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# California's Response for Wrongful Death of a Stillborn Fetus: *Justus v. Atchison*

## INTRODUCTION

The law governing the area of prenatal injuries has developed rapidly over the last thirty years,[1] with the primary impetus being a federal district court ruling in 1946 which permitted a child to recover damages for personal injuries sustained prior to birth.[2] Although prior to that time only a very few jurisdictions in the United States allowed recovery for damages under such circumstances,[3] since the decision, virtually every jurisdiction has upheld this type of action.[4]

The law of prenatal torts continued its development with the granting of recovery for the wrongful death of an infant who was born alive, but died shortly thereafter due to prenatal injuries,[5] and, in 1949,[6] with the successful maintenance of a suit for the wrongful death of a stillborn fetus.[7] Although numerous

1. Prosser refers to this as "what was up till that time the most spectacular abrupt reversal of a well settled rule in the whole history of the law of torts." W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 55, at 336 (4th ed. 1971) [hereinafter cited as PROSSER].

2. Bonbrest v. Kotz, 65 F. Supp. 138 (D.C. Cir. 1946). For a discussion of the importance of this case, *see*: 62 AM. JUR. 2d *Prenatal Injuries* § 2 (1972); PROSSER, *supra* note 1, at 335. Also, it should be noted the dissenting opinion of Boggs, J., in Allaire v. St. Luke's Hospital, 184 Ill. 359, 56 N.E. 638 (1900), which has been often cited, was an important factor in changing the legal thinking in this area.

3. In Scott v. McPheeters, 33 Cal. App. 2d 629, 92 P.2d 678, *hear. denied*, 33 Cal. App. 2d 640, 93 P.2d 562 (1939), California permitted a child to recover for prenatal injuries based upon a statute protecting the rights of unborn children.

4. PROSSER, *supra* note 1, at 337. For a position maintaining some states still do not allow this cause of action, *see* 62 AM. JUR. 2d *Prenatal Injuries* § 3 (1972). Also, in his work on wrongful death, Speiser notes four states which denied recovery in very early cases. S. SPEISER, RECOVERY FOR WRONGFUL DEATH § 4:29 (1966). Only one jurisdiction is mentioned as not having allowed recovery in Annot., 40 A.L.R. 3d 1222, 1251-52 (1971).

5. Cooper v. Blanck, 39 So. 2d 352 (La. App. 1923). Although this case was decided in 1923, it was not released for publication until 1949.

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

7. A fetus is a developing human from usually three months after conception to birth. A stillborn child is one that is born dead. *See* 62 AM. JUR. 2d

courts have since created a cause of action for the wrongful death of a stillborn fetus,[8] California has consistently refused to do so and has once again upheld that precedent in *Justus v. Atchison*.[9]

## Discussion of the Case

In *Justus*, two factually similar cases were joined on appeal, both of which involved Joseph Atchison, M.D., as one of the defendants. In each case, plaintiffs, husband and wife, brought a wrongful death suit against Dr. Atchison based upon allegations of negligence during delivery which resulted in the stillborn birth of their child. Defendants' demurrer to this count in each action was sustained without leave to further amend. The trial court then entered a judgment of dismissal against plaintiffs.[10]

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*Prenatal Injuries* § 1 (1972). However, for purposes of this note, fetus is used to include the embryonic stage from conception to three months.

8. At the time the California Supreme Court decided the case under discussion, the following courts had allowed a cause of action for wrongful death of a stillborn fetus: Eich v. Town of Gulf Shores, 293 Ala. 95, 300 So. 2d 354 (1974) (Alabama); Hatala v. Markiewicz, 26 Conn. Supp. 358, 224 A.2d 406 (1974) (Connecticut); Worgan v. Greggo and Ferrara, Inc., 50 Del. 258, 128 A.2d 557 (1956) (Delaware); Simmons v. Howard University, 323 F. Supp. 529 (D.C. Cir. 1971) (District of Columbia); Porter v. Lassiter, 91 Ga. App. 712, 87 S.E.2d 100 (1955) (Georgia); Christafogeorgis v. Brandenberg, 55 Ill. 2d 368, 304 N.E.2d 88 (1973) (Illinois); Britt v. Sears, 150 Ind. App. 487, 277 N.E.2d 20 (1971) (Indiana); Hale v. Manion, 189 Kan. 143, 368 P.2d 1 (1962) (Kansas); Mitchell v. Couch, 285 S.W.2d 901 (Ky. 1955); *accord*, Rice v. Rizk, 453 S.W.2d 732 (Ky. 1970) (Kentucky); Valence v. Louisiana Power and Light Co., 50 So. 2d 847 (La. App. 1951) (Louisiana); State v. Sherman, 234 Md. 179, 198 A.2d 71 (1964) (Maryland); Mone v. Greyhound Lines, Inc., 331 N.E.2d 916 (Mass. 1975) (Massachusetts); O'Neill v. Morse, 385 Mich. 130, 188 N.W.2d 785 (1971) (Michigan); Verkennes v. Corniea, 229 Minn. 365, 38 N.W.2d 838 (1949); *accord*, Pehrson v. Kirstner, 301 Minn. 299, 222 N.W.2d 334 (1974) (Minnesota); Rainey v. Horn, 221 Miss. 269, 72 So. 2d 434 (1954) (Mississippi); White v. Yup, 85 Nev. 527, 458 P.2d 617 (1969) (Nevada); Poliquin v. MacDonald, 101 N.H. 104, 135 A.2d 249 (1957) (New Hampshire); Stidam v. Ashmore, 109 Ohio App. 431, 11 Ohio Op. 2d 383, 167 N.E.2d 106 (1959) (Ohio); Evans v. Olson, 550 P.2d 924 (Okla. 1976) (Oklahoma); Libbee v. Permanente Clinic, 268 Or. 258, 518 P.2d 636 (1974) (Oregon); Presley v. Newport Hospital, 365 A.2d 636 (R.I. 1976) (Rhode Island); Fowler v. Woodward, 244 S.C. 608, 138 S.E.2d 42 (1964); *accord*, Todd v. Sandidge Constr. Co., 341 F.2d 75 (4th Cir. 1964) (South Carolina); Moen v. Hanson, 85 Wash. 2d 597, 527 P.2d 266 (1975) (Washington); Baldwin v. Butcher, 155 W. Va. 431, 184 S.E.2d 428 (1971); *accord*, Panagopoulous v. Martin, 295 F. Supp. 220 (S.D. W. Va. 1969) (West Virginia); Kwaterski v. State Farm Mut. Auto. Ins. Co., 34 Wis. 2d 14, 148 N.W.2d 107 (1967) (Wisconsin).

9. 19 Cal. 3d 564, 565 P.2d 122, 139 Cal. Rptr. 97 (1977) [hereinafter *Justus*]. Earlier, in Norman v. Murphy, 124 Cal. App. 2d 95, 268 P.2d 178 (3d Dist. 1954) [hereinafter *Norman*], the court refused to allow a cause of action for wrongful death of a stillborn fetus, but, as to be discussed, the court in *Justus* criticized the rationale upon which the ruling was based.

10. Justus v. Atchison, *supra* note 9.

Thus, the issue on appeal was whether the Supreme Court of California would reverse an earlier appellate court decision[11] and allow a cause of action for wrongful death of a stillborn fetus. The court, in its refusal to do so, based its decision almost entirely upon legislative intent and declined to discuss the policy considerations set forth by plaintiffs. The rationale was:

> The considerations advanced by plaintiffs would be relevant if we were called upon to decide whether California should adopt the proposed cause of action as a matter of judge-made law; they are not persuasive when, as here, the cause of action for wrongful death in this state is a pure creature of statute.[12]

As observed in the opinion, at least one jurisdiction held wrongful death to be of common law origin owing to the history of its evolution in the United States.[13] The question of whether or not wrongful death was to be considered a common law cause of action in California, however, was declared moot. Instead, legislative intent to preempt the field was found to exist, regardless of the nature of the action.[14]

To arrive at this conclusion, the court examined the original wrongful death statute of 1862[15] and its successor, Section 377 of the California Code of Civil Procedure.[16] Due to the fact the

11. Norman v. Murphy, *supra* note 9.

12. Justus v. Atchison, *supra* note 9, at 571, 565 P.2d at 127, 139 Cal. Rptr. at 102.

13. In Moragne v. States Marine Lines, 398 U.S. 375 (1970), the United States Supreme Court recognized a cause of action for wrongful death under general maritime law, thus casting some doubt on the issue of whether or not a cause of action for wrongful death existed at common law. Based upon this, the Massachusetts court concluded state law on the subject "has also evolved to the point where it may now be held that the right to recovery for wrongful death is of common law origin." Gaudette v. Webb, 362 Mass. 60, —, 284 N.E.2d 222, 229 (1972).

14. Justus v. Atchison, *supra* note 9, at 575, 565 P.2d at 129, 139 Cal. Rptr. at 104.

15. 1862 CAL. STATS. ch. 330, p. 447.

16. CAL. CIV. PROC. CODE § 377 (West Supp. 1977):

"(a) 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, or in case of the death of such wrongdoer, whether the wrongdoer dies before or after the death of the person injured. If any other person is responsible for any such wrongful act or neglect, the action may also be maintained against such other person, or in case of his or her death, his or her personal representatives. In every action under this section, such damages may be given as under all the circumstances of the case, may be just, but shall not include damages recoverable under Section 573 of the Probate Code. The respective rights of the heirs in any award shall be determined by the court. Any action brought by the personal representatives of

legislators meant to create an entirely new cause of action and later made numerous and detailed amendments thereto, it was held the legislature intended to occupy the field. Therefore, in the court's eyes, wrongful death remained a creature of statute and existed "only so far and in favor of such person as the legislative power may declare."[17]

As a prelude to its own interpretation of the wrongful death statute, the court discussed the interpretation found in *Norman v. Murphy*,[18] the first California decision to treat the issue. The applicable statute for both *Norman* and *Justus* authorized a cause of action for wrongful death "[W]hen the death of a person not being a minor, or when the death of a *minor person* who leaves surviving him either a husband or wife or child or children or father or mother, is caused by the wrongful act or neglect of another" (emphasis added).[19] The entire decision in *Norman* was based upon the meaning of the word "minor" as found elsewhere in the Code.[20] The court in *Justus* criticized this use of the definition of "minor" because it felt the legislature intended it to "facilitate computation not of the beginning but of the end of the period of minority."[21] Also, as noted in the

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the decedent pursuant to the provisions of Section 573 of the Probate Code may be joined with an action arising out of the same wrongful act or neglect brought pursuant to the provisions of this section and a separate action arising out of the same wrongful act or neglect be brought pursuant to the provisions of Section 573 of the Probate Code, such actions shall be consolidated for trial on the motion of any interested party.

"(b) For the purposes of subdivision (a), "heirs" mean only the following:

"(1) Those persons who would be entitled to succeed to the property of the decedent according to the provisions of Division 2 (commencing with Section 200) of the Probate Code, and

"(2) Whether or not qualified under paragraph (1), if they were dependent on the decedent, the putative spouse, children of the putative spouse, stepchildren, and parents. As used in this paragraph, "putative spouse" means the surviving spouse of a void or voidable marriage who is found by the court to have believed in good faith that the marriage to the decedent was valid.

"Nothing in this subdivision shall be construed to change or modify the definition of "heirs" under any other provision of law."

17. Pritchard v. Whitney Estate Co., 164 Cal. 564, 568, 129 P. 989, 992 (1913), as quoted in Justus v. Atchison, *supra* note 9, at 575, 565 P.2d at 129, 139 Cal. Rptr. at 104.

18. *Supra* note 9.

19. CAL. CIV. PROC. CODE § 377 (West 1973).

20. In *Norman, supra* note 9, the court used the definition of "minor" as found in CAL. CIV. CODE §§ 25-26 (West 1954). In Section 25, at that time, a minor was anyone under twenty-one years of age. Section 26, as it still does, provided: "The periods specified in the preceding section must be calculated from the first minute of the day on which persons are born to the same minute of the corresponding day completing the period of minority." Reading these two provisions together, the court held Section 26 prescribed the moment at which the state of minority began, thus excluding fetuses from the class of "minor persons."

21. Justus v. Atchison, *supra* note 9, at 576, 565 P.2d at 130, 139 Cal. Rptr. at 105.

opinion, the legislature had since deleted "minor person" and made the statute generally applicable to the death of a "person."[22] Therefore, the court determined "person" to be the gravamen word for purposes of interpreting the wrongful death statute.[23]

An examination of the specific areas in which the legislature had conferred legal personality on the unborn formed the basis for the final stage of the court's analysis. The court reviewed Civil Code Section 29,[24] the primary section dealing with the legal interests involved, and also discussed the code sections having to do with property[25] and support[26] rights of the unborn

22. "As noted . . . the 1862 predecessor to section 377 created a cause of action for the wrongful death of 'a person.' That broad designation was retained in section 377 when it was originally enacted as part of the 1872 Code of Civil Procedure. In 1873, the Legislature narrowed the section by limiting its application to the death of 'a person not being a minor,' i.e., of an adult only. (Code Amends. 1873-1874, ch. 383, § 40, p. 294.) In 1935 the section was broadened to include 'a minor person,' but only if he was survived by a spouse, child, or parent. (Stats. 1935, ch. 108, § 1, p. 460.) And in 1975 the Legislature abandoned the latter limitation, deleted the reference to 'a minor person' as surplusage, and once again made the statute generally applicable to the death of 'a person.' (Stats. 1975, ch. 334, § 1, p. 783 . . .)." *Id.* at 576-77, 565 P.2d at 130, 139 Cal. Rptr. at 105.

23. *Id.* at 577, 565 P.2d at 130, 139 Cal. Rptr. at 105.

24. CAL. CIV. CODE § 29 (West 1954):

"A child conceived, but not yet born, is to be deemed an existing person, so far as may be necessary for its interests in the event of its subsequent birth; but any action by or on behalf of a minor for personal injuries sustained prior to or in the course of his birth must be brought within six years from the date of birth of the minor, and the time such minor is under any disability mentioned in Section 352 of the Code of Civil Procedure shall not be excluded in computing the time limited for the commencement of the action."

25. The court reviewed the following sections dealing with the posthumous child: CAL. PROB. CODE § 250 (West 1956) (to be considered as living at the death of a parent); CAL. PROB. CODE §§ 71, 90 (West 1956) (entitled to be included among pretermitted heirs); CAL. PROB. CODE § 123 (West 1956) and CAL. CIV. CODE § 698 (West 1954) (can inherit a future interest); CAL. CIV. CODE § 739 (West 1954) (can defeat a future interest in another). However, none of these rights vests unless and until the child is born alive. *See* CAL. CIV. CODE § 29 (West 1954), *supra* note 24, and CAL. PROB. CODE § 123 (West 1956).

26. CAL. PENAL CODE § 270 (West Supp. 1977):

"If a parent of a minor child willfully omits, without lawful excuse, to furnish necessary clothing, food, shelter or medical attendance, or other remedial care for his or her child, he or she is guilty of a misdemeanor punishable by a fine not exceeding one thousand dollars ($1,000), or by imprisonment in the county jail not exceeding one year, or by both such fine and imprisonment. If a court of competent jurisdiction has made a final adjudication in either a civil or a criminal action that a person is the parent of a minor child and the person has notice of such adjudication and he or she then willfully omits, without lawful

as well as murder of a fetus.[27] In each instance, the court found an explicit intent to provide for the unborn and concluded:

> [T]hat when the legislature determines to confer legal personality on unborn fetuses for certain limited purposes, it expresses that intent in specific and appropriate terms; the corollary, of course, is that when the Legislature speaks generally of a "person," as in section 377, it impliedly but plainly excludes such fetuses.[28]

Further, the court declined to acknowledge that the remedial

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excuse, to furnish necessary clothing, food, shelter, medical attendance or other remedial care for his or her child, this conduct is punishable by imprisonment in the county jail not exceeding one year or in a state prison not exceeding one year and one day, or by a fine not exceeding one thousand dollars ($1,000), or by both such fine and imprisonment. This statute shall not be construed so as to relieve such parent from the criminal liability defined herein for such omission merely because the other parent of such child is legally entitled to the custody of such child nor because the other parent of such child or any other person or organization voluntarily or involuntarily furnishes such necessary food, clothing, shelter or medical attendance or other remedial care for such child or undertakes to do so.

"Proof of abandonment or desertion of a child by such parent, or the omission by such parent to furnish necessary food, clothing, shelter or medical attendance or other remedial care for his or her child is prima facie evidence that such abandonment or desertion or omission to furnish necessary food, clothing, shelter or medical attendance or other remedial care is willful and without lawful excuse.

"The court, in determining the ability of the parent to support his or her child, shall consider all income, including social insurance benefits and gifts.

"The provisions of this section are applicable whether the parents of such child are or were ever married or divorced, and regardless of any decree made in any divorce action relative to alimony or to the support of the child. A child conceived but not yet born is to be deemed an existing person insofar as this section is concerned.

"The husband of a woman who bears a child as a result of artificial insemination shall be considered the father of that child for the purpose of this section, if he consented in writing to the artificial insemination.

"If a parent provides a minor with treatment by spiritual means through prayer denomination, by a duly accredited practitioner thereof, such treatment shall constitute 'other remedial care,' as used in this section."

27. CAL. PENAL CODE § 187 (West Supp. 1977):

"(a) Murder is the unlawful killing of a human being, or a fetus, with malice aforethought.

"(b) This section shall not apply to any person who commits an act which results in the death of a fetus if any of the following apply:

"(1) The act complied with the Therapeutic Abortion Act, Chapter 11 (commencing with Section 25950) of Division 20 of the Health and Safety Code.

"(2) The act was committed by a holder of a physician's and surgeon's certificate, as defined in the Business and Professions Code, in a case where, to a medical certainty, the result of childbirth would be death of the mother of the fetus or where her death from childbirth, although not medically certain, would be substantially certain or more likely than not.

"(3) The act was solicited, aided, abetted, or consented to by the mother of the fetus.

"(c) Subdivision (b) shall not be construed to prohibit the prosecution of any person under any other provision of law."

28. Justus v. Atchison, *supra* note 9, at 579, 565 P.2d at 132, 139 Cal. Rptr. at 107.

purpose of the wrongful death statutes warranted a liberal construction, for it felt the clarity of the legislative intent left no room for such liberality. Therefore, it held a fetus was not a "person" within the meaning of the statute.[29]

Finally, the equal protection argument forwarded by plaintiffs was rebuffed. The wrongful death statute was originally intended to compensate for economic loss and deprivation of consortium. The court held, therefore, that the lack of great economic loss due to the death of a fetus provided a rational basis for the legislative classification.[30]

Although no justice dissented, Acting Chief Justice Tobriner, concurring, declined to follow the court's rationale. He agreed with the decision in *Gaudette v. Webb*[31] that the cause of action for wrongful death had reached a level whereby it could be considered of common law origin. Thus, he would have based the opinion, not upon legislative intent, but upon the policy reasons as set forth by plaintiffs and defendants.[32]

## WHERE CALIFORNIA STANDS AMONG OTHER STATES

As hereinbefore mentioned, at the time of the *Justus* decision, twenty-five states recognized a cause of action for wrongful death of a stillborn fetus.[33] This trend began in 1949 with *Verkennes v. Corniea*[34] which reversed an earlier line of decisions stemming from *Dietrich v. Northampton*.[35] In *Dietrich*, Justice Holmes denied recovery due to both the lack of precedent and, as he held, the fact an unborn child had no separate existence from its mother.[36] *Dietrich* formed the basis for a series of opinions which denied, not only recovery for wrongful death, but also for personal injuries sustained by a fetus subsequently born alive. However, the turning point occurred in 1946 when a federal district court ruled a child could maintain an action for

29. *Id.* at 580, 565 P.2d at 133, 139 Cal. Rptr. at 108.
30. *Id.* at 581, 565 P.2d at 134, 139 Cal. Rptr. at 109.
31. 362 Mass. 60, 284 N.E.2d 222 (1972).
32. Justus v. Atchison, *supra* note 9, at 586-87, 565 P.2d at 136-37, 139 Cal. Rptr. at 111-12.
33. *Supra* note 8.
34. *Supra* note 6.
35. 138 Mass. 14 (1884).
36. *Id.* at 17. This was based upon the idea that "the defendant could owe no duty of conduct to a person who was not in existence at the time of his action." PROSSER, *supra* note 1, at 335.

personal injuries suffered prior to birth.[37] *Verkennes* soon followed, along with several other cases allowing recovery for prenatal torts.

Courts have advanced numerous reasons since *Verkennes* for upholding wrongful death actions for stillborn fetuses, one of which maintained, based upon the much-cited twin hypothesis,[38] the unreasonableness of allowing the wrongful death suit when a child, born alive, died moments thereafter, but not allowing the action for a stillborn child.[39] To this, others responded by pointing out the difficulties arising whenever a line must be drawn in law, further reasoning that moving this line of demarcation to an earlier point in time, such as viability,[40] increased the problems of determining causation and damages.[41]

The unequal treatment afforded the unborn in law has also been stressed as a reason to allow a cause of action. It was contended once the law recognized the unborn for purposes of protecting their property and inheritance rights and for protecting them from crimes, then it should have recognized them for purposes of wrongful death.[42] As rebuttal to this argument, courts observed that property rights are contingent upon live birth.[43]

The purpose of the tort was analyzed in an attempt to decipher whether it would be consistent to uphold a cause of action for wrongful death of a stillborn fetus. Some asserted to allow recovery for personal injury but not for wrongful death would create an anomaly,[44] as the tortfeasor would be released

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37. Bonbrest v. Kotz, *supra* note 2.

38. This hypothesis was designed to show the unfairness of allowing recovery to be dependent upon live birth. It postulated that if a woman, pregnant with twins, was injured, and one died before birth and one after birth, it would be absurd to allow recovery for the latter but not the former. Stidam v. Ashmore, 109 Ohio App. 431, 11 Ohio Op. 2d 383, 167 N.E.2d 106 (1959).

39. *See, e.g.*, Todd v. Sandidge Constr. Co., 341 F.2d 75 (4th Cir. 1964); Stidam v. Ashmore, *supra* note 38.

40. Viability is the stage at which a fetus has developed sufficiently to be able to live outside of its mother's womb, either under normal conditions, or, according to some authorities, even if only in an incubator. Generally, this occurs between the sixth and seventh months of pregnancy. *See* 62 AM. JUR. 2d *Prenatal Injuries* § 1 (1972).

41. Endresz v. Friedberg, 24 N.Y.2d 478, 248 N.E.2d 901, 301 N.Y.S.2d 65 (1969).

42. Todd v. Sandidge Constr. Co., *supra* note 39; Kwaterski v. State Farm Mut. Auto. Ins. Co., 34 Wis. 2d 14, 148 N.W.2d 107 (1967).

43. Stokes v. Liberty Mut. Ins. Co., 213 So. 2d 695 (Fla. 1968); Endresz v. Friedberg, *supra* note 41; Hogan v. McDaniel, 204 Tenn. 235, 319 S.W.2d 221 (1958).

44. Personal injury as used here refers to the situation where a child may bring an action for personal injuries suffered as a fetus.

from liability by inflicting a more serious harm which resulted in death rather than in a simple injury.[45] Thus, there would be a wrong without a remedy.[46] Although many courts felt the parents should have some compensation for the loss of the child,[47] others insisted punishment to the tortfeasor in the form of double recovery would result, as some damages were recoverable as part of the parents' general damages.[48] Finally, many decisions to allow the cause of action were based simply upon the concept that wrongful death statutes were intended to be remedial and, hence, to be construed liberally.[49]

Although when the Supreme Court of California handed down *Justus* twenty-five jurisdictions had allowed this cause of action, there were still at least twelve which had not.[50] A concern expressed in many cases was the possibility of double recovery which would have, in effect, constituted punishment to the tortfeasor.[51] As hereinbefore discussed, this contention was grounded on the supposition that most of the damages recoverable by

45. Todd v. Sandidge Constr. Co., *supra* note 39.

46. Kwaterski v. State Farm Mut. Auto. Ins. Co., *supra* note 42; Todd v. Sandidge Constr. Co., *supra* note 39.

47. Kwaterski v. State Farm Mut. Auto. Ins. Co., *supra* note 42.

48. Norman v. Murphy, *supra* note 9; Endresz v. Friedberg, *supra* note 41.

49. Panagopoulous v. Martin, 295 F. Supp. 220 (S.D. W. Va. 1969).

50. At the time the Supreme Court of California decided *Justus*, the following jurisdictions still did not allow recovery for wrongful death of a stillborn fetus: Kilmer v. Hicks, 22 Ariz. App. 552, 529 P.2d 706 (1974) (Arizona); Norman v. Murphy, 124 Cal. App. 2d 95, 268 P.2d 178 (3d Dist. 1954) (California); Stokes v. Liberty Mut. Ins. Co., 213 So. 2d 695 (Fla. 1968); *accord*, Davis v. Simpson, 313 So. 2d 796 (Fla. App. 1975); *but see* Miller v. Highlands Ins. Co., 336 So. 2d 636 (Fla. App. 1976) (recognized a cause of action under a different statute than that in *Stokes*) (Florida); McKillip v. Zimmerman, 191 N.W.2d 706 (Iowa 1971) (Iowa); State ex rel. Hardin v. Sanders, 538 S.W.2d 336 (Mo. 1976) (Missouri); Drabbels v. Skelly Oil Co., 155 Neb. 17, 50 N.W. 2d 229 (1951) (Nebraska); Graf v. Taggert, 43 N.J. 303, 204 A.2d 140 (1964) (New Jersey); Endresz v. Friedberg, 24 N.Y.2d 478, 248 N.E.2d 901, 301 N.Y.S.2d 65 (1969) (New York); Gay v. Thompson, 266 N.C. 394, 146 S.E.2d 425 (1966); *accord*, Cardwell v. Welch, 25 N.C. App. 390, 213 S.E.2d 382 (1975); Yow v. Nance, 29 N.C. App. 419, 224 S.E.2d 292 (1976) (North Carolina); Carroll v. Skloff, 415 Pa. 47, 202 A.2d 9 (1964); *accord*, Marko v. Philadelphia Transportation Co., 420 Pa. 124, 216 A.2d 502 (1966) (Pennsylvania); Hogan v. McDaniel, 204 Tenn. 235, 319 S.W.2d 221 (1958); *accord*, Durrett v. Owens, 212 Tenn. 614, 371 S.W.2d 433 (1963) (Tennessee); Lawrence v. Craven Tire Co., 210 Va. 138, 169 S.E.2d 440 (1969) (Virginia).

51. In these cases, the courts did not feel damages awarded to punish the tortfeasor were within the type of recovery wrongful death was intended to provide. *See, e.g.*, Graf v. Taggert, 43 N.J. 303, 204 A.2d 140 (1964); Endresz v. Friedberg, *supra* note 41; Carroll v. Skloff, 415 Pa. 47, 202 A.2d 9 (1964).

the parents under wrongful death were also recoverable as general damages.[52]

Furthermore, courts expressed a reluctance to deal with the difficulties inherent in such a suit in establishing causation and determining damages.[53] To this, many responded with the accusation the courts were avoiding their responsibilities. Whether or not to allow a cause of action, they felt, should not have been determined on the complexity of the issue involved; after all, the legal system was established to make complex and difficult decisions.[54]

Historically, wrongful death was viewed as having a statutory, not common law origin.[55] Because of this, construction of the pertinent statute was uppermost in importance, sometimes even to the point of ignoring policy considerations. Thus, some courts, as did California in *Justus*,[56] relied exclusively upon statutory construction in denying recovery by finding a fetus not to be a "person" within the wrongful death statute.[57]

### REQUIREMENTS OF VIABILITY AND LIVE BIRTH

Once the courts began to permit actions for prenatal torts,

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52. Norman v. Murphy, *supra* note 9; Endresz v. Friedberg, *supra* note 41. However, even though the mother has an action for her own miscarriage, this technically does not include damages for the loss of the child. *See*: Annot., 15 A.L.R. 3d 992, 1005 (1967); PROSSER, *supra* note 1, at 338. Also, since the actions arising from the wrongful death and the mother's personal injury would probably be consolidated for trial, adequate jury instructions should prevent a double recovery.

53. *See, e.g.*, Graf v. Taggert, *supra* note 51, which was decided upon a statute limiting damages to pecuniary loss. The court held damages in this instance to be too speculative due to the difficulty in determining pecuniary loss. *See also* Gay v. Thompson, 266 N.C. 394, 146 S.E.2d 425 (1966), which was decided upon interpretation of a similar statute; and Endresz v. Friedberg, *supra* note 41, in which the court felt to allow recovery would increase the problems of causation and damages.

54. Cooper v. Blanck, *supra* note 5.

"So far as causation is concerned, there will certainly be cases in which there are difficulties of proof, but they are no more frequent, and the difficulties, are no greater than as to many other medical problems." PROSSER, *supra* note 1, at 336.

55. Justus v. Atchison, *supra* note 9, at 572-75, 565 P.2d at 128-29, 139 Cal. Rptr. at 102-04.

56. Justus v. Atchison, *supra* note 9.

57. Since most wrongful death statutes were enacted before recovery was allowed for prenatal injuries, courts argued wrongful death of a stillborn fetus could not have been within the contemplation of the legislature. Therefore, they concluded any changes made should be statutory. *See, e.g.*, Norman v. Murphy, *supra* note 9 (not a "minor person"); Stokes v. Liberty Mut. Ins. Co., *supra* note 43 (not a "minor child"); Endresz v. Friedberg, *supra* note 41 (not a "decedent"); Hogan v. McDaniel, *supra* note 43 (not a "person"). *See also*: PROSSER, *supra* note 1, at 338; 62 AM. JUR. 2D *Prenatal Injuries* § 16 (1972).

they were confronted with an entirely new set of problems. Among the foremost of these was the question of whether a cause of action would arise if injury occurred to the fetus at any time during the pregnancy or whether the point of viability must have been reached prior to injury. Viability was defined as that point in time when the fetus had developed sufficiently to live outside the mother's womb.[58]

One of the first cases to allow recovery to a child who had suffered prenatal injuries held the fetus had to have been viable at the time of the tort.[59] In general, other early cases followed suit, and, for a time, viability was considered necessary in both personal injury and wrongful death actions.[60]

Nonetheless, the viability requirement gradually fell into disfavor with several courts for a variety of reasons.[61] Not only was viability a difficult issue to determine,[62] but with the advance of medical science, it was also considered outmoded. That is, many deemed the child to be biologically separate from the mother from the time of conception, not viability.[63] In addition, courts concluded that a claim for an injury prior to viability was no less meritorious than a claim for one sustained afterward.[64]

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58. PROSSER, *supra* note 1, at 337; 62 AM. JUR. 2d *Prenatal Injuries* § 1 (1972).

59. Bonbrest v. Kotz, *supra* note 2.

60. "Since the original case denying a right of recovery for prenatal injuries, *Dietrich v. Northampton* [cite omitted], was based on the view that the unborn child is a part of the mother, it was naturally easier to demonstrate the fallacy of that view with respect to viable fetuses—which by definition are capable of living apart from the mother—than to do so for nonviable fetuses. Hence, courts frequently limited their first decision in favor of actions for prenatal injuries to those involving injury to a viable fetus." Annot., 40 A.L.R. 3d 1222, 1227 n.16 (1971).

61. Cases allowing recovery in a personal injury action when viability was not met include: Hornbuckle v. Plantation Pipe Line Co., 212 Ga. 504, 93 S.E.2d 727 (1956), *conformed to* 94 Ga. App. 328, 94 S.E.2d 523 (1956); Daley v. Meier, 33 Ill. App. 2d 218, 178 N.E.2d 691 (1961); Bennett v. Hymers, 101 N.H. 483, 147 A.2d 108 (1958); Smith v. Brennan, 31 N.J. 353, 157 A.2d 497 (1960); Sinkler v. Kneale, 401 Pa. 267, 164 A.2d 93 (1960); Sylvia v. Gobeille, 101 R.I. 76, 220 A.2d 222 (1966).

62. Viability depends on many variables and is often difficult to determine. *See, e.g.*, Smith v. Brennan, *supra* note 61. *See also*: 62 AM. JUR. 2d *Prenatal Injuries* § 6 (1972); PROSSER, *supra* note 1, at 337.

63. Sinkler v. Kneale, *supra* note 61. *See also*: PROSSER, *supra* note 1, at 337; Annot., 40 A.L.R. 3d 1222, 1227-28 (1971).

64. Smith v. Brennan, *supra* note 61; Sylvia v. Gobeille, *supra* note 61. The rationale for allowing recovery for prenatal injuries is the right of a child to start life free from the effects of another's wrongdoing. This should hold true whether or not the fetus is viable at the time of the injury.

Although the requirement of viability was discarded as it pertained to personal injury actions of a surviving child,[65] courts were less willing to do away with it in wrongful death suits, especially those involving stillborn fetuses.[66] Concern about adequate proof of causation prompted the latter reluctance.[67] However, at least one court allowed recovery for wrongful death of a stillborn fetus injured before reaching viability.[68]

Another yardstick employed by courts in determining whether or not a cause of action existed was live birth. An action for personal injuries sustained while a fetus, of course, always carried with it the necessity for live birth.[69] Initially, live birth was also considered a necessary element of wrongful death,[70] although later, many courts supplanted live birth with viability. The inevitable confusion between live birth and viability resulted, and courts were often unclear as to which one was required and when.

In California, the position of the courts has been less than clear. The first case to allow recovery for prenatal personal injuries sustained by a child subsequently born alive, *Scott v. McPheeters*,[71] discussed viability but made no definite pronouncement as to whether or not it was required. However, the decision was based entirely upon an interpretation of Civil Code Section 29, which began: "A child conceived, but not yet born, is to be deemed an existing person . . . ."[72] A literal reading of this

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65. *See supra* note 61. For a discussion of cases where viability may still be required in personal injury actions, *see* Annot., 40 A.L.R. 3d 1222, 1244-51 (1971).

66. Courts requiring viability in a wrongful death action include: Prates v. Sears, Roebuck and Co., 19 Conn. Supp. 487, 118 A.2d 633 (1955); Louisville v. Stuckenborg, 438 S.W.2d 94 (Ky. 1968); Steggall v. Morris, 363 Mo. 1224, 258 S.W.2d 577 (1953); Jasinsky v. Potts, 153 Ohio St. 529, 92 N.E.2d 809 (1950); Leal v. C.C. Pitts Sand and Gravel, Inc., 419 S.W.2d 820 (Tex. 1967).

Courts denying recovery for death of a nonviable fetus include: Mace v. Jung, 210 F. Supp. 706 (D: Alaska 1962); Rapp v. Hiemenz, 107 Ill. App. 2d 382, 246 N.E.2d 77 (1969); West v. McCoy, 233 S.C. 369, 105 S.E.2d 88 (1958).

67. According to Prosser, recovery should not be denied on such an arbitrary basis as viability when there are injuries for which sufficient medical proof exists. PROSSER, *supra* note 1, at 338.

68. Porter v. Lassiter, 91 Ga. App. 712, 87 S.E.2d 100 (1955). However, recovery was conditioned upon a showing that the child was "quick," i.e., capable of moving or stirring in its mother's womb.

69. Keyes v. Constr. Serv., Inc., 340 Mass. 633, 165 N.E.2d 912 (1960).

70. Almost all courts allow maintenance of a wrongful death suit when a child who was injured as a fetus is born alive and dies thereafter. For a discussion of this, *see*: Annot., 40 A.L.R. 3d 1222, 1255-61 (1971); 62 AM. JUR. 2d *Prenatal Injuries* § 12 (1972); S. SPEISER, *supra* note 4, at § 4:31. However, as noted in the above references, recovery is often predicated upon viability at the time of the injury.

71. *Supra* note 3.

72. CAL. CIV. CODE § 29 (West 1954). For text, *see supra* note 24.

indicated no need for viability, and, according to Prosser,[73] this has been the position followed in California. This author found no case since *Scott* in which the issue of viability was litigated for a personal injury action; therefore, viability has evidently not been demanded in this instance.

As hereinbefore discussed, *Norman v. Murphy*[74] was the first California case to decide whether live birth was a necessary element in a wrongful death action. It, of course, denied recovery because the fetus was stillborn.[75] Cases reaffirming this decision included *Bayer v. Suttle*[76] and *Tyrrell v. City and County of San Francisco*.[77] Once again, in *Justus*,[78] the Supreme Court of California held live birth to be necessary.

Dicta in Justice Brown's dissent in *Bayer* indicated California would uphold a wrongful death action for a child who died after birth due to injuries inflicted prenatally.[79] There was also language to this effect in *Justus*.[80] However, whether viability at the time of the injury would be required in this particular instance has remained in doubt.

### INTERPRETING *JUSTUS* IN LIGHT OF *ROE V. WADE*

In *Roe v. Wade*,[81] the United States Supreme Court held a fetus not to be a "person" within the meaning of the Fourteenth Amendment;[82] that is, a fetus was declared to have no constitutionally protected right to life. The decision in *Justus*[83] that a fetus was not a "person" within the wrongful death statute was, therefore, totally consistent with *Roe*.

Obviously, the inconsistency would have arisen had the California court reached an opposite conclusion. To allow recovery for wrongful death of a stillborn fetus, while at the same

73. PROSSER, *supra* note 1, at 337 n.31.
74. *Supra* note 9.
75. *Id.*
76. 23 Cal. App. 3d 361, 100 Cal. Rptr. 212 (1st Dist. 1972).
77. 69 Cal. App. 3d 876, 138 Cal. Rptr. 504 (1st Dist. 1977).
78. Justus v. Atchison, *supra* note 9.
79. Bayer v. Suttle, *supra* note 76, at 367, 100 Cal. Rptr. at 216.
80. Justus v. Atchison, *supra* note 9, at 570, 565 P.2d at 126, 139 Cal. Rptr. at 101.
81. 410 U.S. 113 (1973) [hereinafter *Roe*].
82. *Id.* at 158.
83. Justus v. Atchison, *supra* note 9.

time denying that fetus Fourteenth Amendment protection, was to many irreconcilable. The United States Supreme Court observed this seeming incongruity and formulated an explanation to allow compatibility.[84] In dicta, it was suggested that the damages awarded in such a wrongful death action in actuality vindicated the right of the unborn child's *parents* to recover for their loss. This was considered the only policy which was consistent with the view that the fetus, at most, represented merely the potentiality of life.[85]

One possible solution occurred to those trying to reconcile the holding of *Roe* with permitting a cause of action for wrongful death of a stillborn fetus. This involved the Supreme Court's ruling as to the third trimester, a time roughly commensurate with viability. The decision expressly granted states the right to adopt laws promoting their interests in the potentiality of life represented by the fetus in the third trimester.[86] As noted, the Court indicated a willingness to consider recovery by the parents in a wrongful death action of a stillborn fetus consistent with its decision.[87] Therefore, by expressly including the latter action in their wrongful death statutes in order to protect parental interests and limiting it to viable fetuses, states were given a means of allowing recovery while still remaining within the *Roe* decision.[88]

## SUGGESTED FUTURE LEGISLATIVE ACTION IN CALIFORNIA

Beginning in 1951, with *Norman v. Murphy*,[89] California courts have consistently refused to create a cause of action for wrongful death of a stillborn fetus. The most recent case to so hold, *Justus v. Atchison*,[90] was decided, as were all the other decisions, upon an interpretation of legislative intent. Even though the legislature has altered the wrongful death statute on numerous occasions, it has never included a fetus within the definition of "person."[91] This, combined with the courts' unanimity of approach, would seem to indicate no change to be forthcoming in California law, at least in the immediate fu-

84. Roe v. Wade, *supra* note 81, at 162.
85. *Id.* at 157. *See also* Note, *Wrongful Death and the Unborn: An Examination of Recovery After Roe v. Wade*, 13 J. FAM. L. 99 (1973-74).
86. Roe v. Wade, *supra* note 81, at 163.
87. *Id.* at 162.
88. Note, *Wrongful Death and the Unborn, supra* note 85, at 109-10.
89. *Supra* note 9.
90. *Supra* note 9.
91. *Supra* note 22.

ture.[92] However, if and when such an amendment is made, it will probably be as a result of legislative decision.

Most certainly, the law has developed rapidly in this area. And, by all appearances, its evolution has not as yet concluded. According to Speiser:

> There is little doubt that the trend of authority is toward permitting recovery both for non-fatal and fatal prenatal injuries resulting in stillborn fetuses. The opinions of the recent cases permitting recovery are by far the better reasoned ones. It also seems to be the trend that the requirement of viability will be scrapped as courts begin to accept the notion that a child is an entity, or a "person" from the moment of conception, and that as such is entitled to be protected as is every other person.[93]

With the law in such a state of flux, it seems likely the question of whether or not to create a cause of action for wrongful death of a stillborn fetus could come before the legislature before long.[94]

Once confronted with this issue, the legislature's first task will be to examine the wrongful death statute and determine whether or not creating such a cause of action would be consistent with the stated purposes of the statute. Even if the legislature answers this in the negative, it should consider broadening the scope of the statute to include this cause of action. However, the latter step should be unnecessary as it is well within the spirit of the wrongful death statute to allow recovery for wrongful death of a stillborn fetus.

In the preamble to the progenitor of today's wrongful death statutes, the Lord Campbell's Act, the rationale for the action is stated thusly:

> Whereas, no action at law is now maintainable against a person who, by his wrongful act, neglect or default, may have caused the death of another person, and it is often expedient . . . that the wrongdoer in such case should be answerable in damages for the injury so caused by him.[95]

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92. An interesting position was taken by Justice Brown in his dissent in *Bayer v. Suttle*. He maintained the legislature was unaware of the decision in *Norman v. Murphy*, and, therefore, legislative inaction on the subject should not have been interpreted as passive approval of the decision. Bayer v. Suttle, *supra* note 76, at 366-67, 100 Cal. Rptr. at 216.

93. S. SPEISER, *supra* note 4, at § 4:33.

94. Given the accuracy of Justice Brown's dissent in *Bayer v. Suttle, see supra* note 92, it would seem more likely that the issue will come before the legislature now that there is a California Supreme Court case.

95. 1846, 9 & 10 Vict., c. 93, as quoted in TIFFANY, DEATH BY WRONGFUL ACT § 20 (2d ed. 1913).

Wrongful death statutes, once directed primarily at recovery for actual pecuniary loss occasioned by a death[96] and strictly construed by the courts,[97] have been interpreted more liberally in recent years.[98] Damages can now include loss of consortium in addition to those originally awarded for economic loss.[99] In *Justus*, the court maintains there is no economic loss experienced by the parents of a stillborn fetus. Therefore, only loss of consortium remains, which is regarded by the court as being too trivial to be considered.[100] Nonetheless, loss of consortium *is* an element of damages allowed in California in a wrongful death suit,[101] and it should not be dismissed so readily. In his strong dissent in *Bayer v. Suttle*, Justice Brown takes the latter position:

> I also take issue with this reasoning. The damages and loss are real. The mother's claim for general damages for her injury does not embrace the real loss—the deprivation of parenthood. [cite omitted] If *Norman* is followed, there would be no recovery for the loss of the comfort and society of the child, an element of damages recoverable under the wrongful death statute.[102]

In recent years, many courts, including the Supreme Court of California, have frequently stated that the wrongful death statutes are "remedial" and should be construed liberally.[103] Given this liberal construction and loss of consortium as a bona fide element of damages, it is completely within the ambit of the wrongful death statute to allow a cause of action for wrongful death of a stillborn fetus.

Furthermore, it is generally held that a mother's action does not include damages for the loss of the child.[104] Thus, if recovery

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96. "[T]he action proceeds on the theory of compensating the individual beneficiaries for loss of the economic benefit which they might reasonably have expected to receive from the decedent in the form of support, services or contributions during the remainder of his lifetime if he had not been killed." PROSSER, *supra* note 1, § 127 at 906.

97. Prosser suggests that the reason the original English statute and the subsequent American statutes were strictly construed was because of fear of over-sympathetic juries. PROSSER, *supra* note 1, § 127 at 907.

98. PROSSER, *supra* note 1, § 127 at 907-09.

99. 62 AM. JUR. 2d *Prenatal Injuries* § 23 (1972); PROSSER, *supra* note 1, § 127 at 908; S. SPEISER, *supra* note 4, at § 3:42.

100. Justus v. Atchison, *supra* note 9, at 581, 565 P.2d at 134, 139 Cal. Rptr. at 109.

101. Fuentes v. Tucker, 31 Cal. 2d 1, 187 P.2d 752 (1947); Young v. Fresno Flume and Irr. Co., 24 Cal. App. 286, 141 P. 29 (1st Dist. 1914). *See also* Bayer v. Suttle, *supra* note 76, at 368, 100 Cal. Rptr. at 217.

102. Bayer v. Suttle, *supra* note 76, at 367-68, 100 Cal. Rptr. at 216-17.

103. Justus v. Atchison, *supra* note 9, at 579-80, 565 P.2d at 133, 139 Cal. Rptr. at 108.

104. Thomas v. Gates, 126 Cal. 1, 58 P. 315 (1899). *See also*: Annot., 15 A.L.R.3d 992, 1005 (1967); PROSSER, *supra* note 1, at 338 n.35; 62 AM. JUR. 2d *Prenatal Injuries* § 24 (1972); and *supra* note 52.

cannot be had under wrongful death, there does exist a wrong without a remedy. In essence, the tortfeasor is released from liability for inflicting a fatal injury as opposed to one which would merely harm the fetus. Although a separate cause of action could be created to grant recovery to the mother for loss of a stillborn fetus, this is an unnecessary duplication of effort when the framework already exists within the wrongful death statute.[105]

Unquestionably, problems of double recovery and difficulties of proof are inherent in allowing recovery for wrongful death of a stillborn fetus. They are not, however, insurmountable. In order to avoid double recovery by the mother, both her action for personal injuries and the wrongful death action should be combined in one trial. Careful and adequate jury instructions can then be used to prevent an unjust award to the mother. Although the two actions would ordinarily be tried together,[106] such can be ensured by including an appropriate provision in the statute.

The difficulties of proof involved are not unlike those found with many other torts.[107] Advancements in medical science have enabled physicians to pinpoint the cause of death of a fetus more accurately than before.[108] Since the jury is permitted to decide complicated questions of proximate cause and remoteness in other intricate tort cases, they should also be deemed capable to determine similar issues arising in a wrongful death action of a stillborn fetus.

Furthermore, creation of this cause of action is a logical corollary to the other two prenatal torts herein discussed: (1) personal injury action by a child subsequently born alive and (2) wrongful death action for a child born alive but dying shortly

105. *See* Todd v. Sandidge Constr. Co., *supra* note 39, at 78, where the court, in refusing to consider this as a part of the mother's action, observed that this would not account for the father's anguish.

106. 1 C.J.S. 2d *Actions* § 111 (1936). Note that the wrongful death statute, California Civil Procedure Code Section 377 (for text, *see supra* note 16) already provides for the consolidation of the wrongful death action and any surviving actions under California Probate Code Section 573.

107. *Supra* note 67.

108. For an excellent, but slightly dated, discussion of the medical proof of prenatal torts, *see* Note, *The Impact of Medical Knowledge on the Law Relating to Prenatal Injuries*, 110 U. PENN. L. REV. 554 (1962). *See also*, S. SPEISER, *supra* note 4, at § 4:33.

thereafter. Once the fetus is recognized as a legal entity for these two actions, it should also be so recognized for purposes of wrongful death when stillborn.[109]

After the legislature decides to allow a cause of action for wrongful death of a stillborn fetus, it will also have to grapple with two subsidiary issues: (1) whether the cause of action is to be restricted to viable fetuses and (2) whether any provision is to be made for damages.

As hereinbefore discussed, viability is required in all but one of the cases authorizing recovery for wrongful death of a stillborn fetus.[110] The most frequently cited reason for so limiting the cause of action is difficulty of proof.[111] However, viability in itself is a very complex issue to litigate, and many question its usefulness.[112] It is also important to note with each of the other two prenatal torts recognized,[113] viability has been an element of the tort at the outset which has been later discarded in most cases.[114] In all likelihood, the cause of action for wrongful death of a stillborn fetus will follow this trend, and viability will no longer be required.[115] The more logical course for the legislature to pursue, therefore, is to recognize the fetus as a biologically and legally separate entity and to allow a cause of action whether or not viability is present.[116] This will unify the ap-

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109. "[O]nce we have accepted the basic proposition that the decedent was a person at the time of the injury, the substantive rights necessarily resulting from that fact may surely be enforced, whatever may be the practical difficulties involved." Stidham v. Ashmore, 109 Ohio App. 431, 435, 167 N.E.2d 106, 108 (1959).

110. *See supra* notes 66-68, and accompanying text.

111. *Id.*

112. Prosser, when noting the difficulties of proof involved in injuries occurring prior to viability, states: "This, however, goes to proof rather than principle; and if, as is undoubtedly the case, there are injuries as to which reliable medical proof is possible, it makes no sense to deny recovery on any such arbitrary basis." PROSSER, *supra* note 1, at 337-38.

"The difficulty of proving causation bears no relationship to the viability or nonviability of the fetus at the time of the accident; rather, the magnitude of the proof problem varies according to the particular facts of each case." Note, *The Impact of Medical Knowledge on the Law Relating to Prenatal Injuries, supra* note 108, at 563.

*See also supra* note 67.

113. I.e., a child recovering for prenatal injuries and wrongful death of a child injured prenatally but subsequently born alive.

114. *See* discussion *supra* notes 61-64, and accompanying text.

115. *See* S. SPEISER, *supra* note 4, at § 4:33, and as quoted on p. 603, *supra*. *See also* Note, *The Impact of Medical Knowledge on the Law Relating to Prenatal Injuries, supra* note 108, at 564.

116. Most of the commentators speak in terms of recognizing the fetus as legally separate from conception. *See, e.g.*, PROSSER, *supra* note 1, at 336, and S. SPEISER, *supra* note 4, at § 4:33. However, the definition of "fetus" generally encompasses the period of gestation from the third month, *see supra* note 7.

proach taken towards prenatal torts in that an action will lie for prenatal injuries and wrongful death regardless of viability.

Although it is not within the scope of this note to discuss damages in depth, it should be observed that there may be strong sentiments in favor of limiting recovery by creating a statutory ceiling due to the speculative nature of the damages involved.[117] There are those who feel damages in *any* wrongful death case are conjectural at best,[118] and this has led some states to impose limits on all recoveries under wrongful death.[119] As of the present, no such limit has been established in California by statute.[120]

The primary element of damages for both wrongful death of a minor child and a fetus is the loss of consortium—society and comfort—and the younger the child, the truer this is.[121] Because of this, it has been argued:

> It is submitted that the measure of damages now applied universally in wrongful death cases is inherently a determination involving considerable conjecture, and that this standard applied in prenatal death cases will produce results no more speculative than those in cases involving minor children.[122]

Therefore, since the legislature has made no limits on recovery for wrongful death of children, it makes little sense for them to do so on damages allowable for wrongful death of a stillborn

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Therefore, courts and legislatures need to be careful in defining "fetus" as they determine whether to allow recovery for wrongful death of a stillborn fetus.

If the "fetus" is to be recognized from conception, obviously, there will be some difficulties encountered as to abortion. Before a physician performs an abortion, he may be required to have a release signed by the mother as to any wrongful death rights. More interesting is the question of whether this will be true of the father, especially in light of the United States Supreme Court decision which held that a state could not require a father's consent prior to abortion (Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976)).

Recognizing the "fetus" from conception will also pose problems vis-a-vis *Roe v. Wade, see* discussion *supra* notes 81-88, and accompanying text.

117. *See, e.g.*, Anderson, *A Model State Wrongful Death Act*, 1 HARV. J. LEGIS. 28 (1964), in which he advocates a $1,000 limit because of the speculative nature of the injury.

118. *See* Note, *Prenatal Injuries and Wrongful Death*, 18 VAND. L. REV. 847, 854-55 (1964-65).

119. C. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES § 104 (1935); S. SPEISER, *supra* note 4, at §§ 7:1-7:6.

120. CAL. CIV. PROC. CODE § 377 (West 1977). For text, *see supra* note 16.

121. 62 AM. JUR. 2d *Prenatal Injuries* § 23 (1972); Note, *Prenatal Injuries and Wrongful Death, supra* note 118, at 854-55; PROSSER, *supra* note 1, § 127.

122. Note, *Prenatal Injuries and Wrongful Death, supra* note 118, at 855.

fetus. Furthermore, the courts have been deemed capable of determining damages in wrongful death cases in the past, and there is no reason why they cannot continue to assure that reasonable recoveries are allowed.

## CONCLUSION

A proposed modification of the present wrongful death statute, California Civil Procedure Code Section 377,[123] reads:

> When the death of a person, *or a fetus*, 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 . . . .

It is further suggested: (1) this cause of action should lie whether or not the fetus is viable at the time of injury and (2) that no statutory limit on recovery be imposed. In addition, a provision should be included to the effect that the mother's cause of action for personal injuries and the wrongful death action are to be joined at trial when arising out of the same wrongful act or neglect.

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123. CAL. CIV. PROC. CODE § 377 (West. Supp. 1977). For text, *see supra* note 16.