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To Recover Or Not to Recover: A State by State Survey of Fetal Wrongful Death Law

Jill D. Washburn Helbling
West Virginia University College of Law

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# TO RECOVER OR NOT TO RECOVER:
A STATE BY STATE SURVEY OF FETAL WRONGFUL DEATH LAW

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I. INTRODUCTION

Since 1884 there has been great controversy surrounding the issue of civil recovery for prenatal injuries and fetal wrongful death. In that year Dietrich v. Inhabitants of Northampton1 was decided, in which the Supreme Judicial Court of Massachusetts held that an unborn infant was a part of its mother, not an independent entity that could maintain an action for injuries sustained in the

1 138 Mass. 14 (1884).
womb. This was the first time an American court addressed this issue.

Over the following years courts of other states adopted the Dietrich view and rejected recovery for prenatal injuries. Various reasons were given for denying recovery, most of which have since been discounted. The first was that the unborn child was seen as a part of the mother, having no independent existence, so that an injury to the unborn child was actually an injury to the mother. This view has been abandoned in a majority of jurisdictions due to advances in medical science. The second reason was the lack of precedent allowing recovery. However, this reason is no longer valid because the “weight of authority currently allows a cause of action for the tortious death of a viable child en ventre sa mere.” The third reason traditionally given for denying recovery for prenatal injuries was that the difficulties proving causation would lead to many fraudulent claims. The final reason was that the issue was one which should appropriately be decided by the legislature, not the courts. Courts often stated that if the legislature intended to include an unborn child within the meaning of the applicable wrongful death statute, it could do so explicitly in the language of the statute.

In 1946, in Bonbrest v. Kotz, an American court departed from Dietrich

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2 Id. at 17.


5 Id.

6 Id.

7 Id.


9 Farley, 466 S.E.2d at 529.

10 Id. at 520.

11 Id.

for the first time, rejecting the theory that a viable fetus\textsuperscript{13} is a part of its mother and holding that a child could maintain an action for injuries it sustained while viable in the womb.\textsuperscript{14} Following that decision, courts began rejecting Dietrich and adopting Bonbrest.\textsuperscript{15} Today, every jurisdiction in the country permits recovery for prenatal injuries if the child is born alive.\textsuperscript{16} Furthermore, a majority of jurisdictions now permit a cause of action to be maintained on behalf of a viable\textsuperscript{17} fetus that is killed in the womb by a tortfeasor's negligence.\textsuperscript{18} Four jurisdictions have gone even further in construing their wrongful death statutes, holding that a nonviable fetus is a "person," and therefore recovery can be had for the wrongful death of a nonviable fetus en ventre sa mere.\textsuperscript{19}

This Note will examine prenatal injury and fetal wrongful death law in all fifty states and the District of Columbia. In all cases mentioned, a challenge was brought by the defendant questioning the existence of a cause of action for prenatal injuries or fetal wrongful death. Each court then decided whether the word "person" or "minor child," as used in the applicable wrongful death statute, includes an unborn child.

\textsuperscript{13} Although the "fetus" is defined as "the unborn offspring in the post embryonic period after major structures have been outlined (in man from seven to eight weeks after fertilization)," the term is used throughout this Note to refer to an unborn child at any stage between conception and birth. BLACK'S LAW DICTIONARY, supra note 7, at 621.

\textsuperscript{14} Bonbrest, 65 F. Supp. at 140.

\textsuperscript{15} Farley, 466 S.E.2d at 528.

\textsuperscript{16} Id. at 528 (quoting RESTATEMENT (SECOND) OF TORTS § 869 subsection 1 app. at 79 (1977)).

\textsuperscript{17} The term "viable" is used throughout this Note to refer to a fetus that "is sufficiently developed so as to be capable of life outside the uterus." RANDOM HOUSE COLLEGE DICTIONARY, 1464 (rev. ed. 1980). It is not used to refer to a specific point of prenatal development because courts and doctors alike disagree as to at what point in prenatal development a fetus becomes viable.

\textsuperscript{18} Farley, 466 S.E.2d at 529.

II. **States That Require a Live Birth for Recovery**

A. **Arkansas**

In the only on-point case decided in Arkansas, *Chatelain v. Kelley*, the parents of a stillborn fetus brought a medical malpractice action against the physicians and hospital for the wrongful death of their full-term, unborn child caused by a delay in the performance of a Cesarian section. The Supreme Court of Arkansas held that an unborn fetus, viable or not, is not a person within the context of the Arkansas Wrongful Death Statute, stating that it was the legislature’s job to determine the meaning of the word “person.”

B. **California**

California courts have been reluctant to expand the definitions of “person” and “minor person” within the context of its wrongful death statute. In *Norman*

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20 910 S.W.2d 215 (Ark. 1995). The Supreme Court of Arkansas was previously presented with the issue of whether a viable fetus born dead was a “person” within the wrongful death statute, but it did not reach a decision on the issue because the case was barred by the doctrine of parental immunity. See *Carpenter v. Bishop*, 720 S.W.2d 299 (Ark. 1986). However, the court did decide a similar issue in *Carpenter v. Logan*, in which it held that there was no basis for the conclusion that a fetus was a “decedent” in the context of probate. Carpenter v. Logan, 662 S.W.2d 808 (Ark. 1984).

21 *Chatelain*, 910 S.W.2d at 215.

22 *Id.* at 219. The Arkansas Wrongful Death Statute is a survival statute and provides, in part:

(a)(1) Whenever the death of a person shall be caused by a wrongful act, neglect, or default and the act, neglect, or default is such as would have entitled the party injured to maintain an action and recover damages in respect thereof, if death had not ensued, then, . . . the person who . . . would have been liable if death had not ensued shall be liable to an action for damages.


23 California statute currently provides, in part that “[a] cause of action for the death of a person caused by the wrongful act or neglect of another may be asserted by . . . the decedent’s personal representative on their behalf . . . .” CAL. CIV. PROC. CODE § 377.60 (Deering Supp. 1996). The code also provides that “[e]xcept as otherwise provided by statute, a cause of action for or against a person is not lost by reason of the person’s death, but survives subject to the applicable limitations period.” CAL. CIV. PROC. CODE § 377.20(a) (Deering Supp. 1996).
v. Murphy the parents of a stillborn child brought a wrongful death action for the death of their nonviable fetus following an automobile accident. The District Court of Appeals for the Third District of California held that an unborn child is not a "minor person" within the California wrongful death statutes because "the right of action for wrongful death is unqualifiedly a matter of statutory provision and is completely within the jurisdiction of the legislature to grant, to withhold, or to restrict as it sees fit." The court did not discuss the issue of viability.

In 1972, the Court of Appeals for the First District of California was faced with a wrongful death claim for the stillbirth of a viable fetus that died as a result of an automobile accident in Bayer v. Suttle. The court held that "the rationale of [Norman] applies with equal facility to the viable," and "the legislature did not intend to include an unborn child within the meaning of 'person' in Code of Civil Procedure section 377."

Thus, California still requires that a fetus be born alive before allowing recovery for its wrongful death.

C. Florida

In 1968, the Supreme Court of Florida was first called upon to decide whether a stillborn fetus was a "minor child" under the existing law in Stokes v. Liberty Mutual Insurance Co. In Stokes, the fetus was stillborn as a result of

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25 Id. at 179.

26 Id. at 180.


28 Id. at 213.

29 Id. at 215. Similarly, in Justus v. Atchison, the court held that there could be no recovery for the death of a fetus during delivery because the child was not born alive. Justus v. Atchison, 565 P.2d 122 (Cal. 1977).

30 213 So.2d 695 (Fla. 1968). This case interpreted a Florida statute, which provided, in part that, "[w]henever the death of a minor child shall be caused by the wrongful act, negligence, carelessness or default of any individual . . . the father of such minor child, or if the father be not living, the mother may maintain an action against such individual." FLA. STAT. ANN. § 768.03 (West 1965).
the negligence of an uninsured motorist.\textsuperscript{31} The court, emphasized the “peculiar language of section 768.03, [that allowed] recovery for the wrongful death of a “minor child,”” and held that a stillborn fetus was not a “minor child” and that a right of action for wrongful death can only arise after the live birth and subsequent death of a child.\textsuperscript{32}

Following Stokes, Florida’s wrongful death statutes were repealed and replaced.\textsuperscript{33} The first case to interpret the new statute was Davis \textit{v.} Simpson.\textsuperscript{34} There, the parents of a stillborn, but otherwise viable fetus, brought a wrongful death action against physicians, alleging that the physicians’ negligence caused the fetus to be stillborn.\textsuperscript{35} The District Court of Appeals of Florida concluded that:

\begin{quote}
[w]e must assume that the legislature knew the construction that had been placed upon the previous death by wrongful act statute by the Supreme Court in Stokes when it enacted the new statute. There is no departure in wording of the new statute from that of the old with relation to ‘persons’ and ‘minor children’ which would indicate an intent to create a new right of action on behalf of an unborn fetus. Had the legislature intended to make such a radical change in the law, there is every reason to believe it
\end{quote}

\textsuperscript{31} Stokes, 213 So. 2d at 696.

\textsuperscript{32} \textit{Id.} at 700.

\textsuperscript{33} Florida’s wrongful death statute currently provides:

When the death of a person is caused by the wrongful act, negligence, default, or breach of contract or warranty of any person, including those occurring on navigable waters, and the event would have entitled the person injured to maintain an action and recover damages if death had not ensued, the person or watercraft that would have been liable in damages if death had not ensued shall be liable for damages as specified in this act.

\textbf{FLA. STAT. ANN. }\textbf{§ 768.19} (West 1986).

\textsuperscript{34} 313 So. 2d 796 (Fla. Dist. Ct. App. 1975).

\textsuperscript{35} \textit{Id.}
would have done so in clear language.\textsuperscript{36}

\textit{Day v. Nationwide Mutual Insurance Co.} is the final significant case in Florida dealing with prenatal injuries.\textsuperscript{37} \textit{Day} involved an action for prenatal injuries suffered in an automobile accident by a child who was in the sixth week of gestation (thus presumably nonviable) and was later born alive.\textsuperscript{38} The court held that a child that suffers prenatal injuries at any time after conception may recover for those injuries if it is born alive.\textsuperscript{39}

\textbf{D. Iowa}

The issue of recovery for fetal wrongful death was addressed for the first time by a federal court in \textit{Wendt v. Lillo}.\textsuperscript{40} The parents of a viable fetus that was killed \textit{in utero} as a result of an automobile accident brought a wrongful death action against the negligent driver.\textsuperscript{41} The district court decided that the applicable statute\textsuperscript{42} allowed an infant to bring a cause of action for prenatal injuries received while viable in the womb; therefore, the action survived to the parents of the infant.\textsuperscript{43}

In 1971, the Supreme Court of Iowa faced the issue of recovery for fetal

\textsuperscript{36} \textit{Id.} at 798. \textit{Stokes} and \textit{Davis} have been stubbornly adhered to by the Supreme Court of Florida. \textit{See, e.g.}, Abdelaziz v. A.M.I.S.U.B. of Florida, Inc., 515 So. 2d 269 (Fla. 1987) (denying wrongful death claim for death of fetus, regardless of viability, because fetus is not a “person” under wrongful death statute); Duncan v. Flynn, 358 So. 2d 178 (Fla. 1978) (holding that an unborn fetus is not a “person” within the meaning of the wrongful death statute and holding that a child is not born alive until it achieves an existence separate and independent from that of mother).

\textsuperscript{37} 328 So. 2d 560 (Fla. Dist. Ct. App. 1976).

\textsuperscript{38} \textit{Id.}

\textsuperscript{39} \textit{Id.} at 562.

\textsuperscript{40} 182 F. Supp. 56 (N.D. Iowa, 1960).

\textsuperscript{41} \textit{Id.}

\textsuperscript{42} The Iowa Code provides that “[a]ll causes of action shall survive and may be brought notwithstanding the death of the person entitled or liable to the same.” \textit{IOWA CODE ANN.} \textsection 611.20 (West 1950).

\textsuperscript{43} \textit{Wendt}, 182 F. Supp. at 62.
wrongful death for the first time in *McKillip v. Zimmerman.* The mother of a stillborn, nonviable fetus that died as a result of an automobile accident brought a wrongful death action against the negligent driver. The court held that the legislature did not intend to include an unborn child when it adopted the survival statute but intended to include "only those born alive."

In 1981, the Supreme Court of Iowa was presented with the same issue involved in *Wendt.* The suit was brought by a mother who was improperly treated for bronchitis and hypertension which caused her nearly full-term fetus to be stillborn. The court upheld *McKillip,* and decided that a fetus must be born alive before any action under the survival statute can be maintained because a fetus, viable or not, is not a "person" within the context of that statute.

Two years later, in 1983, *Dunn v. Rose Way, Inc.* was decided. That case also involved the death of a viable fetus that occurred as a result of an automobile accident. The court quickly dismissed the wrongful death claim under the survival statute, but then went on to hold that the father could maintain his action under Rule 8 of the Iowa Rules of Civil Procedure. The court distinguished the two rules by saying "[t]he survival statute and rule 8 serve different functions and compensate different people for different wrongs. Under section 611.20 the wrong is done to the injured person and to that person's estate. Under rule 8 the wrong is done to a child's parents."

To summarize, Iowa does not allow a wrongful death claim under the survival statute unless the child is born alive and then dies from its injuries.

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44 191 N.W.2d 706 (Iowa 1971).
45 *Id.* at 707.
46 *Id.* at 709. *See IOWA CODE ANN.* § 611.20 (setting forth the survival statute).
48 *Id.* at 270.
49 333 N.W.2d 830 (Iowa 1983).
50 *Id.* at 831.
51 The Iowa Rules of Civil Procedure provide that "[a] parent, or the parents, may sue for the expense and actual loss of services, companionship and society resulting from injury to or death of a minor child." Iowa R. Civ. P. 8
52 *Dunn,* 333 N.W.2d at 832.
However, a claim may be brought under Rule 8 of the Iowa Rules of Civil Procedure to recover expenses and damages resulting from the death of an unborn child.

E. Maine

_Milton v. Cary Medical Center_ 53 is the Maine case that deals with fetal wrongful death. _Milton_ was a wrongful death action brought by a mother against a hospital and its physicians for causing the death of her viable unborn daughter. 54 The Supreme Judicial Court of Maine held that a viable fetus is not a person as that term is used in the wrongful death acts, unless born alive. 55

F. Nebraska

Nebraska courts first addressed the issue of fetal wrongful death in 1951 in _Drabbels v. Skelly Oil Co._ 56 That case involved a wrongful death action on behalf of a stillborn fetus that was killed in its eighth month of development as the result of an explosion caused by a defective oil container. 57 The Supreme Court of Nebraska held that there can be no recovery for a fetus killed in _uterus_,

53 538 A.2d 252 (Me. 1988).

54 Id.

55 Id. at 253. The Maine Code provides in part that:

> Whenever the death of a person shall be caused by a wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then the person . . . that would have been liable if death had not ensued shall be liable for damages.


56 50 N.W.2d 229 (Neb. 1951).

57 Id. at 230. The Nebraska Code provides that:

> Whenever the death of a person shall be caused by the wrongful act, neglect or default, of any person, company or corporation, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who, or company or corporation which would have been liable if death had not ensued, shall be liable to an action for damages.

even after the point of viability.\textsuperscript{58} \textit{Drabbels} has been re-examined several times, but the Supreme Court of Nebraska stubbornly adheres to its original ruling that a stillborn fetus is not a "person" for purposes of the wrongful death statute.\textsuperscript{59}

\section*{G. New Jersey}

There are several cases in New Jersey dealing with the issue of prenatal injuries. The first, \textit{Ryan v. Public Service Coordinated Transport}, was an action brought by an infant for injuries he sustained while in the womb.\textsuperscript{60} The court held that no cause of action existed for prenatal injuries because an act of the legislature was necessary to provide for such a cause of action.\textsuperscript{61}

In \textit{Smith v. Brennan}, a case similar to \textit{Ryan}, an infant brought an action for prenatal injuries.\textsuperscript{62} The court overruled \textit{Ryan} and its progeny, stating:

\begin{quote}
We conclude that the reasons advanced for the decisions denying recovery to a child who survives a prenatal injury are inadequate. They deny basic medical knowledge; they ignore the protection afforded unborn children by other branches of the law, and are founded upon fears which should not weigh with the courts. We believe that a surviving child should have a right of action in tort for prenatal injuries for the plain reason that it would be unjust to deny it. Therefore, the rule of \textit{Stemmer v. Kline} is no longer the law of this State.\textsuperscript{63}
\end{quote}

The court also added that this decision was applicable regardless of whether the infant was viable at the time of the injury in the womb.\textsuperscript{64}

\textsuperscript{58} \textit{Drabbels}, 50 N.W.2d at 231.

\textsuperscript{59} \textit{See Smith v. Columbus Community Hosp., Inc.}, 387 N.W.2d 490 (Neb. 1986); \textit{see also} \textit{Egbert v. Wenzl}, 260 N.W.2d 480 (Neb. 1977).

\textsuperscript{60} 14 A.2d 52, 53 (N.J. 1940).

\textsuperscript{61} \textit{Id.} at 55. In 1942, \textit{Ryan} was affirmed in \textit{Stemmer v. Kline}, 26 A.2d 489 (N.J. 1942).


\textsuperscript{63} \textit{Id.} at 503. The rule in \textit{Stemmer} was that no cause of action existed for prenatal injuries. 26 A.2d 489 (N.J. 1942).

\textsuperscript{64} \textit{Id.}

\textsuperscript{11} Washburn Helbling: To Recover Or Not to Recover: A State by State Survey of Fetal Wr

\textsuperscript{373}
In 1964, the Supreme Court of New Jersey was confronted with the stillbirth of a viable fetus following an automobile accident in *Graf v. Taggart.* The parents of the fetus brought a wrongful death action against the negligent driver. The court held that there was no right of recovery for the death of a viable fetus *en ventre sa mere.* This decision was later ratified by *Giardina v. Bennett.*

**H. New York**

New York courts have addressed the issue of prenatal torts numerous times, beginning with *Drobner v. Peters.* In *Drobner,* a cause of action was brought on behalf of an infant who experienced injuries while viable *in utero.* The Court of Appeals of New York denied recovery, ruling that imputing a legal personality to an unborn child is a "legal fiction or indulgence" and that a prenatal injury is an injury to the mother, not to the unborn child.

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65 204 A.2d 140 (N.J. 1964).

66 *Id.* at 141. The New Jersey wrongful death statute provides that:

When the death of a person is caused by a wrongful act, neglect or default, such as would, if death had not ensued, have entitled the person injured to maintain an action for damages resulting from the injury, the person who would have been liable in damages for the injury if death had not ensued shall be liable in an action for damages. N.J. STAT. ANN. § 2A:31-1 (West 1987).

67 *Graf,* 204 A.2d at 146. The court stated:

There are compelling policy reasons, set forth in *Smith v. Brennan,* for allowing recovery where a child born alive and suffering from prenatal injuries sues for damages. In that situation the child bears the mark of defendant's wrong as a physical or mental deformity which could handicap him for the rest of his life; and could require him, his parents, or the state to expend considerable sums of money on his behalf. These reasons do not exist when the child is stillborn.

*Id.*

68 545 A.2d 139 (N.J. 1988).

69 133 N.E. 567 (N.Y. 1921).

70 *Id.*

71 *Id.* at 567-68. The court wrote:

The modern tendency of decided cases is to ignore fiction and deal with things as they are . . . . May this court attach an unnatural meaning to simple words
Drobner remained the law in New York for thirty years, until Woods v. Lancer\textsuperscript{72} was decided in 1951. In Woods, an infant brought an action for injuries he sustained while viable in his mother’s womb.\textsuperscript{73} The court overruled Drobner, concluding that “[t]o deny the infant relief in this case is not only a harsh result, but its effect is to do reverence to an outmoded, timeworn fiction not founded on fact and within common knowledge untrue and unjustified.”\textsuperscript{74} In 1953, the Woods rule was broadened by Kelly v. Gregory.\textsuperscript{75} In Kelly, the Supreme Court, Appellate Division ruled that if an infant is injured prenatally and survives birth, the infant may maintain an action for those injuries, regardless of viability at the time of the injury.\textsuperscript{76} In 1957, the Court of Appeals decided In re Estate of Logan.\textsuperscript{77} Logan involved an application for letters of administration on the estate of a stillborn fetus on the grounds that a cause of action existed for the wrongful death of a fetus.\textsuperscript{78} The court denied the application because it concluded that a right of action for the wrongful death of a fetus en ventre sa mere did not exist.\textsuperscript{79}

\begin{quote}
and hold independently of statute that a cause of action for prenatal injuries is reserved to the child until the moment of its birth and then accrues? The formulation of such a principle of legal liability against precedent and practice may be a tempting task, to which sympathy and natural justice point the way; but I cannot bring myself to the conclusion that the plaintiff has a cause of action at common law. The injuries were, when inflicted, injuries to the mother.
\end{quote}

\textit{Id.}

\textsuperscript{72} 102 N.E.2d 691 (N.Y. 1951).

\textsuperscript{73} \textit{Id.}

\textsuperscript{74} \textit{Id.} at 695. The court limited its ruling to allow recovery only for infants who were injured after the point of viability in the womb. \textit{Id.}


\textsuperscript{76} \textit{Id.} at 698.

\textsuperscript{77} 156 N.Y.S.2d 49 (N.Y. 1956). The decision was affirmed by the Court of Appeals in a very brief opinion. \textit{In re Logan’s Estate}, 144 N.E.2d 644 (N.Y. 1957).

\textsuperscript{78} \textit{Id.} at 50. Letters of administration are “[f]ormal document[s] issued by probate court appointing one an administrator of an estate.” \textit{BLACK’S LAW DICTIONARY}, \textit{supra} note 8, at 905.

\textsuperscript{79} \textit{In re Estate of Logan}, 156 N.Y.S.2d at 52. If the cause of action does not exist, then “there is no property warranting administration.” \textit{Id.}
The issue was next addressed in *Endresz v. Friedberg*, which involved a wrongful death action brought for the stillbirth of viable twin fetuses. The court, relying on the *Logan* decision, maintained that a right of recovery for the wrongful death of a fetus not born alive did not exist.

In short, New York allows recovery for prenatal injuries suffered while in the womb if the fetus is born alive, regardless of whether the fetus is viable at the time of the injury. Recovery for the death of a fetus before a live birth has been denied.

I. Tennessee

Tennessee is one of the few states that adhere to the minority view that a stillborn viable fetus is not a person and therefore cannot be the object of recovery for wrongful death. This view requires a live birth before wrongful death recovery can be had for tortious prenatal injuries. The first time Tennessee

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81 *Id.* at 902. The New York Code provides, in part, that:

1. The personal representative, duly appointed in this state or any other jurisdiction, of a decedent who is survived by distributees may maintain an action to recover damages for a wrongful act, neglect or default which caused the decedent’s death against a person who would have been liable to the decedent by reason of such wrongful conduct if death had not ensued. N.Y. EST. POWERS & TRUSTS LAW § 5-4.1 (McKinney’s 1981 Supp. 1996).

82 *Endresz*, 248 N.E.2d at 901. The court stated:

It is argued that it is arbitrary and illogical to draw the line at birth, with the result that the distributees of an injured foetus which survives birth by a few minutes may have recovery while those of a stillborn foetus may not. However, such difficulties are always present where a line must be drawn. To make viability rather than birth the test would not remove the difficulty, but merely relocate it and increase a hundredfold the problems of causation and damages.

*Id.* This decision was reaffirmed in *Ryan v. Beth Israel Hosp.*, 409 N.Y.S.2d 681 (1978).

83 The Tennessee Code provides, in part, that:

The right of action which a person, who dies from injuries received from another, or whose death is caused by the wrongful act, omission, or killing by another, would have had against the wrongdoer, in case death had not ensued, shall not abate or be extinguished by the person’s death but shall pass to [the personal representative of the decedent].

TENN. CODE ANN. § 20-5-106(a) (1994).
articulated this opinion was in 1958 in *Hogan v. McDaniel*. That case was an action by the parents of an unborn child to recover for its death in the womb after nine-and-one-half months of prenatal development. The court found decisions in other jurisdictions holding that there can be no recovery for the death of a viable fetus *en ventre sa mere* to be most persuasive. That decision has been challenged, but the Supreme Court of Tennessee has steadfastly declined to overrule it, even though the overwhelming majority of states have renounced the rule as unjust and illogical.

In 1962, the Supreme Court of Tennessee was asked to decide if a wrongful death action could be maintained for the death of an infant injured while viable in the womb. The court held that the triplet infants would have been able to maintain actions for their prenatal injuries had they lived; therefore, when the children died from those injuries, their right of action survived in the parents.

\section*{J. Texas}

In Texas, the adjudication of the controversial issue of recovery for prenatal injuries began in 1935 in the case of *Magnolia Coca Cola Bottling Co. v. Jordan*. In *Jordan* the court held that, for reasons of "lack of authority; practical inconvenience and possible injustice; no separate entity apart from the

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\begin{footnotes}

\item [85] Id. at 221-22.

\item [86] Id. at 224. The court stated:

\begin{quote}
The cases relied on by plaintiffs’ counsel and which follow the [at that time] minority rule, are based upon the notable advance in medical science and the biological fact that life begins at the moment of conception, and that it is such a vital organism as to be at once a person is esse. This is a pure fiction of the law.
\end{quote}

Id.

\item [87] See Hamby v. McDaniel, 559 S.W.2d 774 (Tenn. 1977); see also Durrett v. Owens, 371 S.W.2d 433 (Tenn. 1963).


\item [89] Id. at 476.

\item [90] 78 S.W.2d 944 (Tex. 1935).
\end{footnotes}
mother, and therefore no duty of care; no person or human being in esse at the time of the accident," recovery for the death of an infant due to prenatal injuries would be denied, despite a live birth.\textsuperscript{91}

This remained the law in Texas for forty-two years, until the Supreme Court of Texas decided \textit{Leal v. C.C. Pitts Sand & Gravel, Inc.}\textsuperscript{92} In that case, the parents of an infant girl who had sustained injuries in her sixth month of prenatal development, and who died two days after birth, challenged the \textit{Jordan} decision that no cause of action existed in such cases.\textsuperscript{93} The court expressly overruled \textit{Jordan},\textsuperscript{94} holding that a right of action for prenatal injuries sustained by an infant while viable in the womb was recognized in Texas, as was an action for the death of such a child after birth.\textsuperscript{95}

In 1971, the Texas Court of Civil Appeals addressed the issue of whether an infant who sustains injuries while not viable in the womb can maintain an action for those injuries after birth.\textsuperscript{96} The court held that a cause of action exists for prenatal injuries sustained any time during prenatal development only when the child is born alive and survives.\textsuperscript{97}

The final significant case in Texas was \textit{Witty v. American General Capital Distributors, Inc.},\textsuperscript{98} decided by the Supreme Court of Texas in 1987. There, the mother of a viable fetus that died in the womb brought wrongful death and survival actions.\textsuperscript{99} As to the wrongful death action, the court held that no cause

\textsuperscript{91} \textit{Id.} at 947 (quoting Drobner v. Peters, 133 N.E.2d 567 (N.Y. 1951)). The Texas Code provided, "The preceding article [4671] must be of such character as would, if death had not ensued, have entitled the party to maintain an action for such injury." TEX. REV. CIV. STAT. ANN. tit. 77 art. 4672 (West 1921) (current version at TEX. CIV. PRAC. & REM. CODE ANN. § 71.002 (West 1986)).

\textsuperscript{92} 419 S.W.2d 820 (Tex. 1967).

\textsuperscript{93} \textit{Id.} at 821.

\textsuperscript{94} \textit{Id.} at 822.

\textsuperscript{95} \textit{Id.}


\textsuperscript{97} \textit{Id.} at 570.

\textsuperscript{98} 727 S.W.2d 503 (Tex. 1987).

\textsuperscript{99} \textit{Id.} at 504. The Texas Code provides, in part, that "[a] person is liable for damages arising from an injury that causes an individual's death if the injury was caused by the person's . . . wrongful act, neglect, carelessness, unskillfulness, or default." TEX. CIV. PRAC. & REM. CODE ANN. § 71.001
of action exists for the death of a child due to prenatal injuries unless it is born alive. The court came to the same conclusion with regard to the survival statute.

K. Utah

In Utah there is only one important on-point case. In that case, Webb v. Snow, the mother of a viable but stillborn fetus brought a wrongful death action alleging negligent obstetric care. The court held "[w]hile injuries resulting in a miscarriage are actionable, and compensation may be awarded for the physical and mental sufferings experienced by a woman who has a miscarriage by reason of injuries caused by the wrongful acts of others, damages are not awarded for 'loss of the unborn child' itself." Accordingly, a wrongful death action may not be maintained for the death of a viable fetus in utero.

(West 1986).

100 Witty, 727 S.W.2d at 504. The court stated:
[w]e have found no evidence that the legislature intended to include a fetus within the scope of our wrongful death statute. Therefore, no cause of action may be maintained for the death of a fetus under the wrongful death statute until the right to bring such action is afforded by the legislature.

Id. at 506.

101 Id. at 506. This decision has been challenged and reaffirmed several times. See Krishnan V. Sepulveda, 916 S.W.2d 478 (Tex. 1995); see also Edinburg Hosp. Auth. v. Trevino, 904 S.W.2d 831 (Tex. 1995); Blackman v. Langford, 795 S.W.2d 742 (Tex. 1990); Tarrant County Hosp. Dist. v. Lobdell, 726 S.W.2d 23 (Tex. 1987).

102 132 P.2d 114 (Utah 1942).

103 Id. at 115. The Idaho Code currently provides, in part, that "[e]xcept as provided in Title 35, Chapter 1, Workers' Compensation, a parent or guardian may maintain an action for the death or injury of a minor child when such injury or death is caused by the wrongful act or neglect of another." UTAH CODE ANN. § 78-11-6 (1992).

104 Webb, 132 P.2d at 119. That decision was affirmed in 1975 in the case of Nelson v. Peterson, which also involved the death of an unborn viable child. 542 P.2d 1075 (Utah 1975). The Supreme Court of Utah took only two brief paragraphs to address the issue, holding that the action was without merit and that the mother could recover for injuries to herself due to the miscarriage, but not for the death of the fetus itself. Id. at 1077.
L. Virginia

The courts of Virginia addressed the issue of prenatal injuries for the first time in 1969 in Lawrence v. Craven Tire Co. In that case, the father of a stillborn viable fetus sought damages for its death under the wrongful death statute. The court concluded that “the proposition that a viable fetus is a person is a highly theoretical and fictional concept, and to say that such a ‘person’ could have maintained an action if death had not ensued is to carry the fiction even further. This [the court is] unwilling to do.”

The only other case addressing the issue of prenatal injuries in Virginia is Kalafut v. Gruver, decided by the Supreme Court of Virginia in 1990. That case was a wrongful death action brought on behalf of a child that was prenatally injured and died only a few hours after a premature birth. The court held:

[W]e adopt the following principle in this case, paraphrasing the Restatement rule: 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. [citations omitted] We do not limit the application of this rule to unborn children who are viable at the time of the tortious act. Thus, an action may be maintained for recovery of damages for any injury


106 Id. at 440. Virginia’s statutory scheme provided in pertinent part that:
Whenever the death of a person shall be caused by the wrongful act, neglect, or default of any person or corporation, and the act, neglect, or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and to recover damages in respect thereof, then, and in every such case, the person who, or corporation which, would have been liable, if death had not ensued, shall be liable to an action for damages.
VA. CODE ANN. § 8-633 (1958) (current version at VA. CODE ANN. § 8.01-50 (Michie 1992)).

107 Lawrence, 169 S.E.2d at 442. In 1986, the Supreme Court of Virginia allowed an action to recover damages for the death of an unborn child, stating that in Lawrence the court adopted the view that the fetus is a part of the mother until birth and therefore an injury to the fetus is an injury to the mother. See Modaber v. Kelley, 348 S.E.2d 233 (Va. 1986). The court limited damages to physical and mental damages suffered by the mother as the result of the stillbirth, not permitting recovery for loss of the child’s society, companionship, comfort, or guidance. Id. at 237.

108 389 S.E.2d 681 (Va. 1990) (interpreting VA. CODE ANN. § 8.01-50 (Michie 1992)).

109 Id.
occurring after conception, provided the tortious conduct and the proximate cause of the harm can be established.110

III. STATES THAT ALLOW RECOVERY FOR THE DEATH OF A VIABLE FETUS NOT BORN ALIVE

A. Alabama

The courts of Alabama have played an active role in defining the words "minor child" in the Alabama wrongful death statute.111 In 1926, in Stanford v. St. Louis-San Francisco Railway Co.,112 the Supreme Court of Alabama held that a cause of action did not exist for prenatal injuries because the child was a part of the mother.113 Accordingly, the personal representative of a fetal child injured in utero, but subsequently born alive, had no right to proceed with a wrongful death action if the child later died from its prenatal injuries.

This remained the law in Alabama until 1972, when the Supreme Court of Alabama decided Huskey v. Smith.114 Huskey involved a wrongful death action on behalf of an infant who was injured while viable in the womb and who died two days after birth from injuries sustained in an automobile accident occurring just before parturition.115 The court expressly overruled Stanford and held that a parent or legal representative had "the right to proceed in a wrongful death action where (a) the fetal child was viable at the time of the injury; and (b) the

110 Id. at 683-84.

111 The Wrongful Death Act provides, in part:

When the death of a minor child is caused by the wrongful act, omission, or negligence of any person, or corporation, or the servants or agents of either, the father, or the mother as specified in Section 6-5-390, or, if the father and mother are both dead or if they decline to commence the action, or fail to do so within six months from the death of the minor, the personal representative of the minor may commence an action.

ALA. CODE § 6-5-391(a) (Supp. 1996).


113 Id. at 567.

114 265 So. 2d 596 (Ala. 1972).

115 Id. at 596.
child is born alive.”116

In Wolfe v. Isbell,117 the plaintiff brought an action, alleging that his daughter’s death minutes after birth was the result of an automobile accident that occurred prior to viability in utero.118 The court held that an action can be maintained for the wrongful death of an unborn child as the result of prenatal injuries, whether or not the child was viable at the time of the injury, if the child is subsequently born alive and dies from the injury.119

In Eich v. Town of Gulf Shores,120 the Supreme Court of Alabama decided that live birth was not a prerequisite to liability for wrongful death.121 The Eich court did not expressly discuss viability, and the scope of the opinion was unclear. The court seemed as if it would allow recovery for the death of an unborn child at any stage, whether viable or not.122

However, any speculation on this issue was dispelled when two decisions were handed down that denied recovery for the wrongful death of a nonviable fetus en ventre sa mere.123 In both cases, the court stated that a nonviable fetus is not a “minor child” within the meaning of the wrongful death statute.124 The court based its decisions on two factors: the lack of authority from other

116 Id. at 597.


118 Wolfe, 280 So. 2d at 759.

119 Id. at 763.

120 300 So. 2d 354 (Ala. 1974) (interpreting ALA. CODE tit. 7, § 119 (1940) (current version at ALA. CODE § 6-5-391 (Supp. 1996))).

121 Eich, 300 So. 2d at 358.

122 Id. at 358. The court made broad, vague statements such as: “[O]nce we accept the basic premise that a fetus is a potential human life at the time of the injury, we feel that the substantive rights resulting from wrongful death must be protected . . . .” Id.

123 See Lollar v. Tankersley, 613 So. 2d 1249 (Ala. 1993); Gentry v. Gilmore, 613 So. 2d 1241 (Ala. 1993). Both cases were actions against physicians for negligently performing a dilatation and curettage (“D & C”). A dilatation and curettage is a medical procedure which is performed for the purpose of removing placenta and fetal tissue from the uterus.

124 Gentry, 613 So. 2d at 1241; see also Lollar, 613 So. 2d at 1249. Both cases were interpreting section 6-5-391 of the Alabama Code. Id.; Gentry, 613 So. 2d at 1241; see ALA. CODE § 6-5-391 (1993) (previously codified at ALA. CODE tit. 7, § 119 (1940)).
jurisdictions which would allow recovery for the wrongful death of a nonviable fetus en ventre sa mere and the lack of legislative intent to include nonviable fetuses within the statute. ¹²⁵

In sum, Alabama allows recovery for both the death after a live birth, regardless of when the injury was inflicted, and for the death of a viable fetus en ventre sa mere. The Supreme Court of Alabama has denied recovery for the stillbirth of a nonviable fetus.

B. Alaska

Alaska’s state courts have never considered whether recovery for fetal wrongful death is available, but the United States District Court of Alaska addressed the issue in Mace v. Jung. ¹²⁶ In Mace, the Administratrix of the Estate of Baby Mace brought a wrongful death action on behalf of the stillborn fetus who died as the result of an automobile accident which occurred before the fetus was viable. ¹²⁷

The court noted the lack of precedent in Alaska and then determined that the trend in other jurisdictions was to allow actions where the child was viable at the time of the injury and born dead ¹²⁸ and where the child was viable, born alive, and then died as a result of the injuries. ¹²⁹ Based on these decisions, the court held that “recovery could not be had under Alaska’s wrongful death statute for the death of a nonviable unborn child.” ¹³⁰

¹²⁵ Gentry, 613 So. 2d at 1244. See also Lollar, 613 So. 2d at 1252.


¹²⁷ Id. at 706.

¹²⁸ Id. (citing Wendt v. Lillo, 182 F. Supp. 56 (Iowa 1960); Hale v. Manion, 368 P.2d 1 (Kan. 1962); Verkennes v. Comiea, 38 N.W.2d 838 (Minn. 1949)).

¹²⁹ Id. (citing Amann v. Faidy, 114 N.E.2d 412 (Ill. 1953); Keyes v. Construction Serv., 165 N.E.2d 912 (Mass. 1960)).

¹³⁰ Id. The Alaska Wrongful Death Act is a survival statute and states, in part:

 Except as provided under (f) of this section, when the death of a person is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action therefor against the latter, if the former might have maintained an action, had the person lived, against the latter for an injury done by the same act or omission.

ALASKA STAT. § 09.55.580(a) (1994).
C. Arizona

Whether a fetus was a "person" within the Arizona's wrongful death statute was first decided in 1974 in Kilmer v. Hicks. In that case, Evelyn Kilmer was killed in an automobile accident while two days overdue in her pregnancy. Her viable fetus died in utero as a result of the accident. The Arizona Court of Appeals held that "the meaning of the word 'person' in the statute is clear and unambiguous in its non-inclusion of a viable fetus. It is a matter of the legislature to expand the statutory definition if it deems appropriate and not a matter for this court." In 1985, the Supreme Court of Arizona reversed Hicks when it decided Summerfield v. Superior Court. In Summerfield, the parents of a viable fetus that was stillborn as a result of alleged medical malpractice brought a wrongful death action against the physicians. The court took the opportunity to disapprove of Hicks, and holding that "absent a clear and definitive demonstration of legislative intent to the contrary, the word 'person' in the wrongful death statutes encompasses a stillborn, viable fetus."

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131 529 P.2d 706 (Ariz. 1974). The issue was first raised in 1966 but was not decided at that time because the case was dismissed for unrelated reasons. See Larriva v. Widmer, 415 P.2d 424 (Ariz. 1966). The Arizona Wrongful Death Act provides:

When death of a person is caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action to recover damages in respect thereof, then, and in every such case, the person who or the corporation which would have been liable had death not ensued shall be liable to an action for damages. ARIZ. REV. STAT. ANN. § 12-611 (1992).

132 Kilmer, 529 P.2d at 706.

133 Id. at 708.


135 Id.


137 Summerfield, 698 P.2d at 724. The court based its decision on the fact that the fetus would have been able to maintain an action had it lived and on the legislative objective of providing protection for the fetus. Id. at 720-21.
D. Colorado

Colorado state courts have never addressed a case involving prenatal injuries resulting in death. However, the United States District Court of Colorado interpreted the word “person” in Colorado’s wrongful death statute in *Espadero v. Feld.* There, Alejandra Pieroni, who was nine months pregnant, was killed in an automobile accident along with her full-term unborn son. The court held that “a wrongful death action may be maintained under Colorado law for the death of a viable fetus, particularly a full-term fetus.”

E. Connecticut

The first time Connecticut courts interpreted the meaning of the Connecticut wrongful death statute regarding fetal injuries was in *Tursi v. New England Windsor Co.* In that case a child who was injured prenatally brought

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138 649 F. Supp. 1480 (D. Colo. 1986). The Colorado statute is a survival statute and provides:

When the death of a person is caused by a wrongful act, neglect, or default of another, and the act, neglect, and default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who or the corporation which would have been liable, if death had not ensued, shall be liable in an action for damages.


139 *Espadero,* 649 F. Supp. at 1481. In *Espadero,* the plaintiffs alleged that Jerry Feld negligently served intoxicating beverages to a customer, which caused the customer to strike the automobile which Luis Espadero was driving. *Id.* Alejandra Pieroni was a passenger in Espadero’s vehicle. *Id.*

140 *Id.* at 1484.

141 The Connecticut Code provides:

In any action surviving to or brought by an executor or administrator for injuries resulting in death, whether instantaneous or otherwise, such executor or administrator may recover from the party legally at fault for such injuries just damages together with the cost of reasonably necessary medical, hospital and nursing services, and including funeral expenses.

CONN. GEN. STAT. ANN. § 52-555 (West 1991) (previously codified at CONN. GEN. STAT. ANN. § 2428 (West 1953)).

a negligence action for the injuries sustained.\textsuperscript{143} The Superior Court held that "[w]here a viable fetus is injured en ventre sa mere through negligence of the defendants, he has, when born, a cause of action against them."\textsuperscript{144}

Another significant case was Prates v. Sears, Roebuck & Co.\textsuperscript{145} In Prates, an action was brought for the death of a child, five days after her live birth, caused by personal injuries received while viable in the womb.\textsuperscript{146} The Superior Court held that, because, under Tursi, the decedent would have had a right of action had she lived, the action survived her and could be brought by her administrator.\textsuperscript{147}

In 1962, the Superior Court addressed a similar issue involving the stillbirth of a viable fetus as the result of an automobile accident in Gorke v. LeClerke.\textsuperscript{148} The court held that a wrongful death action could be maintained for the death of a viable fetus in the womb.\textsuperscript{149}

One final significant case in Connecticut is Simon v. Mullin.\textsuperscript{150} In that case, a nonviable fetus was injured en ventre sa mere, was born alive, and died from its injuries.\textsuperscript{151} The court held that a child born alive who subsequently dies can recover for prenatal injuries inflicted at any time after conception, without regard to viability.\textsuperscript{152}

\textsuperscript{143} Id.

\textsuperscript{144} Id. at 16.

\textsuperscript{145} 118 A.2d 633 (Conn. Super. Ct. 1955) (interpreting CONN. GEN. STAT. ANN. § 2428 (West 1953) (current version at CONN. GEN. STAT. ANN. § 52-555 (West 1991))).

\textsuperscript{146} Id. at 633.

\textsuperscript{147} Id. at 635.

\textsuperscript{148} 181 A.2d 448, 449 (Conn. Super. Ct. 1962) (interpreting CONN. GEN. STAT. ANN. § 52-555 (West 1991) (previously codified at CONN. GEN. STAT. ANN. § 2428 (West 1953))).

\textsuperscript{149} Id. at 451.

\textsuperscript{150} 380 A.2d 1353 (Conn. Super. Ct. 1977) (interpreting CONN. GEN. STAT. ANN. § 52-555 (West 1991) (previously codified at CONN. GEN. STAT. ANN. § 2428 (West 1953))).

\textsuperscript{151} Id. at 1354.

\textsuperscript{152} Id. at 1357.
F. Delaware

In the only notable Delaware case on the issue, Worgan v. Greggo & Ferrara, the administrator of the estate of a stillborn viable fetus killed by negligence brought a wrongful death action against the defendants. The Superior Court of Delaware, held that a right of action did exist for the wrongful death of a viable fetus. The scope of this decision is not clear, but most courts have interpreted the opinion to hold that a cause of action exists for the death of a viable fetus, whether or not it is born alive.

G. District of Columbia

One of the most important cases in the area of fetal wrongful death law was decided by the Federal District Court for the District of Columbia in 1946. That case, Bonbrest v. Kotz, was the first to recognize a cause of action for prenatal injury. In Bonbrest, a father sued on behalf of his child for injuries sustained during delivery. The court held that an infant who is viable at the time of the injury may maintain an action for prenatal injuries if it is subsequently born alive. Following this decision, every jurisdiction now allows a cause of action for prenatal injuries if the child is born alive.

In 1971, Simmons v. Howard University was decided by the United States District Court for the District of Columbia. In Simmons, a father brought
a wrongful death action after his wife died during delivery and the defendant negligently failed to deliver his child alive. The court concluded that "a viable unborn child, which would have been born alive but for the negligence of the defendant, is a 'person'" as that term is used in the District of Columbia Wrongful Death Statute.164

In 1983, the Court of Appeals for the District of Columbia decided Greater Southeast Community Hospital v. Williams.165 In Williams, the plaintiff brought a wrongful death action against a hospital and a physician for negligent treatment that resulted in the stillbirth of her fetus in the thirty-third week of gestation.166 The court first adopted the Bonbrest rule and held that a child born alive can recover for prenatal injuries.167 The court, holding that fatal prenatal injury to a viable fetus is actionable, stated that:

[i]f a viable fetus is a "person injured" at the time of the injury, then perforce the fetus is a "person" when he dies of those injuries, and it can make no difference in liability under the wrongful death and survival statutes whether the fetus dies of the injuries just prior to or just after birth.168

H. Hawaii

Hawaii's state courts have never addressed the issue of fetal wrongful death. However, the United States District Court for the District of Hawaii did have the opportunity to interpret the state's wrongful death statute as it relates to

163 Id.

164 Id. The District of Columbia Code provides, in pertinent part:

When, by an injury done or happening within the limits of the District, the death of a person is caused by the wrongful act, neglect, or default of a person or corporation, and the act, neglect, or default is such as will, if death does not ensue, entitle the person injured, . . . to maintain an action and recover damages, the person who or corporation that is liable if death does not ensue is liable to an action for damages for the death.


166 Id. at 395.

167 Id. at 396.

168 Id. at 397.
prenatal injuries in *Wade v. United States.* In *Wade,* the parents of stillborn twin fetuses injured in their twenty-second week brought an action against the government for the malpractice of Army hospital physicians. The court concluded that the Supreme Court of Hawaii would be most likely to adopt the majority view that allows a cause of action for the wrongful death of a viable, but not a nonviable, fetus because it is the “more logical and thoughtful holding.”

I. Idaho

In Idaho, there are two cases in the area of recovery for prenatal injuries. The first, *Volk v. Baldazo,* was decided by the Supreme Court of Idaho in 1982. *Volk* involved an action brought by a mother whose viable, unborn child was stillborn as a result of a car accident. The mother claimed that a viable, unborn fetus is a “person” under section 5-311 of the Idaho Code and a “child” as used in section 5-310 of the Idaho Code. The court, noting that this was a matter of first impression, took the “unique opportunity to clarify the law of Idaho as it pertains to the narrow area presented by these unusual circumstances.”

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169 745 F. Supp. 1573 (D. Haw. 1990). The Hawaii Code provides, in part, “when the death of a person is caused by the wrongful act, neglect, or default of any person, the deceased’s legal representative, or any of the persons hereinafter enumerated, may maintain an action against the person causing the death or against the person responsible for the death.” HAW. REV. STAT. § 663-3 (1993).

170 *Wade,* 745 F. Supp. at 1575.

171 Id. at 1579.

172 651 P.2d 11 (Idaho 1982).

173 Id. at 12.

174 The Idaho Code provided, in part, that “[w]hen the death of a person, not being a person provided for in section 5-310, Idaho Code, is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing death.” IDAHO CODE § 5-311 (1972).

175 The Idaho Code provided, in part, “[t]he parents may maintain an action for the injury or death of an unmarried minor child... when such injury or death is caused by the wrongful act or neglect of another.” IDAHO CODE § 5-310 (1972).

176 *Volk,* 651 P.2d at 13.
The court first concluded that a cause of action exists on behalf of a child who sustains prenatal injuries while viable in the womb and is subsequently born alive. Accordingly, had the Volk child lived, it would have been able to maintain a cause of action for its injuries. The court limited this holding to circumstances in which the fetus was viable at the time of the injury, but did not necessarily preclude liability for injuries to a nonviable fetus that was later born alive. The court then held that the term "minor child" in section 5-310 of the Idaho Code marked the upper age limit beyond which a parent may not bring a cause of action, not a lower age limit. Therefore, the term "minor child" encompassed a viable, unborn fetus and a wrongful death action could be maintained for its death.

Although the Volk court did not make any decisions regarding the injury or death of a nonviable fetus, the United States District Court for the District of Idaho was forced to decide the issue in Santana v. Zilog, Inc. Santana involved a woman who alleged that exposure to harmful chemicals caused her to suffer six miscarriages, all prior to viability. The court refused to extend the law to encompass the death of a nonviable fetus, saying:

[B]ased on the better-reasoned view of the majority of jurisdictions, I hold that under Idaho Code § 5-311, viability marks the beginning of legal personhood, and the right to assert a cause of action for the wrongful death of fetus is correspondingly limited to cases involving the death of a viable

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177 Id. at 13.
178 Id. at 14.
179 Id.
180 Id.
181 Id.
182 878 F. Supp. 1373 (D. Idaho 1995). Two years after Volk, in 1984, the Idaho legislature amended sections 5-310 and 5-311 of the Idaho Code by removing all references to death in section 5-310 and removing references to section 5-310 contained in section 5-311. Hence, the Idaho Code now provides, in pertinent part, "When the death of a person is caused by the wrongful act or neglect of another, his or her heirs or personal representatives on their behalf may maintain an action for damages against the person causing the death . . . ." IDAHO CODE § 5-311 (1990).
183 Santana, 878 F. Supp. at 1375.
STATE BY STATE SURVEY

fetus. 184

J. Illinois

The Supreme Court of Illinois first faced the issue of prenatal torts in Allaire v. St. Luke's Hospital.185 In that case, a minor child brought a cause of action for prenatal injuries he received as the result of the negligent operation of an elevator.186 The court held that no cause of action existed for injuries received before birth because the unborn child did not have an existence independent from that of the mother.187

Allaire remained the law in Illinois until 1953, when Amann v. Faidy188 was decided. In Amann, the personal representative of a child brought an action for the death of a child injured while viable en ventre sa mere and subsequently born alive.189 The Supreme Court of Illinois, noting that since Allaire, numerous states had found prenatal injuries actionable, overturned Allaire and held that:

we conclude that the reasons which have been advanced in support of the doctrine of nonliability fail to carry conviction. We hold, therefore, in conformity with the recent decisions of the courts of last resort of [various other states] that plaintiff, as administratrix of the estate of a viable child, who suffered prenatal injuries and was thereafter born alive, has a right of

184 Id. at 1382.
185 56 N.E. 638 (Ill. 1900).
186 Id. at 638.
187 Id. at 640.
188 114 N.E.2d 412 (Ill. 1953).
189 Id. at 413. The Illinois Code provides, in part:
§ 1. Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act . . . is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then . . . the person who or company or corporation which would have been liable if death had not ensued, shall be liable to an action for damages.
ILL. ANN. STAT. ch. 740, para. 180/1 (Smith-Hurd 1993) (previously codified at ILL. ANN. STAT. ch. 70 para. 1 (Smith-Hurd 1951)).
action against the defendant.\textsuperscript{190}

The next important case was \textit{Daley v. Meier},\textsuperscript{191} decided in 1961. In that case, the guardian of a minor brought an action for prenatal injuries received when he was not viable.\textsuperscript{192} The court held that an infant, born alive, can recover for injuries received in the womb regardless of viability at the time of the injuries.\textsuperscript{193}

In 1969, \textit{Rapp v. Hiemenz} was decided.\textsuperscript{194} There, the mother of an unborn child brought a case of action for the stillbirth of her child which occurred prior to viability.\textsuperscript{195} The court held that no wrongful death action exists where the injury took place before viability and where the child was not born alive.\textsuperscript{196}

The last notable case in the area of fetal wrongful death in Illinois is

\footnotesize
\begin{itemize}
\item \textsuperscript{190} \textit{Amann}, 114 N.E.2d at 417.
\item \textsuperscript{191} 178 N.E.2d 691 (Ill. 1961).
\item \textsuperscript{192} \textit{Id.} at 692.
\item \textsuperscript{193} \textit{Id.} at 694. Interestingly, in 1976, a case was decided based on \textit{Daley} in which a mother brought an action for injuries to her child that resulted from alleged medical malpractice that occurred eight years prior to her daughter’s conception. Renslow v. Mennonite Hosp., 351 N.E.2d 870 (Ill. App. Ct. 1976). When the mother was thirteen years old, she was negligently given A-RH negative blood during a blood transfusion. \textit{Id.} at 871. Her blood type was A-RH positive. \textit{Id.} This caused her child born eight years later to have permanent damage to her nervous system and brain. \textit{Id.} The court held in part that the case law in Illinois has established that a minor may recover for prenatal personal injuries sustained by him if he is born alive. That is alleged to have happened here. We find no logical reason to deny recovery to a person simply because he had not yet been conceived when the wrongful conduct took place. \textit{Id.} at 874.
\item \textsuperscript{194} 246 N.E.2d 77 (Ill. App. Ct. 1969), aff'd, 367 N.E.2d 1250 (Ill. 1977) (interpreting ILL. ANN. STAT. ch. 70, para. 1 (Smith-Hurd 1971) (current version at ILL. ANN. STAT. ch. 740, para. 180/1 (Smith-Hurd 1993))).
\item \textsuperscript{195} \textit{Id.} at 78.
\item \textsuperscript{196} \textit{Id.} at 80. \textit{Rapp} was supported by the Supreme Court of Illinois in \textit{Green v. Smith} where the court held that viability should remain the line of demarcation in cases of a fetus’ death en ventre sa mere and that if the fetus was not viable, no cause of action existed. \textit{Green v. Smith}, 377 N.E.2d 37 (Ill. 1978).
\end{itemize}
Chrisafogeorgis v. Brandenberg. In that case, a mother brought a cause of action for the stillbirth of her viable child caused by an automobile accident. The court held that "[w]eighing the holdings for and against giving a right of action and their supporting grounds we are persuaded that the preferred rule is that a right of action [for the death of a viable fetus en ventre sa mere] should be recognized." 

In summary, Illinois allows a cause of action for prenatal injuries if the child is subsequently born alive regardless of viability at the time of the injury and for the stillbirth of a viable fetus. A cause of action for the death of a nonviable fetus en ventre sa mere has been rejected.

K. Indiana

The only notable case in Indiana on the subject of prenatal torts was Britt v. Sears, where a father brought a wrongful death action for the stillbirth of his son. The court concluded that "a full-term healthy male capable of independent life with which its mother, at the time of the death in her womb was then nine months and one week pregnant, is a 'child' within the meaning of [the wrongful death statute]." Accordingly, a wrongful death action can be maintained for the death of a viable fetus en ventre sa mere.

L. Kansas

Kansas courts have decided only two cases involving fetal wrongful
death. The first was *Hale v. Manion.* 203 In that case, the Hales brought a wrongful death action for the death of their viable unborn child following an automobile accident. 204 The Supreme Court of Kansas concluded that, because an action could be maintained by a child after birth for injuries it received *in utero,* the parents had the right to bring an action on its behalf for its death. 205

In 1990, the Supreme Court of Kansas decided *Humes v. Clinton.* 206 In that case, the parents of a stillborn, nonviable fetus brought a wrongful death action against a doctor and a manufacturer of an intrauterine device. 207 The court found “viability an appropriate condition precedent to liability for wrongful death” and held that “an unborn, nonviable fetus is not a ‘person’ within the definition of the wrongful death act and is incapable of bringing an action on its own behalf.” 208

**M. Kentucky**

There is only one case decided in Kentucky involving recovery for fetal wrongful death and prenatal injuries. 209 In *Mitchell v. Couch,* 210 the father of a stillborn viable fetus brought a wrongful death action against the negligent driver that caused the death of the child and its mother. 211 The court concluded that a

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203 368 P.2d 1 (Kan. 1962).

204 Id.

205 Id. at 3. The Kansas Code provides that “[i]f the death of a person is caused by the wrongful act or omission of another, an action may be maintained for the damages resulting therefrom if the former might have maintained the action had he or she lived . . . against the wrongdoer.” KAN. STAT. ANN. § 60-1901 (1994) (previously codified at KAN. STAT. ANN. § 60-3203 (1961)).

206 792 P.2d 1032 (Kan. 1990) (interpreting KAN. STAT. ANN. § 60-1901 (1994)).

207 Id. at 1033.

208 Id. at 1037.

209 In 1969, *Orange v. State Farm Automobile Insurance Co.* was decided in which the court held that a viable unborn child was a legal person with a separate existence of its own and was therefore a member of the “family” or “household” class that was excluded from coverage in an insurance policy. 443 S.W.2d 650 (Ky. 1969).

210 285 S.W.2d 901 (Ky. 1955).

211 Id. at 903.
right of recovery existed for the stillbirth of a viable fetus.²¹²

N. Louisiana

The first case to be decided in Louisiana on the issue of recovery for prenatal torts was Cooper v. Blanck.²¹³ In Cooper, a mother brought a cause of action for the wrongful death of her child occurring several days after birth as the result of prenatal injuries.²¹⁴ The Court of Appeals of Louisiana held that an action may be maintained for the wrongful death of a child injured prenatally and born alive.²¹⁵

In 1980, three cases decided by Courts of Appeals established that a cause of action existed for the stillbirth of a child due to injuries tortiously inflicted while in the womb.²¹⁶ The next year, the issue came before the Supreme Court of Louisiana in Danos v. St. Pierre.²¹⁷ The court first held that there could be no

²¹² Id. at 906.

²¹³ 39 So. 2d 352 (La. 1923).

²¹⁴ Id. at 353. Louisiana statute provides:
Every act whatever of man that causes damages to another obliges him by whose fault it happened to repair it. Damages may include loss of consortium, service, and society, and shall be recoverable by the same with respective categories of persons who would have had a cause of action for wrongful death of an injured person.

²¹⁵ Cooper, 39 So. 2d at 360. Justice Westerfield was particularly eloquent in this opinion, stating:
The maternal instinct is one of the great elemental passions of life. Its gratification often marks the difference between a happy, peaceful and contended existence and a leaden footed march through life’s pathway, far sweeter than the music of the spheres, or the soft cadences of ‘An Aeolian Harp when swept by the fingers of the night wind’ to the mother’s ears are the first plaintive notes of the ‘heir of all the ages.’

Id.


recovery for the wrongful death of a stillborn fetus. However, on rehearing the court reversed and held that "the arguments favoring recovery more fully satisfy logical reasoning and application of the natural law" and that parents could recover wrongful death damages for the stillbirth of their child.

O. Maryland

There are several Maryland cases involving the question of recovery for prenatal injuries. The first is Damasiewicz v. Gorsuch, decided by the Court of Appeals of Maryland in 1951. In Damasiewicz, an infant brought a cause of action for injuries sustained in an automobile accident while he was viable in the womb. The court held that an infant injured while viable in the womb has a cause of action against the responsible party after birth.

The next significant case, State v. Sherman, was a wrongful death action for the death of a viable fetus in the womb that occurred as the result of an automobile accident in the ninth month of gestation. The court held that "under the plain words of the death statute . . . the action survives, or permits the parents to recover, notwithstanding the death of the child."

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218 Id. at 636. The court based its ruling on article 28 of the Louisiana Code, which states that "[c]hildren born dead are considered as if they had never been born or conceived." LA. CIV. CODE ANN. art. 28 (West 1979).

219 Danos, 402 So. 2d at 639.

220 79 A.2d 550 (Md. 1951).

221 Id. The accident caused the infant to be born prematurely and suffer from loss of sight in both eyes. Id.

222 Id. at 560.

223 198 A.2d 71 (Md. 1964).

224 Id. at 72.

225 Id. at 73. The "death statute" mentioned is section 1 of article 67 of the Maryland Code, which read, in part:

Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, the . . . person who would have been liable had death not ensued, . . . shall be liable to an action for damages, notwithstanding
The next case, *Group Health Association, Inc. v. Blumenthal*, was decided in 1983.\(^{226}\) That case was a wrongful death action on behalf of a nonviable fetus that was born prematurely and then died later due to medical malpractice.\(^{227}\) The court held that when a child is born alive after receiving prenatal injuries and then dies, a right of action exists regardless of viability at the time of the injuries.\(^{228}\)

The final case in this area is *Kandel v. White*.\(^{229}\) *Kandel* was a wrongful death action brought on behalf of a nonviable stillborn fetus.\(^{230}\) The court held that:

> to deny a nonviable [stillborn] fetus a cause of action is . . . simply a policy determination that the law will not extend civil liability by giving a nonviable fetus a cause of action for negligence before it becomes a person, in the real and usual sense of the word, by being born alive.\(^{231}\)

In summary, Maryland courts have allowed a cause of action for the wrongful death of a fetus that is born alive, regardless of viability at the time of the injury, and for the death of a viable fetus en ventre sa mere. However, Maryland courts have rejected recovery for the death of a nonviable fetus that is not born alive.

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\(^{227}\) *Id.* at 1201.

\(^{228}\) *Id.* at 1206. Specifically, the court stated that “the concept of viability has no role in a case, such as this, where the child is born alive.” *Id.*


\(^{230}\) *Id.* at 1265.

\(^{231}\) *Id.* at 1270 (quoting Wallace v. Wallace, 421 A.2d 134, 136-37 (N.H. 1980)).
P. Massachusetts

_Dietrich v. Inhabitants of Northampton_232 was the first decision by an American court on the issue of prenatal injuries. _Dietrich_ involved an infant that was injured prenatally, was born prematurely, and died only minutes after its birth.233 The court, in an opinion by Justice Holmes, held that there was no right of recovery for the death of an infant resulting from a prenatal injury.234

This remained the law in Massachusetts until _Keyes v. Construction Service, Inc._235 was decided in 1960. _Keyes_ involved a wrongful death action on behalf of an infant that was injured while viable in the womb. The infant was born prematurely and died shortly after birth.236 The court held that, due to the growing body of precedent allowing recovery in such circumstances and the progress made in medical science since the _Dietrich_ decision, a cause of action would lie if the child is viable when injured and is subsequently born alive.237

In _Torigian v. Watertown News Co._,238 a mother brought a wrongful death action on behalf of her child who was injured before viability, was born alive, and who died two and one-half hours later.239 The court held that an action could be maintained on behalf of a child who was injured while not viable but who was subsequently born alive.240

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233 Id. at 15.

234 Id. at 17.


236 Id. at 913.

237 Id. at 915.


239 Id.

240 Id. at 927. The Massachusetts statute provides, in part:

A person who (1) by his negligence causes the death of a person, or (2) by willful, wanton or reckless act causes the death of a person under such circumstances that the deceased could have recovered damages for personal injuries if his death had not resulted . . . shall be liable in damage.

Five years later, in *Leccese v. McDonough*, the father of a viable fetus that died *in utero* as a result of medical malpractice brought a wrongful death action against the doctors responsible. The court held that extending the definition of the word “person” in the applicable statute to include a fetus not born alive was best left to the legislature. However, just three years later, the court came to the opposite conclusion in *Mone v. Greyhound Lines, Inc.*, holding that a viable fetus was a “person” within the meaning of the wrongful death statute and that a cause of action could be maintained for its death *en ventre sa mere*.

The last case in this series is *Thibert v. Milka*. The father of a nonviable, stillborn fetus brought a wrongful death action against the negligent driver of a truck. The court held that “where a nonviable fetus is stillborn . . . the fetus could not have had a separate existence . . . . There is no separate cause of action for its death.”

In summary, Massachusetts allows a wrongful death action where the infant is born alive, regardless of viability, and where the fetus is viable, but dies in the womb. The courts of Massachusetts deny recovery, however, for the death of a nonviable fetus *en ventre sa mere*.

**Q. Michigan**

In *Newman v. City of Detroit*, an action was brought for the death of a

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242 Id. at 340.

243 Id. at 341.


245 Id. at 917.


247 Id. at 1025. The truck was carrying a backhoe that slid off the back of the truck and struck the automobile driven by his wife who was sixteen weeks pregnant. Id.

248 Id. at 1027.
child who died after birth due to injuries he received in the womb.\textsuperscript{249} The Supreme Court of Michigan held that an action for prenatal injuries resulting in death did not exist under the common law or under any statute.\textsuperscript{250}

The next significant case was \textit{Estate of Powers v. City of Troy}, which involved the stillbirth of a fetus in the sixth month of development.\textsuperscript{251} The Supreme Court of Michigan held that there could be no cause of action for the wrongful death of a viable infant that is not born alive, stating that the legislature never intended the word "person" to include a fetal child.\textsuperscript{252}

In 1971, the Supreme Court of Michigan began to undo the precedent set in \textit{Newman} and \textit{Powers} with the case of \textit{Womack v. Buchhorn}.\textsuperscript{253} In that case, an eight-year old boy brought an action for injuries he sustained in an automobile accident during his fourth month of development in the womb.\textsuperscript{254} The court seized the opportunity to overrule \textit{Newman}, stating, "[i]n the light of the present state of science and the overwhelming weight of judicial authority, this Court now overrules \textit{Newman}. We hold that an action does lie at common law for negligently inflicted prenatal injury."\textsuperscript{255}

Just one month later, the court was given the opportunity to reconsider

\textsuperscript{249} 274 N.W.2d 710 (Mich. 1937).

\textsuperscript{250} \textit{Id.} at 711. The plaintiff brought suit under the Survival Act. \textit{See} MICH. COMP. LAWS § 14040 (1929).

\textsuperscript{251} 156 N.W.2d 530 (Mich. 1968).

\textsuperscript{252} \textit{Id.} at 532-33. The "death act" is section 600.2922 of the Michigan Code, which provided that "[w]henver the death of a Person or injuries resulting in death shall be caused by wrongful act . . . then and in every such case, the person who, or the corporation which would have been liable, if death had not ensued, shall be liable to an action for damages." MICH. COMP. LAWS ANN. § 600.2922 (1961) (current version at MICH. COMP. LAWS ANN. § 600.2922 (1988)). The current version of the "death act" provides:

\begin{quote}
Whenever the death of a person or injuries resulting in death shall be caused by wrongful act, neglect, or fault of another, and the act, neglect, or fault is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages, the person who or the corporation which would have been liable, if death had not ensued, shall be liable to an action for damages.
\end{quote}

MICH. COMP. LAWS ANN. § 600.2922 (1988).

\textsuperscript{253} 187 N.W.2d 218 (Mich. 1971).

\textsuperscript{254} \textit{Id.} at 219.

\textsuperscript{255} \textit{Id.} at 222.
Powers. In *O'Neill v. Morse*,\textsuperscript{256} in which a wrongful death action was brought for the stillbirth of a viable fetus, the facts were "indistinguishable" from those in *Powers*.\textsuperscript{257} The court again took advantage of the opportunity to overrule outdated case law and held that a cause of action would lie for the death of a viable fetus in the womb.\textsuperscript{258}

In *Toth v. Goree*, the Supreme Court of Michigan was asked to decide whether wrongful death recovery could be had for a stillborn nonviable fetus.\textsuperscript{259} In *Toth*, the administrator of the estate of a nonviable fetus that was stillborn as a result of an automobile accident brought a wrongful death action.\textsuperscript{260} The court drew the line of recovery at viability and held that a right of action did not exist for the death of a nonviable fetus injured in the womb unless it was later born alive.\textsuperscript{261}

The last relevant case, *Jarvis v. Providence Hospital*, involved a novel set of facts.\textsuperscript{262} That case involved a wrongful death action for negligence which occurred when the fetus was not yet viable, but which did not result in an injury to the fetus until five months later when it was viable.\textsuperscript{263} The court held that the fetus was viable when injured and, under *O'Neill*, recovery could be had regardless of the fact that the conduct causing the injury occurred while the fetus

\begin{flushleft}
\textsuperscript{256} 188 N.W.2d 785 (Mich. 1971) (interpreting Mich. Comp. Laws Ann. § 600.2922 (1961)).

\textsuperscript{257} *Id.*

\textsuperscript{258} *Id.* at 787-88.


\textsuperscript{260} *Id.* at 298.

\textsuperscript{261} *Id.* at 300. In 1989, the Court of Appeals held that a cause of action could be maintained for the wrongful death of a nonviable fetus that was killed in the womb. *Fryover v. Forbes*, 439 N.W.2d 284 (Mich. Ct. App. 1989). However, that decision was reversed by the Supreme Court of Michigan because it conflicted with *Toth*. *Fryover v. Forbes*, 446 N.W.2d 292 (Mich. 1989).


\textsuperscript{263} *Id.* at 237. The mother cut herself on a vial that contained a bilirubin control substance when the fetus was not viable. The hospital informed the mother that there was no risk of infection. However, five months later, the mother was informed that she had contracted hepatitis and one week later, the fetus was stillborn. *Id.*
was not yet viable.\textsuperscript{264}

In summary, Michigan allows recovery when the fetus is born alive, regardless of viability at the time of the injury, and when a viable fetus dies in the womb. A wrongful death action on behalf of a nonviable fetus not born alive has been rejected twice.

R. \textit{Minnesota}

Minnesota courts have considered the issue of prenatal torts only once, in \textit{Verkennes v. Corniea}.\textsuperscript{265} \textit{Verkennes}, decided in 1949, involved an action on behalf of a child that died just prior to delivery. The Supreme Court of Minnesota in that case became the first state to allow a cause of action for the wrongful death of a viable fetus in the womb.\textsuperscript{266} \textit{Verkennes} began the gradual move from the outdated view that a child in the womb is merely a part of the mother to the modern view that a viable fetus leads an existence separate from the mother.

S. \textit{Mississippi}

In Mississippi there is only one significant case pertaining to prenatal torts. That case, \textit{Rainey v. Horn},\textsuperscript{267} involved the wrongful death of a viable fetus en ventre sa mere due to misconduct on the part of the mother's treating physician.\textsuperscript{268} The Supreme Court of Mississippi held that:

\begin{quote}

an unborn child, after it reaches the prenatal age of viability when the destruction of the life of its mother does not necessarily mean the end of its life also, and when, if separated from its mother would be so far a matured human being that it would live and grow mentally and physically, is a person; and if such child
\end{quote}

\begin{thebibliography}{9}

\bibitem{264} Id. at 238.

\bibitem{265} 38 N.W.2d 838 (Minn. 1949).

\bibitem{266} \textit{See id.} The action was based on section 573.02 of the Minnesota Code, which read, in part, that "when death is caused by the wrongful act or omission of any person or corporation, the personal representative of the decedent may maintain an action, had he lived for an injury caused by the same act or omission." \textit{MINN. STAT. ANN. § 573.02} (1943).

\bibitem{267} 72 So. 2d 434 (Miss. 1954).

\bibitem{268} Id. at 435.
\end{thebibliography}
dies before birth as the result of the negligent act of another, an action may be maintained for its death under the wrongful death statute.  

\[\text{\textsuperscript{269}}\]  

T. Montana  

In Montana, there are two cases dealing with the issue of prenatal injuries. The first, \textit{Kuhnke v. Fisher}, was decided by the Supreme Court of Montana in 1984 and involved a wrongful death action on behalf of a viable fetus due to alleged medical malpractice. \textsuperscript{270} The court, in interpreting the Montana wrongful death act, held that the definition of "minor child" does not encompass an unborn child whether viable or not. \textsuperscript{271} Three years after the \textit{Kuhnke} decision, the legislature amended the wrongful death statutes. \textsuperscript{272} The first case to come before the court after the

\[\text{\textsuperscript{269}}\textit{Id.} at 439-440.\] The Mississippi Code provides:

Whenever the death of any person shall be caused by any real, wrongful or negligent act or omission, . . . as would, if death had not ensued, have entitled the party injured or damages thereby to maintain an action and recover damages in respect thereof . . . the person or corporation, or both that would have been liable if death had not ensued . . . shall be liable for damages.

\textsc{Miss. Code Ann.} \textsection 11-7-13 (1972 & Supp. 1996) (corresponds to \textsc{Miss. Code Ann.} \textsection 1453 (1942)).

\[\text{\textsuperscript{270}}683 \textit{P.2d} 916, 917 (\textsc{Mont. 1984}).\]

\[\text{\textsuperscript{271}}\textit{Id.} at 919.\] The Montana Code provided, in part, that "[e]ither parent may maintain an action for the injury or death of a minor child and a guardian for injury or death of a ward when such injury or death is caused by the wrongful act or neglect of another." \textsc{Mont. Code Ann.} \textsection 27-1-512 (1975).

\[\text{\textsuperscript{272}}\text{At the time of the} \textit{Kuhnke} \text{decision, there were two wrongful death statutes. Chapter 27, article 1, section 512 of the Montana Code created an action by a parent or guardian for the injury or death of a child or ward. \textsc{Mont. Code Ann.} \textsection 27-1-512 (1947). This was the statute in question in} \textit{Kuhnke}. \text{The other wrongful death statute was chapter 27, article 1, section 513, which provided, "[w]hen the death of one person, not being a minor, is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action . . . against the person causing the death." \textsc{Mont. Code Ann.} \textsection 27-1-513 (1947) (current version at \textsc{Mont. Code Ann.} \textsection 27-1-513 (1995)). In 1987, these statutes were changed so that all references to the death of a minor child in section 512 were removed and all distinctions between minor and adult were replaced with the word "person" in section 513, which now provides, "[w]hen injuries to and the death of one person are caused by the wrongful act or neglect of another, the personal representative of the decedent's estate may maintain an action for damages against the person causing the death." \textsc{Mont. Code Ann.} \textsection 27-1-513 (1995).\]
amendments was *Strzelczyk v. Jett*,\(^{273}\) decided in 1994. In *Jett*, the mother of a stillborn viable fetus brought a wrongful death action against the physician who treated her during her pregnancy.\(^{274}\) The court decided to recognize a claim for the wrongful death of a stillborn viable fetus based on the changes in the wrongful death statutes and on Montana legislation that deemed “a child conceived but not yet born” to be an existing person “so far as may be necessary for its interests.”\(^{275}\)

**U. Nevada**

Nevada courts have addressed the issue of fetal wrongful death only once in *White v. Yup.*\(^{276}\) In that case, the mother of a viable fetus that had been killed in an automobile accident brought a wrongful death action against the negligent driver.\(^{277}\) The Supreme Court of Nevada first concluded that a child who suffers prenatal injuries may maintain an action for those injuries after birth.\(^{278}\) The court then went on to hold that an action does exist for the stillbirth of a viable fetus under the wrongful death act,\(^{279}\) stating that “[i]t is no less a loss to the survivors where, as here, the child died before birth; and it is clear that the Legislature

\(^{273}\) 870 P.2d 730 (Mont. 1994).

\(^{274}\) *Id.* at 731.

\(^{275}\) *Id.* at 732-33.

\(^{276}\) 458 P.2d 617 (Nev. 1969).

\(^{277}\) *Id.* at 617-18.

\(^{278}\) *Id.* at 621. Specifically, the court stated that: Without belaboring the point by an analysis of each of the cases in which recovery was denied, it is sufficient to say that if, by the negligence or the willful misconduct of someone, an unborn child must go through life crippled, blind, subject to fits, or otherwise changed from a normal human being, one must be impressed by the harshness of the result.

*Id.*

\(^{279}\) The Nevada Code provided:

Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the person injured to maintain an action and recover damages in respect thereof, then in every such case, the persons who . . . would have been liable if death had not ensued shall be liable to an action for damages.

intended that whatever loss there is should be compensated."\textsuperscript{280}

\textbf{V. New Hampshire}

The first time a New Hampshire court faced this issue was in 1957 in \textit{Poliquin v. MacDonald}.\textsuperscript{281} There, the mother of a stillborn viable fetus brought a wrongful death action against the negligent driver who had caused the death of the unborn child.\textsuperscript{282} The court held that "a fetus having reached that period of pre-natal maturity where it is capable of independent life apart from its mother is a person and if such child dies in the womb as the result of another's negligence, an action for recovery may be maintained in its behalf."\textsuperscript{283}

The second case, \textit{Bennett v. Hymers}, was decided in 1958.\textsuperscript{284} That case involved an action on behalf of an infant who was injured while not yet viable and who was subsequently born alive.\textsuperscript{285} The court held:

an infant born alive can maintain an action to recover for prenatal injuries inflicted upon it by the tort of another even if it had not reached the state of a viable fetus at the time of the injury. We so decide because we see no logical reason for not extending the protection of the law of torts to it and are impressed by the harshness of the opposite result.\textsuperscript{286}

The final significant case in New Hampshire involving prenatal injuries

\begin{itemize}
\item \textsuperscript{280} \textit{White}, 458 N.W.2d at 623.
\item \textsuperscript{281} 135 A.2d 249 (N.H. 1957).
\item \textsuperscript{282} \textit{Id.}
\item \textsuperscript{283} \textit{Id.} at 251. The wrongful death action was brought under section 556:7 of the New Hampshire Code, which provides that "[i]f a right of action existed in favor of or against the deceased at the time of his death, and survives, an action may be brought by or against the administrator." \textit{N.H. REV. STAT. ANN. § 556:7} (1955).
\item \textsuperscript{284} 147 A.2d 108 (N.H. 1958).
\item \textsuperscript{285} \textit{Id.} at 109.
\item \textsuperscript{286} \textit{Id.} at 110.
\end{itemize}
is *Wallace v. Wallace.* Wallace was a wrongful death action brought on behalf of a nonviable fetus that was stillborn as the result of an automobile accident. The court concluded that drawing the line of demarcation for fetal wrongful death recovery at the point of viability was appropriate. Accordingly, no cause of action exists for the wrongful death of a nonviable fetus that is not born alive.

**W. New Mexico**

There are two New Mexico cases dealing with fetal wrongful death. The first, *Salazar v. St. Vincent Hospital*, was decided by the Court of Appeals of New Mexico in 1980. That case involved an action for the wrongful death of a viable fetus en ventre sa mere resulting from alleged medical malpractice. The court concluded that a right of action for the stillbirth of a viable fetus existed under the wrongful death statute.

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287 421 A.2d 134 (N.H. 1980).

288 Id. at 135.

289 Id. at 137.

290 Id. The court in this case made the much-quoted statement that: to deny a nonviable fetus a cause of action is not to deny that life begins with conception. It is simply a policy determination that the law will not extend civil liability by giving a nonviable fetus a cause of action for negligence before it becomes a person, in the real and usual sense of the word, by being born alive. In other words, life may begin at conception but causes of action do not.

Id. at 136-37.


292 Id.

293 Id. at 830. The New Mexico Code provides: Whenever the death of a person shall be caused by the wrongful act, neglect or default of another, although such death shall have been caused under such circumstances as would amount in law to a felony, and the act, or neglect, or default, is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who . . . would have been liable, if death had not ensued, shall be liable to an action for damages.

N.M. STAT. ANN. § 41-2-1 (Michie 1996).
In the other New Mexico case, *Miller v. Kirk*, the mother of a nonviable fetus that died in the womb after an automobile accident brought a wrongful death action against the other driver. The court held that no action exists for the wrongful death of a nonviable fetus en ventre sa mere.

**X. North Carolina**

North Carolina only recently decided a case on the issue of recovery for prenatal injuries. In *Gay v. Thompson*, the father of a viable fetus that was tortiously killed in the womb brought a wrongful death action against his wife’s obstetrician. The court, while condoning actions brought by infants born alive who are impaired by prenatal injuries, refused to recognize a right of action when the prenatal injury results in the death of the fetus in the womb.

In 1968, the issue was revisited in *Stetson v. Easterling*. *Stetson* involved a wrongful death action brought by the father of an infant who sustained injuries during birth which resulted in the infant’s death several months later. The court acknowledged that the infant, had he lived, could have maintained an action for the injuries he suffered during birth. However, the court refused to allow recovery for the baby’s wrongful death, despite the fact that he was born

294 905 P.2d 194 (N.M. 1995).

295 Id.

296 Id. at 197.


298 Id. at 425-26.

299 Id. at 429. The North Carolina Code provides, in part:

> When the death of a person is caused by wrongful act, neglect or default of another, such as would, if the injured person had lived, have entitled him to an action for damages therefor, the person or corporation that would have been so liable . . . shall be liable to an action for damages. N.C. GEN. STAT. § 28A-18-2 (1984) (previously codified at N.C. GEN. STAT. § 28-173(a) (1959)).


301 Id.

302 Id. at 534.
The court based its decision on the grounds that "plaintiff's allegations are insufficient to show that [the infant's] estate has suffered pecuniary loss on account of his death." In 1975, the Court of Appeals reaffirmed Gay, but clouded the viability of the Stetson decision. The case, Cardwell v. Welch, was an action to recover for the wrongful death of a viable but stillborn fetus. The court reasoned:

by speaking of the death of a 'person' and by creating a cause of action to be brought by 'the executor, administrator or collector of the decedent,' the Legislature was thinking solely in terms of and intended to create a cause of action only for the wrongful death of one who by live birth had attained a recognized individual so as to have become a 'person' as that word is commonly understood.

This seems to conflict with the rule in Stetson that no recovery can be had for the death of an infant who is born alive but who later dies from injuries suffered prenatally.

Whatever confusion Caldwell may have caused was dispelled when DiDonato v. Wortman was decided in 1987. In that case, the father of a viable fetus that was stillborn as the result of negligent prenatal care brought a wrongful death action against the negligent physician. The court abandoned its earlier decisions denying recovery for the wrongful death of a viable fetus en ventre sa mere, and held that:

[t]he language of our wrongful death statute, its legislative history, and recognition of the statute's broadly remedial

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303 Id.
304 Id.
306 Id. at 383. This decision was re-affirmed by the Court of Appeals in the case of Yow v. Nance. 224 S.E.2d 292 (N.C. 1976).
308 Id.
objectives compel us to conclude that any uncertainty in the
meaning of the word ‘person’ should be resolved in favor of
permitting an action to recover for the destruction of a viable
fetus en ventre sa mere.\textsuperscript{309}

In summary, North Carolina recognizes a cause of action for prenatal
injuries, for the death of an infant after sustaining injuries in the womb and then
being born alive, and for the wrongful death of a viable fetus en ventre sa mere.
The issue of recovery for the stillbirth of a nonviable fetus has not yet been
addressed.

Y. North Dakota

There is only one significant North Dakota case regarding the issue of
fetal wrongful death. \textit{Hopkins v. McBane}\textsuperscript{310} involved an action brought by the
mother of a viable fetus that was stillborn, allegedly as the result of negligence
on behalf of her treating physician.\textsuperscript{311} The Supreme Court of North Dakota, after
concluding that a cause of action for prenatal injuries would be recognized for a
child who is born alive,\textsuperscript{312} went on to authorize \textquotedblleft a wrongful-death action against
one whose tortious conduct causes the death of a viable unborn child.\textsuperscript{313}

Z. Ohio

Ohio courts have adjudicated several cases within the realm of prenatal
injuries and fetal wrongful death. The first, \textit{Williams v. Marion Rapid Transit},
involved an infant’s right to recover for personal injuries inflicted while in the

\textsuperscript{309} \textit{Id.} at 493.

\textsuperscript{310} 359 N.W.2d 862 (N.D. 1984).

\textsuperscript{311} \textit{Id.} at 863.

\textsuperscript{312} \textit{Id.} at 864.

\textsuperscript{313} \textit{Id.} at 865. The North Dakota Code provides:
Whenever the death of a person shall be caused by a wrongful act, neglect, or
default, and the act, neglect, or default is such as would have entitled the party
injured, if death had not ensued, to maintain an action and recover damages in
respect thereof, then and in every such case the person who . . . would have
been liable if death had not ensued, shall be liable to an action for damages.
womb.\textsuperscript{314} The Supreme Court of Ohio determined that:

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 on its person while in the womb of its mother.\textsuperscript{315}

The next case, \textit{Jasinsky v. Potts},\textsuperscript{316} involved a wrongful death action brought by the father of an infant who was injured during his eighth month of prenatal development, was born alive, and then died three months later.\textsuperscript{317} The court held that recovery can be had for the death of a viable fetus injured en ventre sa mere and subsequently born alive.\textsuperscript{318}

In 1959, \textit{Stidam v. Ashmore} was decided.\textsuperscript{319} \textit{Stidam} was a wrongful death action on behalf of a viable fetus that was negligently killed in the womb.\textsuperscript{320} The Court of Appeals concluded that when a viable fetus is stillborn as a result of a tortfeasor's negligence, the fetus' administrator may maintain a wrongful death

\textsuperscript{314} 87 N.E.2d 334 (Ohio 1949).

\textsuperscript{315} \textit{Id.} at 339 (quoting Montreal Tramways v. LeVeille, 4 D.L.R. 337 (Can. 1933)). Currently, the Ohio Code provides, in pertinent part:

\begin{quote}
When the death of a person is caused by wrongful act, neglect, or default which would have entitled the party injured to maintain an action and recover damages if death had not ensued, the person who would have been liable if death had not ensued . . . shall be liable to an action for damages.
\end{quote}

\textit{OHIO REV. CODE ANN.} § 2125.10 (Baldwin 1994).

\textsuperscript{316} 92 N.E.2d 809 (Ohio 1950) (interpreting \textit{OHIO REV. CODE ANN.} § 10509-166 (Baldwin 1942) (current version at \textit{OHIO REV. CODE ANN.} § 2125-01 (Baldwin 1994))).

\textsuperscript{317} \textit{Id.}

\textsuperscript{318} \textit{Id.} at 812.

\textsuperscript{319} 167 N.E.2d 106 (Ohio 1959).

\textsuperscript{320} \textit{Id.} at 107.
action on its behalf.\textsuperscript{321}  

The final relevant Ohio case, \textit{Egan v. Smith},\textsuperscript{322} was decided in 1993. That case, involved the wrongful death of a nonviable fetus in the womb.\textsuperscript{323} The court refused to push the line of demarcation back from viability to conception, thereby rejecting a cause of action for the wrongful death of a nonviable fetus en ventre sa mere.\textsuperscript{324}

\textbf{AA. Oklahoma}

Oklahoma first addressed the issue of recovery for prenatal injuries and fetal wrongful death in \textit{Howell v. Rushing}.\textsuperscript{325} In \textit{Howell}, the parents of a fetus that was tortiously killed \textit{in utero} brought a wrongful death action for their loss.\textsuperscript{326} The court ruled that no cause of action existed for the wrongful death of a fetus en ventre sa mere.\textsuperscript{327} When the Supreme Court was presented with this issue again in 1967, it chose not to abandon \textit{Howell}.\textsuperscript{328}

\begin{itemize}
\item \textsuperscript{321} \textit{Id.} The court stated:

\begin{quote}
We are unable to reconcile the two propositions, that if the death occurred after birth there is a cause of action, but that if it occurred before birth there is none. Or, to adapt the words of the Supreme Court . . . it would be absurd if recovery could be had for such injuries, unless those injuries were so severe as to cause death before birth. Such a distinction could lead to bizarre results.
\end{quote}

\textit{Id.} This decision was validated in \textit{Werling v. Sandy}, 476 N.E.2d 1053 (Ohio 1985).

\item \textsuperscript{322} 622 N.E.2d 1191 (Ohio 1993).

\item \textsuperscript{323} \textit{Id.} at 1192.

\item \textsuperscript{324} \textit{Id.} at 1193-94.

\item \textsuperscript{325} 261 P.2d 217 (Okla. 1953).

\item \textsuperscript{326} \textit{Id.}

\item \textsuperscript{327} \textit{Id.} The Oklahoma Code provides, in part:

\begin{quote}
When the death of one is caused by the wrongful act or omission of another, the personal representative of the former may maintain an action therefor against the latter . . . if the former might have maintained an action had he lived, against the latter . . . for an injury for the same act or omission.
\end{quote}


\item \textsuperscript{328} See \textit{Padillow v. Elrod}, 424 P.2d 16 (Okla. 1967).
\end{itemize}
In 1976, the court was given another opportunity to reconsider *Howell*.\(^{329}\) In that case, the court, recognizing the right of an infant to bring an action for injuries received while in the womb, decided that "[i]t is time this jurisdiction recognizes the right of a viable unborn child to maintain a cause of action for injury and wrongful death. *Howell* . . . and *Padillow* . . . are expressly overruled as to that issue."\(^{330}\)

The final Oklahoma case of note is *Guyer v. Hugo Publishing Co.*\(^{331}\) That case involved a wrongful death action on behalf of a nonviable fetus that was stillborn as a result of an automobile accident.\(^{332}\) The Court of Appeals held that a wrongful death action does not exist for the death of a nonviable fetus en ventre sa mere.\(^{333}\)

**BB. Oregon**

In Oregon, only two cases have been decided on the issue of recovery for prenatal injuries. The first, *Mallison v. Pomeroy*,\(^{334}\) involved an infant’s action for prenatal injuries sustained during viability.\(^{335}\) The court held that when a viable fetus is tortiously injured in the womb, it may maintain an action for those injuries following birth.\(^{336}\)

The second and most recent Oregon case regarding prenatal injuries was *Libbee v. Permanente Clinic*.\(^{337}\) In *Libbee*, the mother of a full-term fetus that


\(^{330}\) Id.

\(^{331}\) 830 P.2d 1393 (Okla. 1992).

\(^{332}\) Id.

\(^{333}\) Id. at 1395.

\(^{334}\) 291 P.2d 225 (Or. 1955).

\(^{335}\) Id.

\(^{336}\) Id. at 226.

\(^{337}\) 518 P.2d 636 (Or. 1973).
died in the womb sought wrongful death damages from the hospital responsible.\textsuperscript{338} The court, concluded that a viable fetus can be the object of wrongful death recovery, even if not born alive.\textsuperscript{339}

\textbf{CC. Pennsylvania}

In Pennsylvania, there is considerable case law regarding the issue of recovery for prenatal injuries. The first significant case was \textit{Sinkler v. Kneale},\textsuperscript{340} in which an infant sought damages for injuries she received during her first month of fetal development that caused her to be born Mongoloid.\textsuperscript{341} The court held that a cause of action existed for prenatal injuries inflicted on an unborn child, regardless of whether or not the fetus was viable at the time of the injury.\textsuperscript{342}

Four years later, in \textit{Carrol v. Skloff},\textsuperscript{343} the court was asked to decide whether recovery for wrongful death could be had for the death of a stillborn fetus.\textsuperscript{344} The court held that the legislature never intended to create a cause of

\textsuperscript{338} \textit{Id.} at 636-37. The Oregon Code currently provides, in pertinent part:

\begin{quote}
When the death of a person is caused by the wrongful act or omission of another, the personal representative of the decedent \ldots may maintain an action against the wrongdoer, if the decedent might have maintained an action, had the decedent lived, against the wrongdoer for injury done by the same act or omission.
\end{quote}


\textsuperscript{339} \textit{Libbee}, 518 P.2d at 640.

\textsuperscript{340} 164 A.2d 93 (Pa. 1960).

\textsuperscript{341} \textit{Id.} at 94.

\textsuperscript{342} \textit{Id.} at 95-96.


\textsuperscript{344} The Pennsylvania Code currently provides, in part:

\begin{quote}
An action may be brought, under procedures prescribed by general rules, to recover damages for the death of an individual caused by the wrongful act or neglect or unlawful violence or negligence of another if no recovery for the same damages claimed in the wrongful death action was obtained by the injured individual during his lifetime.
\end{quote}


The Pennsylvania Code also provides that "[a]ll causes of action or proceedings, real or personal,
action for an unborn fetus and that the overwhelming authority supported denial of recovery for the death of a fetus never born alive.\textsuperscript{345}

Carrol remained controlling until 1985 when the Supreme Court of Pennsylvania decided Amadio v. Levin.\textsuperscript{346} In Amadio, the parents of a stillborn but otherwise viable fetus brought a wrongful death action against negligent physicians.\textsuperscript{347} The court concluded that, "the time has arrived for us to join our twenty-eight sister states and the District of Columbia and recognize that survival and wrongful death actions lie by the estates of stillborn children for fatal injuries they received while viable children en ventre sa mere."\textsuperscript{348}

The next pertinent Pennsylvania case was decided by a superior court of Pennsylvania in 1989.\textsuperscript{349} That case was a wrongful death and survival action on behalf of triplet nonviable fetuses who were injured in the womb, born alive, and died within twenty-four hours of birth.\textsuperscript{350} The court held that, "we cannot decide that fetuses born prior to attaining viability should now be accorded the same

\textsuperscript{345} Carrol, 202 A.2d at 11. Although, the fetus in this case was not viable, the court does not engage in a discussion of viability; in fact, the issue of viability is completely ignored. However, two years later, the issue of viability was addressed in Marko v. Philadelphia Transportation Co., which involved the stillbirth of a viable fetus. 216 A.2d 502 (Pa. 1966). The plaintiff tried to distinguish the case from Carrol on the grounds that Carrol involved a nonviable fetus, while Marko involved a viable one. Id. at 503. However, the court stated that, "the [plaintiff's] contention is without merit," and that "viability was incidental and not controlling." Id. The court when on to hold that no cause of action exists for the death of a viable fetus en ventre sa mere. Id. This holding was reaffirmed in Scott v. Kopp. 431 A.2d 959 (Pa. 1981).


\textsuperscript{347} Id. at 1085-86.

\textsuperscript{348} Id. at 1086-87. A survival action refers to an action for personal injuries inflicted on the decedent which, rather than being extinguished on the decedent’s death, survives the decedent and which can then be brought by the decedent’s personal representative. BLACK’S LAW DICTIONARY, supra note 8, at 1446. A wrongful death action, on the other hand, is not an action on behalf of the decedent, but an action that accrues to the decedent’s beneficiaries by virtue of the death of the decedent. Id. at 1612.

\textsuperscript{349} 567 A.2d 1095 (Pa. 1989).

\textsuperscript{350} Id. at 1096.
rights that children who have attained viability have been accorded.\textsuperscript{351} Thus, the court refused to recognize a cause of action for the death of a fetus injured in the womb and born alive prior to viability.\textsuperscript{352}

The final significant case decided in Pennsylvania involving fetal wrongful death is \textit{Coveleski v. Bubnis}.\textsuperscript{353} In that case, the mother of a nonviable fetus that died in the womb as a result of an automobile accident brought a wrongful death and survival action.\textsuperscript{354} The court held that drawing the line for recovery at the point of viability was proper and that no right of action existed for the death of a fetus in the womb prior to that point.\textsuperscript{355}

In summary, Pennsylvania recognizes a cause of action for prenatal injuries when the child is born alive regardless of when the injuries were inflicted, for the death of an infant while viable and subsequently born alive, and for the stillbirth of a viable fetus. Pennsylvania courts have denied recovery for the death of a fetus that was injured while not viable and then born alive, and for the death of a nonviable fetus en ventre sa mere.

\paragraph{DD. Rhode Island}

The first time Rhode Island courts ruled on the issue was in 1901 in \textit{Gorman v. Budlong}.\textsuperscript{356} \textit{Gorman} involved an action to recover damages for prenatal injuries inflicted on a fetus that was subsequently born alive. The court adopted the \textit{Dietrich}\textsuperscript{357} rule that a negligence action may not be maintained on behalf of a fetus, nor may the next-of-kin maintain a wrongful death action for its prenatal injuries, regardless of the viability of the fetus, or whether the fetus was born alive.\textsuperscript{358}

\begin{thebibliography}{99}
\item \textsuperscript{351} \textit{Id.} at 1098.
\item \textsuperscript{352} \textit{Id}.
\item \textsuperscript{353} 571 A.2d 433 (Pa. 1990) (interpreting 42 PA. CONS. STAT. ANN. § 8301 (1982 & Supp. 1996)).
\item \textsuperscript{354} \textit{Id.} at 434.
\item \textsuperscript{355} \textit{Id.} at 436. This decision was affirmed in \textit{McCaskill v. Philadelphia Housing Authority}. 615 A.2d 382 (Pa. 1992).
\item \textsuperscript{356} 49 A. 704 (R.I. 1901).
\item \textsuperscript{357} \textit{Dietrich v. Inhabitants of Northampton}, 52 Am.R. 242 (1844).
\item \textsuperscript{358} \textit{Id.} at 17.
\end{thebibliography}
This remained the law in Rhode Island for sixty-five years, until Sylvia v. Gobeille. That case, which involved an action brought by an infant who was born with physical defects as a result of a physician's negligence, was a direct challenge to Gorman. The court seized the opportunity to overrule Gorman and held that "a child born alive has a right of action in tort against a negligent wrongdoer for prenatal injuries."

Ten years later, the court was faced with a wrongful death action for the stillbirth of a viable fetus. The court held that recovery was available under the wrongful death statute for the death of a viable fetus en ventre sa mere. However, the court also stated:

[i]n Sylvia, we were unable logically to conclude that a claim for injury inflicted prior to viability is any less meritorious than one sustained after. Similarly, in the present instance, logic does not permit the insistence on viability as the line of demarcation between those for whom an action will lie and those who are without rights under the statute.

The court went on to say that "as our holding in this case indicates, the decedent, whether viable or nonviable, was a 'person' within the meaning of the Wrongful

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360 Id.

361 Id. at 224. The court also stated, "[i]n our judgment there is no sound reason for drawing a line at the precise moment of the fetal development when the child attains the capability of an independent existence, and we reject viability as a decisive criterion." Id. at 223. This rejection of the viability standard, although unimportant in the Sylvia decision, became increasingly significant in later cases.

Whenever the death of a person shall be caused by the wrongful act, neglect, or default of another, and the act, neglect, or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, the person who . . . would have been liable if death had not ensued shall be liable to an action for damages.

R.I. GEN. LAWS § 10-7-1 (1985).

363 Presley, 365 A.2d at 754.

364 Id.
Death Act.\textsuperscript{365} The rejection of the viability standard led to many questions about the scope of this case. Specifically, there was speculation as to whether Rhode Island now recognized a cause of action for the wrongful death of a nonviable fetus en ventre sa mere. A close reading of the opinion indicates, that, in fact, the Supreme Court of Rhode Island intended to create a cause of action for the death of an unborn child at any moment after conception.

However, in 1991, the question of whether recovery for a stillborn, nonviable fetus could be had was answered in the negative in \textit{Miccolis v. Amica Mutual Insurance Co.}\textsuperscript{366} In \textit{Miccolis}, the court declined to recognize a right of action for the death of a nonviable fetus in the womb, rejecting any indications to the contrary contained within earlier opinions.\textsuperscript{367} Specifically, the court stated:

\begin{quote}
we note that the overwhelming majority view in this country is that a nonviable fetus has no right to bring an action for wrongful death. The language of the plurality opinion of Presley to the contrary is merely dictum and has no precedential value in respect to the instant case. We do not believe that the Legislature intended a nonviable fetus to be defined as a 'person' within the meaning of the wrongful-death statute.\textsuperscript{368}
\end{quote}

In summary, Rhode Island recognizes a cause of action for prenatal injuries, regardless of viability at the time of the injury, if the fetus is subsequently born alive and for the death of a viable fetus in the womb. However, wrongful death recovery for a nonviable fetus that is not born alive has been denied.

\textit{EE. South Carolina}

The courts of South Carolina first contemplated the issue of prenatal injuries in 1958. That case, \textit{West v. McCoy},\textsuperscript{369} was a wrongful death action for the death of a fetus in its fifth month of prenatal development due to an

\begin{footnotesize}
\begin{enumerate}
\item Id.
\item 587 A.2d 67 (R.I. 1991).
\item Id. at 71.
\item Id.
\item 105 S.E.2d 88 (S.C. 1958).
\end{enumerate}
\end{footnotesize}
automobile accident. The Supreme Court of South Carolina concluded that a child is not regarded as a person until it is born alive and ruled that no action existed under the wrongful death statute for the stillbirth of an unborn child.

Two years later, the court was presented with another case involving prenatal injuries. That case, Hall v. Murphy, involved a negligence action on behalf of an infant that was injured while viable in the womb, born alive and died four hours later. The court held that, "a foetus having reached that period of prenatal maturity where it is capable of independent life apart from its mother is a person and if such a child is injured, it may after birth maintain an action for such injuries." Therefore, the court concluded, if the child died, the right of action would survive to its personal representative.

In 1964, two cases dealing with fetal wrongful death were decided within one month of each other. The first, Todd v. Sandridge Construction Co., was a federal case in which the father of a viable fetus that was stillborn as the result of an automobile accident brought a cause of action for its wrongful death. The court distinguished this case from West on the grounds that West involved the death of a fetus prior to viability, while the child in this case was viable at the

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370 Id. at 88.

371 Id. at 90. The South Carolina Code provided (and currently provides), in pertinent part:

Whenever the death of a person shall be caused by the wrongful act, neglect or default of another and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, the person who would have been liable, if death had not ensued, shall be liable to an action for damages.


373 Id. at 791.

374 Id. at 793.

375 Id.


377 Id. at 76.
time of its death. Due to the obvious injustice that would result in allowing recovery where the child is born alive, but denying recovery in the more severe instance where the child dies prior to birth, the court held that recovery would be allowed where a viable fetus is killed in the womb.

The other case, decided one month after Todd, was a state case involving the same question of law. In that case, the Supreme Court of South Carolina came to the same conclusion as the United States Court of Appeals, holding that a wrongful death action would lie for the death of a viable infant, tortiously killed in the womb.

FF. Vermont

There is only one significant Vermont case in the area of fetal wrongful death. That case, Vaillancourt v. Medical Center Hospital of Vermont, Inc., involved a wrongful death action brought on behalf of a viable, but stillborn, fetus. The court held that a wrongful death action can be maintained for the death of a viable fetus in the womb.

GG. Washington

The issue of recovery for prenatal injuries was first addressed by the
Supreme Court of Washington in *Seattle First National Bank v. Rankin.*\(^{385}\) In that case, a child brought an action to recover for injuries sustained prior to birth that resulted in the child being born with a form of cerebral palsy.\(^{386}\) The court took the position in "accord with the clear trend of recent cases" and held that the child could recover for her prenatal injuries.\(^{387}\)

In 1975, the Supreme Court of Washington faced the question of whether the parents of a viable fetus that was negligently killed in the womb could recover for its wrongful death.\(^{388}\) The court in *Moen v. Hanson,*\(^{389}\) concluded that a cause of action could be maintained for the wrongful death of a viable fetus *en ventre sa mere* because "[d]enial of recovery to an unborn child tortiously killed, on the arbitrary grounds that the child did not survive the tort long enough to be born alive, is eminently illogical."\(^{390}\) In 1994, the court decided that a cause of action could also be maintained under the survival statute in the same circumstances.\(^{391}\)

**HH. Wisconsin**

The first important Wisconsin case, *Lipps v. Milwaukee Electric Railway & Light Co.*,\(^{392}\) involved an infant’s action for prenatal injuries received before

\(^{385}\) 367 P.2d 835 (Wash. 1962).

\(^{386}\) *Id.* at 837.

\(^{387}\) *Id.* at 838.

\(^{388}\) *Moen v. Hanson,* 537 P.2d 266 (Wash. 1975). The Washington Code provides, in part, that "[t]he mother or father or both may maintain an action as plaintiff for the injury or death of a minor child, or a child on whom either, or both, are dependent for support." WASH. REV. CODE ANN. § 4.24.010 (West 1988).

\(^{389}\) 537 P.2d 266 (Wash. 1975).

\(^{390}\) *Id.* at 268.

\(^{391}\) *Cavazos v. Franklin,* 867 P.2d 674 (Wash. 1994). The Washington Code provides in pertinent part that "[a]ll causes of action by a person or persons against another person or persons shall survive to the personal representatives of the former and against the personal representatives of the latter, whether such actions arise on contract or otherwise." WASH. REV. CODE ANN. § 4.20.046 (1988 & Supp. 1996).

\(^{392}\) 159 N.W. 916 (Wis. 1916).
it was viable in the womb. 393 The court held that an infant could not recover for prenatal injuries it sustained while not yet viable because a nonviable fetus is incapable of separate existence from its mother. 394

In Puhl v. Milwaukee Automobile Insurance Co., the Supreme Court of Wisconsin was again presented with the question of whether an infant that was injured while nonviable in the womb could maintain an action for those injuries after birth. 395 The court concluded that there was insufficient proof of causation to sustain an award of damages and that there was no need to decide the bigger issue regarding prenatal injuries. 396 However, the court, noting that the issue was an important one took the opportunity to "point out the present status of the law." 397 The court overruled Lipps, rejected the viability standard, and stated that the child is "no more a part of its mother before it becomes viable than it is after viability." 398 This holding was limited to cases in which a child born alive was seeking to recover for prenatal injuries.

The last relevant case is Kwaterski v. State Farm Mutual Automobile Insurance Co. 399 That case involved a wrongful death action brought by the parents of a viable fetus that was stillborn as the result of an automobile accident. 400 The Supreme Court of Wisconsin held that a stillborn viable fetus can be the object of a wrongful death action. 401

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393 Id.

394 Id. at 917.

395 99 N.W.2d 163 (Wis. 1959).

396 Id. at 169.

397 Id.

398 Id. at 170.

399 148 N.W.2d 107 (Wis. 1967).

400 Id. at 108. The Wisconsin Code provides:
Whenever the death of a person shall be caused by a wrongful act, neglect or default and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages . . . then . . . the person who would have been liable, if death had not ensued, shall be liable to an action for damages.


401 Kwaterski, 148 N.W.2d at 112.
IV. STATES THAT ALLOW RECOVERY FOR THE DEATH OF A NONVARIABLE FETUS NOT BORN ALIVE

A. Georgia

The first case to address the issue in Georgia was *Tucker v. Carmichael & Sons.* That case was an action on behalf of an infant to recover damages for prenatal injuries allegedly caused by the defendant’s negligent operation of a vehicle. The Supreme Court of Georgia held that the infant could maintain an action for prenatal injuries, stating:

life begins when the child is able to stir in the mother’s womb. It can have a legacy, can own an estate, and a guardian can be assigned to it. . . . It would therefore be illogical, unrealistic, and unjust -- both to the child and to society -- for the law to withhold its processes necessary for the protection of the person of an unborn child, while, at the same time, making such processes available for the purpose of protecting its property.

The most important Georgia case in this area of the law is undoubtedly *Porter v. Lassiter.* That case involved a wrongful death action by a mother whose nonviable unborn child was stillborn as a result of an automobile accident. The Court of Appeals determined that:

...a suit may be maintained by a mother for the loss of a child that was ‘quick’ in her womb at the time of the [injury] . . . . The court does not believe it necessary for the child to be ‘viable’ provided that it was ‘quick,’ that is able to move in its mother’s womb.

\[402\] 65 S.E.2d 909 (Ga. 1951).

\[403\] Id. at 909-10.

\[404\] Id. at 910-11.

\[405\] 87 S.E.2d 100 (Ga. Ct. App. 1955).

\[406\] Id. at 101.

\[407\] Id. at 103.
As a result of the Porter decision, Georgia became the first state to allow wrongful death recovery for the death of an unborn fetus that may not be viable at the time of the tortious act.408

The next year, the Supreme Court of Georgia decided Hornbuckle v. Plantation Pipe Line Co.409 In Hornbuckle, an action was brought on behalf of a child who sustained prenatal injuries in a car accident while not yet quick in the womb.410 The accident resulted in the child being physically deformed.11 The court held that “if a child is born after a tortious injury sustained at any period after conception, he has a cause of action.”412

B. Missouri

Missouri courts have been very active in the area of prenatal torts. In Buel v. United Railway Co., the court held that an unborn child was a not a separate entity from its mother and therefore could not maintain an action for injuries received while in the womb.413

That remained the law in Missouri for forty years until the Supreme Court

408 Currently, three other states allow recovery for the wrongful death of a nonviable fetus. See also Wiersma v. Maple Leaf Farms, 543 N.W.2d 787 (S.D. 1996); Conner v. Monkem Co., 898 S.W.2d 89 (Mo. 1995); Farley v. Sartin, 466 S.E.2d 522 (W. Va. 1995).

409 93 S.E.2d 727 (Ga. 1956).

410 Id. at 728.

411 Id. The child was born with a deformed right foot, right ankle, and right leg. Id.

412 Id. There are two other notable cases in Georgia that relates to this issue of fetal wrongful death. The first is Gulf Life Insurance Co. v. Brown. 351 S.E.2d 267 (Ga. Ct. App. 1986). In that case, the Court of Appeals was asked to grant the insurance company summary judgment based on their contention that a stillborn child was not a “person” so as to be covered under the insurance policy. Id. The court refused to decide whether the stillborn child was a “person” for purposes of the policy, saying that it was a question of fact for the jury, not a question of law. Id.

The second case, McAuley v. Wills, was an action for the wrongful death of a fetus that died as a result of injuries to the mother prior to conception. 303 S.E.2d 258 (Ga. 1983). The action was barred by the statute of limitations, but on the issue of pre-conception injuries the court said that “to the extent that the trial court ruled that a person owes no duty of care toward an unconceived child, we must disagree. Cases cited [earlier] show that, at least in some situations, a person should be under a duty of care toward an unconceived child.” Id. at 260.

413 154 S.W. 71, 72 (Mo. 1913).
of Missouri decided Steggall v. Morris. Steggall also involved the death of a child shortly after birth as a result of injuries sustained while viable in the womb. The court overruled Buel, stating that "it is but natural justice that a child 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," and that the tort-feasor should also be liable if those injuries cause death.

The next significant Missouri case that dealt with prenatal injuries was State ex rel. Hardin v. Sanders. In that case, a couple brought a wrongful death action for the stillbirth of their viable fetus following an automobile accident. The court held that "[i]t is our view that a fetus is not a 'person' within the meaning of our wrongful death statute until there has been a live birth." However, this decision was fairly short-lived. In 1983, the Supreme Court of Missouri reversed Hardin in O'Grady v. Brown. In O'Grady the parents of a viable fetus, that was stillborn in the ninth month of gestation, brought a wrongful death action against the negligent doctor and hospital. The court held that the term "person" as used in section 537.080 of the Missouri Code includes the human fetus en ventre sa mere and allowed an action for the stillbirth

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414 258 S.W.2d 577 (Mo. 1953) (interpreting Mo. ANN. STAT. § 537.080 (Vernon 1939) (current version at MO. ANN. STAT. § 536.080 (Vernon 1988 & Supp. 1996))).

415 Id. at 538.

416 Id. at 581 (quoting Montreal Tramways v. Leveille, 4 D.L.R. 337, loc. cit. 345 (1933)).

417 538 S.W.2d 336 (Mo. 1976) (interpreting MO. ANN. STAT. § 537.080 (Vernon 1967)).

418 Id. at 337.

419 Id. at 338.

420 654 S.W.2d 904 (Mo. 1983).

421 Id. at 906. The Missouri Code provides, in part:

Whenever the death of a person results from any act, conduct, occurrence, transaction, or circumstance which, if death had not ensued, would have entitled such person to recover damages in respect thereof, the person who, or the corporation which, would have been liable if death had not ensued shall be liable in an action for damages.

of a viable fetus.\textsuperscript{422} 

In 1990, the Supreme Court of Missouri decided \textit{Rambo v. Lawson}.\textsuperscript{423} \textit{Rambo} involved a wrongful death action brought on behalf of a nonviable fetus that died in the womb as the result of an automobile accident.\textsuperscript{424} The court declined to extend the line of demarcation for recovery beyond the point of viability, thus rejecting recovery for the death of a nonviable fetus in the womb.\textsuperscript{425}

In \textit{Connor v. Mon kem Co.},\textsuperscript{426} which involved the death of a nonviable fetus in the fourth month of fetal development, the court, in another quick reversal, reversed \textit{Rambo} and allowed recovery.\textsuperscript{427} The court based its decision on section 1.205 of the Missouri Code, which was enacted by the legislature in 1988, but which the court found unpersuasive five years earlier in \textit{Rambo}.\textsuperscript{428} That

\textsuperscript{422} O'Grady, 654 S.W.2d at 910.

\textsuperscript{423} 799 S.W.2d 62 (Mo. 1990).

\textsuperscript{424} \textit{Id.}

\textsuperscript{425} \textit{Id.} at 63. In 1986, the Missouri legislature passed a statute which reads:

1. The general assembly of this state finds that:
   (1) The life of each human being begins at conception;
   (2) Unborn children have protectable interests in life, health and well-being;
   (3) The natural parents of unborn children have protectable interests in the life, health, and well-being of their unborn child.
2. Effective January 1, 1988, the laws of this state shall be interpreted and construed to acknowledge on behalf of the unborn child at every stage of development, all the rights, privileges, and immunities available to other persons, citizens, and residents of this state . . .
3. As used in this section, the term "unborn children" or "unborn child" shall include all unborn child or children or the offspring of human beings from the moment of conception until birth at every stage of biological development.
4. Nothing in this section shall be interpreted as creating a cause of action against a woman for indirectly harming her unborn child by failing to properly care for herself or by failing to follow any particular program of prenatal care.

\textsuperscript{426} MO. ANN. STAT. § 1.205 (Supp. 1996).

However, the court quickly dismissed this statute, stating, "[w]e find no indication in the text that this bill was designed to amend the wrongful death statutes, which the legislature could easily have done had such been its intention." \textit{Rambo}, 799 S.W.2d at 64.

\textsuperscript{427} 898 S.W.2d 89 (Mo. 1995).

\textsuperscript{428} \textit{Id.} at 92.

\textsuperscript{428} \textit{Id.}
section expresses the intention of the Missouri legislature that the courts read all Missouri statutes in accord with the interpretation that life begins at conception and that parents of unborn children have protectable interests in that child’s life.429 The court stated that “we cannot avoid the conclusion that the legislature intended the courts to interpret ‘person’ within the wrongful death statute to allow a natural parent to state a claim for the wrongful death of his or her unborn child, even prior to viability.”430

C. South Dakota

In South Dakota there exists a situation unlike any other jurisdiction in the United States. Prior to 1984, that state’s wrongful death statute was very similar to those of many other states.431 However, in 1984 the statute was amended to include a provision regarding the wrongful death of unborn children.432 The amendment provided that unborn children would be expressly included in the statute, with no mention of a viability or live birth standard.433

429 Id.

430 Id. The court distinguished this case from Rambo by noting that the incident that gave rise to the lawsuit in Rambo occurred prior to the effective date of the statute and therefore it “is not to be followed for incidents arising subsequent to the effective date of that section.” Connor v. Monkem Company, Inc., 898 S.W.2d at 93.

431 The South Dakota wrongful death statute provided:
Whenever the death of a person shall be caused by a wrongful act, neglect, or default, and the act, neglect, or default is such as would have entitled the party injured to maintain an action and recover damages in respect thereto, if death had not ensued, then and in every such case, the... person who, would have been liable, if death had not ensued... shall be liable, to an action for damages.

432 The South Dakota wrongful death statute now provides, in pertinent part:
Whenever the death or injury of a person, including an unborn child, shall be caused by a wrongful act, neglect, or default, and the act, neglect, or default is such as would have entitled the party injured to maintain an action and recover damages with respect thereto, if death had not ensued, then and in every such case, the... person who, would have been liable, if death had not ensued... shall be liable, to an action for damages.

433 Id.
In 1986, the Supreme Court of South Dakota was asked to interpret the pre-amendment statute with regard to a viable, stillborn fetus. The court held that, due to the "clear, overwhelming and growing majority of jurisdictions" permitting actions in such cases, a cause of action for the death of a viable, unborn fetus did exist under the wrongful death statute, even prior to the 1984 amendment.

In 1996, the Supreme Court of South Dakota decided Wiersma v. Maple Leaf Farms, the first case arising under the amended wrongful death statute. In that case, the parents of a fetus that was killed in its seventh week of prenatal development brought a cause of action for its wrongful death. The court held that the words "including an unborn child" referred to a fetus in all stages of prenatal development, not just to a viable fetus or one later born alive. Accordingly, an action can be maintained for the death of a nonviable fetus en ventre sa mère.

D. West Virginia

There are several cases in West Virginia dealing with fetal wrongful death. The first time the issue was addressed was in 1969 in Panagopoulous v.

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435 Id. at 44. Interestingly, the defendants tried to use the amendment to their advantage, arguing that the amendment evidenced the legislature’s intent to not create a cause of action for the wrongful death of an unborn child until 1984. Id. However, this argument was rejected by the court.

436 543 N.W.2d 787 (S.D. 1996).

437 Id. at 789.


439 Wiersma, 543 N.W.2d at 790.

440 Id. at 791. With this decision, South Dakota became only the fourth state to recognize a wrongful death action for the death of a fetus in the womb prior to viability. See also Porter v. Lassiter, 87 S.E.2d 100 (Ga. 1955) (permitting recovery if the child is "quick" in the womb); Connor v. Monkem Co., 898 S.W.2d 89 (Mo. 1995) (allowing a wrongful death action for a stillborn fetus prior to viability); Farley v. Sartin, 466 S.E.2d 522 (recognizing a right of action for the wrongful death of a nonviable fetus en ventre sa mère).
Martin. In that case, the mother of a stillborn, viable fetus brought an action against the driver of a truck and his employer for the wrongful death of her unborn child resulting from an automobile accident. The United States District Court for the Southern District of West Virginia first addressed the issue of whether an action could be maintained by the infant for prenatal injuries had he survived. On that issue, the court determined that "if the West Virginia Supreme Court of Appeals were to decide a case similar to the present case it would uphold a cause of action for a child seeking to recover damages for injuries suffered while in its mother's womb." The court then went on to conclude that a cause of action for the death of a viable fetus in the womb should also be permitted due to the medical recognition that a viable fetus is an individual capable of a separate existence from its mother.

Two years later, in 1971, the Supreme Court of Appeals of West Virginia addressed this same issue. That case stemmed from an automobile accident in which the plaintiff's viable fetus was killed in the womb. The court held that "an action may be maintained by the personal representative of a viable unborn child for the wrongful death of such child caused by injuries sustained by it while in the womb of its mother resulting from the negligence of the defendant."

Then, in 1995, the landmark case of Farley v. Sartin was decided by the

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442 Id. at 221-22. The West Virginia Code provides, in part:

> Whenever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action to recover damages in respect thereof, then, and in every such case, the person who, or the corporation which, would have been liable if death had not ensued, shall be liable to an action for damages.

W. VA. CODE § 55-7-5 (1994).

443 Panagopoulous, 295 F. Supp. at 223.

444 Id. at 225.

445 Id.


447 Id. at 429.

448 Id. at 436.
Supreme Court of Appeals of West Virginia. In that case, the father of nonviable fetus that was stillborn as the result of an automobile accident brought a wrongful death action against the other driver and his employer. The court held that drawing the line for wrongful death recovery at the point of viability is inappropriate and without merit and that a nonviable fetus is a “person” in the context of the wrongful death statute, even when not born alive. Accordingly, the personal representative of a nonviable fetus tortiously killed in the womb can maintain a wrongful death action against the tortfeasor and recover damages.

With this decision, West Virginia became only the third state (of four) to allow recovery for the wrongful death of a nonviable fetus en ventre sa mere.

V. STATES WITH NO CASE LAW

A. Wyoming

As of the date of this article, no cases had been decided in Wyoming regarding the issue of prenatal injuries and fetal wrongful death.

VI. CONCLUSION

In conclusion, there are three main views regarding recovery for fetal

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449 466 S.E.2d 522 (W. Va. 1995).
450 Id.
452 Farley, 466 S.E.2d at 532. The court stated:
In jurisdictions where the viability standard is controlling, the tortfeasor remains unaccountable for the full extent of the injuries inflicted by his or her wrongful conduct. In our judgment, justice is denied when a tortfeasor is permitted to walk away with impunity because of the happenstance that the unborn child has not yet reached viability at the time of death. The societal and parental loss is egregious regardless of the state of fetal development. Our concern reflects the fundamental value determination of our society that life—old, young, and prospective—should not be wrongfully taken away.
Id. at 533.
453 Id. at 534.
454 See also Porter v. Lassiter, 87 S.E.2d 100 (Ga. 1955); Connor v. Monkm Co., 898 S.W.2d 89 (Mo. 1995); Wiersma v. Maple Leaf Farms, 543 N.W.2d 787 (S.D. 1996).
wrongful death. The minority view, still adhered to in twelve states, holds that there must be a live birth before recovery can be had for death of the infant due to injuries sustained while in the womb. The majority view, which thirty-four states have adopted, allows recovery for the death of a viable fetus in the womb. These states do not require that the fetus be born alive in order for the personal representative to recover for its death due to injuries sustained in the womb. However, these states do limit recovery to fetuses which have obtained viability. The last category of states represent a new trend in this area of the law. These four states of Georgia, Missouri, South Dakota, and West Virginia allow recovery for the death of a fetus in the womb at any point after conception.\textsuperscript{455} These states do not require a live birth for recovery, nor do they require that the fetus have reached the point of viability. Although a number of other states have rejected this idea, it may represent the future in this area of the law.

Jill D. Washburn Helbling

\textsuperscript{455} Georgia requires that the fetus be “quick in the womb,” which may occur before or after viability.
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<tr>
<th>STATES THAT REQUIRE A LIVE BIRTH FOR RECOVERY</th>
<th>STATES THAT ALLOW RECOVERY FOR THE DEATH OF A VIABLE FETUS NOT BORN ALIVE</th>
<th>STATES THAT ALLOW RECOVERY FOR DEATH OF A NONVIABLE FETUS NOT BORN ALIVE</th>
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| Rhode Island**     |       |
| South Carolina      |       |
| Vermont             |       |
| Washington**        |       |
| Wisconsin           |       |

Wyoming has no case law addressing this issue.

* indicates that the issue has not been addressed by a state court but that a federal court has ruled in this manner.

** indicates that the state allows recovery for the death of an infant born alive resulting from injuries sustained prior to viability.