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Recovery for the Wrongful Death of a Fetus

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RECOVERY FOR THE WRONGFUL DEATH OF A FETUS

I. INTRODUCTION

This Note traces the history and development of actions for prenatal wrongful death. It emphasizes the state of the law in Virginia and examines the rationale of various jurisdictions where courts have chosen to draw a line for imposing liability. After discussing the role of wrongful death statutes, this Note concludes with an analysis of the trends in the law and a prediction of the direction the law will take in the future.

II. FROM *Dietrich* TO *Bonbrest* . . .

The common law traditionally failed to recognize a cause of action for prenatal torts.[1] *Dietrich v. Northampton*[2] was the first American case to verbalize the common law tradition. In *Deitrich*, a woman four or five months pregnant prematurely gave birth to her child after being injured by the defendant's negligent conduct. Justice Oliver Wendell Holmes[3] held that the child could not be considered a "person" within the meaning of a statute allowing a cause of action for negligent death.[4] Holmes concluded that:

> as the unborn child was a part of the mother at the time of the injury, any damage to it which was not too remote to be recovered for at all was recoverable by her, we think it clear that the statute sued upon does not embrace the plaintiff's intestate within its meaning.[5]

Although the common law did not allow recovery for prenatal injuries,[6] the plaintiff in *Dietrich* relied on Lord Coke's statement that if a woman "quick with child"[7] is beaten by another, and the child is subsequently born alive, but soon dies, the person committing the battery is guilty of

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1. W. PROSSER, HANDBOOK ON THE LAW OF TORTS § 55, at 335 (4th ed. 1971).

2. 138 Mass. 14, 52 Am. Rep. 242 (1884), *overruled*, Torigian v. Watertown News Co., 352 Mass. 446, 225 N.E.2d 926 (1967).

3. At the time, Holmes was Chief Justice of the Massachusetts Supreme Court.

4. *Dietrich*, 138 Mass. at ___, 52 Am. Rep. at 242.

5. *Id.* at ___, 52 Am. Rep. at 245.

6. W. PROSSER, *supra* note 1, at § 55.

7. *See* BLACK'S LAW DICTIONARY 1247 (6th ed. 1990) ("quickening" means "[t]he first motion of the fetus in the womb felt by the mother, occurring usually about the middle of the term of pregnancy"); *see also* State v. Patterson, 105 Kan. 9, ___, 181 P. 609, (1919) ("quick with child means when the motion of the fetus becomes perceptible . . ."). *But see* Regina v. Wycherley, 173 Eng. Rep. 486, 487 (1838) (" '[q]uick with child' means having conceived").

murder.[8] Holmes correctly noted that even if Lord Coke's statement were to be accepted as part of the common law of Massachusetts, it is distinguishable because Lord Coke's interpretation of criminal law cannot be so easily transferred to create civil liability.[9] Holmes stated the child would not have been able to recover for the injury even if it had survived.[10] Finally, Holmes wrote that he could not find any case that allowed a cause of action[11] for injuries received while *en ventre sa mere*.[12] It has been suggested, however, that a more accurate statement would have been that Holmes could find no English precedent supporting either position.[13]

American courts uniformly followed *Dietrich's* statement of the common law for sixty years.[14] In 1946, the United States District Court for the District of Columbia departed from the *Dietrich* rule in *Bonbrest v. Kotz*.[15] The district court permitted a child's father to sue the defendants for prenatal injuries sustained by the infant when it was negligently taken from the mother's womb.[16]

In distinguishing Holmes' opinion, the *Bonbrest* court stressed the fact that in *Dietrich* a nonviable child was injured, was born alive, and died less than one hour later.[17] In *Bonbrest*, on the other hand, a viable child was prenatally injured, born alive, and lived.[18] Although the child in *Bonbrest* survived, the issue of viability ultimately provided the "solid factual

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8. *Dietrich*, 138 Mass. at ___, 52 Am. Rep. at 243 (citations omitted).

9. *Id.* at ___, 52 Am. Rep. at 243.

10. *Id.*

11. *Id. But see* Wallis v. Hodson, 26 Eng. Rep. 472 (1740). In *Wallis*, the Lord Chancellor stated:

> *First*, as to the common law, there is the trite case of an infant *en ventre sa mere* being vouched in a common recovery; a mother also may justify the detaining of charters on behalf of it; a devise to him is good, . . . a bill may be brought in his behalf, and this court will grant an injunction in his favor to stay waste . . . . *Secondly, as to the civil law*, nothing is more clear, than that this law considered a child in the mother's womb absolutely born, to all intents and purposes, for the child's benefit.

Id. at 473; *see also* Hale v. Hale, 24 Eng. Rep. 25 (1692) (citing Luttrell's case where the court granted an injunction to stay waste of the unborn child's estate). *But see* Scatterwood v. Edge, 91 Eng. Rep. 203 (1795) ("[a] devise to an infant *en ventre sa mere*, by the better opinions, though various, is not good"). Note, however, that these were all cases in equity.

12. *See* BLACK'S LAW DICTIONARY 534 (6th ed. 1990) (defining *en ventre sa mere* as "in its mother's womb").

13. J. LEE & B. LINDAHL, MODERN TORT LAW: LIABILITY AND LITIGATION § 31.03 (rev. ed. 1988) (citing J. SALAMOND, LAW OF TORTS § 160 (15th ed. 1969)).

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

15. *Id.*

16. *Id.* at 139. In *Bonbrest*, the infant did not die, but the court departed from the common law by allowing a recovery for *injuries* to an unborn child.

17. *Dietrich*, 138 Mass. at ___, 52 Am. Rep. at 243.

18. *Bonbrest*, 65 F. Supp. at 138. These distinctions are very important. Issues of live birth and viability are central in the discussion of prenatal torts.

ground on which the two cases stand distinguished."[19] The court reasoned that a viable child can live outside its mother and therefore cannot be considered part of her.[20] For a viable child to be considered part of its mother is itself a contradiction in terms. By its very definition, viability means capable of extra-uterine life.[21] Therefore, the court concluded that the concept of a viable fetus being part of its mother cannot bar a recovery for prenatal injuries to a viable child.[22]

The *Dietrich* court had also taken the stance that issues of proof would be too difficult in prenatal injury cases.[23] The court in *Bonbrest* acknowledged that proof would be difficult, but not necessarily any more difficult than in other personal injury cases.[24] Moreover, the court reasoned that difficulty of proof is no reason to deny a cause of action.[25]

The *Bonbrest* court had scant authority to support this novel decision.[26] The court cited to the Supreme Court of Canada[27] and to civil law tradition[28] which recognized a recovery for prenatal torts. To further bolster this departure from the common law position, the court quoted effectively both Justice Holmes and Chief Justice Stone regarding the ability of the common law to change and adapt to changing times.[29] In the United States, the *Bonbrest* decision is credited with taking the first step away from the common law denial of prenatal injuries.[30]

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19. *Id.* at 140.

20. *Id.*

21. Viability is defined as "[t]hat stage of fetal development when the life of the unborn child may be continued indefinitely outside the womb by natural or artificial life-supportive systems." BLACK'S LAW DICTIONARY 1565-66 (6th ed. 1990).

22. *Bonbrest*, 65 F. Supp. at 140.

23. *Dietrich*, 138 Mass. at ___, 52 Am. Rep. at 245.

24. *Bonbrest*, 65 F. Supp. at 142.

25. *Id.* For instance, all personal injury suits must establish the necessary causation to link the injury to the tort.

26. *Id.* "The absence of precedent should afford no refuge to those who by their wrongful act, if such be proved, have invaded the right of the individual." *Id.*

27. *Id.* at 141. "The wrongful act which constitutes the crime may constitute also a tort, and if the law recognizes the separate existence of the unborn child sufficiently to punish the crime, it is difficult to see why it should not also recognize its separate existence for the purposes of redressing the tort." *Id.* (quoting Montreal Tramways v. Leveille, 4 D.L.R. 337 (1933)).

28. *See, e.g.*, Cooper v. Blanck, 39 So.2d 352 (La. App. 1923) (furnished for publication in 1949) (decided under civil law); *see generally* McReynolds, *Childhood's End: Wrongful Death of a Fetus*, 42 LA. L. REV. 1411 (1982).

29. *Bonbrest*, 65 F. Supp. at 142. "[T]he life of the law has been *not logic*: it has been *experience*." *Id.* (emphasis in original) (quoting O. HOLMES, THE COMMON LAW 1 (1938)).

30. *See generally* Muse & Spinella, *The Right of an Infant to Recover for Prenatal Injury*, 36 VA. L. REV. 611 (1950) (this article gives a comprehensive summary of decisions up to and including the *Bonbrest* ruling); *cf.* Allaire v. Saint Luke's Hosp., 184 Ill. 359, 56 N.E. 638 (1900) (Boggs, J., dissenting), *overruled*, Amann v. Faidy, 415 Ill. 422, 114 N.E.2d 412 (1953) (Judge Boggs' vigorous dissent in Illinois' adoption of the *Dietrich* rule is often quoted and seen as the first step in dismantling the common law mentality).

III. . . . AND BEYOND

Courts quickly departed from *Dietrich v. Northampton* and the common law rule after the *Bonbrest v. Kotz* decision.[31] Today, every jurisdiction recognizes a right of recovery for prenatal injuries[32] so long as the child survives.[33] Courts and commentators, however, disagree about where to draw the line as to liability. In *Bonbrest*, the court allowed recovery for prenatal injuries to a viable child which survived birth.[34] Similarly, some courts require "live birth" as a prerequisite for recovery: if the child is injured any time after conception, it can recover so long as it is born alive.[35] Virginia recently adopted this position.[36] Other courts extend liability to allow recovery for prenatal injuries to a viable fetus even if the fetus is stillborn because of the injury.[37]

The first court to go beyond the "live birth" requirement did so three years after the *Bonbrest* decision.[38] In *Verkennes v. Corniea*,[39] the court allowed recovery for prenatal injuries that caused the death of the fetus. The court held, however, that to recover for the wrongful death of a stillborn fetus, the injury must occur after viability.[40] Thus, Minnesota became the first state to adopt the "viability" rule.[41]

Once again, the point of contention is where to draw the line as to liability. The line demarcated by the *Bonbrest* court, also known as the "conditional liability" rule,[42] is followed in nine jurisdictions.[43] These

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31. *See* W. PROSSER, *supra* note 1, § 55, at 336. The *Bonbrest* decision "brought about what was up till that time the most spectacular abrupt reversal of a well settled rule in the whole history of the law of torts." *Id.*

32. *Id.* § 55, at 337. The last jurisdiction to deny recovery was Texas. *See* Leal v. C.C. Pitts Sand & Gravel Co., 419 S.W.2d 820 (Tex. 1967) (*overruling* Magnolia Coca Cola Bottling Co. v. Jordon, 124 Tex. 347, 78 S.W.2d 944 (1935)).

33. RESTATEMENT (SECOND) OF TORTS § 869 reporter's note (1) (1977).

34. Bonbrest v. Kotz, 65 F. Supp. 138, 143 (D.D.C. 1946).

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

36. Kalafut v. Gruver, 239 Va. 278, 389 S.E.2d 681 (1990).

37. *See, e.g.*, Eich v. Gulf Shores, 293 Ala. 95, 300 So. 2d 354 (1974).

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

39. *Id.* at ___, 38 N.W.2d at 841.

40. *Id.*

41. Presley v. Newport Hosp., 117 R.I. 177, ___, 365 A.2d 748, 751 (1976).

42. *See* Comment, *The Conditional Liability Rule—A Viable Alternative for the Wrongful Death of a Stillborn Child*, 28 U. FLA. L. REV. 187 (1975).

43. *See* Mace v. Jung, 210 F. Supp. 706 (D. Alaska 1962); Justus v. Atchison, 19 Cal. 3d 564, 139 Cal. Rptr. 97, 565 P.2d 122 (1977); Hernandez v. Garwood, 390 So. 2d 357 (Fla. 1980); Stokes v. Liberty Mut. Ins. Co., 213 So. 2d 695 (Fla. 1968); Egbert v. Wenzl, 199 Neb. 573, 260 N.W.2d 480 (1977); Drabbels v. Skelly Oil Co., 155 Neb. 17, 50 N.W.2d 229 (1951); Graf v. Taggert, 43 N.J. 303, 204 A.2d 140 (1964); Endresz v. Friedberg, 24 N.Y.2d 478, 248 N.E.2d 901, 301 N.Y.S.2d 65 (1969); Gay v. Thompson, 266 N.C. 394, 146 S.E.2d 425 (1966); Hogan v. McDaniel, 204 Tenn. 235, 319 S.W.2d 221 (1958); Hamby v. McDaniel, 559 S.W.2d 774 (Tenn. 1977); Lawrence v. Craven Tire Co., 210 Va. 138, 169 S.E.2d 440 (1969).

"live birth" jurisdictions allow recovery for prenatal injuries if the child is born alive.[44] In thirty-four jurisdictions, state courts have chosen to expand liability, allowing recovery so long as the fetus is viable at the time of injury.[45] Like their sister states adhering to the "live-birth" requirement, "viability" jurisdictions also acknowledge a right to recover if the injured fetus is born alive.[46] The "viability" jurisdictions go further however, and allow recovery in certain circumstances when the fetus is stillborn.[47]

These two thresholds[48] are by no means exclusive. The Georgia Court of Appeals allowed recovery for the death of a six week fetus which was clearly not viable.[49] In this case, the court chose to draw the line at "quickness."[50] There is, however, little difference between the "quickness" requirement and the "viability" requirement. Both generally occur

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44. The "live birth" requirement is met even if the child dies shortly after childbirth. *See, e.g., Kalafut*, 239 Va. 278, 389 S.E.2d 681.

45. *See* Simmons v. Howard Univ., 323 F. Supp. 529 (D.D.C. 1971); Eich v. Town of Gulf Shores, 293 Ala. 95, 300 So. 2d 354 (1974); Summerfield v. The Superior Court of the County of Maricopa, 144 Ariz. 467, 698 P.2d 712 (1985); Gorke v. Le Clerc, 23 Conn. Supp. 256, 181 A.2d 448 (Conn. Super. Ct. 1962); Hatala v. Markiewicz, 26 Conn. Supp. 358, 224 A.2d 406 (Conn. Super. Ct. 1966); Worgan v. Greggo & Ferrara, Inc., 50 Del. 258, 128 A.2d 557 (1956); Shirley v. Bacon, 154 Ga. App. 203, 267 S.E.2d 809 (1980); Porter v. Lassiter, 91 Ga. App. 712, 87 S.E.2d 100 (1955); Volk v. Baldazo, 103 Idaho 570, 651 P.2d 11 (1982); Chrisafogeorgis v. Brandenburg, 55 Ill. 2d 368, 304 N.E.2d 88 (1973); Britt v. Sears, 150 Ind. App. 487, 277 N.E.2d 20 (1971); Dunn v. Rose Way, Inc., 333 N.W.2d 830 (Iowa 1983); Hale v. Manion, 189 Kan. 143, 368 P.2d 1 (1962); Mitchell v. Couch, 285 S.W.2d 901 (Ky. 1955); Danos v. St. Pierre, 402 So. 2d 633 (La. 1981); 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); O'Neill v. Morse, 385 Mich. 130, 188 N.W.2d 785 (1971); Verkennes v. Corniea, 229 Minn. 365, 38 N.W.2d 838 (1949); Rainey v. Horn, 221 Miss. 269, 72 So. 2d 434 (1954); O'Grady v. Brown, 654 S.W.2d 904 (Mo. 1983); Amadio v. Levin, 509 Pa. 199, 501 A.2d 1085 (1985); White v. Yup, 85 Nev. 527, 458 P.2d 617 (1969); Poliquin v. MacDonald, 101 N.H. 104, 135 A.2d 249 (1957); Salazar v. Saint Vincent Hosp., 95 N.M. 150, 619 P.2d 826 (1980); Hopkins v. McBane, 359 N.W.2d 862 (N.D. 1984); Stidam v. Ashmore, 109 Ohio App. 431, 167 N.E.2d 106 (1959); Evans v. Olson, 550 P.2d 924 (Okla. 1976); Libbee v. Permanente Clinic, 268 Or. 258, 518 P.2d 636 (1974); Fowler v. Woodward, 244 S.C. 608, 138 S.E.2d 42 (1964); Nelson v. Peterson, 542 P.2d 1075 (Utah 1975); Vaillancourt v. Medical Center Hosp., 139 Vt. 138, 425 A.2d 92 (1980); Moen v. Hanson, 85 Wash. 2d 597, 537 P.2d 266 (1975); Baldwin v. Butcher, 155 W. Va. 431, 184 S.E.2d 428 (1971); Kwaterski v. State Farm Mut. Auto. Ins. Co., 34 Wis. 2d 14, 148 N.W.2d 107 (1967).

46. *See, e.g.*, Hopkins v. McBane, 359 N.W.2d 862 (N.D. 1984).

47. Baldwin v. Butcher, 155 W. Va. 431, ___, 184 S.E.2d 428, 436 (1971) ("an action may be maintained by the personal representative of a viable unborn child for the wrongful death of such child . . . resulting from the negligence of the defendant and, upon sufficient proof, such damages as may be recoverable under the statute may be awarded in such action").

48. "Live birth" on the one hand and "viability" on the other.

49. Porter v. Lassiter, 91 Ga. App. 712, ___, 87 S.E.2d 100, 103 (1955) ("[a] suit may be maintained by the mother for the loss of a child that was "quick" in her womb . . . [and] "quick" is a question of fact for a jury to determine").

50. *Id.* at ___, 87 S.E.2d at 102.

at an unpredictable time during the pregnancy. More importantly, they both occur after conception but before birth. The two standards overlap in many circumstances and will be synonymous in most cases.[51] The significance of the Georgia Court of Appeals holding is that the line of liability has been drawn at a point other than viability or birth.

Only one state court has gone beyond the viability threshold.[52] In *Presley v. Newport Hospital*, the Supreme Court of Rhode Island held that Rhode Island's wrongful death statute[53] included a fetus within its definition of "person."[54] The court based its opinion on the law in other jurisdictions[55] and on a prior case[56] in which the Supreme Court of Rhode Island "explicitly rejected viability as a criterion, substituting in its place reliable proof of causation."[57] It went on to opine that a fetus is a "person" whether it is viable or not.[58] Just as *Bonbrest* and *Verkennes* were trend setters in advancing the line of recovery, the Rhode Island Supreme Court has taken this argument the final step, becoming the first jurisdiction to set the threshold of recovery at conception.[59]

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51. *Compare* the definition of "viability", *supra* note 21, *with* the definition of "quickness", *supra* note 7.

52. Presley v. Newport Hosp., 117 R.I. 177, 365 A.2d 748 (1976). Some courts have allowed recovery for torts occurring *before* conception. Bergstrese v. Mitchell, 577 F.2d 22 (8th Cir. 1978) (injury from negligent caesarian on previous child); Jorgensen v. Meade Johnson Laboratories, 438 F.2d 287 (10th Cir. 1973) (oral contraceptive altered chromosomal pattern causing birth defects); Renslow v. Mennonite Hosp., 67 Ill. 2d 348, 367 N.E.2d 1250 (1977) (negligent transfusion of RH positive blood years before conception); Piper v. Hoard, 107 N.Y. 73, 13 N.E. 626 (1887) (equitable relief for child not yet conceived at the time of intentional fraud). *Contra* Morgan v. United States, 143 F. Supp. 22 (D.N.J. 1956) (no cause of action for child's injury resulting from negligent blood transfusion); McAuley v. Wills, 251 Ga. 3, 303 S.E.2d 258 (1983) (defendant negligently caused car accident resulting in paraplegia, but defendant did not proximately cause future miscarriage). *See generally* Annotation, *Liability for Child's Personal Injuries or Death Resulting from Tort Committed Against Child's Mother Before Child Was Conceived*, 91 A.L.R. 3D 316 (1979).

53. R.I. GEN. LAWS § 10-7-1 (1969).

54. *Presley*, 117 R.I. at ___, 365 A.2d at 754.

55. The court cited cases from its neighboring states. *Id.* at ___, 365 A.2d at 751; Gorke v. Le Clerc, 23 Conn. Supp. 256, 181 A.2d 448 (Conn. Super. Ct. 1962); Mone v. Greyhound Lines, Inc., 368 Mass. 354, 331 N.E.2d 916 (1975).

56. Sylvia v. Gobeille, 101 R.I. 76, 220 A.2d 222 (1966) (stressing that a claim for previable injuries is no less meritorious than post-viable injuries) (overruling Gorman v. Budlong, 23 R.I. 169, 49 A. 704 (1901) (in which the court followed the *Dietrich* example)).

57. *Presley*, 117 R.I. at ___, 365 A.2d at 752.

58. *Id.* at ___, 365 A.2d at 753-54 (this statement was dictum since the fetus in question was viable); *see also* Danos v. Saint Pierre, 402 So. 2d 633, 636 n.2 (La. 1981) (stating that life may begin at conception because of the legislative pronouncement that life begins at implantation and fertilization).

59. *See* Note, *A Viable Fetus is a "Person" for Purposes of Rhode Island's Wrongful Death Act*: Presley v. Newport Hospital, 46 U. CIN. L. REV. 266 (1977).

IV. THE LAW IN VIRGINIA

On March 2, 1990, the Supreme Court of Virginia settled the issue of liability of tortfeasors who fatally injure a fetus.[60] By adopting the rule promulgated by the Restatement (Second) of Torts,[61] the supreme court held "a tortfeasor who causes harm to an unborn child is subject to liability to the child, or to the child's estate, for the harm to the child, if the child is born alive."[62]

The 1969 decision *Lawrence v. Craven Tire Co.*[63] was the first opportunity for the Supreme Court of Virginia to directly address the issue of whether a cause of action could be maintained for the death of a viable, unborn child.[64] In that case, Mrs. Lawrence, who was pregnant at the time, was in an auto accident as a result of the defendant's negligence.[65] The unborn child received injuries which impaired its development and ultimately resulted in its still birth some two months later.[66] The child's father claimed to be the administrator of the decedent's estate and filed a wrongful death action.[67]

In its analysis, the court reasoned that "[i]f plaintiff's decedent had no right, at the time of death, to maintain an action for personal injuries, then the right to maintain the present action could not be transmitted to her personal representative."[68] As a matter of statutory construction, the Supreme Court of Virginia was unwilling to allow a cause of action for an unborn child because it believed the legislature never intended to include a viable fetus within the meaning of the word "person" as used in section 8-633 of the Code of Virginia.[69] The court relied on the rule of statutory construction that words are to be given their popular or ordinary meanings.[70]

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60. Kalafut v. Gruver, 239 Va. 278, 389 S.E.2d 681 (1990).

61. RESTATEMENT (SECOND) OF TORTS § 869(1) (1977).

62. *Kalafut*, 239 Va. at 283-84, 389 S.E.2d at 684 (citing RESTATEMENT (SECOND) OF TORTS § 869(1) (1977)). *But cf.* RESTATEMENT OF TORTS § 869 (1939) ("A person who negligently causes harm to an unborn child is not liable to such child for the harm.").

63. 210 Va. 138, 169 S.E.2d 440 (1969).

64. *Id.*

65. *Id.* The driver, Freddie Gray Spivey, worked at the Craven Tire Company. *Id.*

66. *Id.* at 139, 169 S.E.2d at 440.

67. *Id.*

68. *Id.* at 140, 169 S.E.2d at 441.

69. *Cf.* Harman v. Daniels, 525 F. Supp. 798 (W.D. Va. 1981) (holding that an unborn infant does not have a cause of action under 42 U.S.C. § 1983 because the fetus is not considered to be a person or a citizen in the meaning of the fourteenth amendment); 1980/1981 Rep. Va. Att'y Gen. 136 (1981) (murder of a pregnant woman that resulted in the death of the unborn fetus would not result in two separate capital offenses under proposed section 18.2-31(g) of the Code of Virginia because the term person does not include an unborn fetus).

70. *See* 73 AM. JUR. 2D STATUTES § 206 (1974).

The court cited to various other jurisdictions that had also chosen to strictly construe their wrongful death statutes.[71] In addition to holding that a viable fetus is not a person within the meaning of the Death By Wrongful Act statute,[72] the court in *Lawrence* adopted the concept from *Dietrich v. Northampton*[73] that "an unborn child is part of the mother until birth, and as such, has no juridical existence."[74] It is this phrase that has had the most significant impact on later cases involving recovery for prenatal injuries. In Virginia, the *Lawrence* decision effectively foreclosed recovery for the death of an unborn child. Cases were summarily dismissed by simply citing to *Lawrence v. Craven Tire Co.*[75]

In 1986, the Supreme Court of Virginia reaffirmed the *Lawrence* decision in *Modaber v. Kelly*.[76] In the relevant portions of this case,[77] the court held that an "injury to an unborn child constitutes injury to the mother and that she may recover for such physical injury and mental suffering associated with a stillbirth."[78]

This was a dramatic shift away from the all or nothing result of *Lawrence*. The *Modaber* decision is, however, a completely logical extension of *Lawrence*: if an unborn child is part of the mother,[79] a mother should be entitled to receive compensation for any additional injury *to her*. The death of a fetus will not give rise to an independent cause of action for wrongful death[80] and therefore the child's decedents cannot recover for damages typically associated with such a claim.[81] However, *Modaber* does

71. *Lawrence*, 210 Va. at 141-42, 169 S.E.2d at 442. The court cites with approval Drabbels v. Skelly Oil Co., 155 Neb. 17, 50 N.W.2d 229 (1951); Graf v. Taggert, 43 N.J. 303, 204 A.2d 140 (1964); Howell v. Rushing, 261 P.2d 217 (Okla. 1953); Marko v. Philadelphia Transp. Co., 420 Pa. 124, 216 A.2d 502 (1966); Carroll v. Skloff, 415 Pa. 47, 202 A.2d 9 (1964); Hogan v. McDaniel, 204 Tenn. 235, 319 S.W.2d 221 (1958).

72. VA. CODE ANN. § 8.01-50 (Repl. Vol. 1984).

73. 138 Mass. 14, 52 Am. Rep. 242 (1884).

74. *Lawrence*, 210 Va. at 142, 169 S.E.2d at 442.

75. *See* Myrick v. United States, 723 F.2d 1159 (4th Cir. 1983); Houchins v. Piggly Wiggly, 10 Va. Cir. 392 (Wise County 1988); Johnson v. Cooksey, 6 Va. Cir. 285 (City of Richmond 1986); Shoemaker v. Hotchkins, 4 Va. Cir. 166 (Rockingham County 1984); Strother v. DeVocht, 3 Va. Cir. 161 (City of Alexandria 1984). *But cf.* Bolen v. Bolen, 409 F. Supp. 1371 (W.D. Va. 1975) (the court determined that the Supreme Court of Virginia would allow the action for prenatal injuries on the authority of *Lawrence*).

76. 232 Va. 60, 66, 348 S.E.2d 233, 236 (1986).

77. The decision also dealt with the sufficiency of evidence and the size of the jury verdict on damages. The issue of damages recoverable is beyond the scope of this Note, but the reader should be referred to Annotation, *Right to Maintain Action or to Recover Damages for Death of Unborn Child*, 84 A.L.R. 3D 411, 477 (1978).

78. *Modaber*, 232 Va. at 65, 348 S.E.2d at 237.

79. *Lawrence*, 210 Va. at 142, 169 S.E.2d at 442.

80. *Id.*

81. VA. CODE ANN. § 8.01-52 (Repl. Vol. 1984) (this section specifies the damages recoverable in a wrongful death action which include: sorrow, mental anguish, solace, companionship, loss of income, services or protection, expenses for hospitalization, care and funeral expenses and any punitive damages for willful, wanton or reckless action).

state that this should not foreclose the damages available to the plaintiff/mother.[82]

The *Modaber* holding recognizes that a loss occurs when a defendant's negligence causes a miscarriage and that the loss is compensable.[83] In *Modaber*, the jury was instructed that the deceased child was not entitled to compensation, but "injury to an unborn child in the womb of the mother is to be considered as physical injury to the mother."[84] While remaining faithful to precedent, the court used the harsh results of *Lawrence* to actually justify the *Modaber* holding.

If *Lawrence* held there would be no cause of action for the wrongful death of a stillborn child,[85] and *Modaber* held a mother may recover for damages associated with a stillbirth,[86] *Kalafut v. Gruver* left no doubt. The Supreme Court of Virginia unequivocally stated "[i]n the present case, we have drawn the line between nonliability and liability for prenatal injury at the moment of live birth of the child."[87]

In *Kalafut*, the defendant admitted legal liability but denied his negligence was the proximate cause of the child's premature delivery and death.[88] The child was born alive but died less than two hours later.[89] The defendant conceded that the infant met the requirements of the definition of "person" in section 8.01-50,[90] but argued the statute required the cause of action to arise at the time of the accident.[91] Since the victim was a fetus when the cause of action arose, and since *Lawrence* clearly held that there would be no cause of action for a stillborn fetus,[92] the defendant argued that the plaintiffs in the present case had no right to sue.[93] Finally, the defendant also pointed to *Modaber* to suggest that Mrs. Kalafut had a legal remedy for the injury of the infant.[94]

The court responded bluntly: "we do not agree with the defendant's contentions . . . [and] we are persuaded by the pertinent law elsewhere that maintenance of actions like this should be allowed in Virginia."[95] The court once again resorted to statutory interpretation.[96] Suit may be

82. *Modaber*, 232 Va. at 67-68, 348 S.E.2d at 237.
83. *Id.*
84. *Id.*
85. *Lawrence*, 210 Va. at 142, 169 S.E.2d at 442.
86. *Modaber*, 232 Va. at 66, 348 S.E.2d at 237.
87. *Kalafut*, 239 Va. at 284, 389 S.E.2d at 684.
88. *Id.* at 280, 389 S.E.2d at 682.
89. *Id.*
90. *Id.* at 281, 389 S.E.2d 682; *see* VA. CODE ANN. § 8.01-50 (Repl. Vol. 1984).
91. *Kalafut*, 239 Va. at 281, 389 S.E.2d at 682.
92. *Lawrence*, 210 Va. at 142, 169 S.E.2d at 442.
93. *Kalafut*, 239 Va. at 281, 389 S.E.2d at 682.
94. *Id.* at 282, 389 S.E.2d at 683.
95. *Id.*
96. *See infra* notes 100-18 and accompanying text.

brought under the Death by Wrongful Act Statute[97] if the decedent would have been able to maintain an action had death not occurred. The court stated, "[c]learly, the answer to that question is in the affirmative in the case of a live birth."[98] Thus, by adopting section 869(1) of the Restatement (Second) of Torts,[99] the Supreme Court of Virginia unequivocally aligned with the "live birth" jurisdictions.

V. The Role of Wrongful Death Statutes

Wrongful death statutes are the bases upon which actions for prenatal death are decided.[100] Recovery for wrongful death of any person was unknown at common law.[101] The right of decedent's beneficiaries to recover is purely a statutory creation. In 1846, the British Parliament passed the first wrongful death statute.[102] In the United States, every state followed the British example and has passed a similar wrongful death statute.[103] In analyzing the right of recovery for the death of a fetus, courts have resorted to interpretation of the applicable wrongful death statute to determine if the legislature intended to include an unborn child within its ambit.[104]

Some courts hold that wrongful death statutes ought to be strictly construed.[105] As such, the statute's language can not be read to include a stillborn fetus.[106] Other state courts choose to construe their wrongful death statutes liberally[107] and find that the legislature intended to in-

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97. Va. Code Ann. § 8.01-50 (Repl. Vol. 1984).

98. *Kalafut*, 239 Va. at 285, 389 S.E.2d at 685.

99. *Id.* at 283-84, 389 S.E.2d at 685. "One who tortiously causes harm to an unborn child is subject to liability to the child for the harm if the child is born alive." Restatement (Second) of Torts § 869(1) (1977).

100. *See* Restatement (Second) of Torts § 869(2) (1977) ("[i]f the child is not born alive, there is no liability unless the applicable wrongful death statute so provides").

101. J. Fleming, An Introduction to The Law of Torts 131 (2d. ed. 1985).

102. *Id.* at 132. Fatal Accidents Act of 1846, commonly known as Lord Campbell's Act, provided for the first time a cause of action for certain designated beneficiaries; *see generally id.* at 131-33 (providing a British account of the history of wrongful death); *cf.* J. Clerk & W. Lindsell, On Torts § 165-67 (16th ed. 1989) (the Congenital Disabilities (Civil Liability) Act of 1976 codified what we call the "live birth" rule in England).

103. *E.g.*, Virginia Elec. & Power Co. v. Decatur, 173 Va. 153, 3 S.E.2d 172 (1939).

104. *Compare* Va. Code Ann. § 8.01-50 (Repl. Vol. 1984) ("[w]henever the death of a person . . .") *with* Wash. Rev. Code Ann. § 4.24.010 (1988) ("death of a minor child"); *see also* Norman v. Murphy, 124 Cal. App. 2d 95, 268 P.2d 178 (1954) (a statute that allowed recovery for the death of a "minor person" did not include a fetus, even if a fetus could be considered a "person"); *cf.* Roe v. Wade, 410 U.S. 159 (1973) (holding fetus was not a person, but this holding was limited to an interpretation of the fourteenth amendment).

105. *See, e.g.*, Hogan v. McDaniel, 204 Tenn. 235, 319 S.W.2d 221 (1958).

106. *See, e.g.*, Stokes v. Liberty Mut. Ins. Co., 213 So. 2d 695 (Fla. 1968).

107. *See, e.g.*, Baldwin v. Butcher, 155 W. Va. 431, 184 S.E.2d 428 (1971) (noting that West Virginia's wrongful death statute is remedial and ought to be construed liberally).

clude unborn fetuses.[108] Whereas some courts reject recovery because unborn children are expressly referred to in other statutes,[109] others use this reference to support an argument that the rights of unborn children are recognized by the law.[110] When interpreting wrongful death statutes, courts consistently use this same device to justify opposing views.

As is often the case with statutory construction, there is no "correct" answer.[111] The most logical argument when determining the intent of the legislature regarding the wrongful death of a stillborn fetus is that the legislature probably never even considered the issue of recovery for the stillborn fetus.[112] In *Britt v. Sears*, the court stated that because the applicable wrongful death statute[113] was enacted in 1881, legislators would not have given any thought to the matter.[114] In the absence of binding judicial authority or legislative mandate, and after "[c]arefully consider[ing] the arguments *pro* and *con*,"[115] the Indiana court concluded that a cause of action exists for the father of a viable fetus killed by a tortfeasor.[116] The Indiana court's reasoning is typical: the statute could be easily interpreted either way so it is the duty of the court to make the final determination[117] after weighing the various arguments.[118]

VI. THRESHOLD OF LIABILITY—DISCUSSION AND ANALYSIS

With two exceptions,[119] courts that have dealt with the issue of prena-

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108. *See, e.g.*, Moen v. Hanson, 85 Wash. 2d 597, 537 P.2d 266 (1975).

109. *See, e.g.*, *Stokes*, 213 So. 2d at 700 (since a Florida trust accounting statute and a criminal abortion statute both specifically made reference to an unborn child, the court refused to allow recovery for the death of a fetus because the wrongful death statute referred only to "minor child" and not an unborn child).

110. *See, e.g.*, O'Neil v. Morse, 385 Mich. 130, 188 N.W.2d 785 (1971).

111. *See* RESTATEMENT (SECOND) OF TORTS § 869 comment f (1977) ("[t]he language of the statutes varies and no general rule can be stated for their construction").

112. *See, e.g.*, Britt v. Sears, 150 Ind. App. 487, ___, 277 N.E.2d 20, 24-25 (1971).

113. IND. CODE ANN. § 34-1-1-8 (Burns 1967).

114. *Britt*, 150 Ind. App. at ___, 277 N.E.2d at 24.

> Whatever was in their minds is not recorded and is, at best, a matter of mere supposition. But if we may, *arguendo*, indulge in our own supposition it would be this: That since actions for pre-natal injuries and deaths were then unknown in Indiana jurisprudence our lawmakers very probably gave no thought to whether they were creating an action for pre-natal injury or pre-natal death, or whether their word "child" was the same word "child" so often referred to a pregnant woman as "being with child."

Id. (footnote omitted).

115. *Id.* at ___, 277 N.E.2d at 26.

116. *Id.* at ___, 277 N.E.2d at 27.

117. *Id.* at ___, 277 N.E.2d at 21. Like most questions of statutory interpretation, the legislatures could amend the statute or take other steps to nullify the holding of the court.

118. *Id.*

119. Presley v. Newport Hosp., 117 R.I. 177, ___, 365 A.2d 748, 753 (1976) ("[l]ogic does not permit the insistence on viability as the line of demarcation between those for whom an

tal injury have adopted either the "viability" standard or the "live birth" requirement.[120] While each position is supported, courts usually attack the alternative scheme rather than justify their own position. As a result, both standards are replete with inconsistencies.

Those jurisdictions that have adopted the "live birth" standard often justify their choices by arguing that a mother may recover for damages associated with a stillbirth,[121] therefore allowing a separate recovery for the death of a fetus would result in a double recovery.[122] Furthermore, a child that is born alive and survives must live with whatever physical disabilities resulted from the tortfeasor's action.[123] In response to the argument that other areas of the law recognize the rights of the unborn, "live birth" jurisdictions point out that an unborn child's property right is contingent upon it being born alive and will not otherwise vest.[124] Finally, proof of causation and damages become tenuous when dealing with an unborn child.[125]

These arguments make a strong case for the "live birth" requirement. In addition, "live birth," unlike "viability," creates a definite line of liability.[126] Whether an infant is born alive, even for just a few moments, is a concrete, provable fact. For this reason alone, "live birth" is preferable to "viability."[127] However, the "live birth" requirement is also subject to many criticisms. The common law, in the absence of a wrongful death statute, actually rewarded the tortfeasor.[128] If a tortfeasor committed a battery, the victim would be entitled to damages.[129] However, if the battery was severe enough to kill the individual, the tortfeasor would incur

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action will lie and those who are without rights . . ."); Porter v. Lassiter, 91 Ga. App. 712, 87 S.E.2d 100 (1955) ("[t]he court does not believe it necessary for the child to be 'viable' provided it . . . is 'able to move in its mother's womb' ").

120. *See supra* notes 31-51 and accompanying text.

121. *See, e.g.*, Modaber v. Kelley, 232 Va. 60, 348 S.E.2d 233 (1986).

122. *See, e.g.*, Endresz v. Friedberg, 24 N.Y.2d 478, 487, 248 N.E.2d 901, 906, 301 N.Y.S.2d 65, 72 (1969).

123. *See, e.g.*, Graf v. Taggert, 43 N.J. 303, 204 A.2d 140 (1964); Scott v. Kopp, 494 Pa. 487, 431 A.2d 959 (1981).

124. *Presley*, 117 R.I. at ___, 365 A.2d at 758 (Kelleher, J., dissenting).

125. *See, e.g., Graf*, 43 N.J. 303, ___, 204 A.2d 140, 144 (a wrongful death statute is designed to renumerate the descendants and therefore proof of pecuniary loss is essential; proof of pecuniary losses (lost wages, earning capacity, etc.) for a stillborn child is entirely speculative, even more so than for the wrongful death of a minor); *Endresz*, 24 N.Y.2d 478, 248 N.E.2d 901, 301 N.Y.S.2d 65.

126. Comment, *Developments in the Law of Prenatal Wrongful Death*, 69 DICK. L. REV. 258, 268 (1965). "[S]ince any limitation will be arbitrary in nature, a tangible and concrete event would be the most acceptable and workable boundary. Birth, [unlike viability] being a definite, observable and significant event, meets this requirement." *Id.*

127. *Id.*

128. Todd v. Sandridge Constr. Co., 341 F.2d 75, 77 (4th Cir. 1964); Stidam v. Ashmore, 109 Ohio App. 431, ___, 167 N.E.2d 106, 108 (1959).

129. *See Todd*, 341 F.2d at 77.

no civil liability.[130] "Live birth" jurisdictions analyze fetal wrongful death in a manner analogous to the traditional common law view of wrongful death. If the tortfeasor injures a fetus and it is subsequently born alive bearing its damages, "live birth" jurisdictions allow recovery.[131] If the injury is severe enough to cause the death of the fetus however, the tortfeasor incurs no civil liability.[132] If wrongful death statutes were originally enacted to prevent this disparity it is absurd to allow the same injustice to occur when dealing with the wrongful death of a fetus.

Another hypothetical situation which effectively shows the shortcomings of the "live birth" requirement is the case of the unborn twins.[133] If prenatal twins are injured, and one is born alive and the other is stillborn, states adhering to the "live birth" rule recognize a right to recover for only one child.[134] The law disfavors inconsistent results, but courts have continued to adhere to this "live birth" requirement.

Those jurisdictions adopting the "viability" standard often point to the previous two illustrations as justification for discarding the "live birth" requirement and choosing "viability" instead.[135] Other arguments have been raised in favor of the "viability" standard including: 1) recovery for the death of a viable fetus permits a mother to recover for elements of damages otherwise unrecoverable;[136] 2) issues of proof (causation and damages) should not eliminate a cause of action and a plaintiff should at least be given the chance to prove them;[137] and 3) the law allows recovery for injuries resulting in sterility and, therefore, recovery should be permitted where a child is conceived but dies before being born.[138]

The point at which "viability" jurisdictions really take "live birth" jurisdictions to task is over the latter's contention that the fetus is part of the mother. *Dietrich v. Northampton*,[139] and subsequent decisions adopt-

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130. *See id.*

131. *See, e.g., Graf*, 43 N.J. 303, 204 A.2d 140.

132. *Todd*, 341 F.2d at 77.

133. Weitl v. Moes, 311 N.W.2d 259, 277 (Iowa 1981) (Larson, J., concurring in part and dissenting in part); *Stidam*, 109 Ohio App. at ___, 167 N.E.2d at 108.

134. *Stidam*, 109 Ohio App. at ___, 167 N.E.2d at 108.

135. *Id.*

136. *See, e.g., Graf*, 43 N.J. 303, 204 A.2d 140.

137. F. HARPER, F. JAMES & O. GRAY, THE LAW OF TORTS § 18.3 (2d ed. 1986) (rules of evidence and sufficiency of proof, administered by the courts, should adequately protect against issues of proof); *see also* Torigian v. Watertown News Co., 352 Mass. 446, 225 N.E.2d 926 (1967); Bennet v. Hymers, 101 N.H. 483, 147 A.2d 108 (1958); Smith v. Brennan, 31 N.J. 353, 157 A.2d 497 (1960); Woods v. Lancet, 303 N.Y. 349, 102 N.E.2d 691 (1951); Sinkler v. Kneale, 401 Pa. 267, 164 A.2d 93 (1960); Puhl v. Milwaukee Auto. Ins. Co., 8 Wis. 2d 343, 99 N.W.2d 163 (1959).

138. *See, e.g.*, Valence v. Louisiana Power & Light Co., 50 So. 2d 847 (La. Ct. App. 1951); Bourque v. American Mut. Liab. Ins. Co., 345 So. 2d 237 (La. Ct. App. 1977); McFarland v. Cathy, 349 So. 2d 486 (La. Ct. App. 1951).

139. 138 Mass. 14, 52 Am. Rep. 242 (1884), *overruled*, Torigian v. Watertown News Co.,

ing the "live birth" requirement,[140] rely heavily upon the idea that *filius in utero matris est pars viscerum matris*.[141] But as "viability" courts are quick to point out, a viable child is capable of living outside the womb and it is illogical to deny recovery simply because the fetus is still in the mother's womb.

"Viability" as a threshold also has its criticisms. As other members of the Supreme Court have pointed out in criticizing Justice Blackmun's viability framework[142] in the abortion decisions, viability is a fluid medical term that has not succeeded as a means of demarcation in the abortion context.[143] Medical science continuously narrows the gap between conception and viability.[144] It is conceivable that in the near future, the lines will disappear completely: a fetus will be considered viable at conception and an abortion will be able to be safely performed until birth.[145]

As Justice O'Connor prognosticated in *Akron v. Akron Center for Reproductive Heath*, "the *Roe* framework, then, is clearly on a collision course with itself."[146] Recently, in *Webster v. Reproductive Health Services*, the Supreme Court rejected the trimester approach and abandoned viability as a standard.[147] The Court once again refused, however, to rule on the question of when life begins.[148]

The viability standard proved judicially unmanageable in the context of abortion.[149] Likewise, the viability line cannot work in the context of

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352 Mass. 446, 225 N.E.2d 926 (1967).

140. *See, e.g.*, Lawrence v. Craven Tire Co., 210 Va. 138, 169 S.E.2d 440 (1969); Drabbels v. Skelly Oil Co., 155 Neb. 17, 50 N.W.2d 229 (1951).

141. BLACK'S LAW DICTIONARY 629 (6th ed. 1990) ("[a] son in the mother's womb is part of the mother's vitals").

142. Roe v. Wade, 410 U.S. 113 (1973).

143. *See* Akron v. Akron Center for Reproductive Health, 462 U.S. 416 455-56 (1983) (O'Connor, J., dissenting); Webster v. Reproductive Health Serv., 109 S. Ct. 3040 (1989) (discarding the trimester approach using viability as a line of demarcation).

144. Lintgen, *The Impact of Medical Knowledge on the Law Relating to Prenatal Injuries*, 110 U. PA. L. REV. 554, 600 (1962) ("[t]he viability limitation in prenatal injuries is headed for oblivion").

145. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1359 (2d ed. 1988).

146. *Akron*, 462 U.S. at 456; *see also* Note, *Demise of the Trimester Standard?*, 23 J. FAM. L. 267 (1985).

147. *Webster*, 109 S. Ct. at 3057. Before *Webster*, many courts used *Roe* to justify the viability standard. If a "state is prohibited from criminally punishing the intentional termination of pre-viable fetal life . . . it is likewise prohibited from allowing civil recovery for the negligent termination of such life." Kader, *The Law of Tortious Prenatal Death Since* Roe v. Wade, 45 MO. L. REV. 639 (1980) (citing Toth v. Goree, 65 Mich. App. 296, 237 N.W.2d 297 (1975)).

148. *See Webster*, 109 S. Ct. at 3047; *Roe*, 410 U.S. at 159.

149. *See* Planned Parenthood of Cent. Missouri v. Danforth, 428 U.S. 52, 99 (1976) (White, J., dissenting) (claiming the Court is assuming the role of a "medical board with powers to approve or disapprove medical and operative practices and standards throughout the United States").

prenatal wrongful death actions. Viability depends on numerous factors and varies greatly between individuals and even between pregnancies. Conditions such as the health of the mother, the health of the fetus and many other factors within the stages of development effect viability.[150] Viability is an imprecise medical term that should not, and cannot be transmogrified into the legal lexicon.

VII. Where to Draw the Line

When *Bonbrest v. Kotz* rejected the common law rule, the court pointed to the fact that the denial of recovery was arbitrary.[151] Similarly, in *Verkennes v. Corniea* the court emphasized that "live birth" was an arbitrary line of liability when it adopted the "viability" standard.[152] Finally, *Presley v. Newport Hospital* rejected both "live birth" and "viability" as arbitrary.[153] Indeed, each time a court advances the threshold of liability, they point to the previous line as arbitrary.[154] Although "viability" jurisdictions claim that the "live birth" requirement is arbitrary, the "viability" rule is as arbitrary as any other.[155]

But the line must be drawn somewhere.[156] Courts must recognize the fetus as a separately existing entity regardless of viability.

> The mother's biological contribution from conception on is nourishment and protection; but the fetus has become a separate organism and remains so throughout its life. That it may not live if its protection and nourishment are cut off earlier than the viable stage of its development is not to destroy its separability; it is rather to describe conditions under which life will not continue. Succeeding conditions exist, of course, that have that result at every stage of its life, post-natal as well as pre-natal.[157]

If it is recognized that a child is no less of a person before viability, it is logical to extend the court's protection to conception. Potential life is no less potential during the first weeks of pregnancy than in the last weeks[158] and a fetus is entitled to develop without outside interference.[159] Al-

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150. *See* Comment, *supra* note 126, at 265 (discussing the problems of proving causation in pre-natal death actions).

151. *Bonbrest*, 65 F. Supp. 138 (D.D.C. 1946).

152. *Verkennes*, 229 Minn. 365, 38 N.W.2d 838 (1949); *see also* Todd v. Sandidge Constr. Co., 341 F.2d 75, 77 (4th Cir. 1964).

153. *Presley*, 117 R.I. 177, ___, 365 A.2d 748, 752 (1976).

154. Seattle First Nat'l Bank v. Rankin, 59 Wash. 2d 288, ___, 367 P.2d 835, 838 (1962).

155. Gordon, *The Unborn Plaintiff*, 63 Mich. L. Rev. 579, 589 (1965).

156. Scott v. Kopp, 494 Pa. 487, 431 A.2d 959 (1981). "Admittedly, the requirement of live birth is in some sense an arbitrary requirement, but the line must be drawn somewhere, and wherever it is drawn, it will be the subject of argument and criticism." *Id.*

157. Kelly v. Gregory, 282 A.D. 542, 125 N.Y.S.2d 696 (N.Y. App. Div. 1953).

158. Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 459 (1983).

159. Smith v. Brennan, 31 N.J. 353, ___, 157 A.2d 497, 503 (1960). "[C]onception sets in motion biological processes which if undisturbed will produce . . . a person in being. If . . .

though the argument is strong that a child is a person at viability, "medical authority has recognized long since that the child is in existence from the moment of conception."[160]

Finally, as an added measure of protection, issues of proof will necessarily become more difficult as the term of the pregnancy decreases. That, however, is a function for the jury: to hear testimony, listen to medical experts, analyze the evidence and arrive at a conclusion.[161] For all of these reasons, the threshold of liability should be at conception.

VIII. Conclusion

The "live birth" requirement is susceptible to unfair results in addition to being logically inconsistent, but at least it offers a definite point of liability. "Viability" as a threshold of liability is a poor standard because it is subject to so many factors and varies greatly between individuals. Conception, on the other hand, combines the desireable elements of each: it offers a definable point of liability, it adequately compensates the beneficiaries, and it is not subject to inconsistencies. Proof of pregnancy (medical) and causation offer adequate safeguards against fraudulent claims.

Although "live birth" can be restrictive, as a standard, it is more preferable than the vagueness of "viability." In light of Virginia's heavy reliance on and adherence to the common law, and its thoughtful, purposeful, relatively conservative approach to legal change and innovation, the "live birth" requirement is the most appropriate standard for Virginia at this time. Just as it took sixty years for courts to depart from the *Dietrich v. Northampton* rule, it may also take time for courts to depart from "live birth" and "viability." Furthermore, many courts have already interpreted their wrongful death statutes to preclude recovery for fetal wrongful death. The *Presley v. Newport Hospital* decision is an important step toward allowing recovery for stillborn infants any time subsequent to conception, regardless of viability.

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those processes can be disrupted . . . it is immaterial whether before birth the child is considered a person in being." *Id.*

160. W. Prosser, *supra* note 1, § 55, at 336 (footnote omitted).

161. And, if a jury finds against all evidence, a judge may issue a judgment notwithstanding the verdict.