this restrictive interpretation of the wrongful death statutes, these courts put forth the following arguments:

(1) The considerations of justice that support compensation of the living infant are absent. There is no deformity to live with, no pecuniary injury, and no pain and suffering.[144]

(2) Since there is no pecuniary loss to the infant, the award of damages is purely punitive, not compensatory.[145]

(3) Drawing a line at birth is no more arbitrary than drawing it anywhere else and perhaps less so than drawing it at the point at which the fetus becomes "quick" or "viable," since birth is a tangible and concrete event.[146]

(4) The problems concerning proof of causation and of damages are greatly reduced as is the danger of speculative and fraudulent claims.[147]

(5) The real damages suffered by the parents can be recovered by them separately. Thus, disallowing the fetus' cause of action reduces the likelihood of double recovery.[148]

While the differences between the two sides can, to some extent, be explained by differences in the specific wrongful death statutes involved, the opinions of the courts express more fundamental differences in philosophy and policy than can be explained either by minor variations in statutory language or by whether the applicable statute is a "true" wrongful death statute, under which damages are measured by the loss to the survivors, or is of a type that measures damages by the pecuniary loss to the estate or by some other formula amounting to a combination survival and wrongful death statute. Clearly, a statute such as was in force in North Carolina at the time of *Gay v.*

143. Drabbels v. Skelly Oil Co., 155 Neb. 17, 50 N.W.2d 229 (1951); Endresz v. Friedberg, 24 N.Y.2d 478, 248 N.E.2d 901, 301 N.Y.S.2d 65 (1969); Carroll v. Skloff, 415 Pa. 47, 202 A.2d 9 (1964); Hogan v. McDaniel, 204 Tenn. 235, 319 S.W.2d 221 (1958).

144. *See* 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); Carroll v. Skloff, 415 Pa. 47, 202 A.2d 9 (1964).

145. The decisions in several states whose wrongful death statutes limit recovery to pecuniary loss are based principally on this ground. *See, e.g.*, Graf v. Taggert, 43 N.J. 303, 204 A.2d 140 (1964); Gay v. Thompson, 266 N.C. 394, 146 S.E.2d 425 (1966). Even where the statute is not so restricted, however, judges have suggested the appropriateness of this limitation. *See, e.g.*, Carroll v. Skloff, 415 Pa. 47, 202 A.2d 9 (1964).

146. *See* 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).

147. *See* Graf v. Taggert, 43 N.J. 303, 204 A.2d 140 (1964); Gay v. Thompson, 266 N.C. 394, 146 S.E.2d 425 (1966); Marko v. Philadelphia Transp. Co., 420 Pa. 124, 216 A.2d 502 (1966).

148. *See* Norman v. Murphy, 124 Cal. App. 2d 95, 268 P.2d 178 (1954); Marko v. Philadelphia Transp. Co., 420 Pa. 124, 216 A.2d 502 (1966); *see* 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 18.3, at 1031 (1956).

*Thompson*,[149] which limited recovery to "pecuniary losses," calls for a different measure of damages than one in which damages are not so limited, and if there are no pecuniary losses, then a North Carolina-type statute would prevent any recovery at all.[150] Yet Oklahoma's statute also was interpreted by its Supreme Court to limit recovery to "pecuniary" losses[151] and North Carolina and Oklahoma are on opposite sides of the live-birth question.[152] Thus, although the nominal foundation for any cause of action on behalf of an unborn child is necessarily the applicable wrongful death statute, the differences seem to stem not from the form or wording of the statute but from different conceptions of how far the protection of the law should extend—from different conceptions of duty.

Once the courts recognized the fetus as a living entity with a separate biological existence, it was clearly tempting to carry the proposition to its logical extreme—to endow this living being with all the attributes of personhood and to extend to it all the legal protections that attach to that concept. Thus, when the death of that separate biological existence occurred through the wrongful act of another, logic dictated that such a wrong required a remedy. As stated by the Supreme Court of Wisconsin:

> Denying a right of action for negligence [*sic*] acts which produce a stillbirth leads to some very incongruous results. For example, a doctor or a midwife whose negligent acts in delivering a baby produced the baby's death would be legally immune from a lawsuit. However, if they badly injured the child they would be exposed to liability. Such a legal rule would produce the absurd result that an unborn child who was badly injured by the tortious acts of another, but who was born alive, could recover while an unborn child, who was more severely injured and died as the result of the tortious acts of another, could recover nothing.[153]

But do logic and congruity require the law to go so far? Even the courts that recognize a cause of action for the death of the unborn fetus do not extend the liability backward in time to the point at which biologically a separate existence is first recognized. That point occurs very

149. 266 N.C. 394, 146 S.E.2d 425 (1966).

150. In 1973 North Carolina's statute was revised to make it more like the Lord Campbell or "true" wrongful death statute. N.C. GEN. STAT. § 28A-18-2(b) (1976). In a decision applying the revised statute, the North Carolina Court of Appeals adhered to the view that a viable fetus was not a "person" within the meaning of the statute. Cardwell v. Welch, 25 N.C. App. 390, 213 S.E.2d 382, *cert. denied*, 287 N.C. 464, 215 S.E.2d 623 (1975).

151. Evans v. Olson, 550 P.2d 924, 928 (Okla. 1976).

152. See note 130 *supra*.

153. Kwaterski v. State Farm Mut. Auto. Ins. Co., 34 Wis.2d 14, 20, 148 N.W.2d 107, 110 (1967).

early in pregnancy.[154] Except for Georgia, where the threshold point for liability is "quickness" of the fetus,[155] and Rhode Island, where the court held the distinction between viable and nonviable fetuses to be arbitrary,[156] the threshold for liability for wrongful death occurs at "viability."[157] But what change occurs at viability that makes it a watershed for such a marked alteration in the obligations owed to the fetus?

The answer to this question is not very clear. The one given by the cases is that at this point the fetus becomes capable of independent life if separated from its mother. Transition from nonviability to viability, however, is not marked by some sharp line of demarcation, accompanied by a clearly identified signal to the mother or physician. It is a hazy, perhaps variable, zone of time estimated to occur between the middle of the sixth month and the end of the seventh month of pregnancy.[158] Each day of development before birth will increase the odds of fetal survival, but whether a fetus born near the boundary point between nonviability and viability will live may be more a function of the medical facilities available and the skill and attention of the attending medical team than of the fetus' own strength and maturity.[159]

The nature of wrongful death and survival statutes also casts doubt on the use of the viability requirement. When a person dies as the result of the wrongful act of another, two interests are invaded—the interest of the survivors in the benefits that would flow from his continued life and the interest of the deceased in his bodily integrity.[160] Wrongful death statutes of the Lord Campbell type redress only the former interest; survival statutes redress the latter. Some jurisdictions have survival statutes in lieu of or supplementary to the Lord Campbell type.[161]

A fetus is a biologically separate living being very early in its mother's pregnancy.[162] Its capacity to sense and respond to external

154. See note 59 *supra.*

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

156. Presley v. Newport Hosp., 117 R.I. 177, 365 A.2d 748 (1976).

157. See text accompanying notes 107-10 *supra.*

158. L. HELLMAN & J. PRITCHARD, *supra* note 9, at 493; K. MOORE, *supra* note 123, at 83.

159. L. HELLMAN & J. PRITCHARD, *supra* note 9, at 493; Stewart & Reynolds, *Improved Prognosis for Infants of Very Low Birthweight* in VULNERABLE INFANTS 243 (J. Schwartz & L. Schwartz eds. 1977).

160. St. Louis, Iron Mountain & S. Ry. v. Craft, 237 U.S. 648 (1915). *See also* 1 S. SPEISER, RECOVERY FOR WRONGFUL DEATH 66 (2d ed. 1975).

161. See, for example, the wrongful death and survival statutes of the state of Washington for a comprehensive combination of statutes designed to compensate all losses suffered by both decedent and survivors. WASH. REV. CODE §§ 4.20.010, 4.20.020, 4.20.046, 4.20.060 and 4.24.010 (1976); *see* 2 S. SPEISER, *supra* note 160, at 407-10.

162. See note 59 *supra.*

stimuli and experience "fetal distress" are developed as early as the tenth week.[163] Thus, if the interest which the law seeks to protect is the bodily integrity of the unborn infant, the need for protection occurs much earlier than the point of viability. Whether the death of the fetus occurs before or after viability, the real harm it has suffered is the deprivation of the *potential* for life after birth. As to the interest of the survivors, it seems that they have lost very little that cannot be compensated in an action brought on their behalf. Medical, hospital and funeral expenses—flowing as they do directly from the injury to the mother—are compensable. The pain and suffering of the mother resulting from the miscarriage—including mental and emotional distress—are compensable in an action in her own behalf. As stated by the New York Court of Appeals: "So far as a miscarriage or the delayed delivery of a stillborn child augments the mother's physical injury, pain, or suffering, so far is it proper to be considered on the question of damages . . . ."[164] The father may recover for the loss of the services and consortium of his wife.[165] Neither can recover for the deprivation of offspring, but, as stated by Judge Haynsworth in his dissent in *Todd v. Sandidge Construction Co.*, "juries usually take care of the situation."[166] Although this answer is perhaps not jurisprudentially pure, it expresses the practical answer to the problem of full—but not multiple—recovery for justifiably compensable damages.

In 1965, David A. Gordon wrote:

> The hardship of many of the decisions denying relief lay in the fact that they required an infant to go through life . . . bearing the seal of another's fault. There is no such justification in the wrongful death situation. . . . Although it is true that parents have been able to recover substantially for the loss of a minor child, the grant of compensation to the beneficiaries of such a minor, and a fortiori to the parents of an infant in utero, is in reality compensation for sentimental loss framed as though it were pecuniary loss.
>
> A fundamental basis of tort law is the provision of compensation to an innocent plaintiff for the loss that he has suffered. Tort law is not, as a general rule, premised upon punishing the wrongdoer. It is not submitted that the tortious destroyer of a child in utero should be able to escape completely by killing instead of merely maiming. But it is submitted that to compensate the parents any further than they are entitled by well-settled principles of law and to give them a wind-

163. See notes 119, 122 *supra* and text accompanying notes 122-23 *supra*.

164. Endresz v. Friedberg, 24 N.Y.2d 478, 488, 248 N.E.2d 901, 906, 301 N.Y.S.2d 65, 72-73 (1969) (quoting Witrak v. Nassau Elec. R.R., 52 App. Div. 234, 236, 65 N.Y.S.257, 258 (1900)) (emphasis omitted).

165. Endresz v. Friedberg, 24 N.Y.2d at 487, 248 N.E.2d at 906, 301 N.Y.S.2d at 72.

166. 341 F.2d 75, 81 (4th Cir. 1964) (Haynsworth, J., dissenting).

fall through the estate of the fetus is blatant punishment.[167]

Despite the substantial increase in the weight of authority supporting the opposite view since 1965, the conclusions reached by Gordon remain sound. The concept of viability is too elusive and arbitrary to serve as an appropriate device for limiting the duty owed to the fetus that is never born alive. The difficulty of proving causation, the danger that damages to survivors will be purely speculative and, most fundamentally, the lack of any meaningful correlation between damages awarded and the real injury—the loss by the fetus of its potential for life—all point persuasively toward the need for a rule strictly limiting the duty of care owed to a fetus that dies before birth.

If these considerations are deemed persuasive in the case of the death of unborn infants, should they also be used to cut off a cause of action for an infant dying soon after live birth from prenatal injuries? Is live birth—with postnatal life lasting perhaps only an instant—such a watershed that it should be the point from which tort law's protection of life is measured? For both practical and policy reasons, live birth should be the limiting principle. Live birth is a tangible, concrete, observable event, the event from which human life has traditionally been measured in the common law. Although any line has a degree of arbitrariness, drawing the line at live birth would seem more in accord with the objectives of a just compensation system than a line drawn at any other point. The practical difficulties accompanying any earlier threshold are substantially reduced. Any later threshold would be even more artificial and arbitrary.[168] In addition, considerations of humanity and compassion point to the same conclusion. Again, to quote Judge Haynsworth in *Todd*:

> The longer the pregnancy, the greater the parent's expectation and the deeper the sense of loss if there is a miscarriage or the child is stillborn. The potential personal loss the parents may suffer does not spring from nothingness the moment the child becomes viable. It is a progressive thing. The progress is unmarked by the attainment of viability, but it is tremendously enlarged when the child born alive is seen and embraced by its mother and, perhaps, by its father. In some circumstances, the loss of a month-old fetus may be a crushing disappointment to the prospective parents, but the loss of a child born alive and loved, even for a little while, is a cause of much greater

167. Gordon, *supra* note 9, at 594-95 (footnotes omitted).

168. It is noted, however, that the English Congenital Disabilities (Civil Liability) Act, 1976, c. 28, § 4(4), provides that no damages shall be recoverable for wrongful death unless the child lives at least 48 hours. A commentator has suggested that this dividing line is "probably justified on the basis that the first 48 hours are usually the most crucial and thereafter chances of survival increase considerably . . . ." Hoggett, *The Unborn Child and the Law of Tort—I*, 120 SOLICITERS' J. 807 (1976).

grief.[169]

When Gordon published his paper over a decade ago, he ended the wrongful death section with an expression of hope that future courts would ignore *Verkennes v. Corniea*,[170] the earliest reported case granting an action for the death of a viable fetus.[171] Unfortunately, the trend of judicial decision has been in the opposite direction.[172] But the trend may not be irreversible. In 1977, in a case of first impression for it, the California Supreme Court aligned California in the camp of the live-birth minority.[173] And, after all, for more than a half-century after *Dietrich*, the decisions were virtually uniform in not allowing an action at all for injuries to the unborn.

One reason for the wrong direction of the current trend is an overweening demand by the courts for apparent consistency and symmetry. That demand is illustrated by the oft-quoted hypothetical regarding twins in which the question is postulated: If a born-alive child suffers damages from prenatal injury, why shouldn't its twin which dies prior to birth from similar injuries also be compensated?[174] If a fetus is capable of living outside the womb, is it not just as much a "person" as a child who lives only a day, an hour or a minute after birth? If it is a

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169. 341 F.2d at 80-81 (Haynsworth, J., dissenting).

170. 229 Minn. 365, 38 N.W.2d 838 (1949).

171. Gordon, *supra* note 9, at 595. *See also* Comment, *Developments in the Law of Prenatal Wrongful Death*, 69 DICK. L. REV. 258 (1965).

172. The Restatement Second position is consistent with that trend, but the Reporter's "Note to Institute" and comments accompanying RESTATEMENT (SECOND) OF TORTS § 869 (1979) waffle on the issue of live birth. Section 869 states:

> § 869. Harm to Unborn Child.
>
> (1) One who tortiously causes harm to an unborn child is subject to liability to the child for the harm if it is born alive.
>
> (2) If the child is not born alive, there is no liability unless the applicable wrongful death statute so provides.

Reporter's Note 2 states:

> 2. Must the child be born alive?
>
> . . . .
>
> Essentially it appears to come down to the construction of the language of the wrongful death act in the particular state—is the child the sort of "person" intended to be included? The drafting group and the Council have agreed that this is something that the Restatement cannot determine. The Reporter and the Advisers are inclined to say that there can be no cause of action until the child is born alive. Until then it is a part of the mother. If the injury causes the stillbirth, she should have damages of her own. If it does not, no one should recover. There is too much danger of duplication of the mother's damages in such a case. For this reason the Advisers have proposed the negative form of statement in Subsection (2). An alternative, of course, is to state that there is liability if, but only if, the statute is construed so to provide.

*See* RESTATEMENT (SECOND) OF TORTS § 869, Comment on Subsection (2) at 177-78 (Tent. Draft No. 16, 1970).

173. Justus v. Atchison, 19 Cal. 3d 564, 565 P.2d 122, 139 Cal. Rptr. 97 (1977).

174. *See* Stidham v. Ashmore, 109 Ohio App. 431, 434, 167 N.E.2d 106, 108 (1959), where the hypothetical apparently was first proposed. The anomaly resulting from the live-birth rule is that the more severely injured does not recover while the less severely injured does.

"person" in that sense, why is it not a "person" in the sense of one to whom a duty of care exists, who can suffer present damages and can have standing to bring an action for compensation for those damages?

If one demands total consistency and complete symmetry, then the answer is foreordained. But such total consistency and symmetry are not demanded by our doctrine of stare decisis or by any other principle of our system of jurisprudence. In *Roe v. Wade*,[175] the United States Supreme Court determined that unborn fetuses—regardless of their stage of development—were not persons entitled to the protections of the fourteenth amendment. An unborn infant's rights were recognized in the law of property and criminal law only if the child were later born alive. The practical considerations discussed earlier—much greater difficulties of proof, the possibility of multiple damages for the same injury, the possibility of speculative awards—all seem to point toward a live-birth requirement. If, however, we founder because we cannot conceptualize a framework upon which to base a requirement for live birth, perhaps one can be found in Holmes' opinion in *Dietrich*. Despite the infirmities we see in that opinion in the light of today's medical and biological knowledge, it contained—almost as afterthought—the germ of a theory that, if one could meet Holmes' other objections to recovery, "a man might owe a civil duty and incur a *conditional prospective liability* in tort to one not yet in being."[176]

The concept has been embraced in a number of other cases.[177] It was most clearly articulated by an Australian court in *Watt v. Rama*.[178] Since the case was one of first impression in Australia, the court, as stated by Chief Justice Winneke and Justice Pape resorted

> to basal principles involved in the tort of negligence. . . . The foundation is the duty to take care, and whether such a duty exists depends upon a relationship existing, or coming into existence, between the parties which is capable in the particular circumstances of the case of imposing a duty on the one in relation to the other.[179]

After finding that this relationship depended on the familiar principle of the reasonable foreseeability of harm to the person injured, and that the reasonable foreseeability of harm not only gives rise to the duty "but also provides the test for determining whether a person injured by

175. 410 U.S. 113, 158 (1972).

176. 138 Mass. 14, 16 (1884) (emphasis added).

177. *E.g.*, Zepeda v. Zepeda, 41 Ill. App. 2d 240, 190 N.E.2d 849 (1963), *cert. denied*, 379 U.S. 945 (1964); Keyes v. Construction Serv., Inc., 340 Mass. 633, 165 N.E.2d 912 (1960); Park v. Chessin, 88 Misc. 2d 222, 387 N.Y.S.2d 204 (Sup. Ct. 1976), *modified*, 60 App. Div.2d 80, 400 N.Y.S.2d 110 (1977), *rev'd in part sub nom.* Becker v. Schwartz, 46 N.Y.2d 401 (1978).

178. [1972] Vict. 353 (Sup. Ct. Vict. Austl. 1971).

179. *Id.* at 359.

the careless conduct of another falls within the class of persons to whom a duty of care is owed,"[180] the justices developed their rationale as follows:

> In the common case where the act or neglect of the defendant and the injury to the plaintiff are for all practical purposes contemporaneous, the duty attaches to the defendant and is breached when the act or neglect occurs. But where the injury does not occur contemporaneously with the act or neglect, the relationship will not necessarily crystallize so as to create a duty at the time of the act or neglect. Where the injury to the plaintiff occurs only subsequently to the time of the act or neglect in circumstances where the plaintiff is not defined at that time, as for example where he is only one of a class, the relationship and the duty to arise therefrom may be said to be contingent or potential but capable of ripening into a relationship imposing a duty when the plaintiff becomes defined.[181]

Applying this idea of a potential or noncrystallized duty to the situation in *Watt*, in which a pregnant woman was injured through the negligence of the defendant, the justices concluded:

> In such a case [the defendant] would be bound to take the woman as he found her, . . . and her pregnancy would be just as much a physical condition in his victim as would be the case of a person having an eggshell skull. If it might reasonably have been foreseen that the pregnant woman might be injured by his carelessness, it must follow that the possibility of injury on birth to the child she was carrying must equally be taken to have been reasonably foreseeable . . . . Those circumstances, accordingly, constituted a potential relationship capable of imposing a duty on the defendant in relation to the child if and when born. On the birth the relationship crystallized and out of it arose a duty on the defendant in relation to the child.[182]

To dispel any idea that the duty to the infant was derived from a duty to the pregnant mother, the justices added: "But as the child could not in the very nature of things acquire rights correlative to a duty until it became by birth a living person, . . . it was, we think, at that stage that the duty arising out of the relationship was attached to the defendant."[183]

While the introduction of the artificiality of a duty created on birth and relating back to the time of the act constituting the breach may not add to the persuasiveness of the analysis, the idea of a contingent or noncrystallized duty is helpful indeed. Certainly it is foreseeable to the reasonable person that an act which endangers a pregnant woman also endangers the fetus she is carrying. An actor has no duty to that fetus

180. *Id.*
181. *Id.* at 360.
182. *Id.*
183. *Id.*

*not* because it is not within the reasonably foreseeable radius of danger but because it is not yet a person to whom the law's protection extends—it has only the potentiality of becoming one. Thus, the law says, one acts toward it at one's peril. If that fetus then becomes, by birth, a person to whom the law's protection does extend, then the actor is liable for any injury he may have caused. The duty relates back not in the sense that it springs full-blown out of nothingness, but rather that it matures from a previously existing but incomplete or inchoate duty.

Analysis along the foregoing lines provides a sound basis for limiting recoveries to infants who are born alive.[184] It may also be a way of reconciling several novel fact situations with traditional notions of negligence liability.[185]

## III. THE NEW JURISPRUDENCE

When Gordon wrote in 1965 that "[t]he battle in jurisprudence is almost over,"[186] he was referring to the twenty-year struggle to obtain recognition of the unborn plaintiff's right of action for negligently inflicted prenatal injuries and to establish the appropriate criteria for and limitations on such actions. One wonders whether he would have been so bold as to make that statement if he could have foreseen the novelty and variety of claims that would be made on behalf of infants and their parents in the ensuing dozen or so years. These have included claims by infants for illegitimate birth,[187] for birth to a mentally retarded mother,[188] for birth in a diseased or disabled condition,[189] for postnatal damages flowing from preconception injury to the mother,[190] for claims by parents for the birth of children, both normal and abnormal, after

184. Adopting the contingent-duty approach is one way of reconciling the tort cases allowing recovery to infants for prenatal injury with the abortion cases that permit the subordination of the interest in potential life to the mother's right of privacy. Since the duty is contingent on birth, an abortion is not the intentional destruction of a "person." On the other hand, if the approach permitting a wrongful death action by a fetus not born alive is adopted, then we must conclude either that the mother (and her abortionist) become liable for the death of the fetus when she exercises her constitutional right of privacy or that the Supreme Court has created a privilege in the mother immunizing her from potential criminal or tort liability. By considering the duty owed to the fetus to be contingent, one avoids these constitutional issues. See text accompanying notes 182-83 *supra.*

185. The contingent-duty concept is particularly helpful in the preconception-injury cases. See text accompanying notes 194-210 *infra.*

186. Gordon, *supra* note 9, at 627.

187. Zepeda v. Zepeda, 41 Ill. App. 2d 240, 190 N.E.2d 849 (1963), *cert. denied*, 379 U.S. 945 (1964).

188. Williams v. State, 18 N.Y.2d 481, 223 N.E.2d 343, 276 N.Y.S.2d 885 (1966).

189. Park v. Chessin, 60 App. Div. 2d 80, 400 N.Y.S.2d 110 (1977), *rev'd in part sub nom.* Becker v. Schwartz, 46 N.Y.2d 401 (1978).

190. Renslow v. Mennonite Hosp., 67 Ill. 2d 348, 367 N.E.2d 1250 (1977).

unsuccessful sterilizations[191] and for denial of the opportunity to abort a presumptively defective fetus.[192]

Of these claims, the one most akin to the cases already addressed is the claim for postnatal damage to the infant arising from preconception injury to the mother. The other categories—which collectively have been called "wrongful birth" or "wrongful life" actions[193]—present more novel and difficult jurisprudential issues and will be considered in the final section of this Article.

### A. *Postnatal Damage from Preconception Wrongs.*

Although a number of hypothetical situations can be visualized in which a child could suffer damage from wrongful acts of another prior to its conception,[194] there appear to be only three reported appellate cases in which this issue was raised.

In *Jorgensen v. Meade Johnson Laboratories, Inc.*,[195] the United States Court of Appeals for the Tenth Circuit, applying its interpretation of Oklahoma law, held that an allegation that birth control pills manufactured by the defendant caused chromosomal changes in a mother resulting in her giving birth to mongoloid twins stated a cause of action for the twins for retardation, deformity, and pain and suffering during their lifetimes. The Illinois Supreme Court held in *Renslow v. Mennonite Hospital*[196] that an allegation that the negligent transfusing of a thirteen-year-old Rh-negative female with Rh-positive blood resulting in permanent disability to a child born to her nine years later stated a cause of action on behalf of the child. In *Bergstreser v. Mitchell*,[197] the Eighth Circuit Court of Appeals held that, under Missouri law, a cause of action was stated on behalf of an infant who suffered harmful hypoxia or anoxia during an emergency premature

191. Bowman v. Davis, 48 Ohio St. 2d 41, 356 N.E.2d 496 (1976).

192. Howard v. Lecher, 42 N.Y.2d 109, 366 N.E.2d 64, 397 N.Y.S.2d 363 (1977).

193. Some courts have made a distinction between "wrongful life" and "wrongful birth" cases, classifying within the former term only those actions brought by the infant itself and within the latter category actions brought by parents to recover damages suffered by them. *See, e.g.*, Sherlock v. Stillwater Clinic, 260 N.W.2d 169, 172 n.4 (Minn. 1977). Some have distinguished "wrongful conception" cases from either category. *E.g., id.* at 174-75. This Article will use the terms "wrongful life" and "wrongful birth" synonymously to include actions by both the infant and its parents. For a subcategorization, see text accompanying notes 213-15 *infra*.

194. These could include birth deformities resulting from genetic changes induced by excessive X-ray exposure of the mother and abnormalities resulting from either parent's prior use of drugs. More prosaic are those injuries which an infant might receive from mechanical sources (*e.g.*, toys, machines, foods and medicines) which were manufactured prior to the child's conception but used or consumed by the child after birth.

195. 483 F.2d 237 (10th Cir. 1973).

196. 67 Ill. 2d 348, 367 N.E.2d 1250 (1977).

197. 577 F.2d 22 (8th Cir. 1978).

Caesarian section caused by the defendant physicians' and hospital's negligence in performing a prior Caesarian section on the mother.

The most interesting of these cases, from the viewpoints both of the factual context and the depth and scope of the opinions, is *Renslow*. The objection to establishing liability in that case—as in *Jorgensen* and *Bergstreser*—was that there could be no duty owed to a person not in being at the time of a defendant's claimed negligence.[198] The plurality opinion of Justice Moran met this objection by adopting an approach similar to Holmes' concept of a conditional prospective liability.[199] While the opinion does not make clear whether it relies on a "transferred negligence" growing out of a duty to the child's mother[200] or on an independent duty to the potential child herself growing out of the foreseeability of the harm to the child,[201] its discussion of both of these alternatives and the discussion in the concurring opinion of Justice Dooley indicate that the court's holding is solidly grounded on the concept of duty—a duty whose outer perimeter is established by the concept of foreseeability. Recognizing that use of the foreseeability factor alone as the measure of duty might lead to the possibility of liability in perpetuity—as, for example, claims of second- or third-generation descendants for genetic damage from radiation or chemical exposure of their ancestors—the majority relied on the judiciary to "exercise its traditional role of drawing rational distinctions, consonant with current perceptions of justice, between harms which are compensable and those which are not."[202]

If *Renslow* is to be faulted, it is for failing to state any guidelines as to the proper cut-off point for the duty owed to children not yet conceived, as it may be tested at the margin in future cases. The opinions have given us the outer perimeter—the limits of reasonable foreseeability—and stated that other policy considerations will limit the duty at some point inside that outer perimeter. How are we to find that point?

198. In addition, whether the statute of limitations should bar the cause of action was at issue in *Renslow*. 67 Ill. 2d at 349-50, 367 N.E.2d at 1251.

199. *See id.* at 350-51, 367 N.E.2d at 1251-52 (discussing Justice Holmes' opinion in *Dietrich*).

200. *Id.* at 355-57, 367 N.E.2d at 1254-55.

201. *Id.*

202. *Id.* at 358, 367 N.E.2d at 1255. Seizing on the possibility of just such remote and attenuated claims, Justice Ryan, in the principal dissenting opinion, accused the majority of having "abandoned the traditional fault concept of liability premised upon duty and foreseeability and embraced instead a system which depends wholly upon the element of causation." *Id.* at 372, 367 N.E.2d at 1262. Justice Ryan's opinion is seriously flawed, however, by his use of the case principally as a vehicle for an argument against the abandonment of the fault concept in tort in favor of recovery based solely on the principles "Let All Accident Victims Be Compensated" and "Let The Loss Be Spread," *id.* at 373, 367 N.E.2d at 1262, principles not applied, nor even suggested, in either of the opinions supported by the majority.

Some more helpful guideline is needed than simply a consonance with "current perceptions of justice."[203]

But the *Renslow* court is not alone in finding difficulty in articulating helpful and concrete criteria for determining the limits of duty. It would be hard to find a court in the land which has not at one time struggled to find an all-purpose formula to guide its decisions. Numerous commentators in dozens of scholarly articles have labored, and continue to labor, in an attempt to bring order out of the disorder that seems to exist in the writing on duty and the related concept of proximate cause. All attempts have been unsuccessful. The definitions end up being circular, saying essentially that duty is a relation between individuals without which there could be no liability.[204] Prosser eventually gave up trying to provide a formula, stating: "No better general statement can be made, than that the courts will find a duty where, in general, reasonable men would recognize it and agree that it exists."[205]

Dean Leon Green approached the problem from a different perspective but came to essentially the same conclusion. Eschewing foresight as the sole criterion he stated that it was the *hindsight* of the "wisest of our profession, the judges,"[206] viewing the transaction in its complete environmental setting, and calling into play "far-flung considerations affecting the welfare of persons not parties to the litigation,"[207] that must tell us whether a duty exists in a particular transaction: "It is impossible to write a meaningful formula that will give a judge's hindsight anything approaching automatic precision."[208] The *Renslow* court might have spelled out the "far-flung considerations" with which it would distinguish those harms which are compensable from those which are not. But perhaps adhering to Dean Green's admonition that duty can only be set with hindsight, with a view of the transaction in its complete environmental setting, was the wiser course.

Viewing *Renslow* in this context, it seems apparent that the duty issue was properly resolved in that case. The medical facts creating a risk of harm to this prospective plaintiff were well understood at the time of the transfusion—so well understood that a medical text quoted in the plurality opinion and predating the transfusion stated: "[I]t must be an absolute rule that Rh-positive blood is never transfused to an Rh-

203. *Id.* at 358, 367 N.E.2d at 1255.
204. W. PROSSER, *supra* note 118, at 325.
205. *Id.* 327.
206. Green, *Foreseeability in Negligence Law*, 61 COLUM. L. REV. 1401, 1418 (1961).
207. *Id.*
208. *Id.*

negative female who is below the age of menopause."[209] The plaintiff's mother clearly fell within the operation of this rule. The injury suffered by the plaintiff was not remote enough to create difficulties of proof, and the injury was tangible and compensable under the traditional tort measure of recovery—the comparison of the condition of the plaintiff given the injury and his condition if the injury had not occurred.[210]

Conceptually, once one accepts the proposition that a fetus— even a viable one—is not fully a legal person and only becomes one upon live birth, then the *Renslow* decision does not present a significant extension of the principles of liability for prenatal injuries. The interest protected in such cases is the *potentiality* of human life in a healthy and whole condition. The duty of care imposed on other persons is imposed to protect that interest and no other. If a living infant suffers pain or disability from the wrongful act of another, liability should not depend on whether the wrongful act occurred during life, during prenatal life or prior to conception. That the duty of care, the breach of which will create liability, should not depend on the physical existence of the individual plaintiff at the moment of the defendant's wrongful act is most aptly illustrated by the frequently used hypothetical example of defective baby food manufactured before the child who consumed it was born. If recovery depended on the baby being alive at the time of manufacture, then such a child would be without a remedy.

Viewed in the light of the foregoing discussion, *Renslow* seems only a modest extension of the duty of care to the unborn. But, obviously, *Renslow* could spawn tougher cases. Some of the more difficult will probably be claims for genetic damage or mutations in the second or third generation from radiation or chemical exposure. Difficulties in these cases would stem not only from the remoteness of the claimed damages but also from the difficulties of proof of causation, which in such cases is principally statistical in nature.[211] Perhaps by the time such cases arise, the state of our medical and scientific knowledge will

209. P. MOLLISON, BLOOD TRANSFUSION IN CLINICAL MEDICINE 418 (1961), *quoted in Renslow*, 67 Ill. 2d at 353-54, 357 N.E.2d at 1253.

210. As pointed out in Comment, *Preconception Torts: Foreseeing the Unconceived*, 48 U. COLO. L. REV. 621, 626 (1977), the *Renslow* decision is also consistent with the enterprise liability theory in that the costs of injuries are borne by all those who receive transfusions rather than by an individual recipient who may be injured.

211. Comment, *Radiation and Preconception Injuries: Some Interesting Problems in Tort Law*, 28 SW. L.J. 414, 423 (1974). The English Congenital Disabilities (Civil Liability) Act, 1976, c. 28, §§ 1(3), 4(5), meets the problem by providing that only the first generation is entitled to sue. *See* Hoggett, *supra* note 168; Pace, *Civil Liability for Pre-Natal Injuries*, 40 MOD. L. REV. 141, 149 n.38 (1977). A proposal for American legislation similarly restricting liability for remote harm is made in Comment, *Legal Duty to the Unborn Plaintiff: Is There a Limit?* 6 FORDHAM URB. L.J. 217 (1978).

have advanced to the point that judges can, with greater confidence than today, draw sensible outer boundaries of duty.

Some situations may pose policy problems which are even more difficult to resolve than those of remoteness and of staleness. Although some may be capable of resolution by application of the duty formula, others may not be. Injuries to an infant from the wrongful act or neglect of its parents— either before or during pregnancy—pose unusually difficult issues. Infecting a child with venereal disease, inflicting it with a deformity or disability resulting from chromosomal changes brought about by the mother's preconception drug use, causing physical or mental illness of the child through the mother's neglect of proper nutrition and health care during pregnancy, using alcohol and tobacco to excess during pregnancy, or giving birth to a baby when the parents have a known genetic defect that likely will appear in the child all seem to be cases which are ripe for litigation. Since it would normally be the parent who would bring an action on behalf of a child in such a case, it is not surprising that no such cases have been reported. But resorting to the duty concept will not resolve them when they do appear. The duty would seem clear in such cases. Yet other policy considerations, such as intrafamily immunity and the parents' independent rights of privacy and bodily integrity, may lead to a denial of a cause of action to the infant. This subject has been explored elsewhere[212] and will be touched on herein only as it may be raised by the wrongful life cases.

B. *Wrongful Life.*

The terms "wrongful life" and "wrongful birth" seem to have been used first in *Zepeda v. Zepeda*.[213] Although courts and commentators have applied the terms to a wide variety of actions brought by parents or by infants for damages growing out of unexpected or unwanted birth, or out of birth under conditions of disability or disadvantage, it is helpful for purposes of analysis to break these cases down into three categories.

The first includes cases in which an act of sexual intercourse producing conception, which creates life, also inflicts an injury on the child when born (as by genetic disease). The wrongful act can be either that of the parent or parents in having intercourse under the circumstances or of a third party who had the duty to prevent intercourse or concep-

212. *See* SUFFOLK L. REV. Note, *supra* note 22. The student author of that Note applies a balancing process to the interests of the mother and the *in utero* fetus and concludes that gross negligence should "be the point at which the woman's right to the free control of her body should be subordinate to the unborn child's right to begin life with a sound mind and body." *Id.* 609.

213. 41 Ill. App. 2d 240, 190 N.E.2d 849 (1963), *cert. denied*, 379 U.S. 945 (1964).

tion. Falling within this category are cases such as *Zepeda*, in which an infant sought recovery for being born an "adulterine bastard," and *Williams v. State*,[214] in which the infant sought recovery for being born an illegitimate child to a feeble-minded mother. The second category includes cases in which the negligence charged results in conception of an unwanted child. The paradigm case in this category is the ineffective sterilization of a parent resulting in the birth of an unplanned but healthy child, for which the parents seek compensation for the expenses of raising the child to adulthood. Although there may be some overlap between this category and the first category, particularly in cases in which the reason for the sterilization or contraception was to prevent the passing along of a genetic defect, they will be treated separately in the discussion below. The third category includes those cases in which, through the negligent act of the defendant, an injured or defective fetus is allowed to continue to term. The paradigm case in this category is the negligent failure to diagnose a pregnant mother's rubella, the result of which is the birth of a deformed or disabled child because of the forfeited opportunity to obtain an abortion. For convenience these three categories will be labeled *wrongful-conception* cases, *failed-contraception* cases and *abortion-denied* cases.[215]

1. *Wrongful-Conception Cases.* The first American case in which the issue of "wrongful life" was presented to an appellate court was *Zepeda*. In that case, the infant-plaintiff sued his father for damages because he had been born an adulterine bastard; his father had induced his mother to have sexual intercourse by promising to marry her when in fact the father was already married. The damages sought were for deprivation of the right to be a legitimate child, to have a normal home, to have a legal father, to inherit from his father and from his paternal ancestors, and for being stigmatized as a bastard. The trial court dismissed the complaint for failure to state a cause of action.[216]

In an opinion which frankly acknowledged the father's action as a "tort," the Appellate Court of Illinois nevertheless affirmed dismissal of the complaint

> because of our belief that lawmaking, while inherent in the judicial process, should not be indulged in where the result could be as sweeping as here. The interest of society is so involved, the action needed to redress the tort could be so far-reaching, that the policy of

214. 18 N.Y.2d 481, 223 N.E.2d 343, 276 N.Y.S.2d 885 (1966).

215. A somewhat similar categorization is suggested in Kashi, *The Case of the Unwanted Blessing: Wrongful Life*, 31 U. MIAMI L. REV. 1409 (1977).

216. 41 Ill. App. 2d at 245, 190 N.E.2d at 851.

the State should be declared by the representatives of the people.[217]

The "sweeping" result referred to by the court was not so much the opening of the doors of the courts to other illegitimates—although their sheer numbers would have been enormous[218]—as it was the "nature of the new action and the related suits which would be encouraged."[219]

> Encouragement would extend to all others born into the world under conditions they might regard as adverse. One might seek damages for being of a certain color, another because of race; one for being born with a hereditary disease, another for inheriting unfortunate family characteristics; one for being born into a large and destitute family, another because a parent has an unsavory reputation.[220]

Although the principal thrust of the opinion was directed to the danger of spawning a host of similar actions if relief were granted and the necessity that legislative action should authorize such a step, the court recognized the baffling jurisprudential dilemma that permeated the sought-for action—the fact that the "defendant's wrongful act simultaneously procreated the being whom it injured."[221] Or, as stated elsewhere in the opinion: "[T]he quintessence of his complaint is that he was born and that he is. Herein lies the intrinsic difficulty of this case."[222]

The second case to reach an appellate-level court was *Williams v. State*.[223] That case presented the New York Court of Appeals with the same issue but in a different context. In *Williams* the defendant was the State of New York, whose alleged negligent supervision of a state mental institution allowed a female patient, the plaintiff's mother, to be raped by another patient, resulting in the plaintiff's birth to a mentally defective mother. The New York Court of Appeals, like the Appellate Court of Illinois, held that the common law did not recognize as actionable the act of causing one to bear the "shame and sorrow" of illegitimate birth. Judge Keating, in his concurring opinion, expressed the dilemma posed by this type of case most succinctly:

> The measure of damage which she is really seeking is based

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217. *Id.* at 262-63, 190 N.E.2d at 859.

218. The court pointed out that in 1961, of the nearly 88,000 live births in Cook County, over 11,000 were illegitimate and that the ratio between illegitimate and legitimate births was increasing. *Id.* at 259, 190 N.E.2d at 858. Since the time of the *Zepeda* decision, the proportion of illegitimate births to total live births has continued to rise, particularly among white women. *See* U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 58 (1976); U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, PERSPECTIVES ON AMERICAN FERTILITY 39-48 (1978).

219. 41 Ill. App. 2d at 260, 190 N.E.2d at 858.

220. *Id.*

221. *Id.* at 253, 190 N.E.2d at 855.

222. *Id.* at 258, 190 N.E.2d at 857.

223. 18 N.Y.2d 481, 223 N.E.2d 343, 276 N.Y.S.2d 885 (1966).

> upon a comparison of the position she finds herself now and the position she would have been in, had she been born legitimately. Quite obviously, that is an unwarranted comparison here, for, had the State acted responsibly, she would not have been born legitimately—she would not have been born.[224]

Judge Keating's statement reflects the ordinary rule for computing tort damages—the amount of money necessary to place the plaintiff in the position she would have occupied but for the injury.[225] Thus, if the plaintiff would not have "been" in the absence of the injury, how can such a computation be made?[226]

The most significant recent challenge to the foregoing holdings occurred in *Park v. Chessin*.[227] In that case, the parents of a child born with a fatal, hereditary kidney disease that resulted in her death two and one-half years later brought a medical malpractice action against their physician for their medical and support expenses, their mental anguish & e.d., and loss of the wife's services, and a "wrongful life" action on behalf of the child for her pain and suffering during her life. The wrongful act of the physician which formed the basis of the action was negligently advising the parents, after the birth of an earlier child suffering from the same disease, that the chances of a subsequent baby being similarly diseased were "practically nil."[228] The Appellate Division of the New York Supreme Court upheld the trial court's refusal to dismiss the action except for counts for mental anguish and emotional distress.[229] The New York Court of Appeals reversed as to the wrongful life count on behalf of the infant.[230]

The case is significantly different from the prenatal and preconception injury cases previously considered in that no specific act of the defendant was the physical cause of the injury to either the parents or the child. Rather, the injury flowed from a genetic condition of the parents themselves. The wrongful act of the defendant was allowing conception to take place. The underlying assumption of the complaint is that but for the defendant's negligence, the plaintiff-parents would have prevented conception and the resultant injury to themselves and to the infant. The wrongful act of the defendant is thus essentially sim-

224. *Id.* at 485, 223 N.E.2d at 345, 376 N.Y.S.2d at 888.

225. *See* D. DOBBS, REMEDIES § 3.1 (1973).

226. Cases in accord with *Williams* are Pinkney v. Pinkney, 198 So.2d 52 (Fla. App. 1967) and Slawek v. Stroh, 62 Wis. 2d 295, 215 N.W.2d 9 (1974).

227. 60 App. Div. 2d 80, 400 N.Y.S.2d 110 (1977), *rev'd in part sub nom.* Becker v. Schwartz, 46 N.Y.2d 401 (1978).

228. 60 App. Div. 2d at 83, 400 N.Y.S.2d at 111.

229. *Id.* at 80, 400 N.Y.S.2d at 110.

230. Becker v. Schwartz, 46 N.Y.2d 401 (1978).

ilar to those of the defendants in *Zepeda* and *Williams*: negligently[231] allowing conception to take place under circumstances in which the act of conception which creates life also causes the injury.

The duty of the physician to the parents under the circumstances of the *Park* case presented no novel question of tort law:

> [V]alidating the parents' cause of action in the instant case merely extends to a physician a preexisting duty widely recognized in numerous fields of classic tort law, that one may not speak without prudence or due care when one had a duty to speak, knows that the other party intends to rely on what is imparted, and does, in fact, so rely to his detriment.[232]

As to the "wrongful life" cause of action on behalf of the infant, the essential difference between *Park*, *Zepeda* and *Williams* is in the injuries suffered. Rather than the intangible disadvantages flowing from illegitimacy or from birth to a feeble-minded mother, Lara Park suffered painful physical disease from which she later died. The Appellate Division found this distinction to be sufficient to support recovery by the infant. In the court's view, a persuasive factor was the abolition of the statutory ban on abortion, indicating to the court the emergence of a public policy giving potential parents the right not to have a child and considerable freedom in the manner in which they exercised that right. This right, in the view of the majority, extended to instances in which "it can be determined with medical certainty that the child would be born deformed."[233] The breach of the right was "tortious to the fundamental right [of the child] to be born as a whole, functional human being."[234] The recovery would be measured by the infant's "injuries and conscious pain and suffering"[235]—in other words, on the conventional basis of compensating for the difference between a "normal" life and one marred by the pain and suffering experienced by Lara Park.

There are two difficulties with the Appellate Division's analysis. The first is the unexplained gap in the logical progression from the right of the parents "not to have a child" to the conclusion that "breach of this right [of the parents] may also be said to be tortious to the fun-

231. Although the defendant's act in *Zepeda* was an intentional one, since an intentional act can be considered more culpable than a negligent one and since relief was nonetheless denied in *Zepeda*, the analogy to *Zepeda* remains appropriate.

232. 60 App. Div. 2d at 86, 400 N.Y.S.2d at 113. The Court of Appeals echoed: "Certainly, assuming the validity of plaintiffs' allegations, it can be said in traditional tort language that but for the defendants' breach of their duty to advise plaintiffs, the latter would not have been required to assume these obligations." 46 N.Y.2d at 412-13.

233. 60 App. Div. 2d at 88, 400 N.Y.S.2d at 114.

234. *Id.*

235. *Id.*

damental right [of the child] to be born a whole, functional human being." The second is the court's failure to consider the fact that, for the measurement of damages, the benchmark of a pain-free life was not one within the reach of Lara Park. There was nothing the defendant could have done that would have given Lara a pain- and disease-free life, for the *cause* of the pain and suffering was the genetic defects of her parents. All the defendant could provide as an alternative was "no life."

The Court of Appeals found each of these difficulties to be flaws in the infant's wrongful life claim. The first was characterized as the "more fundamental."[236] As to it the Court found "no predicate at common law or in statutory enactment for judicial recognition of the birth of a defective child as an injury to the child . . . ."[237] In other words, there is no fundamental right to be born as a whole, functional human being. The second was that a cause of action on behalf of an infant demanded a calculation of damages dependent on a comparison of life in an unimpaired state with lack of existence—a "comparison the law is not equipped to make."[238]

Several student commentators, writing prior to the New York Court of Appeals' decision in *Park* and focusing their analyses principally on the elements of duty and causation, seem to agree with the Appellate Division's conclusions, thus essentially equating the *Park*-type of factual situation with that of *Renslow*.[239] These analyses ignore an essential difference between the two situations. That difference lies in the opposite consequences which will flow from negligent versus nonnegligent conduct by the defendant. In *Renslow*, nonnegligent conduct would have resulted (all other factors being equal) in the birth of a healthy child. In *Park*, on the other hand, nonnegligent conduct would have resulted in no birth at all. In assessing compensable harm in *Renslow*, therefore, a conventional measure of damages can be applied—that is, the monetary amount necessary to compensate the plaintiff for the difference between a whole life and one flawed by the injury. In *Park*, the damage assessor faces the impossible task of comparing nonlife with life of less than full quality. Other commentators

236. 46 N.Y.2d at 411.

237. *Id.*

238. *Id.* at 412.

239. Comment, *Pregnancy After Sterilization: Causes of Action for Parent and Child*, 12 J. FAM. L. 635, 644 (1973) (written prior to *Renslow* and *Park*); Note, *Torts Prior to Conception: A New Theory of Liability*, 56 NEB. L. REV. 706, 717 (1977). *But see* Note, *Torts—An Action for Wrongful Life Brought on Behalf of the Wrongfully Conceived Infant*, 13 WAKE FOREST L. REV. 712, 723-25 (1977) (suggested application of the conditional-prospective-liability concept to the *Park* situation).

have tried to develop formulas to measure life with or without defects against nonlife,[240] but their efforts are unpersuasive for the reason well stated by Justice Jasen:

> Whether it is better never to have been born at all than to have been born with even gross deficiencies is a mystery more properly to be left to the philosophers and the theologians. Surely the law can assert no competence to resolve the issue, particularly in view of the very nearly uniform high value which the law and mankind has [*sic*] placed on human life, rather than its absence.[241]

Justice Weintraub, dissenting in part in *Gleitman v. Cosgrove*,[242] perhaps put it best when he said:

> Ultimately, the infant's complaint is that he would be better off not to have been born. Man, who knows nothing of death or nothingness, cannot possibly know whether that is so. . . . To recognize a right not to be born is to enter an area in which no one can find his way.[243]

2. *Failed-Contraception Cases.* The dilemma presented by Justices Jasen and Weintraub is posed most starkly in the failed-contraception cases. In these cases the parents have made an affirmative decision not to have children—either temporarily or permanently—and have acted on that decision either by the use of contraceptives or by having one of the parents sterilized. The paradigm case in this area is the failure of the contraceptive device or the sterilization procedure, leading to the birth of a healthy, legitimate child. The usual damage claim brought by the parents in such cases has included some or all of the following elements: the cost of the failed sterilization operation; the medical costs of pregnancy and delivery; the pain and suffering of the mother during pregnancy and delivery; the costs of rearing the unwanted child to adulthood; the emotional and psychic costs of an unwanted pregnancy and rearing an additional child; and the father's loss of consortium.[244]

Since 1934, when *Christensen v. Thornby*[245] was decided, the courts have recognized that there is no public policy against sterilization to

240. *See, e.g.*, Tedeschi, *On Tort Liability for "Wrongful Life,"* 1 ISRAEL L. REV. 513 (1966); Note, *A Cause of Action for "Wrongful Life": [A Suggested Analysis]*, 55 MINN. L. REV. 58, 66 (1966).

241. 46 N.Y.2d at 411.

242. 49 N.J. 22, 227 A.2d 689 (1967).

243. *Id.* at 63, 227 A.2d at 711 (Weintraub, C.J., dissenting in part).

244. *See, e.g.*, Custodio v. Bauer, 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967); Coleman v. Garrison, 327 A.2d 757 (Del. Super. Ct. 1974), *aff'd*, 349 A.2d 8 (Del. 1975); Bushman v. Burns Clinic Medical Center, 83 Mich. App. 453, 268 N.W.2d 683 (1978); Troppi v. Scarf, 31 Mich. App. 240, 187 N.W.2d 511 (1971); Sherlock v. Stillwater Clinic, 260 N.W.2d 169 (Minn. 1977); Ball v. Mudge, 64 Wash. 2d 247, 391 P.2d 201 (1964).

245. 192 Minn. 123, 255 N.W. 620 (1934).

protect the wife's health. With *Griswold v. Connecticut*[246] and *Roe v. Wade*,[247] the right of a person to prevent conception and to terminate pregnancy under certain conditions took on a constitutional dimension. The recognition of the *right* not to bear children, however, did not automatically provide the solution to the problem created when the negligence of a medical practitioner prevented the attempted exercise of that right from being effective.

Suppose, for example, that a married couple, after the birth by Caesarian section of several children, decided that for the preservation of the health of the mother, the husband should obtain a vasectomy. If the vasectomy is negligently done,[248] resulting in the wife becoming pregnant and giving birth to a normal, healthy child without adverse effect upon the health of the mother other than the normal discomfort, inconvenience and pain of pregnancy and birth by Caesarean section, and the child born is loved and cherished, should the parents be able to recover from the physician who performed the vasectomy for malpractice?

Under ordinary tort principles applicable to medical malpractice, the elements of duty, breach of duty and causation are met. The difficulty is in determining whether an injury has been suffered. If the sole purpose of the sterilization is to protect the prospective mother's health, the only injury she has suffered has been the temporary pain and discomfort of pregnancy and delivery—and perhaps the emotional strain and mental apprehension during pregnancy of the possible adverse effects upon her health. The husband has suffered the temporary loss of consortium. Jointly they have acquired the expenses of rearing the child to adulthood.

But these adverse effects may be offset by the joy, affection, companionship and services of the child during the lifetime of the parents. Under the tort "benefit rule,"[249] these benefits conferred by the defend-

246. 381 U.S. 479 (1965).

247. 410 U.S. 113 (1973).

248. Not all so-called "failed" vasectomies are the result of negligence. Following a vasectomy, which consists of severing the vas deferens (the tube which carries the male sperm from the testicles to the urethra), some sperm remain stored in the seminal vesicle and prostate for several weeks. Thus, if the male resumes intercourse without the use of other contraceptive measures before a semen analysis indicates the absence of sperm, he may impregnate his mate. Further, spontaneous recanalization—a growing together of the severed vas— occurs in 0.5% to 1% of vasectomies. *See* Lombard, *Vasectomy*, 10 SUFFOLK L. REV. 25, 33 (1975). Negligence by the physician, consequently, could take place not only in the conduct of the operation but also in the conduct of the post-operative semen analysis or in failing to counsel the patient about the possibility of continuing fertility for a period after the operation.

249. RESTATEMENT (SECOND) OF TORTS § 920 (1979) provides:

When the defendant's tortious conduct has caused harm to the plaintiff or to his property

ant's tortious conduct should be considered in mitigation of damages if they are to the same interest which was harmed. If the net value of the benefits conferred is more than the harm inflicted, then there should be no recovery whatever. Two early cases, adopting the view that the joys of parenthood always outweigh its burdens, held as a matter of law that there could be no recovery.[250] In one recent case,[251] the Michigan Court of Appeals agreed that the benefits of parenthood could be offset against all elements of claimed damage, but left it to the jury to decide the amounts. Some of the more recent cases, however, have divided the damages into two categories—the first including the pain and suffering of the mother, the father's loss of consortium, the cost of the failed sterilization operation and the medical expenses of birth and delivery, and the second consisting of the expenses of rearing the child to adulthood. Only the second category would be subject to offset under the "benefit rule" since the other interests harmed were not the same as those benefited.[252] Under this rule there would be some "net" injury to parent-plaintiffs in all cases. Since most courts have been unwilling to say that in today's society an unplanned child is always a "blessed event," thus making the benefits outweigh the harm as a matter of law, they have left it to the fact-finder to perform the balancing act.[253]

The question often raised is how to measure the value of the love, companionship and services of an unplanned or unwanted infant. Juries are asked to measure that same value in setting damages in infant wrongful death actions. Is this measurement any less tangible and difficult when it is used as an offset against the cost of rearing a child than when it is an element of damages? Or, for that matter, is it any less tangible than pain and suffering, consortium or emotional upset? Probably not, but society has difficulty in casting aside the time-honored

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and in doing so has conferred a special benefit to the interest of the plaintiff that was harmed, the value of the benefit conferred is considered in mitigation of damages, to the extent this is equitable.

250. Christensen v. Thornby, 192 Minn. 123, 126, 255 N.W. 620, 622 (1934); Shaheen v. Knight, 11 Pa. D. & C. 2d 41, 45-46 (1957). A Delaware trial court reached a similar result on different grounds. It refused to allow inclusion of the costs of child rearing as an element of damages, finding that the parents' decision to keep the child after its birth was an implicit determination that the benefits of having the child outweighed the cost of its rearing. Coleman v. Garrison, 327 A.2d 757, 761 (Del. Super. Ct. 1974); *contra* Sherlock v. Stillwater Clinic, 260 N.W.2d 169 (Minn. 1977).

251. Troppi v. Scarf, 31 Mich. App. 240, 262, 187 N.W.2d 511, 521 (1971).

252. *See, e.g.*, Sherlock v. Stillwater Clinic, 260 N.W.2d 169, 176 (Minn. 1977).

253. Custodio v. Bauer, 251 Cal. App. 2d 303, 323, 59 Cal. Rptr. 463, 475 (1967); Jackson v. Anderson, 230 So.2d 503 (Fla. App. 1970); Troppi v. Scarf, 31 Mich. App. 240, 262, 187 N.W.2d 511, 521 (1971); Sherlock v. Stillwater Clinic, 260 N.W.2d 169, 176 (Minn. 1977); Betancourt v. Gaylor, 136 N.J. Super. 69, 75, 344 A.2d 336, 339 (1975); Rivera v. State, 94 Misc. 157, 404 N.Y.S.2d 950, 953 (Ct. Cl. 1978).

concept that the birth of a child is always a happy occasion. It is true that in many failed-contraception cases, the unplanned birth may truly be an unmixed blessing. Presumably this will be the case when the sole purpose of the sterilization or contraception was to avoid the possibility of harm to the mother or the possibility of a genetic injury to the child, and the mother is not harmed and the baby is born healthy. Other circumstances may make the event less auspicious—the parents may not be married to each other, the child may be born deformed, the parents may not have the financial resources to support another family member[254] or the mother may be physically handicapped and unable to care for the child. Each of these circumstances would make the "net" cost of rearing the child to maturity quite different. In any of these situations, perhaps the solution adopted by most courts of allowing the jury to decide the "net" cost of rearing the child by offsetting the recovery by an amount which represents the benefits to the parents is as good as any, provided, of course, that the jury is also instructed that the net value can be zero.

If this system is adopted, what weight should be given to the fact that the parents may have refused the option of abortion or placing the child up for adoption after its birth? It could be argued that since the parents had the opportunity to avoid the harmful consequences of the defendant's negligence, they should be denied recovery for those elements of damages which their action could have prevented. The counter to this argument is that the mitigation-of-damages doctrine requires only that reasonable measures be taken.[255] Both abortion and giving up a child for adoption are so charged with religious, moral, philosophical and emotional overtones that it is difficult to argue that requiring a plaintiff to take either action as a condition of full recovery for cost-of-rearing expenses is a *reasonable* measure. On the other hand, to saddle a negligent physician or pharmacist with the full costs of rearing a child to maturity when he or she does not receive any of the joys or benefits of parenthood smacks of being punitive.

Except for a Delaware trial court, whose holding that the parents' decision to keep rather than place for adoption a child born after an unsuccessful sterilization amounted to a determination by the parents that the benefits of parenthood outweighed the costs,[256] no court has

254. In Rivera v. State, 94 Misc. 157, 404 N.Y.S.2d 950 (Ct. Cl. 1978), the court characterized the financial consequences to the parents in that case as "catastrophic." *Id.* at 162, 404 N.Y.S.2d at 953.

255. C. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES § 33 (1935); RESTATEMENT (SECOND) OF TORTS § 918 (1979).

256. Coleman v. Garrison, 327 A.2d 757, 761 (Del. Super. Ct. 1974).

required parent-plaintiffs to make the Hobson's choice between abortion or adoption and giving up a cause of action for the costs of childrearing. The few cases which have considered this issue not only have refused to rule on it as a matter of law but have also held that the jury should be instructed that in weighing mitigation of damages they should not take into account that the parents did not choose abortion or placing the child up for adoption.[257] Recognizing the possibility of excessive awards in such cases, however, the Supreme Court of Minnesota has mandated that the damages issue should be submitted to the jury with a special verdict form along with explanatory instruction and should be subjected to "strict judicial scrutiny."[258]

Whether or not the best answer to the philosophical and ethical questions posed by the task of determining the cost-of-rearing element of damages in failed-contraception cases is to "leave it to the jury," it is probably the most practical solution available if we are to rely on our existing tort-litigation system for assessing compensation in such cases. The courts are not indifferent to the difficulties, however, and as suggested by the Minnesota Supreme Court, the responsibility is not that of the courts alone:

> The result we reach today is at best a mortal attempt to do justice in an imperfect world. In this endeavor we are not unmindful of the deep and often times painful ethical problems that cases of this nature will continue to pose for both courts and litigants. It is therefore our hope that future parents and attorneys would give serious reflection to the silent interests of the child and, in particular, the parent-child relationships that must be sustained long after legal controversies have been laid to rest.[259]

The court's reference to the responsibilities of parents and attorneys relates to the psychic and emotional harm that might be inflicted upon a child by the mere litigation of a failed-contraception case. Win or lose, they have branded the child an "emotional bastard."[260] By the act of bringing suit, parents may have caused more harm than can be compensated by any damage award they may receive. But the risk of inflicting psychic or emotional harm is not so great as to warrant a public policy which would prohibit an action by parents for cost-of-rearing expenses in all cases and in all circumstances—at least in the view of the Minnesota court. In some cases, the harm may have occurred already, as when the parents are not married to each other. Or

257. Troppi v. Scarf, 31 Mich. App. 240, 187 N.W.2d 511 (1971); Sherlock v. Stillwater Clinic, 260 N.W.2d 169 (Minn. 1977); Rivera v. State, 94 Misc. 157, 404 N.Y.S.2d 950 (Ct. Cl. 1978).

258. Sherlock v. Stillwater Clinic, 260 N.W.2d 169, 176 (Minn. 1977).

259. *Id.* at 176-77.

260. *Id.* at 173.

the circumstances of the parents or the child may be such that the need for financial support may outweigh the risk of emotional or psychic harm to the child, as when the child has been born deformed or disabled, necessitating extraordinary expenditures for its care. The mother or father may be physically or emotionally incapable of parenthood, also necessitating extraordinary child-care expenditures. The Minnesota court, at least, would say that the initial balancing of these interests should be done by the parents and their attorney, not by the court.[261] If the parents choose to litigate, then the court will not strike down the cause of action but will make a "mortal attempt to do justice in an imperfect world,"[262] leaving it to the jury to assess net damages suffered by the parents. Perhaps this is the fairest and most practical solution to these difficult cases.

In two cases, prior-born brothers and sisters of the child born as a result of failed contraception have sought recovery for a reduction in the love and affection and financial support they would receive as a result of the increase in size of the family.[263] In both cases the court gave short shrift to their claims and rightly so, but in at least two other cases the courts have recognized that the necessity for the mother to spread her love and affection over a larger family is a loss compensable to her.[264] Since the love and affection of a mother for her child would seem to be capable of expansion to include additional family members without diminishing that afforded prior members, it is not apparent that such recovery should be allowed at all, nor, if allowed, what the measure of this element of damages might be.

Only one decision has been discovered in which an infant has sought recovery for its own wrongful life in a failed-contraception case. In *Elliott v. Brown*,[265] the plaintiff was born deformed after her father had undergone a vasectomy—not for the purpose of preventing birth of

261. In a poignant footnote in the majority opinion in *Sherlock*, Justice Rogosheske, stating his own personal view that the birth of a child should "always be regarded as a 'gift' of incalculable benefit to his parents," *id.* at 177 n.15, expressed the hope that parents would be dissuaded from bringing actions principally for recovery of cost-of-rearing expenses. *Id.* In a subsequent footnote he pointed out the obligation imposed on attorneys by the ABA CODE OF PROFESSIONAL RESPONSIBILITY E.C. 7-10 "to treat with consideration all persons involved in the legal process and to avoid the infliction of needless harm [on the infant]." *Id.* at 177 n.16.

262. *Id.* at 176.

263. Aronoff v. Snider, 292 So.2d 418 (Fla. Dist. Ct. App. 1974) (claim without foundation in law or logic); Cox v. Stretton, 77 Misc. 2d 155, 352 N.Y.S.2d 834 (Sup. Ct. 1974) (relying on New Jersey and New York precedents holding that a child had no right of action for the loss of services of a parent resulting from the negligent injury of the parent).

264. Custodio v. Bauer, 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967); Bowman v. Davis, 48 Ohio St. 2d 41, 356 N.E.2d 496 (1976).

265. 361 So.2d 546 (Ala. 1978).

a genetically defective child but rather to avoid endangering his wife's health by a pregnancy. In holding that "there is no legal right not to be born,"[266] the court specifically rejected the rationale of the Appellate Division in *Park v. Chessin*[267] and in addition suggested that *Park* might be distinguishable because in *Park* "there was a causal connection between the alleged negligence and the deformity."[268]

The decision of the Alabama court in *Elliott* seems correct. Moreover, no circumstances can be visualized in which a cause of action by an infant for its own wrongful life should be allowed in a failed-contraception case. If the infant is born whole and healthy, no possible basis of recovery can be visualized, since no harm has been inflicted. If the child is born disabled, there also does not appear to be a basis for its recovery. If the sterilization or contraceptive action was initiated for any reason other than to avoid the risk of the particular disability suffered, the birth of a disabled child was not within the range of reasonable foreseeability and thus not within the outer perimeter of the duty formula. If the sterilization or contraceptive action was initiated for the purpose of avoiding the birth of a disabled child, then the situation is closely analogous to *Park* and poses the same dilemma of measuring no life against life in a diseased or disabled condition.

3. *Abortion-Denied Cases.* In the final category of wrongful life cases, the defendant is almost invariably a physician, and the alleged wrongful acts on the physician's part can include several different types of misfeasance or malfeasance. The wrongs most commonly alleged are failure to diagnose a condition of the fetus or the mother which is likely to lead to the birth of a malformed or disabled child and failure properly to advise the prospective parents of the risk of such a condition once it is diagnosed, the result in either situation being the birth of a disabled or deformed child. The alleged wrongful act may also be a failure to diagnose the pregnancy sufficiently early to permit the mother to obtain an abortion, or the botching of an abortion, the result in either case being the birth of an unwanted—albeit normal and healthy[269]—child.

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266. *Id.* at 548.

267. 60 App. Div. 2d 80, 400 N.Y.S.2d 110 (1977) *rev'd in part on this ground sub nom.* Becker v. Schwartz, 46 N.Y.2d 401 (1978).

268. 361 So.2d at 548.

269. The few reported cases of too-late-for-abortion diagnosis or botched abortion procedures have resulted in the birth of healthy, normal babies. Stills v. Gratton, 55 Cal. App. 3d 698, 127 Cal. Rptr. 652 (1976); Ziemba v. Sternberg, 45 App. Div. 2d 230, 357 N.Y.S.2d 265 (1974); Rieck v. Medical Protective Co., 64 Wis. 2d 514, 219 N.W.2d 242 (1974). It is, of course, conceivable that the child might not be healthy and normal, in which case a different set of issues is raised, depending on whether the abnormality bears a causal relationship to the defendant's conduct.

The earliest (and leading) case in the abortion-denied category is *Gleitman v. Cosgrove*.[270] In this case, the Supreme Court of New Jersey upheld a trial court's dismissal of a malpractice action by a child and its parents against two physicians for negligence in advising the mother that having had rubella when she was approximately one month pregnant would have no effect on her child. The child was subsequently born deaf, nearly blind and mentally retarded. The infant's action was for birth defects, the mother's for the effects on her emotional state caused by the infant's condition and the father's for the costs of caring for the infant. Although this was a pre-*Roe* case, availability of a legal abortion to the plaintiff-mother was assumed by the majority.[271] Nevertheless, the firm New Jersey public policy against abortion permeated the majority and concurring opinions.

Assuming the availability of a legal abortion to the mother, Justice Proctor held for the majority that the child's action could not be maintained because the court could not measure the value of life in an impaired condition against the absence of life.[272] The counts on behalf of the mother and father presented different problems. The mother argued that an abortion would have freed her of the emotional problems caused by the raising of a child with birth defects, and the father argued that it would have been less expensive for him to pay for his wife's abortion than to raise the child.[273] The court, relying on its "felt intuition of human nature"[274] that the unborn child, if he could have been asked, would have chosen life with defects "as against no life at all"[275] and on its own evaluation of the value of the right to life and pointing out that it was not faced with the necessity of balancing the mother's life against the child's, found that eugenic considerations were not controlling. In its dramatic phrasing:

> We are not talking here about the breeding of prize cattle. It may have been easier for the mother and less expensive for the father to have terminated the life of their child while he was an embryo, but these alleged detriments cannot stand against the preciousness of the single human life to support a remedy in tort. . . .
>
> Though we sympathize with the unfortunate situation in which

270. 49 N.J. 22, 227 A.2d 689 (1967).

271. *Id.* at 27, 227 A.2d at 691. However, Justice Francis, who joined the majority, based his additional concurring opinion on a determination that abortion would have been illegal, thus negating any duty that the defendants might have had to advise the parents of potential birth defects. *Id.* at 48, 227 A.2d at 703 (Francis, J., concurring).

272. *Id.* at 28, 227 A.2d at 692. See text accompanying notes 216-43 *supra*, for a discussion of this problem in a different context.

273. 49 N.J. at 29, 227 A.2d at 692-93.

274. *Id.* at 30, 227 A.2d at 693.

275. *Id.*

> these parents find themselves, we firmly believe the right of their child to live is greater than and precludes their right not to endure emotional and financial injury.[276]

Justice Jacobs, writing for himself and Justice Schettino in dissent, stated his view that under the circumstances of the case Mrs. Gleitman could have obtained a legal abortion—probably in New Jersey and certainly in another jurisdiction—and that the difficulty of dealing with compensatory damages should not deter the court from allowing a cause of action. Although he was somewhat vague about whether the child himself should be able to recover for his impaired condition, Justice Jacobs expressed the firm view that any damages allowed "should be dedicated primarily to his care and the lessening of his difficulties."[277]

Chief Justice Weintraub, dissenting in part, agreed with the majority's dismissal of the infant's claim. He would, however, have allowed the parents' action, not for the care and cure of the child, for this was "derivative and dependent upon the accrual of a right in the child,"[278] but rather for the hurt suffered by the mother "in her own right by the denial to her of her option to accept or reject a parental relationship with the child"[279] and by the father "as a victim of a wrong done to [the mother]."[280]

Although *Gleitman* has had substantial impact in other jurisdictions where the same issues have been litigated,[281] its authority, at least as to the claims by the parents, has been considerably weakened by the Supreme Court's 1973 abortion decisions. Reflecting as it did the prevailing pre-*Roe* judicial view of the legality of abortion, the majority's opinion gave precedence to the state's interest in protecting the unborn child's "right to life" over the mother's choice not to endure the emotional harm of the birth and rearing of a deformed child.[282] The effect

276. *Id.* at 30-31, 227 A.2d at 693.

277. *Id.* at 50, 227 A.2d at 704 (Jacobs, J., dissenting).

278. *Id.* at 64, 227 A.2d at 711 (Weintraub, C.J., dissenting in part).

279. *Id.* at 64-65, 227 A.2d at 712.

280. *Id.* at 65, 227 A.2d at 712.

281. *See* Gildiner v. Thomas Jefferson Univ. Hosp., 451 F. Supp. 692 (E.D. Pa. 1978) (applying Pennsylvania law; *Gleitman* followed only to deny the child a cause of action); Smith v. United States, 392 F. Supp. 654 (N.D. Ohio 1975) (applying Texas law; *Gleitman* followed only to deny the child a cause of action); Howard v. Lecher, 42 N.Y.2d 109, 366 N.E.2d 64, 397 N.Y.S.2d 363 (1977) (*Gleitman* followed to deny both parents and child a cause of action); Stewart v. Long Island College Hosp., 35 App. Div. 2d 531, 313 N.Y.S.2d 502 (1970), *aff'd*, 30 N.Y.2d 695, 283 N.E.2d 616, 332 N.Y.S.2d 640 (1972) (*Gleitman* followed to deny both parents and child a cause of action); Jacobs v. Theimer, 519 S.W.2d 846 (Tex. 1975) (*Gleitman* followed to deny both parents and child a cause of action) (dicta); Dumer v. St. Michael's Hosp., 69 Wis. 2d 766, 233 N.W.2d 372 (1975) (*Gleitman* followed only to deny the child a cause of action).

282. 49 N.J. at 31, 227 A.2d at 693.

of *Roe* is to reverse that order of precedence, at least until the fetus becomes viable.[283] If, under *Roe*, a mother during the early periods of pregnancy can, in consultation with her physician, elect to terminate her pregnancy without articulating a reason, *a fortiori* her right to do so for eugenic reasons cannot be contested. Thus, the duty of the physician to diagnose and to advise the pregnant woman of the risks of birth defects in the unborn child is apparent. With the taboo against abortion lifted, the duty of the physician to counsel the pregnant mother as to abortion is identical to that of the physician consulted prior to conception as to the risks of passing along the genetic defects of prospective parents to an as yet unconceived child. If he fails to exercise reasonable care in the performance of that duty, then he should be liable to the same extent as the physician in the failed-contraception situation already examined.

The few reported post-*Roe* cases seem to support that view.[284] In *Becker v. Schwartz*,[285] the companion case to *Park* on appeal, the New York Court of Appeals joined the jurisdictions adopting this view. In *Becker* the court found that a cause of action in medical malpractice was stated on behalf of parents of a child born with Downs Syndrome (mongolism) by allegations that a physician neither advised the expectant parents of the increased risk of the disease when the mother was over thirty-five nor of the availability of an amniocentesis test to determine whether the fetus was so afflicted.[286]

On the other hand, the falling of the barriers against abortion—both prior to and subsequent to *Roe*— does not seem to have had any impact on the wrongful life cause of action by the nonaborted infant. Even those courts which have recognized a right of action in the parents for the costs of rearing a nonaborted, disabled child and for their own injuries flowing from the denial of the opportunity to abort have not changed their position on denial of a cause of action on behalf of the child.[287]

Because of the new constitutional stance on abortion, cases in which the alleged malpractice is the failure to provide the mother an

283. 410 U.S. at 163.

284. Gildiner v. Thomas Jefferson Univ. Hosp., 451 F. Supp. 692 (E.D. Pa. 1978); Dumer v. St. Michael's Hosp., 69 Wis. 2d 766, 233 N.W.2d 372 (1975).

285. 46 N.Y.2d 401 (1978).

286. *Id.* at 412-13. The New York Court of Appeals refused, however, to abandon its long-standing rule against allowing recovery for psychic and emotional harm caused by the birth, suffering and gradual death of their child. *Id.* at 413-15.

287. *See, e.g.*, Gildiner v. Thomas Jefferson Univ. Hosp., 451 F. Supp. 692 (E.D. Pa. 1978); Stills v. Gratton, 55 Cal. App. 3d 698, 127 Cal. Rptr. 652 (1976); Becker v. Schwartz, 46 N.Y.2d 401 (1978); Dumer v. St. Michael's Hosp., 69 Wis. 2d 766, 233 N.W.2d 372 (1975).

opportunity to abort merely because she does not wish to have a child, and the child is subsequently born healthy, seem legally indistinguishable from those involving failed contraception and subsequent healthy birth.[288]

## IV. CONCLUSION

The law concerning tort liability for injuries to the unborn has evolved in several distinct but sometimes overlapping phases since the first case was posed for the American judiciary by *Dietrich* in 1884. In the first era there was uniformity of decision that recovery was not allowed for prenatal injuries. That phase came to an abrupt end in 1946 with the *Bonbrest* decision. Just as *Dietrich* had received immediate and universal acceptance, so also did *Bonbrest*; courts have been almost unanimous in allowing a cause of action in at least some circumstances. The phase immediately following *Bonbrest* was one in which injuries to a *viable* fetus created a cause of action. This phase continues, in attenuated form, to the present; viability of the fetus remains a requirement for recovery for the wrongful death of a fetus in most jurisdictions.

The next phase, which is not marked by any clear initial boundary and continues to the present, is the era in which a cause of action is recognized for injuries received by the fetus prior to viability. *Renslow* represents the current furthest extension of that phase. Except for continuing disagreement among jurisdictions as to whether a cause of action exists for the death of a fetus prior to its live birth, the law developed during each of the foregoing phases appears to have reached a state of relative stability. As to the live-birth requirement, the trend of decisions, despite what the author considers compelling reasons to the contrary,[289] is to eliminate any such requirement. The recent decision of the California Supreme Court denying an action in the absence of live birth[290] may lead to a reassessment or reversal of the majority

288. As in the failed-contraception cases, see text accompanying notes 249-61 *supra*, the difficulty for the parents' cause of action lies in proving the injury when the child is born healthy. As in the failed-contraception cases, courts have split over the question of whether the birth of a healthy child is a "blessed event," the benefits of which, by operation of law, outweigh the injury flowing from the event. *Compare* Greenberg v. Kliot, 47 App. Div. 2d 765, 367 N.Y.S.2d 966 (1975) *and* Rieck v. Medical Protective Co., 64 Wis. 2d 514, 219 N.W.2d 242 (1974) ("blessed event"—benefits by law outweigh injuries) *with* Stills v. Gratton, 55 Cal. App. 3d 698, 127 Cal. Rptr. 652 (1976), Martineau v. Nelson, 247 N.W.2d 409 (Minn. 1976) *and* Ziemba v. Sternberg, 45 App. Div. 2d 230, 357 N.Y.S.2d 265 (1974) (whether the benefits outweigh the injuries a question of fact for the jury). As argued above, see text accompanying notes 256-62 *supra*, the most equitable (and realistic) approach to injury is to treat it as a question of fact. *See* Sherlock v. Stillwater Clinic, 260 N.W.2d 169 (Minn. 1977) (a failed-contraception case).

289. See text accompanying notes 140-85 *supra*.

290. Justus v. Atchison, 19 Cal. 3d 564, 565 P.2d 122, 139 Cal. Rptr. 97 (1977).

view.

The newest phase in the developing law of the unborn was introduced by actions seeking recovery for wrongful life or wrongful birth. Although these actions have elements which in some ways set them apart from the ordinary prenatal injury cases, they lend themselves to a parallel analysis since the ultimate result of the acts upon which liability is asserted is usually the birth of an infant in a less-than-whole condition.

Although the jurisprudence of wrongful life has not yet reached a stage of maturity which permits discernment of ultimate trends, most courts appear to have agreed on two major premises. The first is that parents may recover damages for the injuries they have suffered as a result of a tortfeasor's negligence in causing or permitting the birth of an unwanted child. Such a right of recovery is consistent with traditional tort theories of recovery and damages. The second is that the child himself cannot recover for his own wrongful birth or life because of the impossibility of measuring the value of life— even in a less-than-whole state—against nonlife.

*Park v. Chessin*[291] was a remarkable break from the unanimity which seemed to mark the second premise. In *Park*, the Appellate Division appeared willing to accept the proposition that the difference between a whole life and life in less than whole condition is a compensable harm if it is the result of the wrongful act of another, even if the alternative available to the less-than-whole infant was not wholeness but nonexistence. Although the New York Court of Appeals has now reversed *Park*,[292] restoring unanimity of judicial opinion, the Appellate Division's decision is sure to have some impact in other jurisdictions. Even in overruling *Park*, the Court of Appeals referred to the "emerging legal concept" of wrongful life[293] and remarked on how, having freed themselves from the conceptual difficulties formerly posed by wrongful death actions, "courts have again been drawn toward the murky waters at the periphery of existing legal theory to test the validity of a cause of action for what has been generically termed 'wrongful life.' "[294]

The factual context of *Park* obviously was one which would invoke the sympathy of the court and cry out for relief for the individual plaintiff. If cases in our system were decided *ad hoc*, such a decision

291. 60 App. Div. 2d 80, 400 N.Y.S.2d 110 (1977) *rev'd in part sub nom.* Becker v. Schwartz, 46 N.Y.2d 401 (1978).

292. Becker v. Schwartz, 46 N.Y.2d 401 (1978).

293. 46 *Id.* at 408.

294. *Id.* at 405.

would probably be applauded. But our system of jurisprudence is one in which individual decisions—particularly appellate decisions—have a much broader impact. If *Park* stands for the proposition that wholeness of mind and body is the birthright of every child and that anyone who has the legal power to determine whether the child shall be given life owes a duty to use reasonable care to determine whether a prospective child will be born "whole" and owes a duty to use reasonable care either to prevent conception or to abort a child whose prospects for a healthy life are not good, the implications are enormous.[295]

In *Park* it was the physician-adviser who was found to have breached his duty to the child in failing to provide the parents with proper advice. With the continuing demise of intra-family immunity in most American jurisdictions,[296] there seems to be no barrier to extending liability to the parents themselves, for it is the right of the *child himself* to be born as a "whole, functional human being"[297] that *Park* purports to protect. Once that threshold is crossed, finding an appropriate stopping point is an impossible task. Is a feeble-minded person, or one suffering from hereditary diabetes, or one living in extreme poverty and degradation, or an illegitimate less than a "whole, functional human being?" Unless courts are willing to face these issues—and to differentiate those conditions less than wholeness that create liability from those that do not—they should not attempt to press legal tools into a service they are entirely unsuited to perform. Rather, they should follow the lead of the New York Court of Appeals in *Williams v. State*:[298] "Being born under one set of circumstances rather than another or to one pair of parents rather than another is not a suable wrong that is cognizable in court."[299]

295. Not the least of these implications is that in most cases, the prediction of genetic defects is based on statistical probabilities. If, for example, rubella in the early-stage pregnant mother causes defects in one of five infants, a duty to abort in such circumstances would result in taking the lives of four healthy infants for every one who would be saved from a handicapped life. See note 95 *supra*.

296. *See* W. PROSSER, *supra* note 118, at 865; SUFFOLK L. REV. Note, *supra* note 22, at 583.

297. *Park*, 60 App. Div. 2d at 88, 400 N.Y.S.2d at 114.

298. 18 N.Y.2d 481, 223 N.E.2d 343, 276 N.Y.S.2d 885 (1966).

299. *Id.* at 484, 223 N.E.2d at 344, 276 N.Y.S.2d at 887.